

**In the District Court of Appeal
Third District of Florida**

CASE NO. [REDACTED]
(Circuit Court Case No. [REDACTED])

[REDACTED] INC.

Appellant,

v.

THE BANK OF NEW YORK MELLON, et al.,

Appellee.

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

INITIAL BRIEF OF APPELLANT



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STATEMENT OF THE CASE AND FACTS

I. Introduction

Appellant, ██████████ Inc., appeals from a final judgment of foreclosure ordering the judicial sale of a property it had acquired through a prior foreclosure sale. ██████████ was named in this foreclosure suit solely as the owner of the property—it was neither a borrower nor a mortgagor on the loan documents at issue in this lawsuit.

As discussed below, the trial court erroneously held that the ██████████ ██████████ lacked standing to object to the admissibility of the evidence submitted by the Plaintiff regarding: 1) the amount debt that would be levied against Creative Investor's property; and 2) the Plaintiff's right to collect the debt against the property. As a result, the court admitted unauthenticated hearsay evidence and entered judgment for the Plaintiff despite a dearth of substantial, competent evidence to support the judgment.

II. Statement of the Facts

A. The Pleadings

Appellee, the Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the Certificate holders of CWABS, Inc., Asset-Backed Certificates, Series 2007-1 (“the Bank”), filed a Verified Mortgage Foreclosure Complaint

against Alcira Chow (“the Borrower”) and ██████████ (“the Owner”) on March 12, 2012.¹ The Bank alleged that the Borrower had executed a promissory note, secured by a mortgage on the subject property, and had defaulted by failing to make payments.² At the time the Complaint was filed, ██████████ was the owner of the subject property, having obtained it through a prior foreclosure.³

The Bank further alleged that it was the owner of the Note and Mortgage “by virtue of a corrective assignment of mortgage executed on October 12, 2011, a copy of which is attached hereto and incorporated herein by reference.”⁴ Specialized Loan Servicing (“SLS” or “the Servicer”) was allegedly “the servicing agent” for the Bank and “the present designated holder of the note and mortgage with authority to pursue the present action.”⁵

A copy of the Note was attached to the complaint.⁶ It named Regent Mortgage Funding LLC as the lender to which the Note was payable.⁷ Alcira

¹ Verified Mortgage Foreclosure Complaint, March 12, 2012 (“Complaint”) (R. 6).

² *Id.* at ¶¶ 4, 8 (R. 6-7).

³ *Id.* at ¶ 7 (R. 7).


⁴ *Id.* at ¶ 6 (R. 7).

⁵ *Id.*

⁶ Note attached to Complaint (R. 10-16).

⁷ *Id.* at ¶ 1 (R. 10).

Chow was named as the borrower.⁸ Two Endorsement Allonges were attached to the Note.⁹ The first Endorsement Allonge reads “Pay to the order of _____ without recourse. By Todd J. Piper, President, of Regent Mortgage Funding, LLC.”¹⁰ The words “COUNTRYWIDE BANK, N.A.” are stamped above the blank line:¹¹



Pay to the order of **COUNTRYWIDE BANK, N.A.** without recourse. By
Todd J. Piper, President, of Regent Mortgage Funding, LLC.

An endorsement from Countrywide Bank, N.A. to Countrywide Home Loans, Inc., and an endorsement in blank by Countrywide Home Loans, Inc. appear at the bottom of the first Endorsement Allonge.¹²

The second Endorsement Allonge contains a similar statement regarding Countrywide Bank, N.A., except that “Countrywide Bank, N.A.” is typed into the text, rather than stamped, and a handwritten line crosses out the endorsement:¹³

⁸ *Id.* (R. 12).

⁹ Endorsement Allonges attached to Complaint (R. 15-16).

¹⁰ *Id.* (R. 15).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (R. 16).

Pay to the order of ~~Countrywide Bank, N.A.~~ without recourse. By Todd J. Piper,
President, of Regent Mortgage Funding, LLC.

Also attached to the complaint was the purported Corrective Assignment of Mortgage that the Bank incorporated by reference into its allegations, and based on which it claimed ownership of the Note and Mortgage.¹⁴ The Corrective Assignment of Mortgage was dated October 12, 2011.¹⁵ In that document, the original lender, Regent Mortgage Funding, LLC, purported to assign the Note and Mortgage to the Bank.¹⁶ Written at the top of the document is the statement: “The Corrective Assignment of Mortgage is needed to correct previous AOM plaintiff name.”¹⁷

The Owner moved to dismiss the complaint, asserting that the Bank did not have standing to sue.¹⁸ The motion was denied.¹⁹ Following the denial of its motion to dismiss, the Owner and the Borrower jointly filed an Answer and

¹⁴ Corrective Assignment of Mortgage attached to Complaint (R. 35-36).

¹⁵ *Id.* (R. 35).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Defendant, ██████████ Inc.’s Motion to Dismiss the Complaint, April 24, 2012 (R. 58-60).

¹⁹ Order Denying Defendant’s Motion to Dismiss and Extension of Time, February 26, 2013 (R. 144).

Affirmative Defenses, in which they denied the bulk of the Bank's allegations.²⁰ They also asserted numerous affirmative defenses, including lack of standing.²¹ The Owner and the Borrower disputed the authenticity of the endorsements.²²

B. The Trial

1. The trial court ruled the Owner lacked standing to object to the admissibility of the Bank's payment history.

A bench trial proceeded on June 16, 2014.²³ At the commencement of the trial, the Owner informed the trial court that it was a mortgage holder that had foreclosed on the subject property and was now its owner.²⁴ As such, the Owner asserted that it stood in the Borrower's shoes.²⁵ In response, the Bank's counsel contended that the Owner did not "have standing to even challenge this foreclosure."²⁶ The Owner's counsel at first stated that "I think our defenses are limited to standing in this case,"²⁷ but later clarified the Owner's position that it

²⁰ Defendant, [REDACTED] Inc.'s Answer and Affirmative Defenses, March 4, 2013 (R. 148-155).

