In the District Court of Appeal
Second District of Florida

CASE NO. [redacted]

(Circuit Court Case No [redacted])

[redacted]

Appellant,

v.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2006-AR8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR8, et al.,

Appellees.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

STATEMENT OF THE CASE AND FACTS

I. Introduction

and his mother, Elia E. Corgelas Feron,[1] (collectively, "the Homeowners") appealed the final judgment of foreclosure rendered in favor of the Bank of New York Mellon f/k/a the Bank of New York As Trustee for Holders of Structured Asset Mortgage Investments II Trust 2006-AR8, Mortgage Pass-Through Certificates, Series 2006-AR8 ("the Bank") after a non-jury trial. The Homeowners present two issues for this Court's review:

- Whether the trial court erred in applying the business records exception;
- Whether there was competent evidence to support the Bank's damages and compliance with conditions precedent.

II. Appellant's Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[2] Although the complaint alleged that Ms. Feron owed the

[1] Elia E. Corgelas Feron passed away after this appeal was filed.

[2] Complaint, October 30, 2009 (R. 3-36).

Bank $298,155.99 of unpaid principal,[3] the note attached to the complaint reflected that the principal balance at the time the loan was originated was only $288,000.00.[4]

According to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the Homeowners written notice of default and an opportunity to cure prior to acceleration and foreclosure.[5] Paragraph 15 of the mortgage provided that any notices sent in connection with the mortgage would have been deemed given to the Homeowners only if they were either mailed first-class mail or actually delivered to the Homeowners if sent by any other means.[6]

After retaining counsel, Ms. Feron filed an answer which included as affirmative defenses the Bank's failure to attach proof of the amount it claimed was due to it,[7] and the Bank's failure to comply with conditions precedent to foreclosure—namely, the notice of acceleration that the mortgage required.[8] And

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[3] Complaint, October 30, 2009, ¶ 7 (R. 4).

[4] Adjustable Rate Note attached to Complaint, October 30, 2009 (R. 29).

[5] Mortgage attached to the Complaint, October 1, 2012, ¶ 22 (R. 23).

[6] Mortgage attached to the Complaint, October 1, 2012, ¶ 15 (R. 21).

[7] Eleventh Affirmative Defense, No Proof of Amount Owing, December 14, 2009 (R. 58).

[8] Thirteenth Affirmative Defense, Failure to Satisfy a Condition Precedent, December 14, 2009 (R. 58); Fifteenth Affirmative Defense, Failure to Send Documentation of the Acceleration of the Note (R. 58).

in a separate, *pro-se* answer, Mr. [redacted] pled that he was without knowledge and therefore denied the Bank's allegations that it had complied with conditions precedent to foreclosure.[9] He similarly denied that the Bank was entitled to the principal amount it claimed due to it in its complaint.[10]

On these pleadings, the matter was set for trial.[11]

B. The Trial

The Bank called its first witness, Jose Perez, to the stand who testified that he was a default case specialist for Nationstar Mortgage, LLC ("the Servicer") and whose duties were to review files in preparation for non-jury trials.[12] Perez would later admit that the Servicer took over the servicing of the loan in April 2014 (the same month of the trial)[13] and that he serves as a trial witness every business day of the week.[14]

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[9] Amended Answer of [redacted] November 27, 2012, ¶ 6 (R. 195).

[10] Amended Answer of [redacted] November 27, 2012, ¶ 7 (R. 195).

[11] Order From Judicial Management Conference, December 5, 2013 (R. 322-323). The original trial date was ultimately continued to a later date. Order Granting Continuance, February 12, 2014 (R. 527).

[12] Transcript of Trial Before Judge Daniel R. Monaco, April 30, 2014 (R. Vol. 654; "T. __"), at 10.

[13] T. 24.

[14] T. 32.

Through Perez, and over the Homeowners' hearsay objection,[15] the Bank introduced the following exhibits which composed the entirety of its case:

- The purported original note (Exhibit 1);
- The purported original mortgage (Exhibit 2);
- A "welcome letter" purportedly drafted by Specialized Loan Serving, LLC ("SLS") (Exhibit 3);
- A notice of default purportedly drafted by Countrywide Home Loans ("Countrywide") (Exhibit 4); and
- A payment history (Exhibit 5).[16]

While the Bank appeared to argue that these documents were admissible under the business records exception to the hearsay rule,[17] Perez was only asked whether the note and mortgage were kept in the regular course of the Servicer's business[18] and that apparently the payment history was prepared "in the normal course of business" solely for him.[19]

[15] T. 16.

