In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted] [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HSI ASSET SECURITIZATION CORPORATION TRUST 2006 OPT4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OPT4, et al.

Appellees.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Plaintiff-Appellee DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HSI ASSET SECURITIZATION CORPORATION TRUST 2006 OPT4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OPT4 (the BANK or DEUTSCHE BANK) obtained a summary judgment removing Defendants-Appellants [redacted] and LISETTE [redacted] ("the [redacted] from their West Palm Beach home. The BANK did so without proving that it had standing to foreclose at the time it filed its Complaint or otherwise disproving the defenses raised by the [redacted] Despite filing two affidavits in support of its summary judgment motion—one of which was untimely—DEUTSCHE BANK failed to allege, much less swear, that the single person who signed both endorsements to the Note had the authority to do so, or that it possessed the original Note at the time it initiated the foreclosure proceedings. Moreover, the affidavits filed, on their face, provide calculations that are internally inconsistent and raise genuine issues of material fact that preclude summary judgment. Summary judgment must, therefore, be reversed.

II. Appellant's Statement of the Facts

A. The [redacted] deny material allegations of the Complaint and plead the BANK's lack of standing and failure to have posession of the Note as affirmative defenses.

DEUTSCHE BANK initiated foreclosure proceedings against the [redacted] by filing a single count complaint against them in Palm Beach County.[1] The Complaint alleged that [redacted] was the maker of a Note, and that DEUTSCHE BANK "is the current owner of *or* has the right to enforce" the Note and Mortgage.[2] (emphasis added). The Complaint attached what it purported to be a true copy of the Note and Mortgage.[3] The Note, entitled "Adjustable Rate Note," stated that the starting interest rate would be 6.750%, and that the rate would be adjusted on January 1, 2008 and every six months thereafter based upon the LIBOR Index.[4]

The copy attached to the Complaint also showed that the Lender identified on the face of the Note was H&R Block Mortgage Corporation, a Massachusetts Corporation, not Plaintiff DEUTSCHE BANK.[5] Attached to the Note, on separate

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[1] R. 1-22.

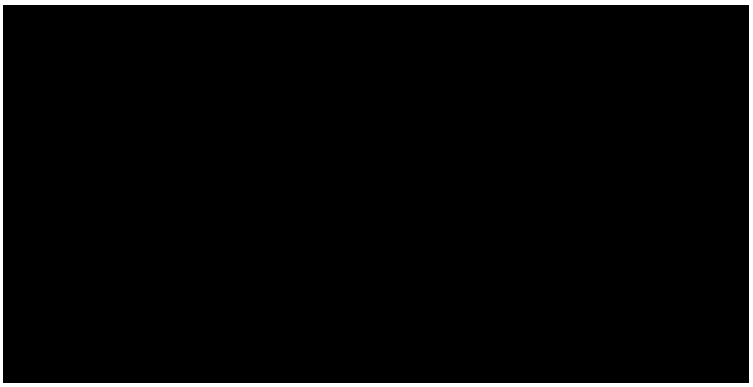
[2] R. 2 at ¶¶5-7.

[3] *Id.* at ¶ 3 and R. 6-22 (Copy of Alleged Mortgage and Note).

[4] R. 6 at ¶ 2, ¶ 4.

[5] R. 6 at ¶ 1.

pages, were two different undated allonges.[6] The first allonge purports to endorse the Note to Option One Mortgage Corporation, and is endorsed by H & R Block Mortgage Corporation by its purported Assistant Secretary, Elizabeth Causseaux:[7]



The second undated allonge bears a purported endorsement in blank, signed by the very same person: Elizabeth Causseaux, this time ostensibly acting as Assistant Secretary of Option One Mortgage Company:[8]

[6] R. 9-10.

[7] R. 9.

[8] R. 10.

The Complaint also "declares the full amount payable under said Note and Mortgage to be due and payable" as of May 13, 2011. [9]

The [redacted] appeared through counsel and filed detailed affirmative defenses, which they later amended.[10] The operative Answer expressly denied the amount of the debt, and "affirmatively claim[ed]" that the BANK had inflated the amounts due through the addition of "unauthorized, illegal, and predatory charges and fees" that had been "added to the claimed balance due."[11]

The Answer also denied the allegation that DEUTSCHE BANK "is the current owner or has the right to enforce the Note and Mortgage."[12] The Answer pointed out that both allonges were executed by Elizabeth Causseaux professing to act as Assistant Secretary for two seemingly unrelated entities, and alleges that DEUTSCHE BANK "has failed to properly plead standing to maintain this

[9] R. 1-2 and ¶ 10.