²¹ *Id.* at ¶¶ 5-18 (R. 151-155).

²² *Id.* at ¶ 18 (R. 155).

²³ *See* Trial Transcript, filed October 23, 2014 as a supplement to the Record. Citations to the transcript will be designated as "T." followed by the page number.

²⁴ T. 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ T. 4.

had standing to object to the Bank's evidence and to dispute that the Bank had proven its case:

MR. DELEON (the Bank's lawyer): Your Honor, I'd ask the Court accept this into evidence as Plaintiff's 4.

MR. ARCIA (Owner's counsel): Objection, hearsay; opportunity to voir dire the witness regarding--

THE COURT: Sure, go ahead.

MR. DELEON: Your Honor, I would object to that. I don't believe this [party] has standing to object with regards to the payment history.

MR. ARCIA: The only -- I have a right to question the witness regarding admissibility of any document and whether or not he is the proper witness to have a document admitted. If he has no personal knowledge and hasn't established the proper foundation for a hearsay exception.²⁸

The trial court indicated disagreement with this point and overruled the Owner's objection without allowing any *voir dire* of the witness.²⁹

2. The Bank's witness

Giovanni Amaya, an employee of the Servicer, SLS, was the Bank's only witness at trial.³⁰ His duties "include the review of the business records on litigated matters."³¹ He became familiar with the subject loan in February 2014,

²⁸ T. 17.

²⁹ *Id.*

³⁰ T. 5-6.

³¹ T. 6.

“when the business records were comprised, put together so [he] could review them.”³² Amaya testified that the Servicer has a procedure requiring that information in its business records be input “contemporaneously with the transaction being recorded.”³³ He also said the Servicer’s procedures require that employees who input information into the records “have personal knowledge of the transaction being recorded.”³⁴

3. The Bank offered into evidence a note that varied from the Note attached to the Complaint.

Through Amaya, the Bank presented a document it contended was the original Note.³⁵ When asked what gave the Bank the right to enforce the Note, Amaya stated that the endorsement in blank on the first Endorsement Allonge from Countrywide Home Loans gave the Bank that right.³⁶ The Owner objected to the admissibility of the document the Bank offered into evidence as the purported original note because “it is an incomplete document.”³⁷

³² T. 36.

³³ T. 6.

³⁴ *Id.*

³⁵ T. 8; Note Copy attached to Plaintiff’s Exhibit List, June 16, 2014 (R. 260-265).

³⁶ T. 8.

³⁷ T. 9.

Specifically, the Owner pointed out that, although the copy of the note attached to the complaint had both the first Endorsement Allonge and the second Endorsement Allonge attached to it, the purported original Note offered into evidence had only the first Endorsement Allonge attached.³⁸ Submitting the Note without one of its allonges calls into question the authenticity of the document being submitted, and such allonges are “part and parcel” of the notes to which they are attached, so removing them is equivalent to submitting an incomplete contract.³⁹ The Owner pointed out that the court file contained the complaint and the attached copy of the Note with the second Endorsement Allonge attached to it, and asked the trial court to take judicial notice.⁴⁰ The trial court overruled the Owner’s objection.⁴¹

On cross examination, Amaya testified that the subject loan became active in the Servicer’s system in December 2011.⁴² Amaya did not know when the Bank obtained the right to foreclose on the subject mortgage.⁴³ He did not know when

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ T. 13.

⁴¹ *Id.*

⁴² T. 18.

⁴³ T. 26.

any assignment or endorsement might have been executed.⁴⁴ He did not know why the second Endorsement Allonge was not attached to the Note offered into evidence.⁴⁵ Nor did Amaya know whether the first Endorsement Allonge was executed before the second Endorsement Allonge or vice versa.⁴⁶

On re-direct, the Bank attempted to offer into evidence a document it said was a corrective assignment of mortgage.⁴⁷ The trial court initially said it would admit that document into evidence over objection.⁴⁸ However, after the trial court inspected the document and asked whether it was “a certified copy of the corrective assignment of mortgage,” and “in the actual file,” the Bank withdrew the document, telling the trial court that the “Plaintiff does not rely on the document...we’ll withdraw that.”⁴⁹

⁴⁴ T. 18.

⁴⁵ T. 22.

⁴⁶ T. 23.

⁴⁷ T. 27.

⁴⁸ *Id.*

⁴⁹ T. 28.

4. The trial court allowed the Bank to reopen its case to attempt to prove standing.

When Amaya finished testifying, the Bank rested its case.⁵⁰ The Owner moved for involuntary dismissal, because the Bank had failed to prove when it “gained the right to foreclose on this property.”⁵¹ When the trial court pointed out that no proof as to the date on which the Bank had come into possession of the Note was presented, the Bank requested to reopen its case, and the trial court allowed it to do so, over objection.⁵²

Recalled to the stand, Amaya testified that a corrective assignment of mortgage, assigning the mortgage to the Bank, was executed on October 12, 2011.⁵³ That document was not introduced into evidence. The Bank asked Amaya to testify about a document he said was a pooling and servicing agreement (“PSA”) between the Bank and the Servicer.⁵⁴ After the trial judge commented that she was “waiting for proof that you all have a power of attorney to prosecute this case on

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² T. 29-30.

