In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No [redacted])

[redacted] [redacted]

Appellant,

v.

NATIONSTAR MORTGAGE, LLC, et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANT

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

TABLE OF AUTHORITIES
(continued)

Other Authorities

Rules

Reports

TABLE OF AUTHORITIES
(continued)

STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] [redacted] ("the Homeowner") appeals the final judgment of foreclosure rendered in favor of Nationstar Mortgage, LLC ("the Servicer") after a non-jury trial. The Homeowner presents two issues for this Court's review:

- Whether hearsay may be used to establish a hearsay exception.
- Whether there was competent evidence to support the Servicer's standing to sue and compliance with conditions precedent.

II. Appellant's Statement of the Facts

A. The Pleadings

The Servicer initiated this action when it filed its verified one-count mortgage foreclosure complaint.[1] According to the complaint, Federal National Mortgage Association ("Fannie Mae"), the owner of the note, had "authorized" the Servicer "to bring [the] present action."[2] And according to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the

[1] Complaint, May 27, 2011 (R. 7-30).

[2] Complaint, May 27, 2011, ¶ 3 (R. 7).

Homeowner written notice of default with a thirty-day opportunity to cure prior to acceleration and foreclosure:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument … 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….[3]

The Homeowner answered the Servicer's complaint and alleged that he was without knowledge and therefore denied the allegation that Fannie Mae owned the note and had authorized the Servicer to sue her.[4] She also alleged that she was without knowledge and therefore denied that the Servicer had complied with all conditions precedent to foreclosure.[5] And as affirmative defenses, the Homeowner pled that the Servicer failed to comply with the notice provisions contained in Paragraph 22 of the mortgage;[6] that it lacked standing;[7] and that it was not the real party in interest.[8] The court then set the matter for trial.[9]

---

[3] Mortgage attached to the Complaint, May 27, ¶ 22 (R. 22).

[4] Answer, August 9, 2012, ¶ 3 (Supp. R. 2).

[5] Answer, November 6, 2013, ¶ 6 (Supp. R. 2).

[6] Affirmative Defenses, November 6, 2013, ¶ 2 (Supp. R. 3-4).

[7] Affirmative Defenses, November 6, 2013, ¶ 3 (Supp. R. 5-6).

[8] Affirmative Defenses, November 6, 2013, ¶ 4 (Supp. R. 6-7).

B. The Trial

After a brief opening statement during which the Homeowner alerted the court that the case would turn on the Servicer's lack of standing (because it did not join Fannie Mae as a party) and its failure to comply with conditions precedent to foreclosure,[10] the Servicer called Patrick Dugan—its first and only witness—to the stand.[11] Dugan testified that he had been employed with the Servicer since March, 2014[12] and that his duties required him to manage a portfolio of loans that he reviewed for loss mitigation, mediations, and trials.[13] According to Dugan, part of his "training" involved how to read payment histories and included an "understanding" of how letters are generated and sent.[14] This training consisted of a five-week stay in Louisville, Texas where he visited different departments and asked questions.[15]

---

[9] Amended Foreclosure Uniform Order Re-Setting Cause for Non-Jury Trial (R. 112-115).

[10] Transcript of Trial Before Judge Beatrice Butchko, October 17, 2014 (R. Vol. II; "T. __"), at 7.

[11] T. 9.

[12] T. 25.

[13] T. 9.

[14] T. 10.

[15] T. 46.

Through Dugan and over the Homeowner's hearsay and authenticity objections, the Servicer introduced the following documents which composed the majority of its case:

- The purported original note (Exhibit 1);[16]
- A payment history (Exhibit 3);[17] and
- A default notice (Exhibit 4).[18]

But Dugan admitted that before the Servicer acquired the servicing rights, the loan was serviced by GMAC Bank ("GMAC"),[19] a company that he never worked for.[20] And while Dugan gave a narrative about how GMAC's records (which included portions of the payment history) were "boarded,"[21] he admitted his knowledge was solely based on discussions he had with employees from the boarding department.[22] He also admitted on cross examination that the default

[16] T. 13. The Servicer also introduced a copy of the original mortgage (Exhibit 3), although the Homeowner did not object to this document (T. 17).

