In the District Court of Appeal
Second District of Florida

CASE NO.

(Circuit Court Case No.)

Appellant,

v.

OCWEN LOAN SERVICES LLC,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is an appeal from a final judgment of foreclosure entered against Appellant, [redacted] ("Homeowner"), and in favor of Appellee, Nationstar Mortgage, LLC (the "Fourth Servicer"), in an action filed by Ocwen Loan Services, LLC (the "Third Servicer").[1] The Third Servicer, in turn, had sued to foreclose on a mortgage and note executed in favor of Grabill Bank.[2]

As set forth below, the trial court erroneously denied dismissal and entered judgment in favor of Nationstar despite its failure to submit competent, substantial evidence: (1) that Nationstar at any time had standing to enforce the note; or (2) that Ocwen had standing at the time of filing suit. Moreover, the trial court abused its discretion in admitting into evidence documents submitted by Nationstar to show that a default occurred and the amount allegedly owed. This Court should reverse.

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[1] R. 401.

[2] R. 7, 13.

II. Appellant's Statement of the Facts

A. The Pleadings

The Third Servicer filed suit on August 8, 2011.[3] It alleged that on November 6, 2006, the Homeowner entered into a Note and Mortgage.[4] The Third Servicer alleged that it was "the mortgagee of record by virtue of an Assignment, a copy of which is attached hereto as Exhibit "C," which either has been or is being duly recorded in the office of the clerk of court of Lee County, Florida."[5] The Third Servicer further alleged that it was "now entitled to enforce Mortgage and Mortgage Note pursuant to Florida Statutes § 673.3011."[6] In addition, the Third Servicer alleged that "[a]ll conditions precedent to the acceleration of the mortgage note and to foreclose the mortgage have been fulfilled or have occurred."[7]

Attached to the complaint were two non-identical copies of the purported Note on which Third Servicer claimed Mr. [redacted] defaulted.[8] On the last page of

[3] R. 1.

[4] R. 2, ¶2.

[5] R. 2, ¶3.

[6] R. 3, ¶5. Section 673.3011, Florida Statutes, defines "'person entitled to enforce' an instrument" as the holder, a "nonholder in possession of the instrument," or a person entitled to enforce under § 673.3091 (person entitled to enforce a lost instrument at the time it was lost).

[7] R. 5, ¶12.

[8] R. 7-12.

the first copy of the purported Note was a single, undated, special endorsement, from the named payee of the Note, Grabill Bank, to Taylor, Bean & Whitaker Mortgage Corp:[9]

Without Recourse, Pay to the Order of:
Taylor, Bean & Whitaker Mortgage Corp.
By: ______________________
Douglas P. Fyock, Vice President
Grabill BAnk

FLORIDA FIXED RATE NOTE—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3210 1/01
ITEM T5996L3 (0011) (Page 3 of 3 pages) GREATLAND To Order Call: 1-800-530-9393 Fax: 616-791-1131

Stamped on the last page of the second copy of the purported Note was an additional endorsement, an undated endorsement in blank by Taylor, Bean & Whitaker Mortgage Corp:[10]

Without Recourse, Pay to the Order of:
Taylor, Bean & Whitaker Mortgage Corp.
By: ______________________
Douglas P. Fyock, Vice President
Grabill BAnk

Without recourse, pay to the order of
By: Taylor, Bean & Whitaker Mortgage Corp.
____
Erla Carter-Shaw, E.V.P.

FLORIDA FIXED RATE NOTE—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3210 1/01
ITEM T5996L3 (0011) (Page 3 of 3 pages) GREATLAND To Order Call: 1-800-530-9393 Fax: 616-791-1131

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[9] R. 9.

[10] R. 12.

A copy of the purported Mortgage was also attached to the complaint.[11] The Mortgage named Grabill Bank as the "Lender," and Mortgage Electronic Registration Systems, Inc. as the mortgagee.[12] In paragraph 22, the Mortgage contained a condition precedent requiring that notice be given to the Homeowner 30 days before acceleration:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.[13]

Also attached to the complaint was a document entitled "Assignment of Mortgage Florida."[14] In that document, dated May 11, 2011, MERS, as nominee

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[11] R. 13-24.

[12] R. 13.

[13] R. 23.

[14] R. 25-26.

for Grabill Bank, purported to assign the mortgage (but not the Note) to the Third Servicer.[15]

On January 2, 2012, five months after filing suit, the Third Servicer filed the purported original Note.[16] This version of the Note differed from both copies that were attached to the complaint. Rather than a blank endorsement on the last page, the endorsement had been made to read as a special endorsement to the Third Servicer:[17]

Without Recourse, Pay to the Order of:
Taylor, Bean & Whitaker Mortgage Corp.
By:
Douglas P. Fyock, Vice President
Grabill BAnk

Without recourse, pay to the order of
Ocwen Loan Servicing LLC
By: Taylor, Bean & Whitaker
Mortgage Corp.
Erla Carter-Shaw, E.V.P.