⁵³ T. 30.

⁵⁴ T. 32.

behalf of the Plaintiff, which is Bank of New York Mellon,” the PSA was not offered into evidence.⁵⁵

Instead, at the trial judge’s behest, the Bank submitted a copy of a different document Amaya described as a limited power of attorney between the Bank and the Servicer, “giving SLS authority on behalf of the Plaintiff.”⁵⁶ Asked where in the Servicer’s business records that document was located, Amaya said it was “in our computer systems.”⁵⁷ He did not know who created it and did not know who may have signed it.⁵⁸ The document offered into evidence was a copy.⁵⁹ Over the Owner’s hearsay and best evidence objections, the trial court admitted the Limited Power of Attorney into evidence as Exhibit 6.⁶⁰

The Bank next presented another document that appeared to be a printout of a computer screen, entitled “Document Detail” which had the words “Bank of America Home Loan” (apparently, a previous servicer) across the top.⁶¹ Across

⁵⁵ *Id.*

⁵⁶ T. 35; Limited Power of Attorney Copy attached to Plaintiff’s Exhibit List (R. 295-298).

⁵⁷ T. 36.

⁵⁸ T. 37.

⁵⁹ T. 38.

⁶⁰ T. 39.

⁶¹ T. 40; Screen Shot of Document Detail attached to Plaintiff’s Exhibit List (R. 299).

the middle of the page were the words “Bank of America Home Loan Routing History,” which Amaya characterized as a “collateral routing” history of the Note.⁶² The document appears to show that Bank of America received the Note almost four years before the case was filed.⁶³ It also appears to show that Bank of America sent the Note to the law firm who filed the case eight months before the case was filed.⁶⁴

On cross-examination, Amaya admitted that the Document Detail had been created before SLS became the servicer of the loan.⁶⁵ Amaya had had no involvement with that prior servicer.⁶⁶ Asked how he could vouch for the accuracy of the prior servicer’s records, Amaya claimed that through “the review of our business records and through the boarding process, we have no reason to believe that they are not correct.”⁶⁷ The Owner raised a hearsay objection to the Document

⁶² T. 40-41; Screen Shot of Document Detail (R. 299).

⁶³ *Id.* (R. 299).

⁶⁴ *Id.* (R. 299).

⁶⁵ T. 42.

⁶⁶ T. 43.

⁶⁷ T. 42.

Detail.⁶⁸ The trial court overruled the objection and admitted the document into evidence as Exhibit 7.⁶⁹

After the close of evidence, counsel for the Bank admitted that two Endorsement Allonges had been attached to the original Note.⁷⁰ The second Endorsement Allonge, he said, was “ineffective in this case,” and claimed that was “why the Plaintiff did not introduce it into evidence.”⁷¹ The Owner’s counsel told the trial court that it is improper to “simply detach an endorsement allonge...because it meets their needs for that case...Endorsement allonges are meant to travel with the note all the way until cancellation.”⁷² Detaching the allonge effectively amounted to evidence tampering.⁷³ The trial court stated that “there’s no testimony that that [the second Endorsement Allonge] was the original endorsement” so it would enter judgment for the Bank.⁷⁴

⁶⁸ T. 44.

⁶⁹ T. 46.

⁷⁰ T. 55-56.

⁷¹ T. 55.

⁷² T. 57-58.

⁷³ T. 58.

⁷⁴ T. 60-61.

SUMMARY OF THE ARGUMENT

The Final Judgment of Foreclosure should be reversed for multiple reasons. First, the trial court erroneously concluded that the Owner lacked standing to object to the admissibility of the payment history documents. The test of standing looks to the sufficiency of the party's stake in the outcome, and the Owner had a strong interest in both the outcome of the foreclosure action in general, and of the determination of the amount owed in particular. Moreover, the Bank failed to satisfy the requirements for admission of the payment history documents under the business records exception. And even if admissible, the payment history documents do not support the amount owed set forth in the final judgment.

Second, the trial court erred in finding that the Bank had proven its standing to sue. The Bank was not the lender named in the Note and the Bank disclaimed any reliance on an assignment of mortgage. And the Bank failed to submit competent, substantial evidence that it had standing as a holder of the Note. The only evidence it submitted as to possession of the Note was inadmissible, and even if admissible, did not show when the Bank came into possession of the Note. Finally, the Bank could only be a holder if the Note had been properly endorsed in blank, and the Bank failed to prove that it was.

For all of these reasons, the judgment should be reversed.

STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for competent, substantial evidence. *Airport Plaza Ltd. P'ship v. United Nat'l Bank*, 611 So. 2d 1256, 1257 (Fla. 3d DCA 1992). Competent, substantial evidence "is tantamount to legally sufficient evidence." *Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 257 (Fla. 1st DCA 2002) (quoting *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000)). To be substantial, evidence must "establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). To be competent, "the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.* Findings of fact should be set aside when unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012); *Randy Int'l, Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

The Court generally "review[s] a trial court's ruling on the admissibility of evidence for an abuse of discretion." *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 620 (Fla. 4th DCA 2013). However, the trial court's discretion "is

limited by the rules of evidence.” *Id.* Thus, rulings interpreting and applying the rules of evidence are reviewed *de novo*. *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011) (“[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review.”); *Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

ARGUMENT

I. The trial court erroneously admitted the payment history into evidence and relied on it in entering judgment.

To prove the amount allegedly owed by the Borrower, the Bank offered into evidence a document Amaya said was “a copy of the payment history of the loan in question.”⁷⁵ The entirety of the Bank’s attempt to lay a foundation for admission of this document was the following exchange:

Q. Earlier, you testified regarding procedure that your company maintains in order to create and maintain its business records. Was this document prepared in that procedure?

