In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-66, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-66,

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

[redacted] ("the Homeowner") appeals the final judgment of foreclosure rendered in favor of The Bank of New York, f/k/a The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-66, Mortgage Pass-Through Certificates, Series 2005-66 ("the Bank") 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 Bank's compliance with conditions precedent.

II. Appellant's Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its verified one-count mortgage foreclosure complaint.[1] According to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the Homeowner written notice of default with a thirty-day opportunity to cure prior to acceleration and foreclosure:

[1] Complaint, November 18, 2011 (R. 6-35).

> 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….[2]

The Homeowner answered the Bank's complaint and specifically denied that the Bank had complied with all conditions precedent to foreclosure.[3] And as affirmative defenses, the Homeowner pled that the Bank failed to comply with the notice provisions contained in Paragraph 22 of the mortgage;[4] that foreclosure was barred under the doctrine of unclean hands because the Bank or its agents induced the Homeowner to default;[5] and that it was equitably estopped from foreclosure because it induced the Homeowner to default with promises of a loan modification.[6]

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[2] Mortgage attached to the Complaint, November 18, 2011, ¶ 22 (R. 30).

[3] Amended Answer, June 21, 2012, ¶ 4 (R. 128). The Homeowner's motion for leave to file an amended answer had previously been granted pursuant to an agreed order. (Agreed Order on Defendant's Motion for Leave to Amend Answer, June 19, 2012 (R. 125)).

[4] Affirmative Defenses, June 21, 2012, ¶ 2 (R. 130-131).

[5] Affirmative Defenses, June 21, 2012, ¶ 6 (R. 134-135).

[6] Affirmative Defenses, June 21, 2012, ¶ 7 (R. 135-136).

As an avoidance, the Bank pled that it had complied with all conditions precedent, including sending the notices required by both Paragraph 15 and 22 of the mortgage.[7] The court then set the matter for trial.[8]

B. The Trial

After a brief opening statement in which the Homeowner asserted that the Bank had failed to comply with conditions precedent[9] and induced the default,[10] Mary Davids, the Bank's first and only witness, was called to the stand.[11] Davids testified that she was an employee of Bank of America ("the Servicer") whose job required her to manage a portfolio of litigated loans and appear as a corporate representative.[12] She testified that she was familiar with the Homeowner's account because she had "reviewed" certain documents related to the loan.[13] She would later admit that she had only been employed with the Servicer since October

[7] Reply to Affirmative Defense Filed June 2012, August 16, 2012, ¶ 2 (R. 142).

[8] Foreclosure Uniform Order Setting Cause for Non-Jury Trial, August 29, 2014 (R. 344-347).

[9] Transcript of Trial Before Judge Beatrice Butchko, October 28, 2014 (R. Vol. V; "T. __"), at 13.

[10] T. 14.

[11] T. 17.

[12] *Id.*; T. 62.

[13] T. 18.

2012[14] and that prior to that she had never worked in a bank.[15] In fact, other than her time with the Servicer, the only other instance where she had worked with a bank was at her previous job with a law firm where she was a title resolution manager.[16]

Through Davids, and over the Homeowner's hearsay and foundation objections, the Bank introduced the following documents which composed the majority of its case:

- Screenshots purporting to establish the routing history of the loan and the original note (Exhibit 2);[17]
- A notice of default (Exhibit 4);[18]
- A payment history (Exhibit 5);[19]
- An Account Information Statement (Exhibit 6);[20] and
- A screenshot purporting to establish the Bank as the owner of the note (Exhibit 7).[21]

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[14] T. 59.

[15] T. 60-61.

[16] T. 61.

[17] T. 29; R. Vol. IV.

[18] T. 42; R. Vol. IV.

[19] T. 46; R. Vol. IV.

[20] T. 53; R. Vol. IV.