[16] T. 17.

[17] T. 16-17.

[18] T. 11.

[19] T. 15.

And while he identified and testified that he reviewed the welcome letter (Exhibit 3)[20] and the default notice (Exhibit 4),[21] he did not testify when the documents were made; whether they were made by a person with knowledge; whether they were kept in the ordinary course of the Servicer's regularly conducted business activity; or whether it was the regular practice of the Servicer to make the documents. In fact, the witness did not even testify that the default notice was mailed or otherwise sent to the Homeowners.[22]

Perez testified that the Servicer and the Bank had retained counsel to represent them and that the witness, through his employer, the Servicer, was obligated to pay the lawyer a reasonable fee.[23] But there was no testimony as to the amounts or reasonableness of this fee, either from Perez, the lawyer who performed the work, or an expert witness.

Before concluding Perez's direct examination the Bank asked him whether he was familiar with the final amount that was "due and owing"—which at first drew no response.[24] Perez then testified that the figures were in his phone (which

[20] T. 13-14.

[21] T. 14.

[22] T. 14.

[23] T. 21.

[24] T. 18.

was not admitted into evidence).[25] And based on a review of his phone, Perez testified that the total amount due is $399,953.71, which included an "interest to date" amount of $69,776.33.[26]

On cross examination, Perez admitted that he was not the records custodian of the documents the Bank had introduced through him.[27] He also admitted that the first time he saw the note and mortgage was a week before trial (when the case was assigned to him).[28] Additionally, he admitted that he did not verify the numbers in the payment history for accuracy nor did anyone he supervises verify the numbers—because he did not supervise anyone.[29] And Perez also admitted that he did not send out the default notice or work for Countrywide.[30]

After the evidence and testimony was closed, the Homeowners gave a closing argument—which was interrupted by a request from the Bank that the court report Mr. [redacted] to the Florida Bar on the theory that Mr. [redacted] was

[25] T. 19.

[26] *Id.*

[27] T. 34-35.

[28] T. 28.

[29] T. 30.

[30] T. 31.

practicing law without a license.[31] The trial court then announced that it would "enter judgment at this time in the amount of $399,953.71" (the amount Perez testified was due to the Bank after looking at his phone).[32] But then, and without any explanation why, the trial court signed a judgment in the amount of $414,471.55.[33]

This appeal follows.

[31] T. 66. *See also*, T. 8. Because Mr. [redacted] was not a borrower on the note (but a owner and mortgagor of the subject property), both the trial court and opposing counsel were under the impression that he could not speak about, or ask questions about, the note.

[32] T. 67.

[33] Final Judgment of Foreclosure, May 2, 2015 (R. 637-647)

SUMMARY OF THE ARGUMENT

Initially, the trial court erred when it applied the business records exception to the hearsay rule in this case. As a threshold matter, the Bank's witness failed to lay the predicate for admission of any of the Bank's exhibits under the exception. And even if it had laid the predicate, its witness was wholly incompetent to do this. Therefore, the Bank's exhibits should have been excluded from evidence.

Additionally, the sufficiency of the evidence, an issue which may be raised for the first time on appeal, does not support the final judgment for two reasons. First, the Bank failed to establish when the default notice was sent or even if it was sent at all. Furthermore, even assuming the demand notice was sent, it fails to comply with the unambiguous notice provisions of the mortgage. And this requires dismissal because the Bank failed to comply with a condition precedent to foreclosure.

Second, the Bank also failed to provide competent, substantial evidence of its damages—including the amounts awarded for principal, interest, and attorneys' fees.

Consequently, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

STANDARD OF REVIEW

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

Furthermore, in a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987); *see also, Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2d DCA 1996) (reversing where there was no record support for the trial court's findings of fact).

ARGUMENT

I. The Bank's witness was not qualified to lay the foundation for a business records exception for the exhibits he introduced because hearsay cannot be used to establish a hearsay exception.

Perez failed to lay the business records predicate for any of the exhibits he introduced.