FLORIDA FIXED RATE NOTE—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3210 1/01
GREATLAND
ITEM T5996L3 (0011) (Page 3 of 3 pages) To Order Call: 1-800-530-9393 Fax: 616-791-1131

After denial of his motion to dismiss, the Homeowner filed an Answer, Affirmative Defenses, and Demand for Attorney's Fees.[18] The Homeowner

[15] R. 25.

[16] R. 74-78.

[17] R. 78. No evidence was ever presented as to when and how the Note came to be specially endorsed to the Third Servicer. At trial, counsel for the Fourth Servicer said "between the time the complaint was filed, and the time when [the Note] was filed with the court, it was specially endorsed to Ocwen." Transcript of Proceedings (Non-Jury Trial), October 31, 2014 at 10 ("T. 10").

[18] R. 105-109.

admitted that the Third Servicer was seeking foreclosure, but otherwise denied the allegations of the complaint.[19] He also asserted three affirmative defenses: 1) lack of standing; 2) failure to comply with the contractual condition precedent of pre-suit notice; and 3) failure to properly verify the complaint.[20]

On September 25, 2013, the Third Servicer filed a motion to substitute the Fourth Servicer as party plaintiff.[21] According to the motion, the basis for the substitution was that the Third Servicer had transferred "its interest in the cause of action" to the Fourth Servicer via an assignment of mortgage.[22] The assignment of mortgage attached to the motion—like the assignment of mortgage to the Third Servicer that had been attached the complaint—purported to assign only the Mortgage, but not the Note.[23]

B. The Trial

A non-jury trial was held on October 31, 2014.[24] When the Fourth Servicer attempted to introduce a copy of the Note that resembled one of the copies attached to the complaint (with no special endorsement to the Third Servicer), the

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[19] R. 105-106.

[20] R. 108.

[21] R. 151-155.

[22] R. 151.

[23] R. 153.

[24] T. 1.

Homeowner objected that the document was "not a copy of the original note."[25] The Fourth Servicer argued that this copy of the Note was appropriate to introduce because "[s]tanding is determined at the time the complaint's filed," and the Note was specially endorsed to the Third Servicer after the complaint was filed.[26]

A short discussion ensued, in which the Homeowner pointed out that the "original note that's in the court file is endorsed specifically to Ocwen Loan Servicing," and that it was the original Note that the trial court should consider.[27] But the fact that the Note was specially endorsed to the Third Servicer was problematic as to the plaintiff's standing, because "the Plaintiff is Nationstar, and it was never endorsed by Ocwen either in blank or to Nationstar."[28] Agreeing that the original Note remained specially endorsed to Ocwen,[29] the Fourth Servicer told the trial court that did not matter, because standing is determined only as of the date of filing suit, and on that date, the Note purportedly "was blank endorsed."[30]

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[25] T. 8.

[26] T. 8-10.

[27] T. 8.

[28] T. 10.

[29] T. 14 ("It's just that once -- this has been specially endorsed, now it's closed.").

[30] T. 14.

As its first exhibit, the Fourth Servicer proceeded to offer into evidence a copy of the Note.[31] The Homeowner objected and asked to voir dire the witness.[32] Stating a preference to combine voir dire with cross-examination, the trial court deferred ruling on the admissibility of Exhibit 1.[33]

In addition, the Fourth Servicer offered seven more documents in support of its case, all but one of which was admitted into evidence:

- a copy of the Mortgage;[34]
- a copy of an Assignment of Mortgage dated May 11, 2011 from MERS as nominee for Grabill Bank to the Third Servicer;[35]
- a document described as a "loan history;"[36]
- a "breach letter" purporting to be from Ocwen Loan Servicing;[37]
- a letter purportedly sent by the Homeowner to the Third Servicer;[38]

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[31] T. 22.

[32] *Id*.

[33] T. 23.

[34] T. 23; Exhibit 2 (R. 355-368).

[35] T. 25; Exhibit 3 (R. 369-371).

[36] T. 26; Exhibit 4 (R. 372-386).

[37] T. 29; Exhibit 5 (R. 388-390).

[38] T. 31; Exhibit 6 (R. 391-392).