But on a direct question posed by the court, Davids admitted that the entire basis of her knowledge was her "training":

> THE COURT: How do you know the things that you just testified about? In other words, that it was made at or near, by someone with knowledge, in the regular course, 'cause we really – other than you describing your occupation, we really don't know if you are one of those quote, other qualified witnesses that the rule talks about, so could you expand upon how you know these things?
>
> * * *
>
> DAVIDS: I know it by my training.[22]

This training, however, consisted of "reviewing" the servicing platform and "entering" information into it along with how to "communicate" with various internal departments and the Servicer's attorneys.[23] Thus, Davids would later admit, the entirety of her operational experience with the Servicer's business practices was limited to reading and interpreting the servicing documents and inputting information into those documents.[24]

Davids did not, for instance, work in or supervise anyone who worked in the solicitations department[25] (the department responsible for mailing the default

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[21] T. 132; R. Vol. IV.

[22] T. 40-41.

[23] T. 63.

[24] T. 67-68.

[25] T. 81.

notices).[26] Nor did she work for any of the various departments responsible for inputting information regarding interest rates or payments received into the payment history (Exhibit 5).[27] In fact, Davids did not supervise anyone—including members of her own department.[28]

Davids also admitted that the loan had been serviced by at least two other servicers—Countrywide and Countrywide Home Loan Servicing, LP.[29] According to her testimony, when the Servicer purchased Countrywide, it also purchased Countrywide's "servicer platform" and "[s]o the information didn't change hands…"[30]

As for the notice of default (Exhibit 4), Davids testified that the document itself established when it had been sent and, based on the fact that the envelope contained the words "first class," she believed that it had been sent "first class and certified mail at the same time."[31] The envelope, however, contained the certified

[26] T. 80.

[27] T. 94.

[28] T. 95.

[29] T. 129.

[30] T. 130.

[31] T. 79.

tracking number. It also indicated that it had been presorted to save the Servicer money.[32]