To properly authenticate the documents before admitting them into evidence, Perez would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

1) The hearsay document was made at or near the time of the event;
2) The hearsay document was made by or from information transmitted by a person with knowledge;
3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such the hearsay document; 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 the Bank did not even come close to laying the business records predicate for any of the documents it sought to introduce. As to the note and

mortgage, the only question asked was whether those documents were kept in the ordinary course of the Servicer's business and whether Perez reviewed the documents[34]—which, at best, only established the third prong of the exception.

Perez's testimony with respect to the payment history was also similarly unavailing since all he testified was that the loan payment history was prepared in the normal course of business for "you."[35] This testimony fails to establish compliance with any prong of the business records exception.

But worst was his testimony regarding the welcome letter (Exhibit 3)[36] and the default notice (Exhibit 4)[37] since there was no testimony whatsoever regarding the business records exception for these documents. The Bank's failure to lay the business records predicate alone warrants reversal of the final judgment. *See generally Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014).

[34] T. 11.

[35] T. 15.

[36] T. 13-14.

[37] T. 14.

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

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, 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*, 148 So. 3d 819 (Fla. 1st DCA 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.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because the bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA

2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

See also 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); *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 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.)

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

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices.

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to say about the company's alleged recordkeeping practices so as to appear to meet the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

In this case, Perez testified that his job required him to testify in court nearly every business day.[38] He never verified any of the numbers on the payment history[39] and only saw a copy of the note and mortgage for the first time a week before the trial.[40] And he testified repeatedly that he did not supervise anyone.[41]

And for nearly every document he sought to introduce, he had absolutely no experiential familiarity with the department responsible for creating them. For instance, he did not work for Countrywide, the entity he claimed sent the default notice to the Servicer.[42]

In short, Perez was a "robo witness"—one of the hearsay-toting automatons, the use of which the Fourth District explicitly forbade in *Bank of New York v. Calloway*, __ So. 3d __, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015). While certainly well trained in the art of giving hearsay testimony, he was admittedly not a records custodian[43] or other qualified witness since he was neither in charge of, nor (other than through hearsay) acquainted with, any of the activity constituting usual business practices for creating and maintaining the note, the

[38] T. 35.

[39] T. 28.

[40] T. 30.

[41] T. 29, T. 30, T. 34.

[42] T. 31

[43] T. 34-35.

mortgage, the welcome letter, the demand notice, and the payment history. His only connection to the documents was that he had "reviewed" them.[44]

The trial court offered no explanation why it denied the Homeowners hearsay objection other than baldly stating that he had "met the business records exception."[45] But this was an incorrect statement of law not only because the business records predicate was not laid, but also because Perez was unqualified to lay it. The Homeowners' objection should have been sustained.

The myth that bank records are inherently trustworthy.

A typical bank argument (and one apparently espoused by the trial court) is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of

[44] T. 4 (Perez's duties required him to "review files"), T. 7 (he reviewed the note as part of his job duties for the Bank), T. 9 (as part of his job duties he reviewed the mortgage); T. 13-14 (he reviewed the welcome letter in preparation for trial); T. 14 (the default notice was "one of the documents" he reviewed in preparation for trial); T. 17 (he reviewed the payment history in preparation for trial).

[45] T. 13.

trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("…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 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);[46] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[47]

[46] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf

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

Arguably, this well-known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish authenticity or to lay the foundation for the business-record hearsay exception because banks are somehow more worthy of the court's trust than the average litigant.

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As this Court noted in *Calloway*, "[t]he rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *See generally U.S. v. McIntyre*, 997 F. 2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business records exception is "a practice and environment encouraging the making of accurate records.") (Citations omitted). For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan[48] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[49]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's unreliability is acceptable so long as it is in their favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

Here, Perez's testimony reveals just how untrustworthy the Bank's records were. He testified (from numbers found on his cell phone) that the Bank was due a total amount of $399,953.71[50]—but the final judgment which the Bank presented

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[48] Paul Fitzgerald Bone, *Toward a Model of Consumer Empowerment and Welfare in Financial Markets with an Application to Mortgage Servicers*, Journal of Consumer Affairs, Vol. 42, Issue. 2, pg. 165 (2008) ("Mortgage servicers act on behalf of the investors holding the mortgage-backed security. Keeping customers satisfied generally means keeping investors, rather than homeowners, satisfied.") *Id*. at 178.

