In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RASC 2005KS10, et al.

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure case brought by US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RASC 2005KS10 ("the Bank" or "the Plaintiff Bank") to take the home of [redacted] ("the Homeowner") in satisfaction of an unpaid debt.

II. Appellant's Statement of the Facts

Filed in April of 2009,[1] this case was initially set for trial to take place in December of 2012.[2] In response to the Homeowner's Motion in Limine, which pointed out the Bank's failure to comply with the trial order,[3] the Court extended the trial date sixty days.[4] A new trial order set the trial for late March of 2013,[5] but

[1] Complaint to Foreclose Mortgage, filed April 9, 2009 (R. 5).

[2] Foreclosure Uniform Order Setting Cause for Non-Jury Trial and Trial Instructions, dated October 25, 2012 (R. 101).

[3] Defendant, [redacted] Motion in Limine, served December 5, 2012 (R. 143).

[4] Order on Defendant's Motion in Limine, dated December 11, 2012 (R. 148).

[5] Foreclosure Uniform Order Setting Cause for Non-Jury Trial and Trial Instructions, dated February 11, 2013 (R. 237).

the order was vacated because the case was not at issue.[6] A third trial order set the trial for June 14, 2013.[7]

A. The Bank does not provide its trial witness for deposition.

The trial order required the parties to provide opposing counsel with "a written list containing the names and addresses of all [witnesses] intended to be called at trial…"[8] The Homeowner had also propounded formal Pre-Trial Interrogatories asking for the name of the Bank's trial witness, to which the Bank responded: "Plaintiff will file its witness list prior to trial identifying a corporate representative or representative of Plaintiff able to speak on Plaintiff's behalf."[9] Yet, the Bank had already served its witness list which provided the names of fourteen "potential" witnesses—all but one of whom were located out of state.[10]

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[6] Defendant's Motion to Vacate Trial Order, served March 21, 2013 (R. 290); Order On Defendant's Motion to Vacate Trial Order, dated March 25, 2013 (R. 287).

[7] Foreclosure Uniform Order Setting Cause for Non-Jury Trial and Trial Instructions, dated April 30, 2013 (R. 312).

[8] *Id*. at ¶3.(a).

[9] (emphasis added). *See*, Defendant, [redacted] Motion in Limine, served June 13, 2013, p. 3 (R. 559); Answers to Interrogatory No. 4 of Defendant's Pre-Trial Interrogatories, served May 29, 2013, p. 4 (Supp. R. 120).

[10] Plaintiff's Witness List, served May 23, 2013 (R. 319).

The Homeowner asked the Bank to identify the actual witness who would be testifying at trial and to provide a mutually agreeable time for that witness to sit for a deposition. In the alternative, should the Bank not identify which one of the "potential" witnesses would actually appear at trial, the Homeowner asked to depose all fourteen.[11] Three days before trial, the Bank advised that the witness would be Peter Knapp, but that he would be unavailable for deposition prior to trial.[12]

The Homeowner moved in limine to bar Knapp's testimony, citing unfair prejudice.[13] The Homeowner also asked the court to preclude any summaries or compilations of computer data on the grounds that the Bank had not provided the underlying data from which the summary was compiled as required by § 90.956, Fla. Stat.[14]

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[11] Defendant, [redacted] Motion in Limine, served June 13, 2013, p. 3 (R. 559).

[12] *Id.*; Transcript of Trial before Judge Gerald D. Hubbart, June 14, 2013 ("T. ___"; Supp. R. 1), p. 6.

[13] Defendant, [redacted] Motion in Limine, served June 13, 2013 (R. 557).

[14] *Id.*

B. The court denies the Bank's agreed motion to continue trial to permit the Homeowner to depose its witness.

To its credit, the Bank moved to continue the jury trial, based in part, on the inability of its witness to appear for deposition—a motion to which the Homeowner agreed.[15] However, the day before trial, the court (Judge Hogan Scola) denied the motion, opining that there had been a "failure to diligently pursue discovery" because "case is 4 years old."[16] Nevertheless, the court also ordered that "Depo can be taken today telephonically." The Bank did not permit the deposition.

C. A different judge overrides the ruling that the Homeowner be permitted to depose the Bank's trial witness.

The next day at the start of trial, the Homeowner re-argued the agreed motion for continuance on the grounds that its denial had been premised on the Bank providing its witness for deposition.[17] The Bank responded that, if the deposition was mandatory, it had been impossible to comply with that directive. Now, what was originally the Bank's own motion was, according to its counsel,

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[15] Agreed Motion to Continue Non-Jury Trial Set for June 14, 2013, served June 12, 2013 (R. 389).

[16] Order on Agreed Motion for Continuance of Trial, dated June 13, 2013.

[17] T. 4.

"simply a ploy to delay this case further."[18] The court (Judge Hubbart) denied the motion.[19]

The Homeowner then argued the motion in limine. The court denied the part of the motion regarding the Bank depriving the Homeowner of a deposition of the Bank's witness based on Judge Hogan Scola's refusal to continue the case—even though the deposition did not take place as she had ordered.[20] The court also denied the part of the motion based upon § 90.956, Fla. Stat (Summaries), but left the door open to an objection whenever the Bank sought to introduce the compilation evidence.[21]

D. The Bank's document reader.

The Bank's only witness at trial was Peter Knapp. Mr. Knapp did not work for the Plaintiff Bank, but for its servicer, Ocwen Loan Servicing.[22] His job in Ocwen's "Legal Operations" department involves the "review [of] loan files in anticipation of testifying at trials, hearings and depositions."[23] In the past, he had

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[18] *Id*.

[19] *Id*.

[20] T. 8-9.

[21] T. 5-8.

[22] T. 13.

[23] T. 13.

been employed in some unidentified capacity by the other two servicers who had handled the loan, Homecomings Financial and GMAC Mortgage.[24] Knapp testified, without elaboration, that he knew how information was entered into, and retrieved from, the Bank's computer system.[25] Over objection, Knapp answered a series of leading questions designed to establish a business records exception to hearsay—regarding all the records he had reviewed in the case even though the specific documents had not yet been identified:

> **Q. Okay. The records that you referred to, are they kept in the ordinary course of business?**
>
> MR. BROTMAN: Objection. Hearsay. Lack of foundation, lack of knowledge of the procedures of the plaintiff or servicer.
>
> THE COURT: Overruled.
>
> A. They are.
>
> **Q. I'll just repeat the question. So they are kept in the ordinary course of business, the records we were just referring to?**
>
> A. They are.

[24] T. 14-15.

[25] T. 15.

Q. They're kept by a person who is authorized to keep them?

A. Yes.

MR. BROTMAN: Objection. Lack of foundation.

THE COURT: Overruled.

Q. Are the records kept by a person who is authorized to keep those records?

MR. BROTMAN: Objection. Hearsay. Lack of foundation.