A. Yes, it was.⁷⁶

When the Bank asked the trial court to admit the payment history into evidence, the Owner objected and requested the opportunity to *voir dire* the witness.⁷⁷ After initially saying the Owner could do so, the Bank told the trial court that the Owner lacked “standing to object with regards to the payment history.”⁷⁸ The Owner responded that it was entitled to object to the admissibility of the evidence submitted by the Bank:

⁷⁵ T. 16.

⁷⁶ *Id.*

⁷⁷ T. 17.

⁷⁸ *Id.*

I have a right to question the witness regarding admissibility of any document and whether or not he is the proper witness to have a document admitted. If he has no personal knowledge and hasn't established the proper foundation for a hearsay exception.⁷⁹

The trial judge responded that she disagreed, and on that basis, overruled the objection.⁸⁰ As explained below, the trial court erred in finding the Owner lacked standing to object, and in admitting the payment history into evidence.

A. The Owner had standing to object to the admissibility of the payment history documents (Exhibit 4).

The trial court erred in concluding that the Owner lacked standing to object to the admissibility of the payment history documents. Although the Owner was not a party to the Note and Mortgage, it owned the property on which the Bank sought to foreclose. It, thus, had a stake in the outcome of the trial.

And the admissibility of the payment history, which was used to prove the amount owed, impacted the Owner. If the property is sold at auction, the sales price may exceed the amount of the judgment. And under § 45.032, Florida Statutes, there is “a rebuttable legal presumption that the owner of record on the date of the filing of a *lis pendens* is the person entitled to surplus funds...” Thus,

⁷⁹ *Id.*

⁸⁰ *Id.*

every dollar of the judgment has an impact on the property owner even if he or she is not the borrower.

In finding the Owner lacked standing to object to the payment history, the trial court appears to have applied a standing inquiry based on privity. But under Florida law, standing is determined based only on whether a litigant has a sufficient interest in the outcome—not based on privity. *Gen. Dev. Corp. v. Kirk*, 251 So. 2d 284, 286 (Fla. 2d DCA 1971).

Thus, under Florida law, when a litigant has a sufficient stake in the outcome, it need not be a party to a contract to have standing to participate in litigation over its enforcement. For example, in *Martin Properties v. Florida Industry Investment Corp.*, 833 So. 2d 825, 827 (Fla. 4th DCA 2002), the Fourth District held that the winning bidder in a foreclosure sale (MPI) lacked standing to challenge the validity of the borrower's assignment of its right of redemption, which the assignee exercised. The Fourth District rejected the assignee's contention that MPI lacked standing to challenge the assignment based on the fact that the bidder was "neither a party to it nor a third party beneficiary of it," because "that is not the test." *Id.* To the contrary, the proper issue in determining standing is whether the party has a stake in the outcome, which MPI had because the validity of the assignment impacted MPI's potential ownership of the property: "If,

in the present case, the assignment of the equity of redemption was not valid, MPI, as the successful bidder at the foreclosure sale, will own the property. This is sufficient to give MPI standing.” *Id.*

Applying the same principles of Florida law in *Robert C. Malt & Co. v. Carpet World Distributors*, 861 So. 2d 1285, 1287 (Fla. 4th DCA 2004), the Fourth District held that a litigant (Malt & Co.) with a potential ownership interest in funds held in the court registry had standing to challenge the foreclosure of a charging lien by its opponent’s attorneys. Although Malt & Co. was not a party to the contract between its opponent and the opponent’s attorneys, the Fourth District “disagree[d] with the trial court’s determination that Malt & Co. had no standing to contest the foreclosure of the charging lien.” *Id.*

Malt & Co. had standing to challenge the foreclosure because it had a claim to the funds, and that is all that is necessary to have standing: “If it is later proven that all conditions precedent under the agreement for entitlement to the funds have been met, as Malt & Co. purports, then the money in the court registry will belong to it. This is enough to establish standing.” *Id.*

In fact, the Fifth District has expressly recognized that a litigant need not be a party to the note and mortgage to have standing to contest the right to foreclose. As the court explained, “standing to contest the validity of a mortgage belongs to

...third persons whose rights or interests are adversely affected by the mortgage, such as junior mortgagees or creditors with an interest or lien in the underlying property.” *Centerstate Bank Cent. Fla., N.A. v. Krause*, 87 So. 3d 25, 28-29 (Fla. 5th DCA 2012) (listing cases).

The trial court’s holding that the Owner lacked standing to challenge the payment history cannot be reconciled with the proper test for standing under Florida law, as elucidated in *General Development Corp., Martin Properties, Robert C. Malt & Co.*, and *Centerstate Bank*. As the Second, Fourth, and Fifth Districts explained in those cases, the proper inquiry for the trial court was whether the Owner had a stake in the outcome, not whether the Owner was a party to the Note and Mortgage. Just as Malt & Co. had standing to contest the foreclosure by virtue of its potential ownership of the funds in the court registry and MPI had standing to challenge the assignment by virtue of its potential ownership of the property, here the Owner had standing by virtue of its ownership of the property, and its potential rights to surplus funds from the foreclosure sale.

In a recent decision directly on point, *Clay County Land Trust #08-04-25-0078-014-27 v. JPMorgan Chase Bank, National Association*, Case No. 1D14-1125 (Fla. 1st DCA November 20, 2014), the First District held that the trial court had erred in granting a foreclosure judgment against a property owner based on

business records from a prior servicer because the affiant had not demonstrated familiarity with the business practices of the prior servicer. In doing so, it expressly rejected the argument that the property owner—who was not a party to the loan—had no standing to object to evidence regarding the amount of debt owed by the borrower:

We also reject appellee’s assertion that appellant lacked standing to raise this claim. As the current owner of the property, appellant had standing to challenge [the summary judgment affiant’s] affidavit as to the amount of the debt owed because it related to appellant’s right of redemption, i.e., how much appellant would have to pay under the judgment in order to exercise its right to stop the foreclosure sale.