[17] T. 35.

[18] T. 50.

[19] T. 25.

[20] T. 50.

[21] T. 20.

[22] T. 21.

notice was created by the Servicer's collections department,[23] a department which he also never worked in.[24]

Importantly, Dugan also admitted that the cure amount in the default letter could vary from day to day and therefore may be greater than the amount stated in the letter.[25] Dugan noted that the Homeowner was to contact the Servicer on the date she intended to pay the full amount to confirm the amount necessary to bring the loan current.[26]

After the Servicer rested, the Homeowner moved for an involuntary dismissal, first reasserting that there had not been an adequate foundation laid for admission of the Servicer's exhibits.[27] The Homeowner also argued that the Servicer failed to prove compliance with Paragraph 22 of the mortgage and that Fannie Mae was not before the court.[28] The trial court denied this motion.[29]

---

[23] T. 68.

[24] T. 69.

[25] T. 72-73.

[26] T. 73.

[27] T. 78.

[28] *Id.*

[29] T. 80.

The Homeowner's case consisted of her own testimony[30] and the following documents:

- A default notice dated January 15, 2009 (Defense Exhibit A);[31]
- A letter from the Servicer dated July 31, 2009 indicating that certain default notices sent between July 22nd and 27th of that year should not have been sent (Defense Exhibit B);[32] and
- A letter from the Servicer dated January 3, 2009 indicating that it had not received the December 1, 2008 payment (Defense Exhibit C).[33]

But the Homeowner testified that, in contrast to the default notice dated January 15, 2009 (Defense Exhibit A) and the letter dated January 3, 2009 (Defense Exhibit C), she made the December, 2008 payment but the Servicer simply failed to cash it. This testimony drew the following exchange with the court:[34]

---

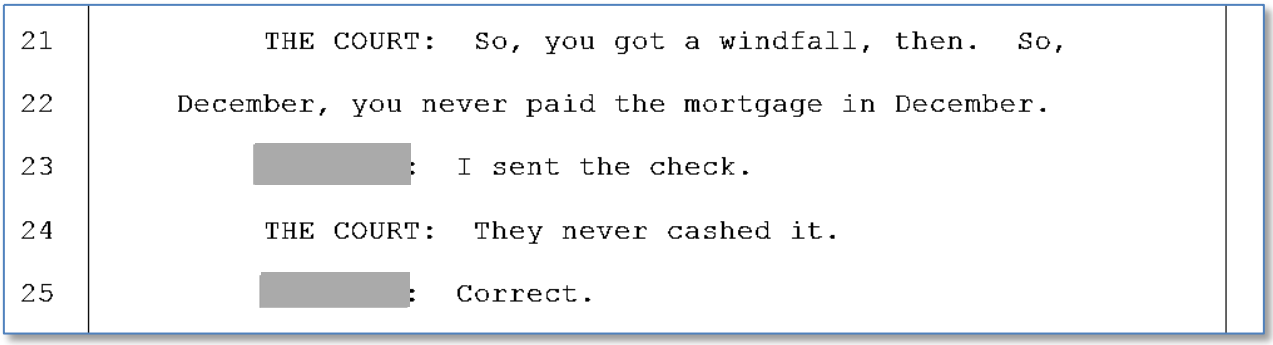
[30] *Id.*

[31] T. 85

[32] T. 90.

[33] *Id.*

[34] T. 86



THE COURT: So, you got a windfall, then. So, December, you never paid the mortgage in December.

[redacted]: I sent the check.

THE COURT: They never cashed it.

[redacted]: Correct.

And when questioned about the default notice admitted during the Bank's case (Exhibit 4), the Homeowner testified that when she received the letter she did not know what was needed to cure the default.[35] In fact, on cross examination, the Homeowner testified that after receiving the notice she called the Servicer to find out exactly how much she needed to pay; the Servicer could not tell her.[36] And on redirect, she further testified that sometime after March, 2010 (the alleged default date), the Servicer refused to accept her payments.[37]

* * *

[35] T. 95.

[36] T. 104.

[37] T. 105.