MR. PETERS: You just overruled that.

MR. BROTMAN: I have to preserve every objection, Your Honor.

THE COURT: Overruled.

Q. I'll just repeat the same question.

MR. BROTMAN: Same objection.

THE COURT: Overruled.

Q. Are the records kept by a person who is authorized to keep them?

A. Yes.

Q. Are they kept and entered by a person who has knowledge of those records?

MR. BROTMAN: Objection. Hearsay. He's testifying to what other people have done.

THE COURT: Overruled.

A. They are.

Q. So you answered the affirmative. Okay. Are the records made at the time the information is transmitted and recorded by a person with knowledge?

MR. BROTMAN: Objection, Your Honor. Hearsay. Lack of foundation.

THE COURT: Overruled.

A. They are.

Q. Is it the regular practice of Ocwen Loan Servicing to keep those records that we're referring to?

A. It is.[26]

The Bank then handed Knapp a myriad of documents which were shuttled into evidence without further foundational testimony for a business records hearsay exception (or any other exception):

1. a note (endorsed differently than that attached to the complaint);[27]
2. a mortgage;[28]
3. a screen printout labeled "Asset Detail;"[29]

[26] T. 15-17.

[27] Volume IV Record on Appeal ("Exhibits"), p. 2, *compare* R. 29.

[28] Exhibits, p. 6.

[29] Exhibits, p. 25.

4. a screen printout labeled "Loan Summary;"[30]

5. a screen printout labeled Affidavit Checklist;"[31]

6. a screen printout labeled "Display/History;"[32]

7. a document containing text that was purportedly in a default letter that was said to have been sent to the Homeowner;[33]

On cross-examination, a different story emerged. Knapp testified that he had never worked in any of the departments where the digital records were created. For example, as to the Asset Detail (Exhibit 3), Knapp testified:

> Q. Who inputted the information that's in this record?
>
> A. An employee in the records department.
>
> Q. In the records department? Is that a separate department from the imaging department?
>
> A. Yes.
>
> Q. Do you work in the records department?
>
> A. I do not.
>
> Q. What department do you work in?
>
> A. I work in legal operations.

[30] Exhibits, p. 26 (more legible copy at R. 395).

[31] Exhibits p. 27.

[32] Exhibits, p. 29.

[33] Exhibits, p. 45.

> Q. Have you ever worked in the records department?
>
> A. I have not.
>
> Q. Have you ever been in a management level in the records department?
>
> A. No, sir.[34]
>
> * * *
>
> Q. Were you able to find out in your research of this file who input these records in the loan detail?
>
> A. I don't know the specific person that inputted these records.[35]

See also, as to Exhibit 5: T. 53-54 (witness did not work in, or have managerial responsibility for, default department where record was created); as to Exhibit 6: T. 56-57 (witness did not work in, or have supervisory capacity for, payment processing department of Homecomings Financial or GMAC Mortgage department where records were created); as to Exhibit 4: T. 41, 50 (witness did not work in the GMAC Mortgage imaging department that created the record). Nevertheless, the court denied the Homeowner's motions to strike these exhibits based on hearsay

[34] T. 47-48.

[35] T. 48-49.

and the failure to show that the witness was qualified to lay the foundation for a business records exception to hearsay.[36]

E. The court admits data compilations into evidence over objection.

Exhibit 4 was entitled "Loan Summary." The court, nevertheless, admitted the document into evidence over the objection that it was a summary.[37] Knapp himself identified the "Affidavit Checklist" (Exhibit 5) as "a compilation of the amounts due and owing for this loan pulled from our computer system."[38] Yet, the court summarily overruled an objection to both Exhibit 5 and the payment history (Exhibit 6) expressly based on § 90.956, Fla. Stat.[39]

On cross-examination, Knapp admitted that the Loan Summary (Exhibit 4) references the existence of document images, such as the "name affidavit," the "hazard insurance," the "HUD-1 statement," the "flood certificate," and the "servicing transmittal," among others.[40] Knapp did not know what kind of document the "hazard insurance" would be, nor did he know what one of the

[36] T. 81-87.

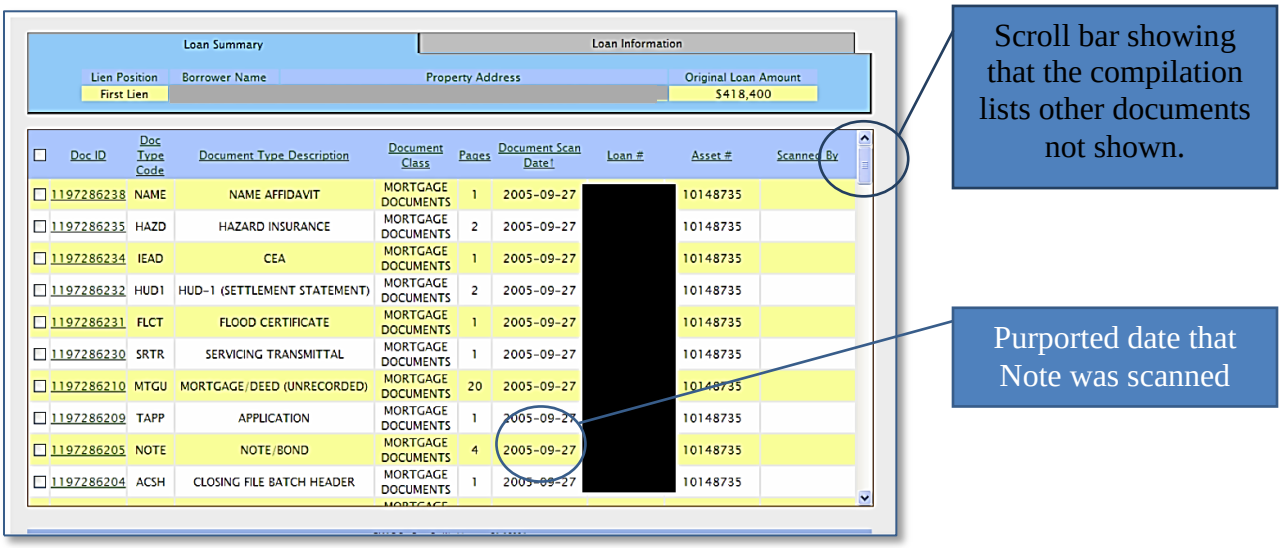
[37] T. 23.

[38] T. 25 (emphasis added).

[39] T. 25-26.