- a "Certificate of Secretary," purporting to identify certain individuals as employees of the Third Servicer (not admitted);[39] and
- a "Payoff Statement," labeled "FOR LEGAL PURPOSES ONLY."[40]

The Fourth Servicer submitted no documents to show that the Third Servicer was in possession of the original Note at the time it filed suit, or to show that the Fourth Servicer had the right to enforce the Note. The Fourth Servicer's witness had no knowledge as to when the Note was endorsed to the Third Servicer.[41] Nor was there any information in the Fourth Servicer's records on that issue.[42]

The Fourth Servicer's Document Reader

To lay a foundation for the admission of its exhibits into evidence, the Fourth Servicer called a single witness, Edward Hynan, who identified himself as an employee of the Fourth Servicer, in the position of "litigation resolution specialist."[43] His job is "to review the business records for Nationstar Mortgage in preparation for testimony at trials, depositions, and mediations."[44]

[39] T. 33-34; Exhibit 7 for Identification (R. 395-399).

[40] T. 35-36; Exhibit 8 (R. 400).

[41] T. 42.

[42] T. 42.

[43] T. 5.

[44] T. 5-6.

He testified that he had "knowledge" of the loan at issue only as a result of his "preparation and review of the prior deposition and the trial for today."[45] He said he was "trained on Nationstar's loan procedures."[46]

The Homeowner objected to the admission of Exhibit 4, the "loan history," through Mr. Hynan, because the loan history had been created by entities about whose practices Mr. Hynan had no personal knowledge.[47] Without giving the Homeowner a chance to voir dire Mr. Hynan, the trial court overruled the Homeowner's objection to admitting Exhibit 4.[48] The Homeowner also objected to the admissibility of Exhibit 8, a "payoff quote" generated from the payment history documents contained in Exhibit 4.[49] The trial court overruled the objection.[50]

On cross-examination, Mr. Hynan testified that Nationstar had been the servicer for the subject loan only since May 2013.[51] Prior to that time, there had

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[45] T. 6.

[46] *Id.*

[47] T. 27.

[48] T. 27.

[49] T. 36.

[50] T. 37.

[51] T. 40.

been three other servicers for the loan, which had kept the payment records during the periods in which they serviced the loan.[52]

Asked whether he had personal knowledge of the prior servicers' recordkeeping practices, Mr. Hynan admitted that he did not.[53] He claimed that because the loan was owned by Freddie Mac, the prior servicers were required "to follow certain guidelines, which would include servicing the loan in the proper and generally accepted servicing principles."[54] But he admitted that he had no personal knowledge of what their actual practices were.[55]

On redirect, Mr. Hynan said the Fourth Servicer has "an acquisitional boarding process," in which it checks records received from Ocwen.[56] But Mr. Hynan later admitted that Nationstar had done no such checks were done with regard to records created by the first and second servicers.[57] He also claimed he did not need to have personal knowledge of Ocwen's recordkeeping practices because he knows "industry standards," and every servicer follows them.[58]

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[52] T. 40.

[53] T. 40.

[54] T. 41.

[55] T. 41.

[56] T. 43-44.

[57] T. 48-49.

[58] T. 48.

The Trial Court's Denial of the Homeowner's Motion for Dismissal

At the close of the evidence, the Homeowner moved for dismissal based on 1) the Fourth Servicer's failure to prove standing; and 2) the loan history documents being inadmissible, and therefore insufficient to show the amount owed.[59] In response, the Fourth Servicer argued that it had established standing because "[a]t the time the complaint was filed, the facts show that it was blank endorsed, which means that Ocwen had standing at the time."[60] It also said that the assignment of mortgage was "a second source" of standing.[61]

At that point, the trial judge cut off further argument and stated that despite his obligation "to make sure you've got all your issues on the record," he believed the Fourth Servicer had made an adequate showing for the court "to receive all items in evidence, including "the original note and mortgage as they appear in the court file, and the original assignment as it appears in the court file."[62] Without

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[59] T. 51.

[60] T. 52.

[61] T. 52.

[62] T. 52-53.

expressly stating that it was denying the motion for dismissal, the trial court stated that it was "going to grant the judgment.[63]

The Final Judgment of Foreclosure in favor of the Fourth Servicer was entered the same day.[64] On November 20, 2014, the Homeowner timely filed a notice of appeal.[65]

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[63] T. 53.

[64] R. 401-404 (final judgment).

[65] R. 411-413.

SUMMARY OF THE ARGUMENT

When the plaintiff claims standing as a holder, the plaintiff must prove standing both at the time of filing suit and at the time of trial. There was no competent, substantial evidence to prove standing at either point in time.

First, there was no competent, substantial evidence that the Third Servicer—the original plaintiff, Ocwen—had standing at the time of filing suit. The plaintiff argued that Ocwen had standing as a holder of a note endorsed in blank, but offered no evidence to show that Ocwen possessed the original of the Note (which was not filed with the court until five months later) when it filed suit.

Second, the Fourth Servicer, Nationstar, failed to prove that it was authorized to enforce the Note at the time of trial. By that time, the Note was specially endorsed to Ocwen, and the plaintiff submitted no evidence that Ocwen ever endorsed, assigned, or otherwise transferred its rights to Nationstar.