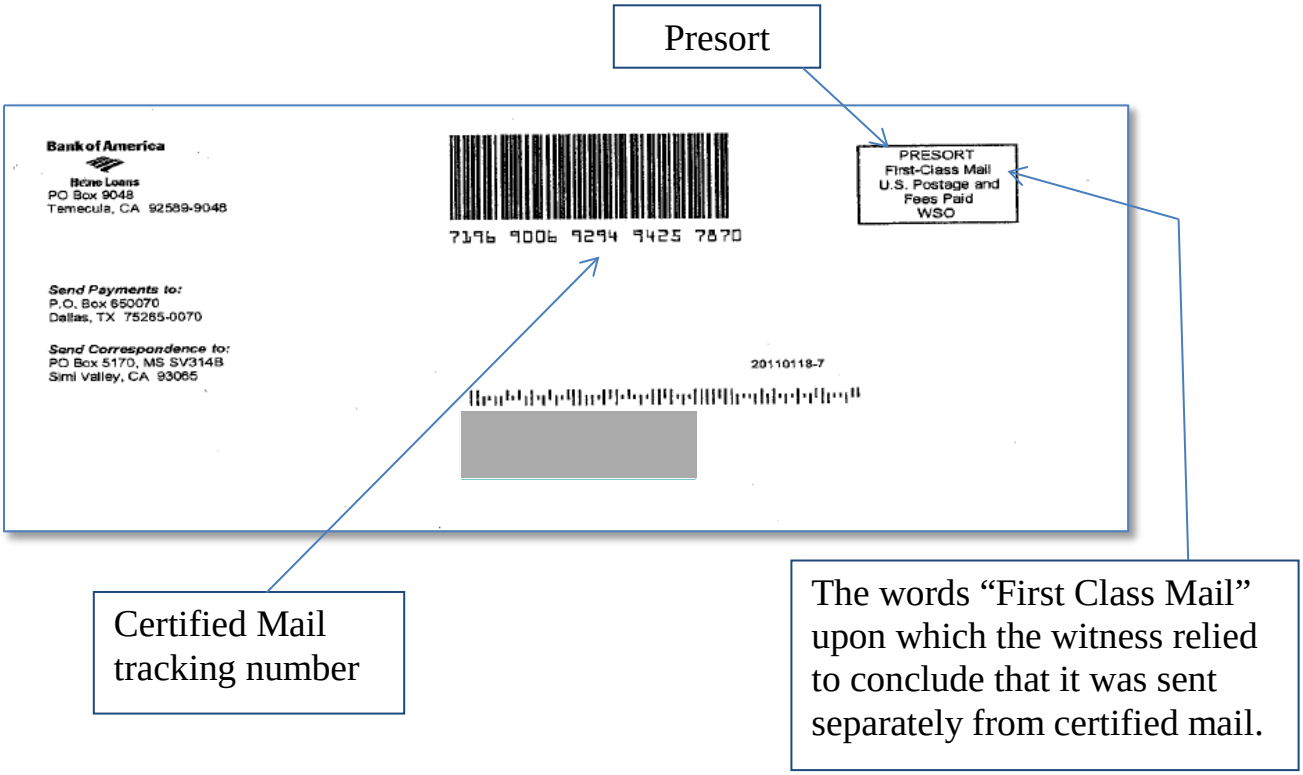


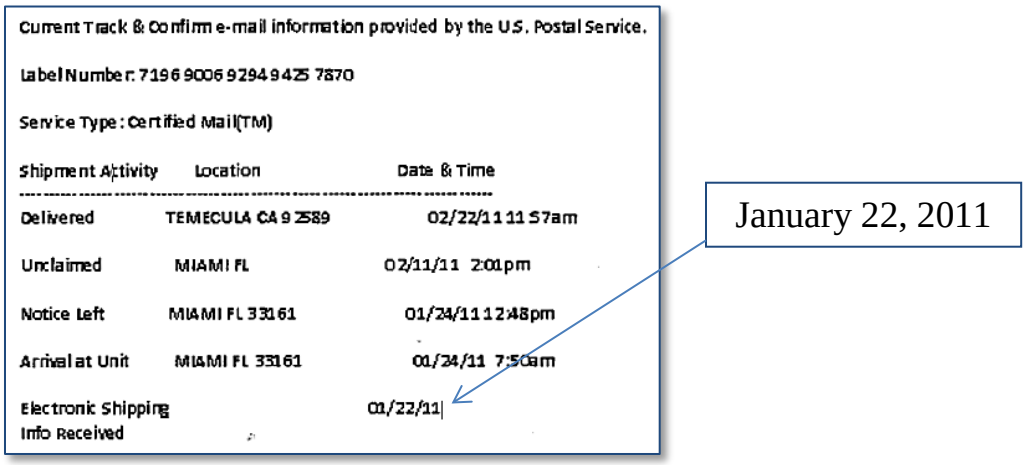
EXHIBIT 4
(Excerpt)

After the Bank rested,[33] the Homeowner moved for an involuntary dismissal asserting that a communication with the United States Postal Service confirmed that the actual date the default notice (Exhibit 4) was received by USPS for

[32] Exhibit 4 (R. Vol. IV).

[33] T. 135.

sending was January 22, 2011—four days after the witness testified the notice was mailed:[34]



The Bank's counsel interrupted the Homeowner's argument with the exclamation that it was "not true" that the notice was mailed less than 30 days from the date it was dated.[35] Under questioning by the court, Davids again asserted that the envelope itself demonstrated that the notice was also mailed first class mail (apparently under the belief that certified mail is something different than first class).[36] But then she testified that the way the Servicer's mailing works was that the Servicer's mail was placed in first class and certified mail bins and then picked up and given to the post office—to which the court responded that there was no way a notice would just sit in a mail truck:

[34] T. 140-141.

[35] T. 142.

[36] T. 145.

> THE COURT: So there's just – I have to be intellectually honest here. If a bin is picked up by the mail carrier, it's not going to sit in that truck. They move that mail. That mail's going to get scanned on the day that the mailman got it...[37]

The Court then admitted the postal service communication into evidence over the Bank's objection (Defendant's Exhibit A).[38] Nevertheless, it denied the Homeowner's motion for involuntary dismissal.[39]

The defense case consisted of testimony from the Homeowner that he did not recognize the default notice[40] and that the reason he defaulted was because he was induced to do so by his bank.[41]

After the defense rested, the Homeowner renewed his motion for involuntary dismissal, once again asserting that the Bank failed to prove compliance with conditions precedent to foreclosure.[42] And after this motion was denied for the second time by the court,[43] he argued in his closing that Davids was unqualified to lay the business records exception for the documents admitted into evidence.[44]

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[37] T. 149.

[38] T. 155; R. Vol. IV.

[39] T. 158.

[40] T. 160.

[41] T. 161.

[42] T. 187.

[43] T. 188.

[44] T. 190-191.