[40] T. 51-52.

referenced documents, the "CEA," was.[41] He admitted that the screen print indicated by way of a scroll bar on the right that there were actually more documents listed on the screen which had not been captured in the printout. He did not have a full copy of the document listing that would have been displayed and did not know what the other documents would be.[42]



Notably, the witness had specifically relied on the Loan Summary to establish that the endorsements on the purported original Note (different from those on the copy attached to the Complaint) had pre-existed the filing of the case in April of 2009. He testified that the scan date of September of 2005 shown on

[41] T. 51

[42] T. 52.

the Loan Summary was when it was imaged and that the image (which was not in evidence) already had the requisite endorsements.[43]

Additionally, on cross-examination, Knapp reiterated his description of the Affidavit Checklist (Exhibit 5) as a compilation or a collection of information combining "all of the necessary elements for judgment figures into one document."[44]

At the end of cross-examination and redirect, the Homeowner moved to strike the exhibits that were summaries or compilations based on the Bank's failure to comply with § 90.956, Fla. Stat.[45] The court denied the motions.[46]

The Homeowner moved for involuntary dismissal pointing out that Mr. Knapp had no personal knowledge of the facts and documents to which he attested.[47] The Homeowner also pointed out that the evidence before the court was that GMAC Mortage was in possession of the Note, apparently endorsed in blank,

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[43] T. 19-21.

[44] T. 54-55.

[45] T. 82 (as to Exhibit 3), T. 83-84 (as to Exhibit 4—articulated as a lack of completeness), T. 84-85 (as to Exhibit 5), T. 85 (as to Exhibit 6).

[46] T. 81-87.

[47] T. 97-93.

when the Complaint was filed, making it the holder.[48] There was no documentary evidence that GMAC's possession was on behalf of the Plaintiff Bank or that the Note was already endorsed to the Bank. These assertions came only from the mouth of the Bank's witness who claimed that he saw proof of these facts in documents that were not in evidence and not even in the courtroom.

The court denied the motion[49] and entered judgment against the Homeowner[50] from which he took this appeal.

[48] T. 42, 89.

[49] T. 93.

[50] Final Judgment of Foreclosure dated June 14, 2013 (R. 576).

SUMMARY OF THE ARGUMENT

The trial court erred in admitting hearsay summaries and compilations into evidence because the Bank failed to timely produce all the summaries and the source records. More egregiously, the Bank did not provide a witness qualified to provide foundational testimony for the hearsay exceptions needed for both the underlying source documents and the summaries themselves.

The Bank had its day in court and even insisted that trial take place over the Homeowner's objection that the Bank had not provided its trial witness for deposition. Despite the Bank's claim that it was ready to try the case, it adduced no admissible evidence that it had standing when it initiated the lawsuit. It also adduced no admissible evidence of the amount of damages it was due for nonpayment of the loan. The case should be remanded for entry of an order granting involuntary dismissal.

ARGUMENT

I. The Trial Court Erred in Admitting Compilations of the Bank's Documents and Data That Were Never Provided to the Homeowner.

A. Standard of Review

Although a trial court's decision to admit evidence is, as a general rule, reviewed for abuse of discretion, that discretion is limited by the evidence code and applicable case law. *Pantoja v. State*, 59 So. 3d 1092, 1095 (Fla. 2011). Thus, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011). Because the Homeowner challenges the trial court's application of the Florida Evidence Code, § 90.956, Fla. Stat. (summaries) and § 90.803 (6), Fla. Stat. (business records hearsay exception), the *de novo* standard of review applies. *See Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

While this Court has previously applied an abuse of discretion standard to the admission of a tabulated summary of business records (*Perma Spray Mfg. Co. v. La France Indus. of Miami, Inc.*, 161 So. 2d 13, 16 (Fla. 3d DCA 1964)), its

ruling predated the passage of § 90.956, Fla. Stat. The statute changed this court-fashioned rule of convenience such that it was now conditioned on three prerequisites not found in the *Perma Spray* case:

- **Notice:** the party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court;
- **Opportunity to examine the originals:** The party intending to use a summary shall make it and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place; and
- **A competent witness**: A qualified witness must present the summary or compilation.

These new requirements are to be strictly applied such that any item proved only through a summary or compilation cannot be properly awarded as part of the damages. *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991).

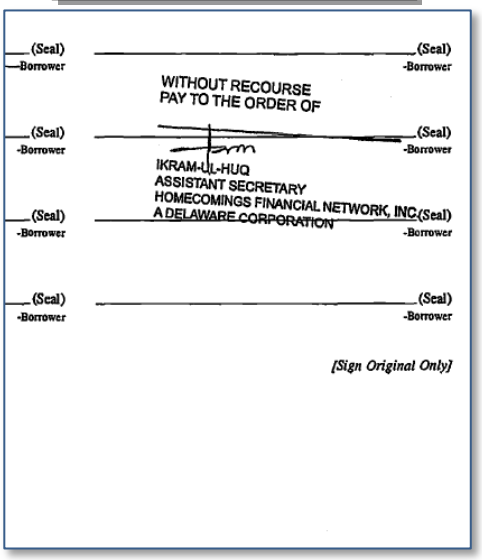
Even under the abuse of discretion standard applied in *Perma Spray*, this Court found that the trial court had not abused its discretion when it admitted the tabulations, rather than requiring the original records, because the veracity of the summaries were uncontested and the originals were available in court. Neither of these conditions are found here.

B. The Homeowner was denied the opportunity to examine the originals documents or data.

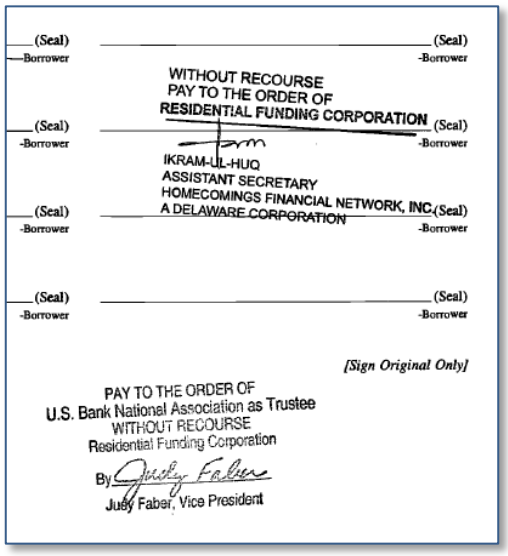
1. The Bank did not provide the original image of the Note with the new endorsements.