Finally, the trial court abused its discretion in admitting into evidence Exhibits 4 and 8, which were submitted to prove a default and the amount owed. The Fourth Servicer's witness had no personal knowledge of the recordkeeping practices of the three prior servicers, so he was not qualified to lay a foundation for the admissibility of records they created.

STANDARD OF REVIEW

Appellate courts "review the sufficiency of the evidence to prove standing to bring a foreclosure action de novo." *Lacombe v. Deutsche Bank Nat'l Trust Co.*, 149 So. 3d 152, 153 (Fla. 1st DCA 2014) (citing *Dixon v. Express Equity Lending Grp.*, 125 So. 3d 965 (Fla. 4th DCA 2013). The trial court's ruling on the Homeowner's motion for involuntary dismissal is also reviewed de novo. *Bank of New York v. Calloway*, 157 So. 3d 1064, 1069 (Fla. 4th DCA 2015).

This Court generally reviews a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *Sas v. Fannie Mae*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013). However, because a "'court's discretion is limited by the evidence code and applicable case law," a trial "court's erroneous interpretation of these authorities is subject to de novo review.'" *Olesky v. Stapleton*, 123 So. 3d 592, 594 (Fla. 2d DCA 2013) (quoting *Sottilaro v. Figueroa*, 86 So. 3d 505, 507 (Fla. 2d DCA), *review denied*, 103 So. 3d 139 (Fla. 2012)).

ARGUMENT

Because the Fourth Servicer failed to submit competent, substantial evidence to prove standing, and because the trial court abused its discretion in admitting the payment records into evidence, this Court should reverse the final judgment.

I. Because the Fourth Servicer failed to submit competent, substantial evidence of the Third Servicer's standing when it filed suit and of the Fourth Servicer's standing at the time of trial, the trial court erred in denying the homeowner's motion for involuntary dismissal.

The trial court erred in denying the Homeowner's motion for involuntary dismissal because the Fourth Servicer failed to submit competent, substantial evidence: 1) that the Third Servicer had standing at the time it filed suit; and 2) that the Fourth Servicer had the right to enforce the Note at the time that judgment was entered. The Fourth Servicer was required to prove both.

When a homeowner disputes the plaintiff's standing to foreclose, the burden is on the plaintiff to prove standing. *See Lacombe v. Deutsche Bank Nat'l Trust Co*., 149 So. 3d 152, 153-54 (Fla. 1st DCA 2014) ("Appellants disputed the fact of Deutsche Bank's right to enforce the note and attendant standing to maintain an action for foreclosure. Deutsche Bank's ownership of the note was thus an issue it was required to prove."); *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When [the defendant] denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required

to prove."). The Homeowner here, like the defendant in *Lacombe*, asserted in his answer to the complaint that the plaintiff lacked standing, in addition to arguing that issue at trial.[66] As such, it was the Fourth Servicer's burden to prove standing.

Moreover, where, as here, the plaintiff at the time of trial claimed to have standing as the holder of a Note in substitution for the original plaintiff, who had also claimed to be the holder, the plaintiff must prove both that the original plaintiff had standing when it filed suit and that the substitute plaintiff was authorized to enforce the Note at the time of trial. *Russell v. Aurora Loan Services, LLC*, __ So. 3d __, 40 Fla. L. Weekly D967 (Fla. 2d DCA April 24, 2015) ("A plaintiff alleging standing as a holder must prove it is a holder of the note and mortgage both as of the time of trial and also that the (original) plaintiff had standing as of the time the foreclosure complaint was filed.") (quoting *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 352 (Fla. 1st DCA 2014)). The Fourth Servicer failed to submit substantial, competent evidence to carry that burden.

A. The Fourth Servicer failed to prove that the Third Servicer had standing when it filed suit.

It is by now firmly established in Florida law that "[a] crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *McLean v. JP Morgan Chase Bank*

[66] *See* R. 108; T. 14.

N.A., 79 So. 3d 170, 172 (Fla. 4th DCA 2012); *accord*, *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010); *Verizzo v. Bank of N.Y.*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010). Proof of standing at the time of filing suit is a *sine qua non* for a plaintiff to be awarded a judgment of foreclosure. *May v. PHH Mortg. Corp.*, 150 So. 3d 247, 248-49 (Fla. 2d DCA 2014); *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014).

Here, the Fourth Servicer attempted to prove that the Third Servicer was the holder of the Note at the time it filed suit. It asserted that the Note was endorsed in blank when suit was filed. But to "establish standing as the holder of a note endorsed in blank, a party must be in possession of the original note." *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013). Thus, the Fourth Servicer "was required to submit evidence that [the Third Servicer] was in possession of the original note with the blank endorsement at the time it filed the complaint to establish standing." *Id.* at 310-311; *accord, May v. PHH Mortg. Corp.,* 150 So. 3d 247, 249 (Fla. 2d DCA 2014).