[10] R. 43-48 (Answer and Affirmative Defenses); R. 61-63 (Amended Answer and Affirmative Defenses).

[11] R. 63.

[12] R. 63 ¶ 6 (denying allegations of R. 2 ¶ 6).

action."[13] The Answer alleged that DEUTSCHE BANK did not possess the Note.[14]

B. DEUTSCHE BANK moves for summary judgment relying on a faulty affidavit that did not refute standing and did not support the claimed interest.

DEUTSCHE BANK sought a final summary judgment, and filed a copy of the Note and Mortgage along with its Motion for Summary Judgment ("MSJ").[15] On the same day it filed its MSJ, the BANK also filed a document entitled "Affidavit of Indebtedness," as well as affidavits to support its claims for attorney's fees and costs.[16] Neither the MSJ nor the Affidavit of Indebtedness made any attempt to rebut the [redacted] affirmative defenses, however.[17] The MSJ relied solely upon the complaint, rather than any evidence in the record, to support its claim that "Plaintiff has the right to enforce the Note which is the subject of this action…."[18] The Affidavit of Indebtedness parroted the same legal

[13] R. 63-64 at ¶ 1-4.

[14] R. 64 at ¶ 5.

[15] R. 82-84; R. 75-81.

[16] R. 99-215 (Affidavit of Indebtedness); R. 88-89 (affidavit of costs); R. 85-87 (affidavit as to attorney's fees); R. R. 90-91 (affidavit as to reasonableness of attorney's fees).

[17] R. 82-84; R. 99-125.

[18] R. 82 ¶ 2.

conclusion as the Complaint, stating only "Plaintiff has the right to enforce the Note and Mortgage."[19]

In the body of the Affidavit of Indebtedness, the affiant claims almost three years' of interest at "variable rate(s)" but does not explain what interest rates are applied or when, demanding a total of $104,135.05 in interest.[20] The affidavit further demands interest of $62.94 per day from December 30, 2011, again without stating what interest rate that *per diem* is based upon.[21]

Additionally, the *per diem* interest does not accumulate to the amount awarded in the final judgment. The final judgment awards the BANK $114,686.84 in "Interest to the date of this judgment."[22] Deducting the $104,135.05 of past interest (through December 29, 2011), leaves $10,551.78. But the *per diem* of $62.94 accumulated for the 117 days between the judgment and the affidavit amounts to only $7,363.98—a difference of well over $3,000.

[19] R. 100 ¶ 3.

[20] R. 100 ¶ 5.

[21] *Id.*

[22] R. 222.

Furthermore, although the affidavit claims that a true and correct copy of "the business record" that substantiates these figures is attached as Exhibit A,[23] none of the attached documents are labeled "Exhibit A."[24] The first document is entitled "Fact Verification Checklist," which has all the appearances of having been created for purposes of litigation.[25] The instructions on the face of the "Fact Verification Checklist" asks the affiant to "Verify each fact within the affidavit and initial next to corresponding information below," to attach additional supporting documentation if necessary, and to "reject the affidavit" if the fact cannot be verified.[26]

Like the affidavit itself, the Fact Verification Checklist contains nothing that would inform the trial court, the [redacted] or even the affiant as to what interest rates were used throughout the nearly four-year period for which past interest was computed. Likewise, one of the later attachments—presumably what the affiant used to verify the interest—gives a total interest figure without revealing the underlying rates. Indeed, it merely states "MULTIPLE IR CHANGE

[23] R. 100 ¶ 5.

[24] R.102-124.

[25] R. 102.

[26] *Id.*

PERIODS CROSSED," thus confirming that the debt figures were computed using a variety of different interest rates that were undisclosed—not only to the reader of the affidavit, but apparently, to the affiant himself.