The court then granted judgment in favor of the Bank[45] from which the Homeowner appealed.[46]

[45] T. 193; Final Judgment of Foreclosure, October 28, 2014 (R. 487-491).

[46] Notice of Appeal, November 6, 2014 (R. 479-486).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred when it applied the business records exception to the hearsay rule in this case. The Bank'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 sufficiency of the evidence, an issue which may be raised for the first time on appeal, does not support the final judgment. Specifically, the Bank failed to provide competent, substantial evidence that it complied with the notice provisions of the mortgage before filing the foreclosure lawsuit. There was no competent evidence when the notice was sent or how. And even if there had been, the notice itself is insufficient to satisfy the requirements of Paragraph 22. Further, the Bank waived any "prejudice" argument by failing to assert this as an avoidance in its reply and even if it had not, it failed to prove this avoidance at trial.

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 Bank's witness was not qualified to lay the foundation for a business records exception for the exhibits she 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.

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 record-keeping 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, Davids would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would have had to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

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

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

But 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) (holding that despite witness's use of "magic words"—the

elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an

adjuster was not qualified to testify about the usual business practices of sales agents at other offices).

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

In this case, Davids testified that she was employed with the Servicer for just two years prior to trial[47] and that her sole job function was to

[47] T. 59.

"handle" a portfolio of litigated loans and appear as a corporate representative for the Servicer.[48] Prior to her employment with the Servicer, the only other experience she had working with a bank was when she was employed as a "title resolution manager" with a law firm.[49]

And for nearly every document she sought to introduce, she had absolutely no experiential familiarity with the department responsible for creating them. For instance, she admitted that entries in the payment history (Exhibit 5) were created by several different departments—but she could not even name all of them.[50] Further, she did not work in, or supervise anyone who worked in, any of the departments responsible for creating these records.[51] Likewise, she admitted that she neither worked in, nor supervised anyone who worked in, the department responsible for creating the default notice (Exhibit 4).[52] In fact, Davids did not even supervise anyone in her own department.[53] In short, her operational expertise

[48] T. 17; T. 62.

[49] T. 61.

[50] T. 87.

[51] T. 94.

[52] T. 81.

[53] T. 95.

with the Servicer's documents was limited to reading and interpreting servicing records and inputting information into those records.[54]

In short, Davids was a "robo witness"—one of the hearsay-toting automatons, the use of which the Fourth District explicitly forbade in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015). While certainly well trained in the art of giving hearsay testimony, she was not a records custodian or other qualified witness since she was neither in charge of, nor (other than through hearsay) acquainted with, any of the activities constituting usual business practices for creating and maintaining the Servicer's exhibits. Her only connection to the documents was that she had read them and that her "training" taught her how to parrot the business records exception.

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

On a direct question posed by the trial court, Davids admitted that the entire basis of her knowledge regarding the Servicer's documents was garnered through her "training."[55] And the Bank will no doubt cite to this to 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

[54] T. 67-68.

[55] T. 41.

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 thereby 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 improper 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 on-the-job-responsibility tied to the business activity. *See e.g.*, *Lassonde v. State*, 112 So. 3d at 662. Acceptable training would be instruction on how to perform a business-related job, not a litigation-related job. To hold otherwise would have the business record exception swallow the rule because <u>there is no record that a witness cannot be told (or "trained") to say meets the exception</u>.

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);[56] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[57]

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

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As this Court noted in *Calloway*, "[t]he rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to

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

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

keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *See generally U.S. v. McIntyre*, 997 F. 2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business records exception is "a practice and environment encouraging the making of accurate records.") (Citations omitted). For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan[58] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[59]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's

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[58] 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.

[59] *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.

recordkeeping ineptitude 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.

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.

Exhibit 7 was merely another company's document incorporated into the Servicer's records.

Davids at first claimed that the screen shot purporting to establish that the Bank was the owner of the note (Exhibit 7) was information that was input by the Servicers' department that onboards the loans when it became the servicer.[60] She later admitted, however, that when the information in Exhibit 7 was input by Countrywide and was acquired when the Servicer acquired Countrywide.[61] The Servicer bought Countrywide's entire "platform," and therefore, "the information

[60] T. 125. If any actual boarding or records occurred in this case, Davids' "knowledge" about it was rank hearsay. She did not know the name of the department that would perform the onboarding or even where it was located. (T. 127).