[49] *See for example, JPMorgan $300M Settlement Over Force-Placed Insurance Approved*, Insurance Journal, March 3, 2014, available at, http://www.insurancejournal.com /news/national/2014/03/03/321966.htm.

[50] T. 19.

to the trial court was more than $14,500.00 over this amount. No explanation for this difference was given at trial and none exists in the record.

Stated plainly, the appellate record is devoid of any suggestion that the Servicer proffering this evidence suffers any financial penalty if the records it inherits or creates are inaccurate. And court rulings that give banks an evidentiary pass only increase the likelihood that their records will be even more untrustworthy in the future.

The myth that providing admissible evidence from qualified witnesses is "impractical."

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should excuse them from the rules because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for foreclosing banks to introduce records from far-flung departments or corporate affiliates.

Section § 90.902(11), Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

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

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, Florida courts, have already suggested that foreclosing banks can meet the hearsay exception requirements in

exactly this manner. *Holt*, 155 So. 3d at 506; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of this rule 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 to conduct this litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the business.

Thus, even if it were proper for the Court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, it is unnecessary to ignore binding precedent or to rewrite the rules of evidence to allay that concern.

The Bank had its day in court.

Litigants are not permitted "mulligans" or "do-overs" when it comes to trial. *See Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280 (Fla. 2d DCA 2014). *See also Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) (Reversing damages award but finding new trial unwarranted

because "[h]aving proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) ("No statute or rule permitted the trial court to give the [plaintiff] a "do-over" after a three and a half-day trial.").

Accordingly, upon reversal of the judgment, this Court should also instruct the trial court to enter an involuntary dismissal of the case.

II. The evidence admitted at trial is insufficient to support the judgment and therefore the judgment must be reversed with instructions to enter an involuntary dismissal.

As shown by the transcript, the trial court did not pause to review the exhibits admitted at trial to see whether they supported the Bank's case or consider any of the testimony. This was encapsulated at the end of the trial when, despite the fact that the trial court announced it was entering judgment in the Bank's favor in the amount of $399,953.71,[51] it proceeded to sign a judgment which exceeded that amount by over $14,500.00.

Therefore, the trial court abdicated its fact-finding role by simply executing the proposed judgment without determining whether the documents in evidence supported the judgment. *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) (trial court's verbatim adoption of proposed final judgment suggested that trial court did

[51] T. 67.

not independently make factual findings and legal conclusions, created appearance of impropriety, and was reversible error); *Walker v. Walker*, 873 So. 2d 565, 566 (Fla. 2d DCA 2004) (a proposed judgment cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge.)

It should not be surprising then that the documents in evidence do not support the judgment. As a result, the judgment must be reversed.

A. The Bank presented insufficient evidence to support compliance with the notice provisions of the mortgage.

There was no evidence that the acceleration notice was mailed.

Prior to filing the foreclosure action, the Bank was required to send the Homeowners a notice of acceleration and opportunity to cure which complied with Paragraph 22 of the mortgage. The Bank, however, failed to present any competent evidence—much less substantial evidence—that it actual mailed this notice, or if it did mail the notice, when it actually placed it in an envelope, stamped it, and brought it to the post office or mailbox for delivery. There is therefore insufficient evidence to support a finding that the Bank complied with conditions precedent to foreclosure.

The Bank adduced a single document—purportedly a copy of the letter itself—to prove that it sent a notice of acceleration. However, Perez did not testify

that it was mailed—rather, he simply read the name and address on the notice.[52] And to the extent that Perez testified at all regarding the notice being "sent," his testimony was limited to cross-examination when he testified that Countrywide sent the notice to the Servicer.[53] Nor did Perez introduce any documents such as a communications log or a return receipt which would prove that Countrywide mailed the notice to the Homeowners. And without this testimony or documents, there was no competent, substantial evidence to support a finding that the notice was mailed to the Homeowners.

There was no evidence of when the notice of acceleration was mailed.

Not only was it critical to establish that the notice was actually mailed, it was also critical to establish the exact date that it was mailed. This is because Paragraph 22 requires that the Bank give the Homeowners thirty days to cure any default identified in the notice:

> 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

[52] T. 14.

[53] T. 31.