C. The BANK submits additional summary judgment evidence less than 20 days before the summary judgment hearing.

Apparently recognizing its obligation to refute the [redacted] affirmative defenses, the BANK served an additional affidavit entitled "Affidavit in Response to Affirmative Defenses" (the Late Affidavit).[27] The certificate of service indicates that the Late Affidavit was served sixteen days prior to the summary judgment hearing, and the record reflects it was filed with the Court on the fifteenth day prior to the hearing.[28]

The Late Affidavit, like the Affidavit of Indebtedness, is executed by Fenton Ramsey as Vice President of AHMSI as servicing agent for the loan.[29] The Late Affidavit asserts that "[a]ccording to the business records, Plaintiff had the right to enforce the note prior to the filing of the Complaint. Plaintiff *is* in possession of the original note endorsed in blank."[30] The only item appended to the affidavit is

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[27] R. 126.

[28] R. 126.

[29] R. 128.

[30] R. 129 ¶ 6 (emphasis added).

an additional copy of the Note and Mortgage.[31] The BANK failed to attach to the affidavit any of the "business records" upon which Ramsey purports to rely that would demonstrate the BANK had the right to enforce the Note prior to filing the Complaint—by way of possession of an endorsed negotiable instrument or otherwise.

The trial court entered final summary judgment against the [redacted] on April 25, 2012.[32] The Court ordered the [redacted] to pay a total final judgment of $499,447.59[33] which included the interest computed from undisclosed rates and the incorrectly calculated *per diem* interest.

The [redacted] through counsel, timely moved for rehearing.[34] In that motion, the [redacted] brought to the Court's attention the issues with the late-service of the summary judgment evidence and other deficiencies in the affidavits, the BANK's failure to refute the affirmative defenses, and the BANK's failure to

[31] *Id.*; R. 130-146.

[32] R. 147-151.

[33] R. 147-151.

[34] R. 187-197.

properly calculate the interest owed. The trial court denied the motion for rehearing, and this timely appeal follows.[35]

[35] R. 211-212 (order denying rehearing); R. 219-229 (notice of appeal).

SUMMARY OF THE ARGUMENT

The summary judgment of foreclosure in this case does not add up. First, the BANK violated due process by filing some of its summary judgment evidence only fifteen days before the summary judgment hearing. This procedural infirmity alone requires reversal. *Servedio v. U.S. Nat. Bank Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010).

Second, neither the timely Affidavit of Indebtedness nor the Late Affidavit rebuts the affirmative defense challenging the endorsements. The BANK made no attempt to offer a scintilla of evidence to prove the authority of Elizabeth Causseaux to endorse the two allonges upon which its standing was based. The affidavits also failed to attach the actual business records upon which they are based, violating Rule 1.510(e).

Finally, the danger of allowing summary judgment based upon affidavits that fail to attach the proper underlying business records was realized in this case, because the few supporting materials submitted demonstrated that the interest calculation "defies simple arithmetic." *Spencer v. EMC Mortgage Corp*., __ So. 3d __, No. 3D11-136, 2012 WL 3705166 (Fla. 3d DCA August 29, 2012).

STANDARD OF REVIEW

This court reviews the entry of summary judgment as a matter of law *de novo*. *Soncoast Cmty. Church of Boca Raton, Inc. v. Travis Boating Ctr. of Florida, Inc.*, 981 So. 2d 654, 655 (Fla. 4th DCA 2008), *citing Craven v. TRG-Boynton Beach, Ltd.*, 925 So. 2d 476, 479-80 (Fla. 4th DCA 2006); *see also Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The Court must examine the record in the light most favorable to the non-moving party. *See Princeton Homes, Inc. v. Morgan*, 38 So. 3d 207, 208 (Fla. 4th DCA 2010). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Albelo v. S. Bell*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996).

Even where a defendant does not submit evidence in opposition, summary judgment must be reversed where the movant's evidence is not admissible or otherwise does not comply with the procedural requirements of Fla. R. Civ. P. 1.510. *Bifulco v. State Farm Mut. Auto. Ins. Co*., 693 So. 2d 707 (Fla. 4th DCA 1997) (reversing summary judgment because the "procedural strictures [of Rule 1.510] are designed to protect the constitutional right of the litigant to a trial…[and] are not merely procedural niceties nor technicalities").

ARGUMENT

I. The BANK Violated Rule 1.510 by Failing to File and Serve All of Its Summary Judgment Evidence Twenty Days Before the Summary Judgment Hearing.