The copy of the note attached to the Complaint was endorsed in blank, giving the appearance that the Plaintiff Bank (U.S. Bank N.A.) was the holder of bearer paper. However, the endorsement had changed by the time the document represented as the "Original Note" was filed fifteen months later:

Copy attached to Note



"Original" filed 15 mo. later



Now the single open endorsement on the version attached to the Complaint had been filled in with the name of an intermediary bank, Residential Funding Corporation ("Residential"). This change was accompanied by a second

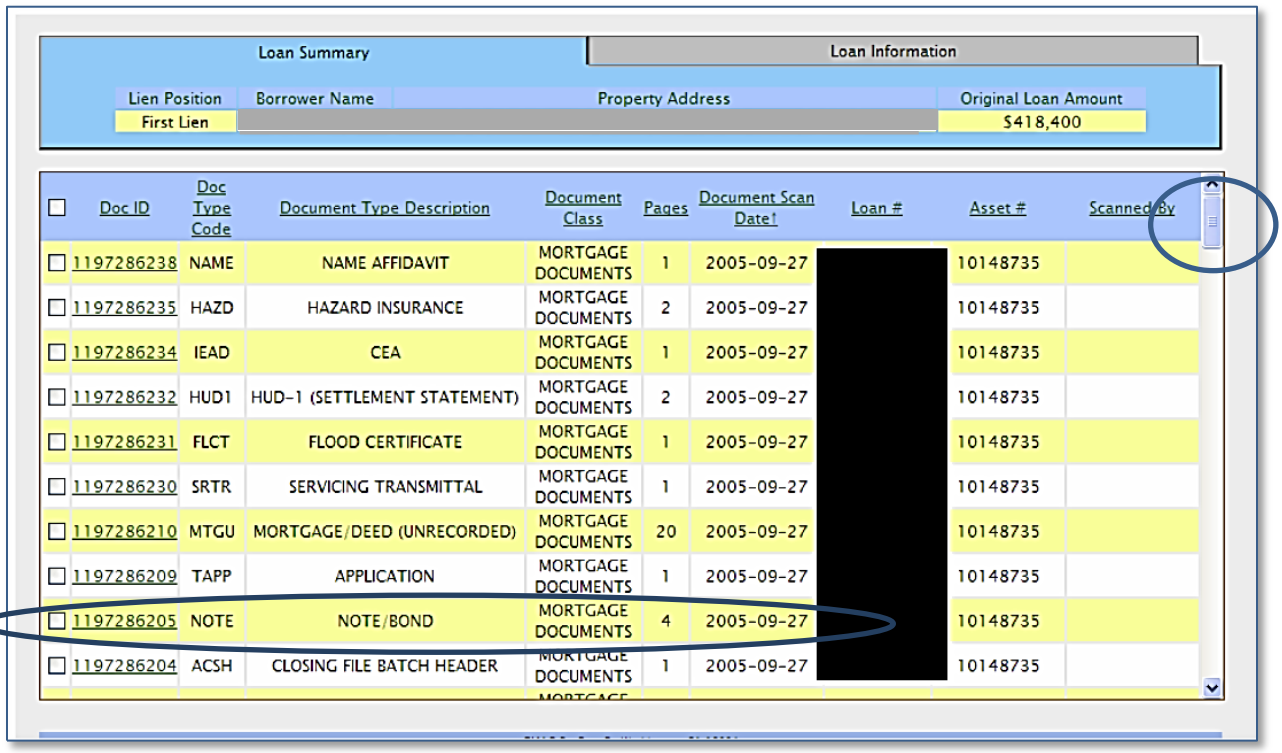
endorsement—this time by Residential—purportedly transferring the Note to the Plaintiff Bank.

These changes suggested that Residential (or some other bank) had been the holder of the bearer paper when the Plaintiff Bank filed suit and that it had endorsed it to the Plaintiff afterwards. These endorsement changes, therefore, implied that the Bank had no standing to bring the action when it initiated the suit. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285 (Fla. 5th DCA 2013); *Gonzalez v. Deutsche Bank Nat. Trust Co.*, 95 So. 3d 251 (Fla. 2d DCA 2012).

At trial, the only evidence that these new endorsements pre-existed the Complaint was testimony from the Bank's document reader, Knapp, based upon his review of documents that were not before the court. Specifically, he testified from the Loan Summary (Exhibit 4) which was a listing of the loan documents which had been scanned into the computer system. He testified that he had looked at the image of the Note, which was mentioned on the Loan Summary, and seen that the endorsements were present on that version.[51] Although he did not image the document and never worked in the imaging department, he was permitted to testify that the scan date on the Loan Summary—over three and half years before

[51] T. 19-21.

the Complaint was filed—was when the image was made and that the date was automatically input by the computer.[52]



Loan Summary | Loan Information

Lien Position	Borrower Name	Property Address	Original Loan Amount
First Lien			$418,400

Doc ID	Doc Type Code	Document Type Description	Document Class	Pages	Document Scan Date↑	Loan #	Asset #	Scanned By
1197286238	NAME	NAME AFFIDAVIT	MORTGAGE DOCUMENTS	1	2005-09-27	[redacted]	10148735	
1197286235	HAZD	HAZARD INSURANCE	MORTGAGE DOCUMENTS	2	2005-09-27		10148735	
1197286234	IEAD	CEA	MORTGAGE DOCUMENTS	1	2005-09-27		10148735	
1197286232	HUD1	HUD-1 (SETTLEMENT STATEMENT)	MORTGAGE DOCUMENTS	2	2005-09-27		10148735	
1197286231	FLCT	FLOOD CERTIFICATE	MORTGAGE DOCUMENTS	1	2005-09-27		10148735	
1197286230	SRTR	SERVICING TRANSMITTAL	MORTGAGE DOCUMENTS	1	2005-09-27		10148735	
1197286210	MTGU	MORTGAGE/DEED (UNRECORDED)	MORTGAGE DOCUMENTS	20	2005-09-27		10148735	
1197286209	TAPP	APPLICATION	MORTGAGE DOCUMENTS	1	2005-09-27		10148735	
1197286205	NOTE	NOTE/BOND	MORTGAGE DOCUMENTS	4	2005-09-27		10148735	
1197286204	ACSH	CLOSING FILE BATCH HEADER	MORTGAGE DOCUMENTS	1	2005-09-27		10148735	

However, the Loan Summary is…a summary. First, the Bank only produced part of the summary (which had been made by a previous servicer, GMAC Mortgage).[53] Whether it listed other documents and other scan dates for the Note, was withheld from the Homeowner, the trial court, and now this Court.