After the close of evidence, the Homeowner renewed her motion for involuntary dismissal[38] and made a brief closing asserting that the language of the Servicer's default notice did not comply with Paragraph 22 of the mortgage.[39] The court granted judgment in the Servicer's favor.[40]

[38] T. 112.

[39] T. 114.

[40] T. 118; Final Judgment of Foreclosure, October 17, 2014 (R. 157-161).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred when it applied the business records exception to the hearsay rule in this case. The Servicer's witness was a professional document reader wholly incompetent to lay the predicate. Therefore, the Bank's exhibits should have been excluded from evidence.

Additionally, the trial court should have granted the Homeowner's motion for involuntary dismissal because the evidence does not support the final judgment for two reasons. First, the Servicer failed to establish its standing to sue. Its complaint alleged that Fannie Mae had authorized it to sue the Homeowner, but the Servicer presented no evidence at trial that Fannie Mae joined in the suit or ratified the action taken by the Servicer.

Second, the Bank also failed to provide competent, substantial evidence that it complied with the notice provisions of the mortgage before filing the foreclosure lawsuit.

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

STANDARD OF REVIEW

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

Likewise, a trial court's ruling of a motion for involuntary dismissal is reviewed *de novo*. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). Furthermore, in a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

ARGUMENT

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

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

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

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices (or the record-keeping practices of other companies).

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to

say about the company's alleged recordkeeping practices so as to appear to meet the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

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

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

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

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently

experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

See also Yang v. Sebastian Lakes Condo. Ass'n, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (despite witness's use of "magic words"—the elements of a

business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (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) (an adjuster was not qualified to testify about the usual business practices of sales agents at other offices).

See also Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient for business records exception because the witness was not the custodian, and was not in charge of the activity constituting the usual business practice); *Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'"); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay.)

In this case, Dugan testified that he was employed with the Servicer for less than twelve months prior to trial.[41] His job duties required him to merely "review" documents in preparation for trials,[42] and he attended trials on a daily basis.[43]

---

[41] T. 25 (indicating that he had been employed with the Servicer since March, 2014),

[42] T. 9.

[43] T. 47.

And for nearly every document he sought to introduce, he had absolutely no experiential familiarity with the department responsible for creating them. Specifically, he admitted that after his five-week "training" course, he operated solely in his current function as a "default case specialist."[44] He did not work for the collections department (which was responsible for creating and mailing the default notices)[45] nor had he ever worked for GMAC (who was responsible for a portion of the payment history).[46]

In short, Dugan was a "robo witness"—one of the hearsay-toting automatons, the use of which this Court 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 the Servicer's documents. 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 the business records exception.

---

[44] *Id.*

[45] T. 68-69.

[46] T. 50.

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

The Servicer will argue that Dugan was "familiar" with the records—citing to his witness "training" 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—was that it 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

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

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.

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 "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);[47] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[48]

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.

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

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

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

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the

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

owners of the loan[49] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[50]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's unreliability is acceptable so long as it is in their favor. When a note is not performing, the only check against absolute fabrication is the courts themselves.

And the record in this case clearly reflects why the Servicer's records are untrustworthy. For instance, the Homeowner introduced a letter from the Servicer representing that it had incorrectly stated her loan was past due.[51] And she also testified that she made a payment that was not cashed by the Servicer.[52] The trial court, however, merely found that this granted the Homeowner "a windfall."[53]

---

[49] 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.

[50] *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.

[51] Letter Dated July 31, 2009 (Defendant's Exhibit B).

[52] T. 90.

[53] *Id.*

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

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

The Servicer (and the court through *sua sponte* questioning)[54] also attempted to establish the "trustworthiness" of the payment history through Dugan's testimony about "boarding." But Dugan's description of this process was wholly inadequate to make the records admissible, since Dugan's purported "knowledge" of this process was hearsay. His testimony was based entirely on his conversations with employees of the boarding department who "described" the process in detail.[55] This was quintessential hearsay because it was an out-of-court statement from those employees offered by Dugan to prove the truth of the matter asserted.

[54] T. 21-25; T. 31.

[55] T. 21.

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, including this Court, 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.