The Fourth Servicer failed to submit proof that the Third Servicer was in possession of the original Note at the time it filed suit. It was not until five months after filing suit that the Third Servicer filed the original Note with the clerk of

court.[67] Merely attaching a copy of the Note to the complaint did not prove that the Third Servicer was in possession of the original Note when it filed suit. *Focht,* 124 So. 3d at 310 (rejecting argument that submitting the original note established standing because the plaintiff "did not submit the original note until several months after it had filed the complaint."). Leaving aside that attachments to complaints are not evidence, the Fourth Servicer asked the trial court to leap over a gap in its evidence—to simply assume that the Third Servicer itself made the copy from an original in its possession. But there are many ways that the Third Servicer could come by a photocopy, which is why possession of an <u>original instrument</u> is required for an alleged holder to be entitled to enforce its terms.[68]

Indeed, the Third Servicer's attachment of two different copies of the Note to the complaint—neither of which was identical to the original that was later filed—strongly suggests that the Third Servicer was *not* in possession of the original Note when it filed the complaint, such that it did not know which version was an accurate copy of the original. This Court should reject the Fourth

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[67] *See* R. 74.

[68] The Florida legislature thought proof of possession of the original note was so important it implemented the certification requirements found in § 702.015, Fla. Stat. for complaints filed after July 1, 2013.

Servicer's proffer of a photocopy of a note as evidence—just as the servicers themselves would reject an attempt to pay this debt with a photocopy of a check.

And the Fourth Servicer submitted nothing else—much less actual evidence—to show that the Third Servicer was in possession of the original Note on the date it filed suit. None of the exhibits submitted by the Fourth Servicer purported to show the date on which the Third Servicer came into possession of the original Note. And the Fourth Servicer's witness provided no testimony as to when the original Note came into the Third Servicer's possession.

Indeed, because no document was admitted into evidence demonstrating the date on which the Third Servicer came into possession of the original Note, Mr. Hynan, who had never worked for the Third Servicer and could have had no personal knowledge as to when the original Note came into its possession, would have been incompetent to testify to that issue even if he had attempted to do so. *See Sas v. Fannie Mae*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) ("[T]he trial court abused its discretion in allowing Greenlee to testify over objection about the contents of Fannie Mae's business records to prove the amount of the debt without having first admitted those business records.").

Having failed to submit evidence showing that the Third Servicer was in possession of the original Note on the date it filed suit, the Fourth Servicer failed to

meet its burden to prove standing. *May*, 150 So. 3d at 249 (reversing foreclosure judgment and remanding for dismissal because "the bank needed to introduce evidence that it was in possession of the original note with the blank endorsement at the time it filed the complaint," but "failed to do so; none of the evidence adduced at trial demonstrated when, if at all, the bank came into possession of the note.").

Nor did the Fourth Servicer submit evidence to show that the original Note was, in fact, endorsed in blank at the time suit was filed. As noted, copies of two different versions of the Note were attached to the complaint, only one of which contained an endorsement in blank. And when the original Note was filed with the clerk of court five months after suit was filed, it was different than either of the versions attached to the complaint, containing an undated special endorsement that was not reflected on either of the two prior versions.

No documentary or testimonial evidence was submitted as to whether the Note was endorsed in blank at the time suit was filed. It is true that the Fourth Servicer's *counsel* stated that the Note was endorsed in blank and in the Fourth Servicer's possession at the time suit was filed.[69] But unsworn statements of counsel do not substitute for evidence. *Spring Lake NC, LLC v. Figueroa*, 104 So.

[69] T. 14, 16.

3d 1211, 1215 n.2 (Fla. 2d DCA 2012); *Hitt v. Homes & Land Brokers, Inc*., 993 So. 2d 1162, 1166 (Fla. 2d DCA 2008).

And although the Fourth Servicer submitted an assignment of mortgage from the original lender to the Third Servicer, which was dated prior to the filing of the complaint, that document purported to assign the *mortgage* only, not the Note. An assignment of mortgage, without an assignment of the Note, does not confer standing. *See Russell*, 40 Fla. L. Weekly D967; *Bristol v. Wells Fargo Bank, Nat'l Ass'n*, 137 So. 3d 1130, 1133 (Fla. 4th DCA 2014); *Lindsey v. Wells Fargo Bank, N.A.*, 139 So. 3d 903, 907 (Fla. 1st DCA 2013) (finding lack of standing even though the plaintiff "filed a document showing that the mortgage was assigned to it" because "[t]he document did not, however, assign the note.").