> 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.[54]

The alleged notice identifies this cure date as exactly thirty-one days from the date the letter was written (the date on the letter).[55] Thus, for the Homeowners to have the benefit of the agreed thirty-day cure period, they must be given the notice on the same day the letter is written or the day immediately proceeding it. The Bank would normally rely on the legal fiction in Paragraph 15 which allows the court to "deem" that the Homeowners receive notice on the day it is mailed:

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument 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.[56]

Accordingly, in the instant case, to prove that the Homeowners were given a full thirty days to cure, the Bank needed to prove, not just that the notice was mailed, but <u>when</u> the notice was mailed—and more specifically, that it was mailed the same day it was written, or at most, the day after.

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[54] Copy of Mortgage, ¶ 22, April 30, 2014 (R. 583).

[55] Notice dated October 17, 2008, Plaintiff's Exhibit 4, (R. 608) (indicating that in order to cure the default, Countrywide was required to receive payment on or before November 16, 2008).

[56] Copy of Mortgage, ¶ 15, (R. 581-582).

Here, again, Perez admitted that Countrywide sent the notice—and only that it was sent to the Servicer.[57] He provided absolutely no testimony that the notice was actually mailed to the Homeowners (by Countrywide or otherwise), much less the date it was actually mailed.

Thus, the Bank is left merely with a dated letter. And even if the date on the letter could establish when it was mailed, this statement would be rank hearsay and insufficient to prove compliance with the notice provisions. *Webster v. Chase Home Fin., LLC*, 155 So. 3d 1219 (Fla. 5th DCA 2015) (reversing final judgment of foreclosure after bench trial because trial court permitted impermissible hearsay testimony regarding lender's compliance with notice provisions of the mortgage). Therefore, the Bank failed to establish the date the notice was mailed and, as a result, it could not have proven compliance with the thirty-day notice provision of Paragraph 22 or that the Bank was entitled to the legal fiction in Paragraph 15. *See Holt v. Calchas, LLC*, 155 So. 3d at 507 (notice alone was insufficient to show compliance with Paragraph 22).

[57] T. 109-110.

The envelope indicates that if the notice was mailed, it was not mailed until three days after it was drafted.

And not only does the notice include a breach that had not yet occurred, the evidence admitted at trial actually indicates that, if the notice was mailed, it was not mailed until three days after it was drafted – which gave the Homeowners less than 30 days to cure any default.

Specifically, Exhibit 4 also includes what appears to be a copy of the envelope the notice may have been mailed in (if, in fact, the notice was mailed). On the upper right-hand corner the notice indicates that it was sent "presort":[58]