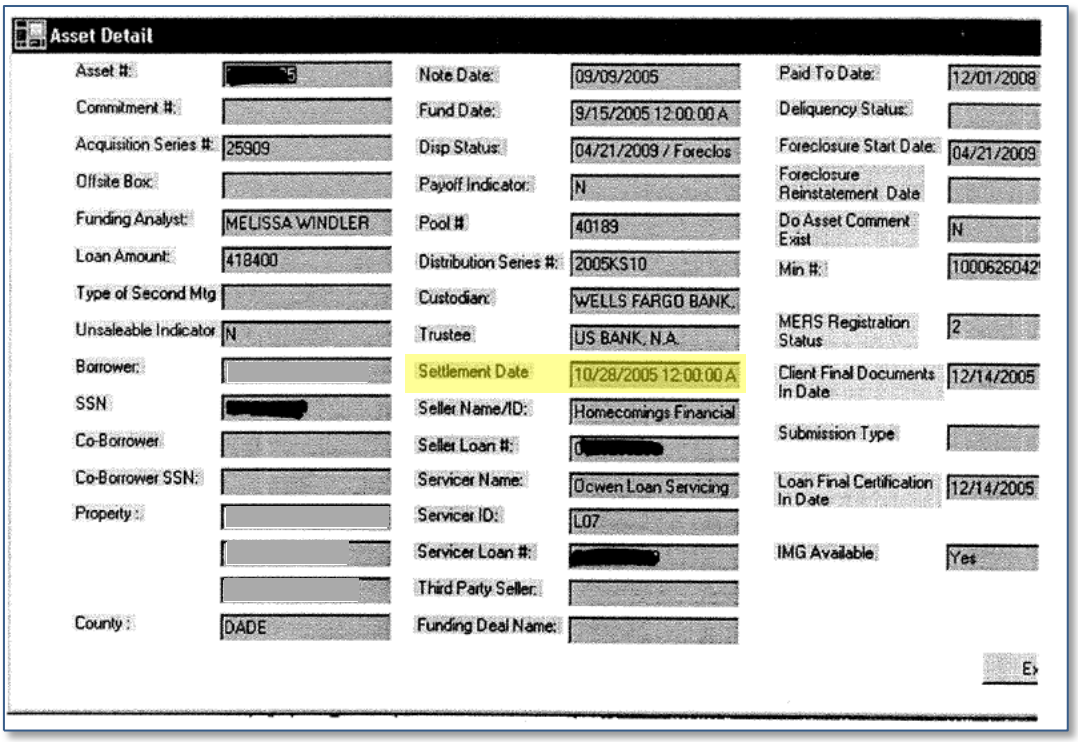
[52] T. 41.

[53] T. 52.

Second, the imaged documents mentioned in this tabulation were never produced. The Homeowner and the fact-finder were forced to rely on the testimony of Knapp about a document not in evidence—whether the version he claimed was imaged years before the Bank filed its case had the additional endorsements. Ensuring that the Homeowner could confirm the existence and appearance of this underlying document, and to cross-examine Knapp about his claim, is the very reason for the notice and disclosure requirements of § 90.956, Fla. Stat.

Knapp also relied on another summary to testify that the loan was transferred to the Plaintiff Bank in 2005. Specifically, he testified from Asset Detail (Exhibit 3) which he said showed that the loan had been transferred to the Plaintiff's trust:[54]

[54] T. 23-24.

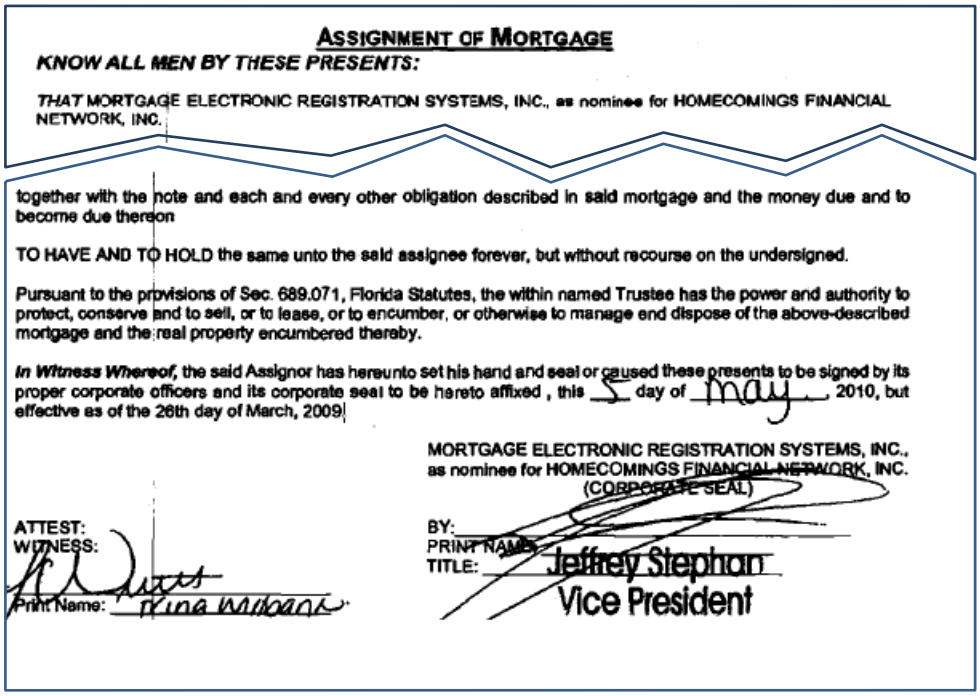


On cross-examination, Knapp admitted that all the information shown in the Asset Detail—and to which he just testified—came from other documents.[55] None of these source documents were in evidence, or offered in evidence, and except for the Pooling and Servicing Agreement (also not offered in evidence), none of them were even mentioned. This failure to disclose the source documents was aggravated by the fact that the Asset Detail itself was first produced the day before

[55] T. 49-50.

trial[56] in violation of the trial order which required an exchange of exhibits twenty days before trial.[57]

The Homeowner had a good faith basis for questioning the veracity of these summaries because the Assignment of Mortgage (Defendant's Exhibit 1)—which allegedly memorializes a transfer of the mortgage, "together with the note" from Mortgage Electronic Registration Systems, Inc. ("MERS") to the Plaintiff Bank—was executed over a year after the Complaint was filed:[58]



ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HOMECOMINGS FINANCIAL NETWORK, INC.

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee forever, but without recourse on the undersigned.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within named Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed , this 5 day of May , 2010, but effective as of the 26th day of March, 2009

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HOMECOMINGS FINANCIAL NETWORK, INC.
(CORPORATE SEAL)

ATTEST:
WITNESS:
Print Name: Tina Williams

BY:
PRINT NAME:
TITLE: Jeffrey Stephan
Vice President

[56] Plaintiff's Supplemental Exhibit List, served June 13, 2013 (R. 393). Asset Detail is listed as a "Screen Print" and appears at R. 396.

[57] Foreclosure Uniform Order Setting Cause for Non-Jury Trial, Trial Instructions, dated April 30, 2013 (R. 312).

[58] Exhibits, p. 57.