Finally, the Fourth Servicer did not submit competent, substantial evidence showing that the Third Servicer had standing as an agent of the owner or holder. Although a servicer can have standing to sue as an agent for the owner or holder, "a servicer may be considered a party in interest to commence legal action" only if "the trustee joins or ratifies its action." *Russell*, 40 Fla. L. Weekly D967a (quoting *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14, 17 (Fla. 4th DCA 2012)). Thus, to prove such standing, the plaintiff must submit proof of a pooling and servicing agreement, power-of-attorney, or other authorization to sue

on behalf of the owner or holder. *Russell*, 40 Fla. L. Weekly D967. The Fourth Servicer submitted no such evidence. Because the Fourth Servicer submitted no evidence of ratification of the Third Servicer filing suit, it failed to submit substantial, competent evidence to establish standing on that basis.

Thus, the Fourth Servicer failed to submit substantial, competent evidence to prove the Third Servicer's standing at the time it filed suit, either as a holder of a note endorsed in blank or on any other basis. Because the plaintiff's failure to submit substantial, competent evidence of standing was fatal to establishing its cause of action, the trial court erred in denying the Homeowner's motion for involuntary dismissal. This Court should reverse and remand for dismissal.

B. The Fourth Servicer failed to submit evidence to show that it was authorized to enforce the note at the time of trial.

Even if the Fourth Servicer had submitted evidence to demonstrate that the Third Servicer was in possession of the Note endorsed in blank at the time of filing suit, the trial court's judgment would still be subject to reversal because the Fourth Servicer failed to submit evidence of its own standing at the time of trial. Indeed, the Fourth Servicer did not even attempt to prove its own right to enforce the Note on the date of trial. Instead, the Fourth Servicer argued that "standing is determined at the time the complaint's filed," and that such standing was

established by the mere fact that at the time that the Third Servicer filed suit, the original Note was supposedly "blank endorsed."[70]

Contrary to the Fourth Servicer's position, however, Florida law requires a substitute plaintiff in a mortgage foreclosure action to prove its own standing to enforce the Note at the time of trial. *See Jaffer v. Chase Home Fin., LLC*, 155 So. 3d 1199, 1202 (Fla. 4th DCA 2015) ("Even if a foreclosure defendant waives the right to challenge the bank's standing as of the date suit was filed, the bank must prove its right to enforce the note as of the time summary judgment is entered.") (emphasis added); *Pennington v. Ocwen Loan Servicing, LLC*, 151 So. 3d 52, 53 (Fla. 1st DCA 2014) ("Additionally, a bank must also have standing at the time final judgment is entered.") (emphasis added); *Beaumont v. Bank of N.Y. Mellon*, 81 So. 3d 553, 555 (Fla. 5th DCA 2012) ("Mellon must prove its right to enforce the note as of the time the summary judgment is entered, even if Beaumont had waived the right to challenge the bank's standing as of the date suit was filed.") (emphasis added). Thus, the Fourth Servicer was required to demonstrate its own standing at the time of trial.

But the Fourth Servicer failed to submit any such evidence. Indeed, the evidence the Fourth Servicer did submit suggested that the Fourth Servicer did not

[70] T. 14.

have standing. By the time of trial, the original Note had been specially endorsed to the Third Servicer.

So for the Fourth Servicer to have obtained the right to enforce the Note, the Third Servicer would have needed to transfer its rights through an assignment or endorsement. *See Pennington*, 151 So. 3d at 53 ("The allonge was a special indorsement because it named a specific payee: Countrywide…As such, negotiation of the note required both possession and an indorsement by Countrywide.") (citing § 673.2051(1), Fla. Stat.). Given that the Note contained no endorsement from the Third Servicer either in blank or special, and no evidence was presented of any assignment of the Note from the Third Servicer to the Fourth Servicer, the Fourth Servicer failed to submit substantial, competent evidence that it had the right to enforce the Note at the time of trial.

Nor did the Fourth Servicer submit a power of attorney, pooling and servicing agreement, or any other substantial, competent evidence of the owner or holder's ratification of the Fourth Servicer pursuing foreclosure. Thus, the Fourth Servicer failed to submit any evidence—much less substantial, competent evidence—that it was authorized to enforce the Note as an agent of the owner or holder.

In all, even if the Fourth Servicer had submitted evidence of the Third Servicer's standing at the time of filing the complaint, it failed to prove standing because it submitted no evidence of its own right to enforce the Note at the time of trial. This was fatal to its cause of action and this Court should reverse the final judgment and denial of the Homeowner's motion for involuntary dismissal.

II. The trial court abused its discretion in overruling the Homeowner's objections to the admissibility of Exhibits 4 and 8.