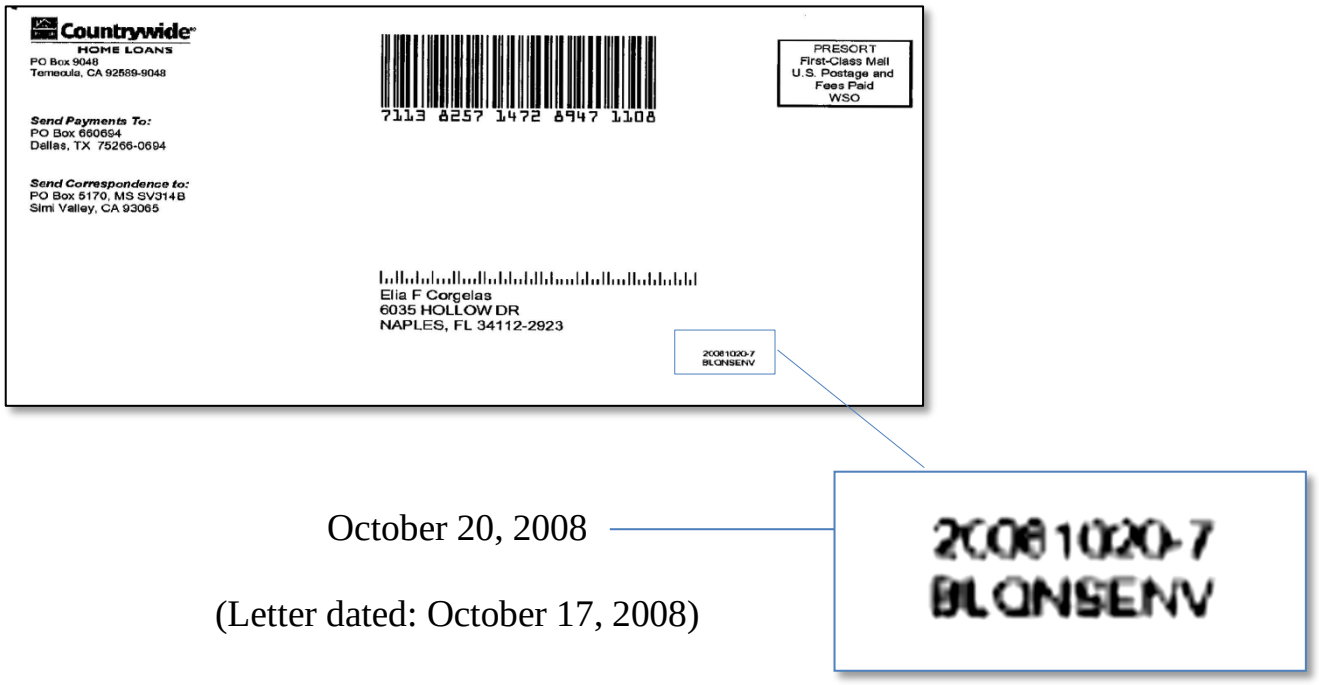
"Presort" mail is a form of bulk mailing where the mailer "presorts" the mail by destination in return for a lower postage fee from the Postal Service. *U.S. Postal Serv. v. Postal Regulatory Com'n*, 717 F.3d 209, 210 (D.C. Cir. 2013). Often, the sorting is performed by third party vendors who pick up outgoing mail for their customers, sort it, and then deliver it to the Postal Service:

[58] Purported Envelope for Letter entitled Notice of Intent to Accelerate, Exhibit 4, dated October 17, 2008 (R. 607).

> Defendant Zip Mail is in the "mail presort business" with facilities in Missouri, Illinois, and Michigan. Zip Mail picks up outgoing mail from its clients, sorts the mail according to U.S. Postal System regulations, and delivers the sorted mail to a designated post office where it is inspected and mailed. Zip Mail also sells and addresses envelopes for clients from its St. Louis office and performs other related services.

Duggan v. Zip Mail Services, Inc., 920 SW 200, 201 (Mo. App. 1996).

But the envelope admitted as composite Exhibit 4 at trial indicates that notice was not actually mailed (i.e. did not reach the United States Postal Service for mailing) until October 20, 2008, three days after the notice was drafted:[59]



[59] *Id.*

This three-day lag would be logical given that the notice itself purports to have been drafted on a Friday. If Countrywide sent it that day for sorting, then the notice did not get mailed until the following Monday.

But because the notice did not get mailed until October 20th, then it did not give the Homeowners the full 30 days to cure—and it is black letter law that the thirty day notice must be strictly observed. *See Konsulian v. Busey Bank, N.A.*, 61 So. 3d at 1285 (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); *Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed).

Accordingly, the Bank's own evidence (even though it was inadmissible hearsay) established that the notice was not mailed on the date stated on the letter and not mailed early enough to give the Homeowners the thirty-days cure period to which they were entitled.

Even if it had been sent timely, the notice improperly included a breach that had not even occurred directly in the cure amount.

The plain language of Paragraph 22 of the mortgage required that the Bank send the Homeowners a notice following their alleged breach which specifies the breach they allegedly committed and which specifies a date not less than thirty days after the notice was sent during which the Homeowners could cure the breach.

The notice admitted into evidence, however, does not comply with the mortgage's notice requirements because it includes an amount not yet due in the cure amount:[60]

> You have the right to cure the default. To cure the default, on or before November 16, 2008, Countrywide must receive the amount of $2,859.44 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before November 16, 2008.

Countrywide therefore attempted to provide notice that was not only prior to this assumed future breach, but which provided the Homeowners less than thirty days to cure that breach. This is because the alleged future breach could not have occurred until November 1, 2008, leaving the Homeowners only fifteen days from the date of the notice to cure this additional breach. In other words, the Bank

[60] Letter entitled Notice of Intent to Accelerate, Exhibit 4, dated October 17, 2008 (R. 608).

impermissibly tried to start the thirty-day clock to cure a default of the November 1, 2008 payment 16 days before the payment was even due.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—Countrywide rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[61] the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

Therefore the notice does not comply with Paragraph 22 of the mortgage even if the Bank could have proven that the notice was actually sent.