Presumably, it would have been as easy (if not easier) to provide these certifications from legitimately qualified witnesses—perhaps the very employees that Dugan claims to have spoken with—than to attempt to train one person on all aspects of the business

In this case, however, the 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 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—perhaps the very employees that Dugan claims to have spoken with—than to attempt to train one person on all aspects of the business. Rather than bring the employees which Dugan admits have the personal knowledge and the best evidence of actual boarding procedures, the 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 Dugan was the sole conduit. The most egregious of these were the alleged acceleration notice and the payment history. Because the acceleration letter was not admissible through this witness, the case must be remanded for dismissal. *Holt v. Calchas, LLC*, 155 So. 3d at 506 (Fla. 4th DCA 2015) ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."). And since the payment history was the only evidence offered to prove Fannie Mae's standing at inception, 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.").

II. Even if it had been admissible, the evidence admitted at trial is insufficient to support the judgment and therefore the judgment must be reversed with instructions to enter an involuntary dismissal.

A. The Servicer failed to establish that it had standing to sue on the day the lawsuit was filed.

Although it pled in its complaint that it had been authorized to sue the Homeowner on behalf of Fannie Mae,[56] the Servicer made absolutely no effort at trial to prove it had any authority from that entity. In fact, the Servicer did not mention Fannie Mae once during the trial.[57] Thus, the Servicer apparently sought to establish at trial that it was the "noteholder" under Article 3 of the Uniform Commercial Code ("UCC"). The Servicer, however, as agent for Fannie Mae, could never be Article 3 holder.

1. The Servicer lacked standing because it was not an Article 3 holder of the note.

Under Article 3 of the UCC a servicer that is acting solely as an agent is not a "holder" of the Note. This is because, when an agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that

[56] Complaint, May 27, 2011, ¶ 3 (R. 7).

[57] The only time Fannie Mae is even referenced in the transcript is when the Homeowner's attorney referenced the Servicer's failure to join it during her opening statement (T. 7) and motion for involuntary dismissal (T. 78; renewed during closing argument at T. 112).

possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent.")[58]

In fact, the use of an agent to possess the instrument on behalf of the holder is such a common banking practice that it was officially authorized by the 1998 amendments to Article 9 of the UCC[59] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[60]). The drafters'

---

[58] *Quoting*, Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code § 1–201:265* (3d ed. 2012).

[59] These changes were enacted in Florida in 2001, effective 2002, §§ 679.1011.709, Fla. Stat.; s*ee* § 679.3131(3), Fla. Stat. regarding requirements for use of an agent to possess the collateral.

[60] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at:* http://dirt.umkc.edu/files/newart9i.htm. (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees

Comment 3 to § 9-313 explicitly equated possession by an agent with actual possession by the principal. § 679.3131, Fla. Stat. Ann. ("if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession").

[I]f anyone is an Article 3 holder, it is Fannie Mae and not the Servicer, because Fannie Mae is the principal which has always been in possession of the Note through its agent, the Servicer.

This explains why mailmen and attorneys can "possess" or "hold" the instrument without becoming Article 3 holders—the true holder remains in constructive possession of the note. Here, if anyone is an Article 3 holder, it is Fannie Mae and not the Servicer, because Fannie Mae is the principal which has always been in possession of the Note through its agent, the Servicer.

"without the bother of taking physical possession of the notes in question, a process that they often consider irksome"); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9, available at:* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46 (revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

Additionally, one can only become an Article 3 holder by way of a "negotiation"—which involves a transfer of the entire bundle of rights in the instrument. § 673.2011, Fla. Stat. (defining negotiation); § 673.2031(4), Fla. Stat. ("If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur."). Thus, the principal's act of giving possession of the Note to an agent for the purpose of enforcing that Note on the principal's behalf is not a negotiation and was never intended to be. The agent (in this case, the Servicer), therefore, never became a holder, even if it has proven they were in possession of a properly endorsed note.

2. The Servicer had no standing because it was an agent who neither joined its principal in the action nor submitted evidence of ratification.

Because the Servicer was an agent of Fannie Mae, the Servicer needed to prove standing either by: 1) joining its principal, Fannie Mae, in the action; or 2) demonstrating that it had been authorized by its principal to bring and prosecute this case on its behalf.