The payment history documents contained in Exhibit 4 and incorporated into Exhibit 8 were hearsay, i.e., out of court statements offered to prove the truth of the matter asserted. *See Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 620 (Fla. 4th DCA 2013). Under Florida's hearsay rule, § 90.802, Fla. Stat., hearsay evidence is inadmissible unless subject to an exception. The Homeowner objected to the payment history document's admissibility, but the trial court overruled his objections. Because the Fourth Servicer failed to lay a proper foundation for the admissibility of Exhibits 4 and 8 under the business records exception to the rule against hearsay, found in § 90.803(6), Fla. Stat., the trial court abused its discretion in admitting them into evidence.

As the Supreme Court of Florida has enjoined, "[i]f evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception." *Yisrael v. State*, 993

So. 2d 952, 957 (Fla. 2008) (emphasis in original). Before a document can be admitted under the business records exception of §90.803(6), the proponent must show that the document was made in a way that satisfied five statutory requirements bearing on their trustworthiness, including:

1) The record was made at or near the time of the event;
2) The record was made by or from information transmitted by a person with knowledge;
3) The record was kept in the ordinary course of a regularly conducted business activity;
4) It was a regular practice of that business to make such a record; and
5) The circumstances do not show a lack of trustworthiness.

§ 90.803(6), Fla. Stat.; *Yisrael*, 993 So. 2d at 956.

And Florida law requires the proponent of the evidence to satisfy the conditions for admission of business records "through a records custodian or other qualified person." *Glarum v. LaSalle Bank N.A.*, 83 So. 3d 780, 782 (Fla. 4th DCA 2011). Thus, to even be permitted to testify to the threshold requirements for admission of business records, Mr. Hynan would have needed to be a records custodian or an otherwise "qualified" witness—one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *See, e.g., Holt v. Calchas, LLC,* 155 So. 3d 499, 505 (Fla. 4th DCA 2015) ("When the foundation for the business records exception is sought

through a subsequent note holder for documents containing electronic records of loan payments made to a prior note holder, the foundation must demonstrate compliance with section 90.803(6) based on personal knowledge."); *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) ("Mr. Martin was neither a current nor former employee of MortgageIT, and otherwise lacked particular knowledge of MortgageIT's record-keeping procedures. Absent 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 MortgageIT regularly made such records, or, indeed, whether the records belonged to MortgageIT in the first place."); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified where 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); *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'").

Mr. Hynan admitted in his testimony that he lacked the personal knowledge necessary to lay a foundation for the admissibility of Exhibit 4, which contained records created by three prior servicers. He testified that he had never worked for the first, second, or third servicer, and had no personal knowledge of their recordkeeping procedures. The fact that Mr. Hynan was never employed by the prior servicer, and had no personal knowledge of how their records were created or maintained, rendered him unqualified to lay a foundation for their records' admissibility. *See Glarum*, 83 So. 3d at 783 (holding a servicer's employee was not qualified to testify about records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made); *Yang*, 123

So. 3d at 621 (holding that an employee from a successor HOA management company did not have personal knowledge of the prior management company's practice and procedure and had no way of knowing whether the data obtained from that company was accurate). Given the utter lack of any evidence that Mr. Hynan had personal knowledge sufficient to establish the requirements for admission of the payment records purportedly created by the prior servicer, he was not qualified to lay a foundation for their admission into evidence.

The Fourth Servicer erroneously attempted to satisfy the personal knowledge requirement by having Mr. Hynan testify that he was knowledgeable of the "industry standards," under which he claimed every servicer operates.[71] But Florida courts have repeatedly rejected the contention that mere "knowledge of common standards and practices is enough to satisfy the requirements to lay the proper foundation for the business records exception." *Holt v. Calchas, LLC*, 115 So. 3d at 505; *Hunter*, 137 So. 3d at 573. Only personal knowledge of the recordkeeping of the entity that created the records is sufficient. Because Mr. Hynan lacked such knowledge, he was not a qualified witness to lay a foundation for the admission into evidence of records created by the three prior servicers.

[71] T. 46-47.

In short, Hynan 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*, 157 So. 3d 1064 (Fla. 4th DCA 2015). While certainly well trained in the art of giving hearsay testimony, he was not a records custodian 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 any of the documents of the four servicers involved in this case. His only connection to the documents was that he had read them (in preparation for trial) and that his “training” taught him how to parrot what the plaintiff wanted him to say.

“Training” to testify is another word for “hearsay” or worse, “witness coaching.”

The Fourth Servicer will argue that Hynan was “familiar” with the records—citing to his witness “training” in what was alleged to be Nationstar and Ocwen procedures as though it were something laudable. First, “training” which consists of feeding the witness information for purposes of regurgitating it to the factfinder is nothing more than a synonym for “hearsay.” In essence, the witness is saying, “My employer told me to testify that the recordkeeping policy of our company—or some other company—met all the criteria required for a business record hearsay

exception." The self-serving statement which the Servicer smuggles to the factfinder is not only rank hearsay, but hearsay designed to coax the court to admit other hearsay (the purported records). And it is hearsay of the worst kind because it is deliberately communicated to the witness for the specific purpose of testifying in court. It is witness coaching to create a façade of "familiarity" with recordkeeping procedures.