The document claimed to have become "effective" over a year earlier (and as it so happened, just two weeks before the Complaint was filed), but years after Knapp said the transfer occurred.[59]

The Bank's failure to disclose the source documents (or timely disclose all the summaries) for proving the date of transfer was exacerbated by its refusal to do so in responses to discovery. For example, in response to the Homeowner's request for production of "[a]ll documents, records, or computerized data files which evidence ownership of the promissory note and mortgage which are the subject of this litigation, including but not limited to any evidence of prior transfers of the note and consideration paid," the Bank responded:

> Plaintiff has produced copies of the Note at P&M0001-0004, Mortgage at P&M0005-0023, and Assignment of Mortgage at P&M0052.[60]

The Bank mentioned no evidence that would date the endorsements or the alleged transfer of the loan to the Plaintiff Bank—other than the Assignment which had

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[59] Notably, the Assignment is executed by GMAC's notorious "robo-signer," Jeffrey Stephan, whose deposition precipitated a nationwide scandal. *See*, *Ally Financial legal issue with foreclosures may affect other mortgage companies*, Ariana Eunjung Cha, Washington Post, September 22, 2010, available at: *http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/AR2010092105872.html*

[60] Plaintiff's Response to Defendant's Request to Produce Regarding Entitlement to Enforce Loan Documents, served May 29, 2013 (R. 371).

been executed after the Complaint was filed. It did not mention the summaries and underlying documents that it relied upon at trial.

And while the Bank did not comply with the notice and disclosure requirements of § 90.956, Fla. Stat., the Homeowner put the Bank on notice of the problems with its evidence, because he moved in limine on that ground the day before the trial.[61] The Bank, however, did nothing to provide either the complete summary or the underlying data and documents which had been compiled into the summary. *Tallahassee Hous. Auth. v. Florida Unemployment Appeals Com'n*, 483 So. 2d 413, 414 (Fla. 1986) (error to admit § 90.956 summary where record "contains no evidence that the underlying data from which the summary was compiled was made available"; actual notice of the summary insufficient to meet written notice requirement).

The Homeowner argued his Motion in Limine to the judge before trial, objected to the evidence as it was introduced, and moved to strike the evidence after cross-examination.[62] The court overruled all objections and denied all motions.

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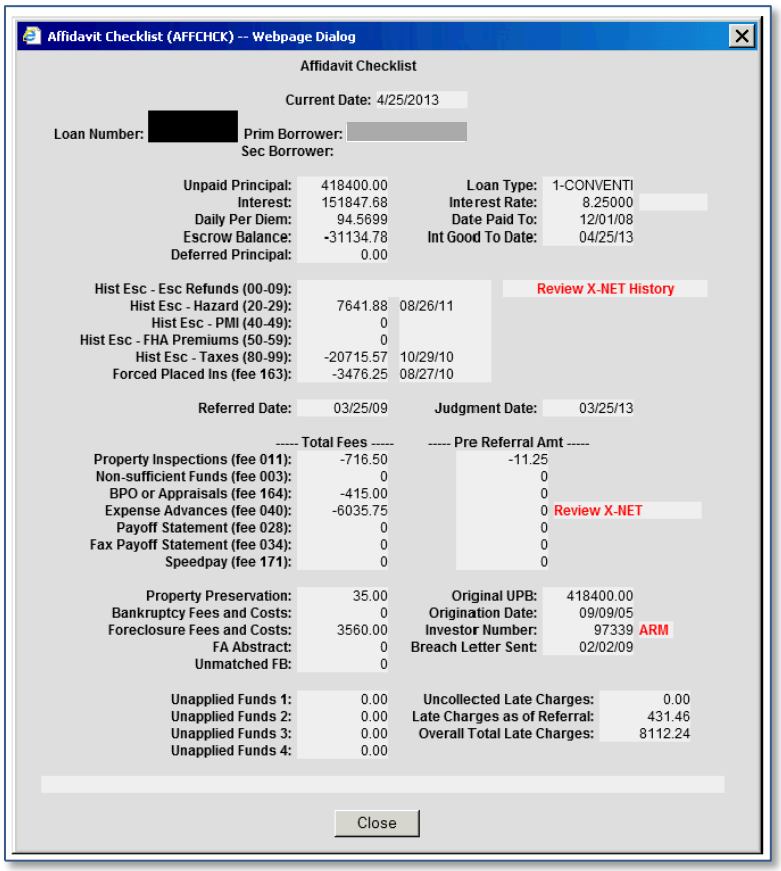
[61] Defendant, [redacted] Motion in Limine, served June 13, 2013, p. 5 (R. 561).

[62] T. 7-8, 23, 25, 26, 82, 85.

2. The Bank did not provide the source documents for the amounts due and owing.

Knapp also relied upon a compilation to testify about the damage figures. When asked by the Bank's counsel to identify the Affidavit Checklist (Exhibit 5), Knapp described it as "a compilation of the amounts due and owing for this loan pulled from our computer system."[63] From this document, Knapp testified that the principal balance owed was $418,400 and the unpaid interest was $151,847.68:[64]



Affidavit Checklist (AFFCHCK) -- Webpage Dialog

Affidavit Checklist

Current Date: 4/25/2013

Loan Number: [redacted] Prim Borrower:
Sec Borrower:

Unpaid Principal:	418400.00	Loan Type:	1-CONVENTI
Interest:	151847.68	Interest Rate:	8.25000
Daily Per Diem:	94.5699	Date Paid To:	12/01/08
Escrow Balance:	-31134.78	Int Good To Date:	04/25/13
Deferred Principal:	0.00		

Hist Esc - Esc Refunds (00-09):			Review X-NET History
Hist Esc - Hazard (20-29):	7641.88	08/26/11	
Hist Esc - PMI (40-49):	0		
Hist Esc - FHA Premiums (50-59):	0		
Hist Esc - Taxes (80-99):	-20715.57	10/29/10	
Forced Placed Ins (fee 163):	-3476.25	08/27/10	

Referred Date:	03/25/09	Judgment Date:	03/25/13

	----- Total Fees -----	----- Pre Referral Amt -----	
Property Inspections (fee 011):	-716.50	-11.25	
Non-sufficient Funds (fee 003):	0	0	
BPO or Appraisals (fee 164):	-415.00	0	
Expense Advances (fee 040):	-6035.75	0	Review X-NET
Payoff Statement (fee 028):	0	0	
Fax Payoff Statement (fee 034):	0	0	
Speedpay (fee 171):	0	0	

Property Preservation:	35.00	Original UPB:	418400.00
Bankruptcy Fees and Costs:	0	Origination Date:	09/09/05
Foreclosure Fees and Costs:	3560.00	Investor Number:	97339 ARM
FA Abstract:	0	Breach Letter Sent:	02/02/09
Unmatched FB:	0		

Unapplied Funds 1:	0.00	Uncollected Late Charges:	0.00
Unapplied Funds 2:	0.00	Late Charges as of Referral:	431.46
Unapplied Funds 3:	0.00	Overall Total Late Charges:	8112.24
Unapplied Funds 4:	0.00		

Close

[63] T. 25.

[64] T. 27-28.