* * *

In summary, finding that the Bank actually sent a notice in accordance with the mortgage requires more than the mere existence of some piece of paper. There must be proof that the notice was actually sent and when it was sent. Since the Bank failed to present any testimony or evidence indicating whether the notice was sent or when it was sent, the Bank was not entitled to the Paragraph 15 presumption that the Homeowners received the notice or the legal fiction that they

[61] Specify means to mention specifically or to state precisely in full and explicit terms or detail so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

received it as of the moment of mailing. Because there was no competent, substantial evidence that the Bank complied with the mortgage's notice provisions, there is insufficient evidence to support the judgment.

The proper remedy of remand is involuntary dismissal.

The demand letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("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.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt*, 155 So. 3d at 507 ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."); *Blum v. Deutsche Bank Trust Co.*, __ So. 3d. __, 40 Fla. L. Weekly D574 (Fla. 4th DCA March 4, 2015) (holding that failure to comply with notice provisions of mortgage requires dismissal of the case).

B. The Bank presented insufficient evidence to support its measure of damages.

The interest award is not supported by competent, substantial evidence.

The judgment awarded $68,187.36 in interest for the period between August 1, 2008 and February 12, 2014—without mentioning any annual or per diem interest figures for that period. And the judgment also awards the Bank interest at 6.625% (for a total award of $2,279.97) for the period between February 13, 2014 and April 30, 2014.

By its own terms, the note's interest rate was indisputably adjustable both before and after default.[62] Initially, interest on the unpaid principal was set at 8.250 percent.[63] The interest rate was permitted to change on November 1, 2006 and every month thereafter.[64] This change would have been based on an "Index" defined as the "twelve-month average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as

[62] Copy of Adjustable Rate Note, pg. 1, providing that "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT," April 30, 2014 (R. 595).

[63] Copy of Adjustable Rate Note, pg. 1, ¶ 2(A), providing that "Interest will be charged on unpaid principal until the full amount has been paid. Up until the first day of the calendar month that immediately precedes the first monthly payment due date set forth in Section 3 of this Note, I will pay interest at a yearly rate of 8.250%," April 30, 2014 (R. 595).

[64] Copy of Adjustable Rate Note, pg. 1, ¶ 2(C), April 30, 2014 (R. 595).

published in the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates."[65] According to the note, the "Current Index" would be the most recent Index figure available 15 days before any interest rate "change date."[66] The note also set an interest rate ceiling at 9.950% and interest rate floor at 3.525% (or what the note terms the "margin.")[67]

And the interest rate apparently did change because the final judgment it produced to the trial court and which the trial court signed awarded it interest at 6.625% for the period between February 13, 2014 and April 30, 2014.[68] But there is no indication what the interest rate was for the period between August 1, 2008 and February 12, 2014. If the interest rate was the 3.525% floor during this time period, the Bank would have been entitled to nearly $10,000.00 less than what it was awarded.[69]

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[65] Copy of Adjustable Rate Note, pg. 1-2, ¶ 2(C), April 30, 2014 (R. 595-596).

[66] *Id.*

[67] Copy of Adjustable Rate Note, pg. 2, ¶ 2(D), April 30, 2014 (R. 596).

[68] Payment History, Exhibit 3.

[69] Assuming (without conceding) that the principal balance of $298,155.99 is correct, per diem interest at 3.525% would have been $28.79. And between August 1, 2008 and February 12, 2014, there were a total of 2,022 days. Multiplied together, the interest award would have been $58,213.38.

But even more disturbing was Perez's testimony that, according to his phone, the total interest award "to date" (i.e. April 30, 2014) was $69,776.33.[70] And while this may "only" be a difference of $700.00, it is further evidence that the trial court merely signed the judgment that was presented to it rather than actually peruse the testimony and exhibits to see whether they supported the proposed judgment.