But the law has always required that the familiarity of the otherwise qualified witness be experiential—i.e., that it be gained through an actual job-responsibility tied to the business activity. *See e.g.*, *Lassonde v. State*, 112 So. 3d at 662. Acceptable training would be instruction on how to perform a business-related job, not a litigation-related job. To hold otherwise would have the business record exception swallow the rule because there is no record that a witness cannot be told (or "trained") to say meets the exception.

> …there is no record that a witness cannot be told (or "trained") to say meets the [business records] exception.

Hynan's testimony regarding the "boarding" process was itself based upon hearsay.

Nor does Mr. Hynan's testimony about the Fourth Servicer's supposed "boarding" procedures render him a qualified witness. As an initial matter, Mr. Hynan did not testify to having any personal involvement with "boarding," and gave no other indication as to how he might have personal knowledge of the procedures.

Moreover, Mr. Hynan did not testify that the Fourth Servicer engages in any real verification of the information contained in records, as opposed to a check of the accuracy of the duplication process. He did not describe any methodology that would confirm the truth and accuracy of the content of the records—such as by speaking with the borrower, checking it against tax records, LIBOR records, insurance records, or other independent data—as would be necessary to meet the standards set by this Court in *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005). He offered only vague testimony that "we go through a series of, what we call, QA reviews to ensure that the data is proper and accurate," and "if there are any anomalies, then the people in our servicing department would determine what those anomalies might be, and then

take necessary steps to fix them."[72] Mr. Hynan did not testify as to what "anomalies" the Fourth Servicer supposedly looks for and offered no information about the process that is supposedly used to find them or correct them. He offered no reason to excuse the Fourth Servicer from laying a foundation for admission of business records through a qualified witness.

Because Mr. Hynan was not a qualified witness to lay a foundation for the admission of purported business records created by prior servicers, the trial court abused its discretion in admitting Exhibits 4 and 8 over the Homeowner's objections.

The myth that bank records are inherently trustworthy.

A typical bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible

[72] T. 44. What the witness is describing, commonly known as "data integrity" checking, is simply a comparison to ensure that each data point is accurately and precisely reproduced…warts and all. It is the electronic equivalent of making sure that a photocopier made perfect copies without any concern as to whether the documents themselves are accurate or even truthful.

"unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that 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);[73] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[74]

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 the Fourth District 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." *Id*. at 1070 (quoting *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co*., 71 F.3d 335, 341 (10th Cir. 1995). But that incentive is driven by a profit motive—the desire to keep customers. *See generally US v. McIntyre*, 997 F. 2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business

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

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

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[75] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[76]). 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

> When a note is not performing, the only check against absolute fabrication is the courts themselves.

[75] 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.

[76] *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.

favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

Stated plainly, the appellate record is devoid of any suggestion that the Fourth 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 v. Calchas,* 155 So. 3d 505-06; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Fourth Servicer 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 Fourth Servicer 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 than to attempt to train one person on all aspects of the business. Rather than bring the employees that have the personal knowledge and the best evidence of actual boarding procedures, the Fourth Servicer brought hearsay testimony such that the true source of the testimony cannot be cross-examined.

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.

* * *

In summary, the court erred in admitting the Servicer's exhibits, the predicate for which Hynan was the sole conduit. The most egregious of these were the payment history documents (Exhibits 4 and 8). And since these purported records was the only evidence offered to prove the Fourth Servicer's damages dismissal is also warranted. *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.").

CONCLUSION

This Court should reverse and remand for dismissal.

Dated: June 3, 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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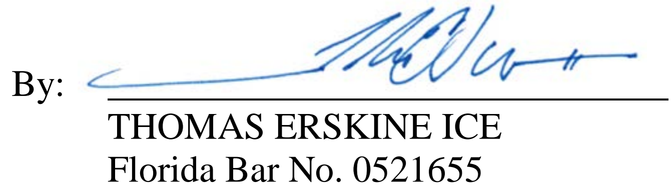
By: 

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this June 3, 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 June 3, 2015.

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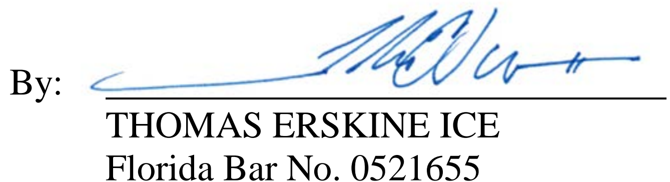
By: 

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