Id. at 4-5.

Likewise, the trial court here erred in disallowing the Owner to *voir dire* Amaya concerning the payment history, and overruling the Owner’s objection to the admissibility of the payment history, based on the Owner’s purported lack of standing to object.

B. The Bank failed to lay a sufficient foundation for admission of the payment history under the business records exception.

The payment history documents 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, Florida Statutes, hearsay evidence is inadmissible unless subject to

an exception. The Owner objected to the payment history document's admissibility. Because the trial court overruled the Owner's objection based on purported lack of standing and did not allow *voir dire*, the record shows that the Bank failed to carry its burden to render the payment history documents admissible under the business records exception to the rule against hearsay, found in § 90.803(6), Florida Statutes. Worse, because the court disallowed *voir dire*, it prevented the Owner from fully developing why the document was hearsay and why the witness was not qualified to establish the business records exception.

1. The Bank did not elicit testimony to establish the prerequisites to admission under § 90.803(6).

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 created and kept in a way that satisfied the 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.

The Bank failed to elicit testimony to establish these prerequisites of § 90.803(6) to the admissibility of its business records in general, and the payment history documents in particular. To lay a foundation for its purported business records, the Bank only elicited testimony from Amaya that the Servicer's "procedure" generally requires that information be input in a timely manner by a person with knowledge:

Q. And in regards to servicing of notes and mortgages, do you have a procedure in place by which you maintain your business records?

A. Yes, we do.

Q. Does that procedure require that any information contained in your business records be placed contemporaneously with the transaction being recorded?

A. Yes.

Q. Does that procedure also require that any employee who is inputting information have personal knowledge of the transaction being recorded?

A. Yes.⁸¹

When seeking to admit into evidence the payment history documents, the Bank relied on Amaya's earlier testimony about the Servicer's "procedure." The Bank's sole effort to lay a foundation for admission of the payment history documents was to ask Amaya: "Earlier, you testified regarding procedure that your company maintains in order to create and maintain its business records. Was this document prepared in that procedure?"⁸² Amaya replied simply "Yes, it was."⁸³

Even putting aside whether Amaya's testimony was sufficient to establish § 90.803(6)'s first two requirements for admissibility of documents created by the Servicer, the Bank elicited no testimony whatsoever as to the third, fourth, and fifth requirement, including whether the payment history documents were "kept in the ordinary course of a regularly conducted business activity;" and whether "it was a regular practice of that business to make such a record," and whether the circumstances showed a lack of trustworthiness. *Yisrael*, 993 So. 2d at 956. As such, the Bank failed to establish the requirements for admitting the payment history documents into evidence.

⁸¹ T. 6.

⁸² T. 16.

⁸³ *Id.*

Moreover, as to three of the eight pages of the payment history documents, covering February 2007 through December 2011, the Bank elicited no testimony from Amaya even as to the first two requirements for admissibility of business records. The payment history documents were admitted into evidence as a composite exhibit that actually consisted of two documents, one of which was created by a prior servicer.⁸⁴

But Amaya testified only about his own employer's purported "procedure" for keeping records. The Bank elicited no testimony to lay a foundation for the admission of the prior servicer's records. Thus, even if Amaya's testimony would have been sufficient to lay a foundation for admission of documents created by the Servicer, it still would have been improper to admit the payment history documents into evidence, because no foundation whatsoever was laid for admission of the first three pages of the payment history documents.

2. Amaya was not a qualified witness and lacked the personal knowledge necessary to lay a foundation.

Aside from failing to establish all of the requirements for admission, Amaya's testimony was also insufficient because the Bank failed to establish that

⁸⁴ See Payment History and Account Routing History attached to Plaintiff's Exhibit List (R. 287-294); T. 18 (Amaya's employer, SLS, took over servicing in December of 2011); T. 42 (payment history contains entries made by the prior servicer).

he had the personal knowledge necessary to testify to those requirements. 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).

To even be permitted to testify to the threshold requirements for admission of business records, Amaya 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 Burdeshaw v. Bank of N.Y. Mellon*, 39 Fla. L. Weekly D2145 (Fla. 1st DCA October 13, 2014) (“Proper authentication by a witness requires that the witness demonstrate familiarity with the record-keeping system of business that prepared the document and knowledge of how the data was uploaded into the system.”); *Lacombe v. Deutsche Bank Nat’l Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA October 14, 2014) (finding witness unqualified where “It was never suggested that he ever worked for Washington Mutual or had any knowledge about the creation of the letter or about Washington Mutual’s business practices regarding such letters, as would be required to admit the hearsay document as a business record.”); *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 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’”).

Amaya’s sole testimony as to his knowledge of the Servicer’s records was that “[p]art of my duties include the review of the business records on litigated matters.”⁸⁵ He testified to no involvement with creating the Servicer’s records, supervising the persons who create them, or any other involvement with them whatsoever. His connection with the documents admitted into evidence, over objection, was that he had read them. As such, he was not a qualified witness to lay a foundation for admission of the Servicer’s records.

And while Amaya was not qualified to lay the foundation even for those records that originated from his employer, the Servicer, he was even less qualified to establish a business records hearsay exception for documents that had purportedly been generated and maintained by the prior servicer. That he was never employed by—and “had no involvement with”⁸⁶—the prior servicer even further distanced him from any personal knowledge of how it was created or

⁸⁵ T. 6.