This Court has unequivocally held that a servicer may only be considered a party to a foreclosure action if its principal has been joined in the case or has expressly authorized or ratified the servicer's act of bringing the suit. *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA

2012). Here, the Servicer neither joined the principal nor submitted any admissible evidence that Fannie Mae authorized or ratified the action. Accordingly, the Servicer was not a real party in interest at the time of judgment or when the case was filed.

The analysis in *Elston/Leetsdale*, and this case, begins with Fla. R. Civ. P. 1.210(a) which states that "[e]very action may be prosecuted in the name of the real party in interest…" Under this rule, a real party in interest may sue in its own name. And because the rule is "permissive," a nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1185 (Fla. 3d DCA 1985).

Here, the Servicer brought and prosecuted the case in its own name for the benefit of Fannie Mae. But the ability of an agent to prosecute an action belonging to another in its own name is not without conditions. One such condition is that the real party in interest must still be joined as a party unless the relationship between that party and the nominal plaintiff fits into one of six categories: 1) a personal representative; 2) an administrator; 3) a guardian; 4) a trustee of an express trust; 5) a party with whom or in whose name a contract has been made for the benefit of another; or 6) a party expressly authorized by statute to sue in that

party's own name without joining the party for whose benefit the action is brought. Fla. R. Civ. P. 1.210(a).

A servicer's agency relationship with their principal—the real party in interest—is not one of these six enumerated categories. That the rule expressly lists the types of representatives that may sue in their own name without joining the real party in interest implies the exclusion of other agency relationships. *See Biddle v. State Beverage Dept.*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966) (applying '[e]xpressio unius est exclusio alterius'—the mention of one thing implies the exclusion of another). Accordingly, under the plain language of Rule 1.210(a), the Servicer was required to join Fannie Mae.

This comports with, and provides the basis for, this Court's holding in *Elston/Leetsdale* that required joinder of the principal as one of two options for complying with the real party in interest rule. The other option, ratification by the principal, is a judicial gloss upon Rule 1.210(a)—the rule itself does not expressly mention ratification. The gloss arises from decisions such as *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d at 1185 (affidavits unequivocally show that principal ratified and endorsed the agent's action in bringing suit on principal's behalf) and *Juega ex rel. Estate of Davidson v. Davidson*, 8 So. 3d 488, 490 (Fla. 3d DCA 2009) (standing established by affidavit indistinguishable from the affidavit of the

principal in *Kumar*). These cases may be harmonized with Rule 1.210(a) by treating the authorization affidavit (or other ratification) as an assignment, which would transform the servicer into a real party in interest in its own right. *See E. Investments, LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d DCA 2007) (citing to *Kumar* for the conclusion that the plaintiff's lack of standing could be remedied by an assignment from the signatory of the contract).

Accordingly, the Servicer was not the owner (nor can it be an Article 3 holder), and it failed to either join Fannie Mae in the action or show authorization to act on behalf of that entity. Therefore, the Servicer failed to prove its standing.

3. The allegations of the complaint bound the Servicer to its agency theory.

And not only did the Servicer fail to prove that it had authority from Fannie Mae to prosecute the action, its own allegations made in its complaint required it to prove this theory. Indeed, the Servicer alleged that Fannie Mae had authorized it sue the Homeowner in its complaint.[61] And since the Homeowner denied this allegation in their answer,[62] this was a fact that the Servicer had to prove. *Gee v. US Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue

[61] Complaint, May 27, 2011, ¶ 3 (R. 7).

[62] Answer, August 9, 2012, ¶ 3 (Supp. R. 2).

that U.S. Bank, as the plaintiff, was required to prove."). *See also Berg v. Bridle Path Homeowners Association, Inc.*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002) ("It is well-settled in Florida law that the plaintiff is required to prove every material allegation of its complaint which is denied by the party defending against the claim."). *See also United Bank v. Farmers Bank*, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987) ("Farmers Bank is thus bound by the allegations of the pleading it framed, and will not be permitted to alter its theory of the stated cause of action at the appellate stage in order to defeat United Bank's venue privilege."); *U.S. v. Century Fed. Sav. & Loan Ass'n of Ormond Beach*, 418 So. 2d 1195, 1197 (Fla. 5th DCA 1982) ("The parties to an action are bound by the allegations in their pleadings....").