[61] T. 130.

didn't change hands."[62] In other words, this exhibit was merely a document "incorporated" into the Servicer's records—and therefore inadmissible hearsay. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015).[63]

Bank of America may argue—as it typically does—that because it adopted the previous servicer's recordkeeping system, it was not required to establish trustworthiness by verifying the accuracy of those records when it inherited them. Since they never "boarded" the records, they claim that they are not bound by such cases as *Calloway* and *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) that require such verification during boarding. As a result, the Servicer did no accuracy checking.[64]

But simply inheriting a computerized recordkeeping system does not remotely guarantee, or even imply, that Countrywide entered the information accurately. An equivalent statement in the era of paper documents would be that the Servicer did not need to check the accuracy of Countrywide's recordkeeping

[62] T. 130. *See also*, T. 28 (testimony that there was no "transfer of platform, they were all servicing the same platform.").

[63] Notably, *Pin-Pon* and *Calloway* were decided on the very same day.

[64] In fact, the only testimony about accuracy checking was Davids' self-serving testimony that she herself "checked" the documents for "accuracy"—without any explanation of what "accuracy" check she did.

because it bought Countrywide's file cabinet and continued to maintain the documents inside those same drawers.[65]

Thus, the boarding process that Davids described was wholly inadequate to make Exhibit 7 admissible and that insufficiency alone requires reversal. The same is true for the portion of the payment history which included the prior servicer's documents.

[65] The very argument exposes the truth about the financial industry's claims about accuracy checking during the boarding of information from one servicer to another. In reality, all that is ever checked is the accuracy of the duplication process—a verification that each and every data point is perfectly copied to the new system…warts and all. These "data integrity" checks do not confirm the accuracy of the prior servicer's recordkeeping, but simply insure that every bit of false and mistaken information in the original records is mirrored in the new system. This is why, when a bank buys the entire computer system of its predecessor (as it did here) it wrongly believes it has complied with the trustworthiness objective of the hearsay exception because there is no need to actually copy data. But the requirement of verification as an alternative means of establishing a business record exception was intended to demonstrate the trustworthiness of the original information, not the trustworthiness of the copying process.

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

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

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

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

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, Florida courts, have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Holt v. Calchas*, 155 So. 3d at 506; *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of this rule which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may

be admitted into evidence. It is telling that the Bank chose to conduct this litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the business.

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

* * *

In summary, the court erred in admitting the Bank's exhibits, the predicate for which Davids attempted to lay. The most egregious of these was the alleged acceleration notice, the payment history, and the screenshot allegedly proving the Bank's ownership. Because the acceleration letter was not admissible through this witness, the case must be remanded for dismissal. *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015) ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case.").[66] Likewise, without

[66] In *Holt*, the Fourth District held that the default notice at issue in that case was admissible as a verbal act. *Id*. at 507. Here, however, the notice was not admitted "merely to show that it was made," but rather to prove the truth of the matter it

the payment history, there was no evidence of the Bank's damages and the trial court was likewise obligated to dismiss. *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."). And finally, without the screen shot, there was no evidence of the Bank's standing which also required dismissal. *Hunter v. Aurora Loan Services, LLC*, 137 So. 3d 570, 574 (Fla. 1st DCA 2014).

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purportedly asserts—that it was mailed certified and first class mail on January 18, 2011. (T. 43).

II. Even if it had been admissible, the default notice did not satisfy the notice requirements of the mortgage and therefore the case should be dismissed.

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

Paragraph 22 of the mortgage required the Bank, prior to filing the foreclosure action, to send the Homeowner a notice of acceleration which would give him a thirty-day opportunity to cure:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that 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.[67]

The Bank, however, failed to present any competent substantial evidence when it actually placed it in an envelope, stamped it, and brought it to the post office or mailbox for delivery. There is therefore insufficient evidence to support a finding that the Bank complied with conditions precedent to foreclosure.

The thirty day notice must be strictly observed. *See Kurian v. Wells Fargo, Nat. Ass'n*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (summary judgment

[67] Mortgage, Composite Exhibit 1, ¶ 22.

reversed where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1285 (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter).