Without evidence or testimony regarding the interest rates for the years preceding the final judgment, and no information (such as the Current Index) from which the applicable rate can be determined, there is no competent, substantial evidence supporting the interest award. *Salauddin v. Bank of Am., N.A.*, 150 So. 3d 1189 (Fla. 4th DCA 2014) (reversing and remanding where bank did not produce evidence of a change in the interest rate, and holding that "the trial court erred in adopting the interest amount set forth in the bank's proposed final judgment").

The Bank's failure to produce competent, substantial evidence to support the interest award does not only affect those damages, but also the principal amount awarded to it, too.

[70] T. 19.

The principal award is not supported by competent, substantial evidence.

Indeed, the judgment awarded $298,049.55 in principal to the Bank. However, the note[71] and mortgage[72] both expressly provide that the original principal balance of the loan was $288,000.00. And Perez's testimony failed to explain this difference.

While this increase was undoubtedly attributable to the "negative amortization" of deferred interest,[73] without testimony from Perez explaining how payments were applied, there is no evidence before this Court supporting the amount of additional principal. More to the point, the negatively amortized amount is a function of the payments made, the portion that was attributed to interest, and, most importantly, the interest due at the time of that payment. The difference between the interest paid and the interest due would become additional principal. But because Perez offered absolutely no testimony regarding what the individual payments were or how they were applied, and because, as shown in the above section, the interest due in any given month cannot be computed, the additional principal cannot be determined from the exhibits.

[71] Copy of Adjustable Rate Note, pg. 1, ¶ 1, April 30, 2014 (R. 595).

[72] Copy of Mortgage, pg. 1, April 30, 2014 (R. 574).

[73] Copy of Adjustable Rate Note, pg. 3, ¶ E, April 30, 2014 (R. 596-597).

The attorney's fee award is not supported by competent, substantial evidence.

Finally, the final judgment also awarded the Bank $4,140.00 in attorney's fees. However, the Bank's attorney did not testify or present evidence as to the number of hours spent on the case, nor was there any expert witness testimony as to the reasonableness of the fee. Rather, the Bank's witness merely testified the Servicer was obligated to pay the lawyers a "reasonable" fee.[74] And this was insufficient evidence to support the attorney's fee award.

The trial court therefore erred in awarding attorney's fees without testimony of the attorney as to the number of hours spent on the case or testimony from an expert witness as to the reasonableness of the fee. *Miller v. The Bank of New York Mellon*, 149 So. 3d 1198 (Fla. 4th DCA 2014) (reversing final judgment of foreclosure because the attorney's fee award was not supported by expert testimony); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121 (Fla. 2d DCA 2012) (affirming denial of motion for attorney's fees in foreclosure action because attorney failed to present evidence of number of hours spent); *Saussy v. Saussy*, 560 So. 2d 1385, 186 (Fla. 2d DCA 1990) ("To support a fee award, there must be the following: 1) evidence detailing the services performed and 2) expert testimony as to the reasonableness of the fee.")

[74] T. 21.

Additionally, this issue may be raised for the first time on appeal since it tests the sufficiency of the evidence of the fee award made after a nonjury trial. *Diwakar v. Montecito Palm Beach Condo. Ass'n, Inc.*, 143 So. 3d 958, 961 (Fla. 4th DCA 2014) (holding that the sufficiency of evidence supporting an attorney's fee award after a nonjury bench trial in a foreclosure case can be raised for the first time on appeal); *see also Markham v. Markham*, 485 So. 2d 1299, 1301 (Fla. 5th DCA 1986) (holding that former husband did not waive his right to contest attorney's fee award on appeal where award was established solely through testimony of former wife without testimony from either the attorney rendering services or an expert witness.)

The proper remedy on remand is involuntary dismissal.

Since the Bank failed to establish an evidentiary basis for the damages it sought, the proper remedy on remand is involuntary dismissal. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014) ("When a party seeking monetary damages fails to establish an evidentiary basis for the damages ultimately awarded at trial, reversal for entry of an order of dismissal is warranted."). *See also Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) (reversing summary judgment of foreclosure on lack of prosecution grounds and noting that, had this ground not existed, the court would have nevertheless

reversed because the judgment contained mathematically impossible interest figures); *but see Salauddin*, at 1191 (suggesting that trial court should compute interest at minimum rate allowed by the note, where the note stated a minimum interest rate).

CONCLUSION

The Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

Dated: April 1, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this April 1, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this April 1, 2015.

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