⁸⁶ T. 43.

maintained. *See Lacombe*, 39 Fla. L. Weekly D2156; *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 Amaya 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.⁸⁷

3. The erroneous admission of the payment history documents compels reversal.

Because Amaya failed to testify that the requirements of § 90.803(6) were satisfied, and was not qualified to do so, the trial court erred in admitting the payment history documents into evidence. As this Court and other Florida

⁸⁷ Which is not to say that records of predecessor services can never be admitted without bringing a diaspora of live witnesses to a Florida courtroom. Section 90.902(11), Fla. Stat. provides that the testimony of a records custodian or qualified person (who often still works for the successor bank) may be admitted through an affidavit (a "certification or declaration"). *See also* § 90.803(6)(c), Fla. Stat.; *Yisrael*, 993 So. 2d at 957; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

appellate courts have repeatedly recognized, under these circumstances, reversal of the final judgment of foreclosure is required. *See, e.g., Holt v. Calchas, LLC*, --- Fla. L. Weekly ---, 2014 Fla. App. LEXIS 18081 (Fla. 4th DCA Nov. 5, 2014); *Lacombe*, 39 Fla. L. Weekly D2156; *Burdeshaw*, 39 Fla. L. Weekly D2145; *Hunter*, 137 So. 3d at 573; *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014); *Yang*, 123 So. 3d at 620; *Glarum*, 83 So. 3d at 783.

Indeed, had the trial court properly applied the hearsay rule to exclude the payment history documents, a key element of a *prima facie* foreclosure case would be missing. *See Kelsey*, 131 So. 3d at 826 (“To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers’] outstanding debt on the note.” [emphasis added]); *Ernest v. Carter*, 368 So. 2d 428 (Fla. 2d DCA 1979) (same).

Accordingly, because the trial court erred in admitting the payment history documents into evidence, it also erred in entering judgment for the Bank.

C. The payment history documents did not support the amounts included in the judgment.

It is well established that to be entitled to relief, a plaintiff in a foreclosure action must prove the existence of an “agreement, a default by the defendants, that plaintiffs properly accelerated the debt to maturity, and the amount due.” *Ernest v.*

Carter, 368 So. 2d 428, 429 (Fla. 2d DCA 1979); accord *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) (relying on *Ernest* as articulating the required elements for proving a mortgage foreclosure cause of action). “It is axiomatic that the party seeking foreclosure must present sufficient evidence to prove the amount owed on the note.” *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014).

And when the plaintiff submits “insufficient evidence to support the amount of indebtedness” reflected in the judgment, the judgment should be reversed. *Id.* For this additional reason, the Final Judgment of Foreclosure should be reversed here. Even if the payment history documents would have been admissible, they failed to prove the amount due reflected in the Final Judgment of Foreclosure.

Among other things, the Final Judgment of Foreclosure includes amounts due of \$33,058.72 for hazard insurance for the year 2009 (more than four times the amount paid in 2008 and 2010, according to the judgment); \$11,217.42 for flood insurance for the year 2008 (almost double the amount paid the following year, according to the judgment); \$9,750.75 for property taxes for the year 2008; and \$21,344.67 for “subsidence insurance” for the year 2007.⁸⁸ Yet none of those

⁸⁸ Notice of Appeal Exhibit A, July 16, 2014 ¶ 1 (R. 310-311). Notably the figure \$21,344.67 in 2008 (not 2007) and only as the running total under “TRNEBL” which, although unexplained by Amaya, appears from the context to refer to

purported expenses appears on the payment history documents.⁸⁹ Nor was any other evidence submitted to support those amounts—all of which are attributed to the years when some prior servicer was making payment entries. Moreover, the judgment includes pre-acceleration late charges of \$215.31, in contravention of the payment history documents, which contain an entry reflecting “LATE CHARGES” of “0.00” as of February 5, 2014.⁹⁰

Where, as here, the payment records submitted to prove the amount owed do “not support the dollar amounts contained in the final judgment,” the final judgment should be reversed for lack of competent, substantial evidence. *Wolkoff*, 39 Fla. L. Weekly D1159. Thus, even if it would have been proper for the trial court to admit the payment history documents into evidence, the Final Judgment of Foreclosure would still be subject to reversal.

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

Transaction Escrow Balance or the balance of the escrow after posting of the transaction.

⁸⁹ See Account Routing History (R. 287-289).

⁹⁰ Compare Notice of Appeal Exhibit A, ¶ 1 (R. 310) with Payment History (R. 290).

trial court did not independently make factual findings and legal conclusions, created appearance of impropriety, and was reversible error); *see 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).

II. Because the bank failed to submit admissible evidence demonstrating standing, the trial court erred in entering judgment for the bank.

The Final Judgment of Foreclosure should also be reversed because the Bank failed to submit substantial, competent evidence that it 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 N.A.*, 79 So. 3d 170, 172 (Fla. 4th DCA 2012); *accord, Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012); *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010); *Verizzo v. Bank of N.Y.*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010); *Philogene v. ABN Amro Mortg. Group Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006)). Moreover, “a party’s standing is determined at the time the lawsuit was filed.” *McLean*, 79 So. 3d at 172 (citing *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005)).

Thus, to be entitled to judgment, the plaintiff must prove standing not only at the time of trial, but at the time of filing suit. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014); *Zimmerman v. JPMorgan Chase Bank, N.A.*, 134 So. 3d 501, 502 (Fla. 4th DCA 2014); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990).