The alleged notice identifies this cure date as exactly thirty days from the date of the notice.[68] Thus, for the Homeowner to have the benefit of the agreed thirty-day cure period, he must be given the notice the day it was dated. The Bank would normally rely on the legal fiction in Paragraph 15 which allows the court to "deem" that the Homeowners receive notice on the day it is mailed:

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.[69]

Accordingly, in the instant case, to prove that the Homeowner was given a full thirty days to cure, the Bank needed to prove, not just that the notice was

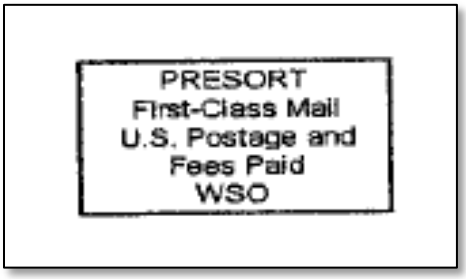
[68] Notice dated January 18, 2011, Exhibit 4 (indicating that in order to cure the default, the Servicer was required to receive payment on or before February 17, 2009).

[69] Mortgage, Composite Exhibit 1, ¶ 15.

mailed, but when the notice was mailed—and more specifically, that it was mailed on the date it was written.

Here, the Bank's only "evidence" was a dated letter. And even if the date on the letter could be assumed to be the date it was mailed (rather than merely the date it was written), this statement would be rank hearsay and insufficient to prove compliance with the notice provisions. *Webster v. Chase Home Finance, LLC*, 155 So. 3d 1219 (Fla. 5th DCA 2015) (reversing final judgment of foreclosure after bench trial because trial court permitted impermissible hearsay testimony regarding lender's compliance with notice provisions of the mortgage).

But there was ample evidence—mostly from the Bank itself—that established that the date on the letter was not the date that it was delivered the post office for mailing. To being with, the envelope itself indicates that the letter was not delivered immediately to the post office, but was first sent to be presorted in order to save the Servicer money:



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

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

Duggan v. Zip Mail Services, Inc., 920 SW 200, 201 (Mo. App. 1996). This presorting would explain the four day delay that the trial court found difficult to reconcile with its knowledge of postal service operations.

And contrary to the Davids assumption, the words "first class mail" do not indicate that a separate first class letter was sent without being certified because certified mail is not a separate "class," but simply a service added to first class mail. All certified mail is first class mail.[70] And indeed, the envelope bears the

[70] Certified mail is "first class mail for which proof of delivery is secured but no indemnity value is claimed." Mirriam-Webster online dictionary, available at: http://www.merriam-webster.com/dictionary/certifiedmail. See also *Session v. Director of Revenue*, 417 SW 3d 898, 904 (Mo.App W.D. 2014) ("Certified mail is

tracking number of certified mail. If the letter was only sent by certified mail, this added still more delay to the delivery—and the risk of non-delivery—for which the Homeowner never bargained.[71]

And finally, even if the Servicer mailed a separate letter by simple first class (without the certified, return receipt requested service), there is no evidence that actual mailing would not have similarly been postponed by presorting. These observations are all corroborated by the Homeowner's evidence that established that the letter did not reach the post office until January 22, 2011—four days after the date on the letter.[72]

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a form of first class mail and, therefore, Session received notice by first class mail.").

[71] The Servicer's use of certified mail rather than normal first class mail is not mentioned as a permitted form of delivery in Paragraph 15 of the mortgage. Certified mail is a special service offered on first class mail which requires the recipient to be at home to sign for the letter before it is actually delivered. Here, it not only delayed the bargained-for delivery time, but actually caused the Homeowner not to receive the notice at all. (T. 147 (court noting that the notice was unclaimed); T. 169 (Homeowner testimony that he does not recognize the notice)). In agreeing to Paragraph 15's one-sided provision that notices from the lender (but not the borrower) are "deemed to have been given …when mailed by first class mail," the Homeowner never agreed to the delays (or the risk of non-delivery) caused by the use of something other than simple, unadorned first class mail.

[72] Defendant's Exhibit A.

Therefore, the Bank failed to establish the date the notice was mailed and, as a result, it could not have proven compliance with the thirty-day notice provision of Paragraph 22 or that the Bank was entitled to the legal fiction in Paragraph 15.