These allegations prove a salient fact: that the Servicer's authority with respect to the loan was subject to limitations. It did not have the entire bundle of rights in the note that an Article 3 holder would enjoy. These allegations are admissions upon which the Homeowner could rely. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence"). Thus, the admissions are clear

evidence that Fannie Mae held until giving it to the Servicer solely to prosecute this action on behalf of Fannie Mae.

4. The proper remedy on remand is reversal.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015): *Fischer v. U.S. Bank National Association*, 152 So. 3d 1289 (Fla. 4th DCA 2015); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

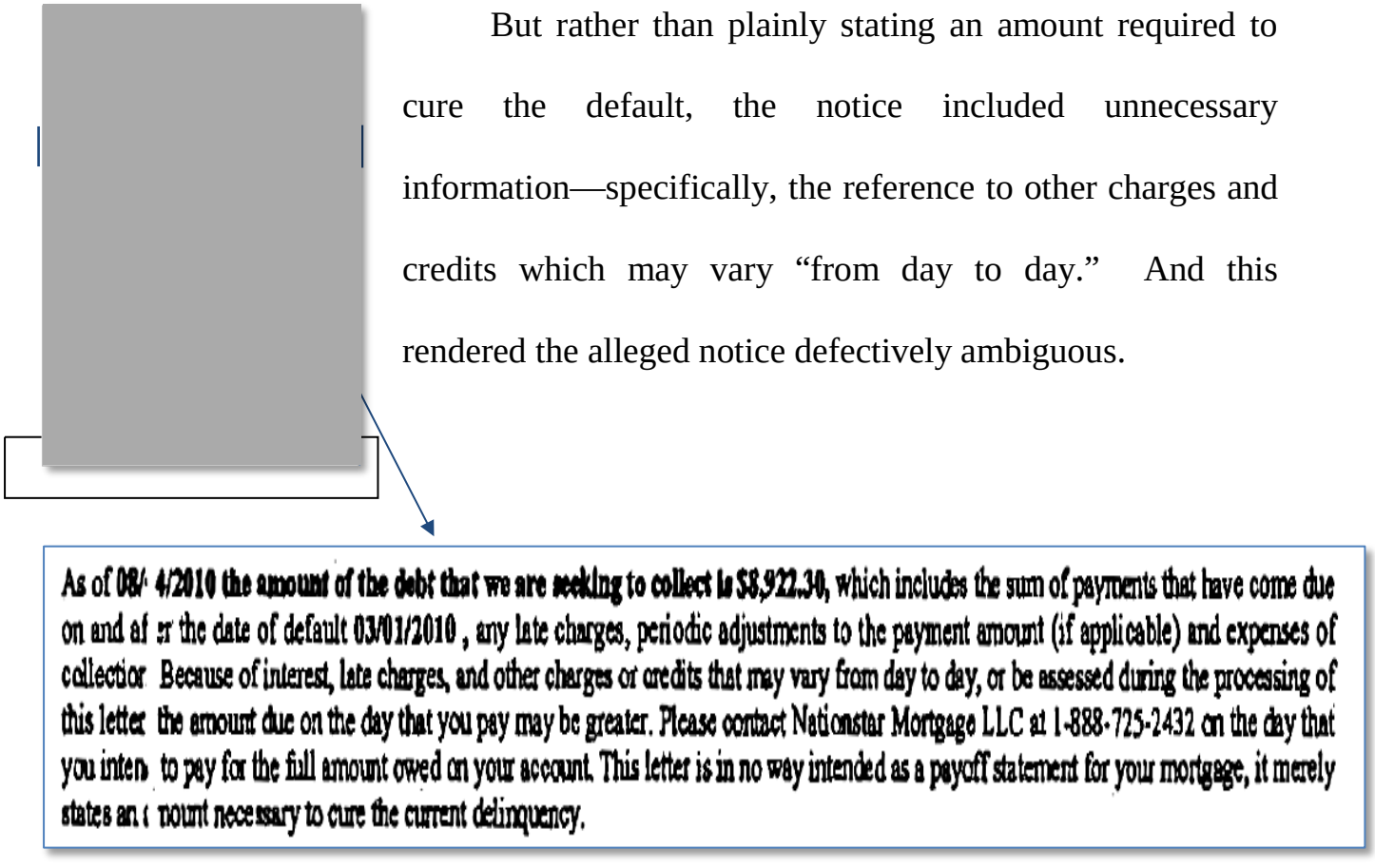
Therefore, on remand, the trial court should be instructed to enter an involuntary dismissal.