To prove standing, “the plaintiff must show it held or owned the note at the time the complaint was filed.” *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014). That means the plaintiff must present admissible “evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.” *Stone v. Bankunited*, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010)); accord, *Hunter*, 137 So. 3d at 574; *McLean*, 79 So. 3d at 172. Standing may be proven by the plaintiff’s possession of an original note endorsed in blank only if the plaintiff proves that it was in possession of the original note on the date the complaint was filed. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014).

And when the plaintiff has failed to present competent, substantial evidence to carry its burden of proving standing, the trial court cannot enter judgment in favor of the plaintiff. *Klemencic v. U.S. Bank Nat’l Ass’n*, 142 So. 3d 983, 984

(Fla. 4th DCA 2014) (“Because appellee failed to prove it had standing to foreclose, we reverse the final judgment and remand for the trial court to enter an involuntary dismissal of the complaint.”); *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965, 968 (Fla. 4th DCA 2013) (reversing final judgment of foreclosure entered after trial due to failure of proof as to standing).

Here, the Bank failed to submit substantial, competent evidence that it was the owner or holder of the Note on the date it filed suit. First, no substantial, competent evidence was submitted to show that the Bank was the owner of the Note. As noted, the Note was payable to Regent Mortgage Funding LLC (the Original Lender), not the Bank.⁹¹ And no evidence was adduced to show that the Bank acquired ownership of the Note through an assignment. The Bank’s verified complaint alleged that it was the owner of the Note by virtue of a purported Corrective Assignment of Mortgage from the Original Lender.⁹² At trial, however, the Bank disclaimed reliance on the purported Corrective Assignment of Mortgage, telling the trial court that the “Plaintiff does not rely on the document...we’ll withdraw that.”⁹³

⁹¹ Note attached to Complaint, ¶ 1 (R. 10).

⁹² Complaint, ¶ 5-6 (R. 7).

⁹³ T. 28.

Second, the Bank failed to submit competent, substantial evidence that it was the Article 3 holder of the Note under the Uniform Commercial Code (“UCC”) on the date it filed suit. As an initial matter, because the Bank’s complaint claimed standing based on the purported Corrective Assignment of Mortgage, it was improper for the trial court to allow the Bank, over objection, to attempt to prove standing through other means. Unless tried by consent, a trial must be confined to the matters raised by the pleadings. *See, e.g., Lopez v. Lopez*, 922 So. 2d 408, 410-11 (Fla. 4th DCA 2006) (“A trial court is precluded from hearing and deciding ‘matters which are not the subject of appropriate pleadings and notice.’”) (quoting *Todaro v. Todaro*, 704 So. 2d 138, 139 (Fla. 4th DCA 1997)); *Roque v. Paskow*, 812 So. 2d 500, 502-03 (Fla. 4th DCA 2002) (“In order for the trial court to modify a final judgment, the moving party must present the issue by appropriate pleadings.”); *Instituto Patriotico Y Docente San Carlos v. Cuban Am. Nat’l Found.*, 667 So. 2d 490, 492 (Fla. 3d DCA 1996) (““where, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal.”) (quoting *Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957)). Because, in its pleadings, the Bank predicated its standing on the purported

Corrective Assignment of Mortgage, it was improper for the trial court to allow (indeed, encourage) the Bank to prove its standing based on holder status.

But even if it would have been proper to consider the issue, the Bank failed to submit substantial, competent evidence that it was the Article 3 holder of the Note on the date it filed suit. “A ‘holder’ is someone who is ‘in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession’” *U.S. Bank Nat’l Ass’n v. Knight*, 90 So. 3d 824, 826 (Fla. 4th DCA 2012) (quoting § 671.201(21)(a), Fla. Stat. (2008)). “The ‘bearer’ is a person ‘in possession of a negotiable instrument . . . that is payable to bearer or indorsed in blank.’” *Id.* (quoting § 671.201(5), Fla. Stat. (2008)). The Bank failed to submit substantial, competent evidence showing either that the Note was in its possession on the date it filed suit or that the Note was endorsed in blank.

To prove the Note was in its possession when it filed suit, the Bank offered into evidence a printout of a computer screen, with the words “Bank of America Home Loan Routing History,” across the middle of the screen, which Amaya characterized as a “collateral routing” history of the note.⁹⁴

⁹⁴ T. 40-41 & Screen Shot of Document Detail (R. 299).

That document, however, was inadmissible hearsay. Amaya admitted that the document had been created before his employer, the Servicer, became involved with the loan.⁹⁵ Amaya had had no involvement with Bank of America.⁹⁶ As explained in Section I.B. above, to admit this hearsay document into evidence under the business records exception, the Bank was required to show that the requirements for admitting the document under the business records exception were satisfied, and make that showing through a qualified witness with sufficient personal knowledge to testify to the satisfaction of those requirements. No such showing was made through Amaya or otherwise. To the contrary, Amaya was not even questioned as to those issues. The Owner objected of the admission into evidence of the document based on hearsay.⁹⁷ Because no showing was made to justify the admissibility of the collateral routing history under the business records exception, the trial court erred in admitting that document into evidence.

Moreover, even if it would have been admissible, the document was not competent, substantial evidence that the Note was in the Bank's possession on the date of filing the complaint, or ever. To the contrary, the document was a routing history for Bank of America. Thus, the most it could show was when the Note was

⁹⁵ T. 42.

⁹⁶ T. 43.

⁹⁷ T. 44.

transferred into and out of Bank of America's possession. No entry in the document purports to state that the Note was ever in the possession of the Bank (The Bank of New York Mellon) or that Bank of America was its agent.