Even if it had been admissible, the notice improperly included a breach that had not even occurred.

The plain language of Paragraph 22 of the mortgage required that the Servicer send the Homeowner a notice following his alleged breach which specifies the breach he allegedly committed and which specifies a date not less than thirty days after the notice was sent which the Homeowner could cure the breach.

The notice admitted into evidence, however, does not comply with the mortgage's notice requirements because it includes an amount not yet due in the cure amount:[73]

> You have the right to cure the default. To cure the default, on or before February 17, 2011, BAC Home Loans Servicing, LP must receive the amount of $4,037.28 plus any additional regular monthly payment or payments, late charges, fees and charges which become due on or before February 17, 2011.

The Servicer therefore attempted to provide notice that was not only prior to this assumed future breach, but which provided the Homeowner less than thirty days to cure that breach. This is because the alleged future breach could not have

[73] Notice dated January 18, 2011, Exhibit 4.

occurred until February 1, 2011, leaving the Homeowner only seventeen days from the date of the notice to cure this additional breach. In other words, the Servicer impermissibly tried to start the thirty-day clock to cure a default of the February 1, 2011 payment 14 days before the payment was even due.

To understand the Servicer's overreaching, it is important to note that there is an important difference between curing a default and bringing the loan current. A borrower can cure a default, but still be behind because a new payment came due in the interim. The mortgage clearly contemplates that a borrower can continue indefinitely in this way, curing successive defaults so as to avoid the draconian consequence of foreclosure, even though the loan is not current by one payment. As a result, the borrower always has a thirty-day grace period before foreclosure is initiated. And while one payment remains overdue during this period, the lender more than makes up for the lost time value of money through the successive late fees that the borrower will pay until completely current.

Here, the Servicer's overreaching not only fails to provide the thirty-day grace period, but it rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to

"specify"[74] the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

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

The proper remedy of remand is involuntary dismissal.

The demand letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt*, 155 So. 3d at 507 ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015)

[74] 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).

(holding that failure to comply with notice provisions of mortgage requires dismissal of the case).

To the extent that this Court is persuaded that the Fifth District's decisions in *Gorel v. Bank of New York Mellon*, __ So. 3d __, 40 Fla. L. Weekly D1094 (Fla. 5th DCA May 8, 2015) and *Vasilevskiy v. Wachovia Bank, Nat. Ass'n*, __ So. 3d. __, 2015 WL 2414502 (Fla. 5th DCA 2015 May 22, 2015) hold otherwise, those decisions should be distinguished or outright rejected by this Court. First, "prejudice," or the idea that a breach must be material, is an affirmative defense. And when a plaintiff seeks to avoid an affirmative defense (like the Bank did at trial when it presented the default notice), it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to file a reply waives this "affirmative defense to the affirmative defense." *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the due process consideration that the Homeowner must be put on notice that prejudice is an issue to be tried.

And even if it had filed a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, the Bank also had the burden of proving such a claim. *See Richardson v. Wilson*, 490 So. 2d 1039, 1040 (Fla. 1st DCA 1986) ("the burden of showing that the statute of limitation comes within a statutory exception is on the

plaintiff"). The Bank adduced no evidence that the Homeowner suffered no prejudice.[75]

Second, the Court should simply reject *Gorel* and the majority's decision in *Vasilevskiy* adopt instead Judge Palmer's well-reasoned dissent in *Vasilevskiy*. Noting that the bank did not attempt to avoid the borrower's Paragraph 22 defense by providing evidence that the borrowers were not prejudiced, Judge Palmer correctly observed that there should not be any "materiality test" with regards to Paragraph 22.

Therefore, on remand, the case should be dismissed.

[75] If anything, the Homeowner proved that he was prejudiced because his testimony unequivocally proved that he was induced to default by his lender. (T. 161; T. 173). And for this reason, it was also an error for the trial court to prohibit the Homeowner from testifying about what he would have done had he actually received the notice (T. 181) since this testimony could have completely rebutted the notion that he was not prejudiced by the Bank's failure to comply with Paragraph 22.

CONCLUSION

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

Dated: June 8, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this June 8, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this June 8, 2015.

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