He also testified that the Display/History (Exhibit 6) was "compiled from our system of records."[65] The trial court immediately overruled an objection that these were inadmissible compilations in that the Bank had not complied with § 90.956, Fla. Stat.[66]

When asked on cross-examination whether he knew when the information on this exhibit was input into the system, Knapp testified that "[t]hese are just numbers that were pulled under various amounts listed on our system or record." He also described it as "combining all of the necessary elements for judgment figures onto one document." The court never required the Bank to identify, much less provide, what specific data or documents were consolidated in this single screen print. Without the source documents, the Homeowner's ability to cross-examine the accuracy of the figures was completely hamstrung.

3. The proposed judgment was the ultimate "summary" or "compilation."

In a bizarre ritual quite foreign to any evidentiary rules, the Bank's counsel handed Knapp a document which he identified as a "copy of the final judgment

[65] T. 25.

[66] T. 25-26.

we're proposing today" and asked the witness to agree that "it reflects the amounts that are due and owing on this particular loan."[67]

First, the trial court erred in permitting any testimony over the Homeowner's objection that the document from which the witness was reading was not in evidence.[68] *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (Error to permit bank witness to testify about the contents of business records when the records were not in evidence.); *McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003) (where original evidence is available, best evidence rule bars "substitutionary" evidence, such as oral testimony about the original evidence). The Bank never moved to have the document (which was not on its exhibit list) admitted into evidence.

Nor could the trial court have admitted the document without committing reversible error. It would be difficult to imagine a document that would fit the description of "prepared for the purpose of litigation" more than a proposed final judgment. Such documents do not qualify for the business records exception—or any other exception—to hearsay. *See McElroy v. Perry*, 753 So. 2d 121, 125-26 (Fla. 2d DCA 2000) ("when a record is made for the purpose of litigation, its

[67] T. 32-33.

[68] T. 32.

trustworthiness is suspect and should be closely scrutinized"). *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA. 1985) (same) *citing* 1 C. Ehrhardt, Florida Evidence § 803.6, at 490-91 (2d ed. 1984).

Thus, the proposed final judgment, and Knapp's testimony about it, was a highly improper backdoor attempt to introduce numbers from documents that were not in evidence. The sum total of Knapp's testimony on the amount due and owing was that the figures in the proposed judgment were "true and correct, based on [his] business records."[69] (The trial court sustained the objection to the questions that it reflected the amounts that are due and owing.)[70] In short, Knapp never testified that the numbers were reflected in documents that were evidence. He did not even testify that the figures were in the summaries that were improperly in evidence.

Worse, because the document shown the witness was not marked for identification, the appellate record is silent as to what the witness considered to be the "true and correct" figures. There is no way for this Court to discern whether the document discussed in the transcript matched the final judgment executed by

[69] T. 32.

[70] T. 33.

the trial court. For example, the witness testified that "reasonable attorney's fees" are reflected in the final judgment, but did not mention the number. Thus, there is no evidence to support any award of attorney's fees (which, in any event, cannot be awarded without expert testimony).[71]

This outlandish ritual of bootstrapping the final judgment—known only to foreclosure trials—is not merely an attempt to do what is prohibited by *Sas v. Fed. Nat. Mortg. Ass'n*., but is the ultimate end run around the hearsay rule with the use of an inadmissible summary.

C. The Bank's witness was not qualified to introduce the summaries.

The requirement of §90.956, Fla. Stat. most egregiously flouted by the Bank is that the witness be "qualified" or "competent" to present the summary or calculation. While the Rule does not specify what characteristics are necessary to be a competent witness, the example given in the Law Revision Council Note—1976 is an "expert accountant" investigating the bookkeeping records:

> When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an expert accountant, who has made examination and analysis of the books and figures, may testify as a witness and give summarized

[71] Rule 1.530 Fla. R. Civ. P. provides that the Homeowner may raise insufficiency of the evidence as an issue on appeal, without making an objection to the trial court.

> statements of what the books show as a result of his investigation, provided the books themselves are accessible to the court and parties.

Quoting, Scott v. Caldwell, 37 So.2d 85 (Fla.1948). While the threshold for being a qualified witness may not necessarily be that of an expert, the Rule certainly contemplates something more than Mr. Knapp, whose only demonstrated competence is sufficient literacy in the English language to read pre-printed screen shots to the judge.

The most logical minimum standard to apply should be determined by recognizing that § 90.956 is essentially an exception to the two levels of hearsay inherent in a summary. *See McKown v. State*, 46 So. 3d 174, 175 (Fla. 4th DCA 2010) (summary of bank statements erroneously admitted over hearsay objection where "'[n]o evidence was adduced identifying who had made the compilation, nor was any further predicate shown that would render it admissible as a summary pursuant to section 90.956, Florida Statutes (2001).'"), *quoting, Johnson v. State*, 856 So. 2d 1085, 1087 (Fla. 5th DCA 2003) (same).

The first level of hearsay is that which would have to be overcome if the Bank had sought to admit as exhibits the phantom underlying documentation (the computer records and images that were constantly referenced, but never offered in evidence). The trustworthiness of these source materials cannot be presumed

merely because the Bank skipped to a document that summarizes their content. The second level of hearsay is the process of culling the data itself, because it is an out-of-court statement about what the source materials say or do not say.

1. The Bank's witness was not qualified to provide the foundation for a business records exception to hearsay for the source materials.

The Bank's only witness, Knapp, was a professional testifier (or "document reader") employed by the Bank's servicer to review loan files in order to read them to the court at trial or deposition.[72] His only connection to the documents that he was permitted (over objection) to talk about on the stand was that he had read them in preparation to do just that—talk about them at trial.

To overcome the hearsay objections made to each and every exhibit, the Bank would have to first lay the predicate for the "business records" exception for the source materials. 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; and
>
> 4) it was a regular practice of that business to make such a record.

[72] T. 13.

5) the sources of information or other circumstances do not show a lack of trustworthiness.[73]

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

But to even be permitted to testify to these thresholds facts, Knapp needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or well enough acquainted with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA

[73] It is at least footnote-worthy that this rarely mentioned fifth requirement poses, by itself, a nearly insurmountable hurdle for foreclosing banks in the post-robo-signing era. It has become common knowledge—even a judicially noticeable fact—that the purported business records of banks servicing and foreclosing on loans are highly unreliable and untrustworthy. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("many, many mortgage foreclosures appear tainted with suspect documents"); Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers—including one involved in this case—had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness) (available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf); Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings (available at: http://www.nationalmortgagesettlement.com/) including the consent judgment against one of the servicers here, GMAC Mortgage (available at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_Ally-4-11-12.pdf).

1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'").