Nor did the Bank submit substantial, competent evidence showing that the Note was endorsed in blank or payable to bearer. It is true that the Note, as submitted, had the first Endorsement Allonge attached to it, in which the Original Lender purported to endorse the Note to Countrywide Bank, N.A., and stamped on the same document was an endorsement from Countrywide Bank, N.A. to Countrywide Home Loans, Inc., and an endorsement in blank by Countrywide Home Loans, Inc.

But, as noted, the copy of the Note attached to the Bank's verified complaint, of which the trial court properly took judicial notice, had the second Endorsement Allonge attached to it as well.⁹⁸ The Bank admitted at trial that the original Note had had the second Endorsement Allonge attached to it. And the crossing out of the endorsement on the second Endorsement Allonge demonstrates

⁹⁸ The trial court should have required the Bank to submit the Note into evidence with both allonges attached, as the Owner requested. *See* § 90.108, Fla. Stat. ("When a writing...or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing...that in fairness ought to be considered contemporaneously."); *Robinson v. CSX Transp., Inc.*, 103 So. 3d 1006, 1009 (Fla. 5th DCA 2012).

an intent by the original lender to nullify the transfer to Countrywide Bank, N.A., which arguably nullifies the original lender's endorsement on the first Endorsement Allonge. At a minimum, it demonstrates that the Note was back in the hands of the original lender at some point after the Countrywide endorsements were placed on the first Endorsement Allonge and that the lender decided not to transfer a second time to Countrywide. The strong implication is that the original lender became the holder and never relinquished that status.

Although the trial court questioned the order in which the Endorsement Allonges were executed, the first Endorsement Allonge could only have preceded the second. That is because, by definition, an allonge must remain affixed to the note. *See Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 598 (Fla. 1st DCA 2013) (explaining that the "dictionary definition" of an allonge is "'a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements...Such must be so firmly affixed thereto as to become a part thereof.'") (quoting *Booker v. Sarasota, Inc.*, 707 So. 2d 886, 887 n.* (Fla. 1st DCA 1998)). So when the second Endorsement Allonge was executed, the first Endorsement Allonge must have already been attached to the Note.

It is also unlikely that the Countrywide entities would have placed their endorsements on the first Allonge, if at the time they made their endorsements, the

final page of the document was the second Allonge—especially when that Allonge evidenced an intent not to transfer to Countrywide.

There is also an implication that the Bank itself recognized that the endorsements were defective when it decided to allege standing based on the Corrective Assignment of Mortgage, rather than alleging it was an Article 3 holder. Indeed, the Corrective Assignment itself suggests that the Bank, rather than the original lender, was involved in its execution because it was notarized in California. More specifically, the Corrective Assignment was executed before a notary public commissioned in Los Angeles County, California.⁹⁹ The only one of the three entities associated with the Corrective Assignment that claimed to have a Los Angeles address was the Plaintiff, the Bank of New York Mellon.¹⁰⁰

Moreover, the Corrective Assignment was prepared by and recorded by the very lawyers who filed this action on the Bank’s behalf.¹⁰¹ It states that the document was needed to change a previous assignment of mortgage in order to correct a name—not the “assignor name” and not the “assignee name,” but the

⁹⁹ Corrective Assignment of Mortgage, p. 2 (R. 36).

¹⁰⁰ Corrective Assignment of Mortgage (R. 35). Regent Mortgage Funding, is a Florida Limited Liability Company who was accepting payments in Naples, Florida. (Note, ¶ 3 R. 10, 260). The assignor, Mortgage Electronic Registrations Systems, Inc. acting solely as a nominee for Regent reported its address as Danville, Illinois. (Corrective Assignment of Mortgage, R. 35).

¹⁰¹ Corrective Assignment of Mortgage (R. 35).

“plaintiff name.” Thus the document was prepared in anticipation of litigation specifically for the purpose of providing the Plaintiff Bank with standing (or at least, the appearance of standing).

At trial, rather than attempt to prove the reliability of this Corrective Assignment, the Bank chose to travel under the endorsements. But not all the endorsements. Instead, the Note was apparently altered in an effort to convince the factfinder that the Bank had standing. The Bank’s lawyer conceded that both allonges were on the original (that was attached to the verified Complaint) and that only one of the allonges had been submitted as evidence in trial.¹⁰²

Even if the Bank’s subterfuge was mitigated by the court’s judicial notice of the second allonge on the Complaint’s version of the Note, the very attempt further eviscerates what little reliability and competency the Bank’s evidence might have enjoyed. It was the Bank’s burden to prove when the endorsements were placed on the Note and when it came into possession of that fully endorsed Note. *See Cutler v. U.S. Bank N.A.*, 109 So. 3d 224, 225-26 (Fla. 2d DCA 2012) (“The note includes the allonge endorsed in blank, but the allonge is not dated. If indeed U.S. Bank cannot establish that the allonge took effect prior to the date of the complaint, it did not have standing to bring suit.”); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d

¹⁰² T. 55-56.

1195, 1196 (Fla. 4th DCA 2012) (noting that it is the plaintiff's burden to demonstrate that it had standing when it filed suit). But it did not carry that burden. Because the Bank failed to prove that the Note was properly endorsed in blank at the time it filed suit, it failed to submit competent, substantial evidence that it had standing as an Article 3 holder.

CONCLUSION

Because the trial court's judgment was predicated on payment history documents that were erroneously admitted into evidence and that failed to support the amounts in the judgment; and because the Bank failed to submit competent, substantial evidence to demonstrate its standing to sue, the Final Judgment of Foreclosure should be reversed.

Dated: November 21, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 21, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this November 21, 2014.

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