B. The Servicer presented insufficient evidence to support compliance with the notice provisions of the mortgage.

Even if it had been admissible, the notice failed to specify the action required to cure the default.

The plain language of Paragraph 22 of the mortgage required that the Servicer send the Homeowner a notice following her alleged breach. The mortgage required the Servicer to specify the breach allegedly committed and a cure date that would provide the Homeowner at least thirty days to cure the breach.

But rather than plainly stating an amount required to cure the default, the notice included unnecessary information—specifically, the reference to other charges and credits which may vary "from day to day." And this rendered the alleged notice defectively ambiguous.



As of 08/ 4/2010 the amount of the debt that we are seeking to collect is $8,922.30, which includes the sum of payments that have come due on and af er the date of default 03/01/2010 , any late charges, periodic adjustments to the payment amount (if applicable) and expenses of collection Because of interest, late charges, and other charges or credits that may vary from day to day, or be assessed during the processing of this letter the amount due on the day that you pay may be greater. Please contact Nationstar Mortgage LLC at 1-888-725-2432 on the day that you inten to pay for the full amount owed on your account. This letter is in no way intended as a payoff statement for your mortgage, it merely states an a nount necessary to cure the current delinquency.

Indeed, Dugan admitted that the cure amount included in the notice could vary from day to day and noted that the Homeowner was to call the Servicer on the day she wanted to pay to find out the full amount necessary to bring the loan current.[63] But the Homeowner's unrebutted testimony was that when she actually made this phone call, the Servicer was unable to tell her this amount.[64]

The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[65] the default and to precisely identify the action to cure. The alleged notice does not specify the action required to cure the default because it does not give an amount necessary to cure but rather a phone number to call. And the uncontroverted testimony was that when the Homeowner called the number after receiving the notice the Servicer could not even tell her how much was owed.

Worse than merely adding an ambiguity, this superfluous language demanding additional sums is an impermissible overreaching prohibited by Paragraph 22. It is non-compliant because the Servicer's letter was attempting to force the Homeowner to bring the loan up-to-the-minute current, something very

---

[63] T. 72-73.

[64] T. 104. It is worthwhile to note that the Servicer reserved Dugan for rebuttal purposes (T. 78), but then failed to call him to rebut this testimony.

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

different from curing a specified default. In other words, the letter declares that it will accelerate based on additional charges and interest incurred after the letter was sent, such that the Homeowner was given less than thirty days to cure these additional amounts to avoid acceleration.

This is made painfully obvious in the next paragraph in which the Servicer acknowledges that the "right to cure this default as referenced herein does not suspend [the] payment obligation"[66]—i.e. that the right to cure the identified default and the next payment obligation are two different things. If the borrower failed to make that next payment, it would be a new default, subject to a new thirty-day cure period. Thus, by coercing the Homeowner to bring the loan current as of the moment of cure, the letter, on its face, fails to give the Homeowner thirty days to pay all the sums that must be paid to avoid this foreclosure.

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

The proper remedy of remand is involuntary dismissal.

The demand notice was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to

[66] Plaintiff's Exhibit 4.

introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowner a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt*, 155 So. 3d at 507 ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015) (holding that failure to comply with notice provisions of mortgage requires dismissal of the case).

CONCLUSION

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

Dated: May 18, 2015

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

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 18, 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 May 18, 2015.

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Nancy M. Wallace
William P. Heller
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
nancy.wallace@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
william.heller@akerman.com
lorraine.corasro@akerman.com