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988), the court addressed the admissibility of computerized records virtually identical to those in this case. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The testimony was insufficient under the business records exception to hearsay because

the manager, like Knapp in this case, admitted that he was not the custodian and did not prepare the statements, nor supervise anyone who did:

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

Id. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not a qualified witness to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). Nevertheless, this does not mean the Bank was burdened with having to transport witnesses from various distant departments to the courthouse so they could give this foundational testimony for each proposed exhibit. The Bank had the option of establishing this predicate through a certification or declaration by a records custodian or other qualified witness under penalty of perjury. §90.902(11); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that

foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

The Bank in this case, however, chose not to avail itself of this rule—one which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Bank chose not to supply certifications or declarations from Homecomings Financial, GMAC Mortgage or Ocwen employees who actually created or kept the records, despite the relative ease of doing so. For example, although Knapp never worked in the imaging department, he was allowed to provide the hearsay testimony that the scan date of the Note (that he claimed had the new endorsements) is automatically input by the computer at the moment the image is created, rather than manually inserted later.[74] This essential testimony should have come from someone with personal knowledge—and could have come by way of a certification or declaration.

The layers of hearsay are piled even higher when one servicer begins to make statements about records of previous servicers, as Ocwen's employee, Knapp, has done here about Homecomings and GMAC records. In the case of *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011), the Fourth

[74] T. 19-21.

District specifically disapproved of testimony from one servicer's employee about the records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made:

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

Id. at 783.

This Fourth District recently confirmed that *Glarum* applies in the context of a bench trial. *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318 (Fla. 4th DCA 2013). In *Yang*, the plaintiff's witness had testified about account balances found in the records of a prior management company, even though she had never been employed there. *Id*. at *1. As in this case, on direct examination (and over objection), the witness "employed all the 'magic words'" of the business record exception to hearsay. As in this case, cross-examination revealed a different story—that the witness had no way of knowing whether the data obtained from that company was accurate. *Id*. at *3-4. The court reversed the

trial court's final judgments of foreclosure and remanded for entry of a directed verdict in favor of the condo owners. *Id*. at *4.

Here, Knapp never testified how images, text and numerical figures were moved from servicer to servicer or what, if anything, each successive servicer did to confirm the accuracy of any data. He had never even seen or "spent much time with" some of the documents mentioned in the summaries and was clueless as to what other documents even were.[75] He was exceedingly unqualified to overcome the hearsay objection even as to the source materials.

2. The Bank's witness was not qualified to lay the foundation for the § 90.956, hearsay exception for the summary.

Knapp never testified that he personally culled the records to choose what data and documents would be presented and what would remain hidden. In fact, as to the summary that was only partially provided (the Loan Summary, Exhibit 4), he did not know what other documents were listed in the withheld portion.[76] He never professed any personal knowledge what other data was available (or should be available), what other display screens could be perused, or how the database was constructed and organized to store images, text, and the numerical figures. He

[75] T. 45, 50, 51.

[76] T. 52.

never testified that he had any experience in accounting or bookkeeping to establish that the summaries accurately represented all the data. Again, the only experience established by the witness was that he was possessed of at least a grade-school proficiency in reading. He offered the trier of fact no competency that the court did not already have for itself.

D. The error in admitting the summaries was exacerbated by the court's abuse of discretion in denying the deposition of the Bank's witness.

The Homeowner had moved in limine to preclude Knapp's testimony on the grounds that the Bank would not, or could not, make him available for deposition prior to trial.[77] That problem, in turn, became the basis of the Bank's agreed motion for continuance.[78] That motion was denied the day before trial on the assumption that the deposition could take place that day. Again, however, the Bank would not, or could not, comply with the court's intent that the discovery be had.[79]

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[77] Defendant, [redacted] Motion in Limine, served June 13, 2013 (R. 557).

[78] Agreed Motion to Continue Non-Jury Trial Set for June 14, 2013, served June 12, 2013 (R. 389).

[79] T. 4.

At trial, the court proceeded without requiring the Bank to produce Mr. Knapp for deposition.[80] Had the deposition taken place, the Homeowner would have been able to identify the underlying source documents and taken steps to obtain them. The Homeowner would not have been ambushed by Knapp's claim to have seen a pre-Complaint image of a properly endorsed note or by the unsubstantiated totals for the amounts due and owning. The Homeowner would have had an opportunity to explore the many avenues of demonstrating even further that Knapp was neither a custodian nor qualified witness capable of introducing the Bank's abridged exhibits.

The trial court's failure to either strike the testimony or briefly continue the trial to permit the deposition was an abuse of discretion. *See Health Options, Inc. v. Palmetto Pathology Services, P.A.*, 983 So. 2d 608, 617 (Fla. 3d DCA 2008) (prejudice due to surprise use of § 90.956 summary cured by permitting objecting party to depose witness); *Metro. Dade County v. Sperling*, 599 So. 2d 209 (Fla. 3d DCA 1992) (holding that court did not abuse discretion in excluding late-listed witness and noting that, while a deposition might have cured the prejudice, counsel would not have had adequate time to prepare); *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (same); *Cf. In re Estate of Lochhead*, 443 So. 2d

[80] *Id.*

283, 284 (Fla. 4th DCA 1983) (abuse of discretion to exclude testimony of witness because elimination of surprise "could have been achieved in this case by permitting appellees to depose the witness or simply by granting a continuance…"); *Med. Pers. Pool of Palm Beach, Inc. v. Walsh*, 508 So. 2d 453, 454 (Fla. 4th DCA 1987) (trial court did not abuse discretion in refusing to strike surprise testimony where prejudice could have been cured by other means such as a continuance and further discovery—but which were not requested); *Louisville Scrap Material Co., Inc. v. Petroleum Packers, Inc.*, 566 So. 2d 277, 278 (Fla. 2d DCA 1990) (court abused discretion in excluding late-identified witness because aggrieved party had time to depose, and in fact, deposed witness).

E. The Homeowner's motion for involuntary dismissal should have been granted because there was no admissible evidence to support standing or the amount of damages.

1. Standard of Review

The standard of review for a trial court's ruling on a motion for involuntary dismissal is *de novo*. *Lizio v. McCullom,* 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.,* 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). The burden is on the plaintiff to establish a *prima facie* case. *Tillman v. Baskin,* 260 So. 2d 509, 512 (Fla. 1972). *Tylinski v. Klein Auto., Inc.*, 90 So. 3d 870, 873 (Fla. 3d DCA 2012) (directed verdict should be granted when there is no reasonable

evidence upon which the fact finder could legally predicate a verdict in favor of the non-moving party).

2. The trial court erred in denying the motion for involuntary dismissal.

Here, there was no admissible evidence to support the verdict on the issue of standing or the amount of damages and dismissal was required. *See Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318, at *4; *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d at 240 (item proved only through inadmissible summary was improperly awarded as part of the damages).

CONCLUSION

The case should be remanded for entry of an order granting involuntary dismissal.

Dated: November 11, 2013

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 respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 11, 2013 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

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

By: 

THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Marc James Ayers, Esq.
Bradley Arant Boult Cummings, LLP
One Federal Place 1819 Fifth Avenue North
Birmingham, AL 35203-2104
mayers@babc.com
acockrell@babc.com