Rule 1.510(c) requires that a party seeking summary judgment shall "serve the motion at least 20 days before the time fixed for the hearing…and shall also serve *at that time* copies of any summary judgment evidence on which the movant relies that has not already been filed with the Court. Fla. R. Civ. P. 1.510(c) (emphasis added). In addition to serving copies on the non-movant, the party seeking summary judgment must also place the evidence "on file" at least 20 days before the hearing. *Servedio v. U.S. Nat. Bank Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (reversing summary judgment of foreclosure where docket indicated "original" note was filed after entry of judgment and was not filed and served at least 20 days prior to the summary judgment hearing); *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989) (reversing summary judgment based upon late-filed and unsworn exhibits to motion in violation of Rule 1.510(c)).

DEUTSCHE BANK did not comply with this rule, because the Affidavit in Response to Affirmative Defenses was filed and served only 15 days prior to the

summary judgment hearing.[36] As a matter of due process, the "procedural strictures [of Rule 1.510] are designed to protect the constitutional right of the litigant to a trial…[and] are not merely procedural niceties nor technicalities." *Bifulco v. State Farm Mut. Auto. Ins. Co*., 693 So. 2d 707 (Fla. 4th DCA 1997). Because this was a violation of due process, the summary judgment must be reversed. *Servedio v. U.S. Nat. Bank Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (reversing summary judgment of foreclosure because plaintiff's evidence was filed late); *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989) (same); *Verizzo v. Bank of New York*, 28 So. 3d 976, 977 (Fla. 2d DCA 2010) (same).

II. The BANK Failed to Submit Competent Evidence to Refute the Affirmative Defenses Challenging the Authority of the Endorsements, and Therefore, Its Standing.

"Before a plaintiff is entitled to a summary judgment of foreclosure, the plaintiff must either factually refute the alleged affirmative defenses or establish that they are legally insufficient to defeat summary judgment." *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009), *quoting Knight Energy Servs., Inc. v. Amoco Oil Co*., 660 So. 2d 786, 788 (Fla. 4th DCA 1995) (citation omitted).

[36] R. 126-146 (certificate of service dated April 9, 2012); *see also* R. 147-151 (summary judgment entered at hearing and on docket on April 25, 2012).

DEUTSCHE BANK has not met this heavy burden, and the summary judgment must be reversed.

A. The BANK was required to adduce admissible and conclusive evidence that the endorsements were authorized to prove a transfer by "negotiation" under the Uniform Commercial Code.

In the Answer, the [redacted] challenged the authority of Elizabeth Causseaux to endorse notes as the Assistant Secretary of both the California corporation, Option One Mortgage Corporation ("Option One"), and the Massachusetts corporation, H&R Block Mortgage Corporation ("H&R Block"), and pled that the BANK lacked standing to foreclose.[37] Each undated endorsement was on a separate allonge annexed to the promissory note, even though there was plenty of room for endorsements on the Note itself. *See, e.g., Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618, 621 at n.2 (Fla. 5th DCA 2010) (defining an allonge as "a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof"). Because the [redacted] properly pled their challenge to the authority of the endorsing signatures, and because at summary judgment the court is required to draw all

[37] R. 63 ¶ 6 (denying Plaintiff is the current owner); R. 63-64 (as an affirmative defense, challenging Causseaux's authority to act as an officer of two different entities).

inferences in favor of the [redacted] the unauthenticated allonges, by themselves, were not sufficient evidence to support the BANK's claim that it had become a holder "entitled to enforce" the Note by a way of a "negotiation" under Article 3 of the Uniform Commercial Code ("UCC").

1. The Note and its allonges were not authenticated.

First, the BANK failed to authenticate the Note, including its alleged allonges, as an "original." The BANK cannot enforce a copy of a promissory note any more than a bank customer could cash a photocopy of a check. *Deutsche Bank Nat. Trust Co. v. Clarke*, 87 So. 3d 58, 61 (Fla. 4th DCA 2012) ("a party who seeks to foreclose on a mortgage must produce the original note"; requirement "protects the defendant against the possible negotiation of the note to a bona fide purchaser for value"); *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004) ("Because it is negotiable, the promissory note must be surrendered in a foreclosure proceeding so that it does not remain in the stream of commerce").

2. Self-authentication under the UCC applies to signatures, not documents.

Nor does the self-authentication provision for "commercial paper" assist the BANK, because it only provides a shortcut for authenticating signatures, not

documents themselves. § 90.902(8), Fla. Stat. (2012) ("Commercial papers and signatures thereon and documents relating to them" are considered self-authenticating, but only "to the extent provided in the Uniform Commercial Code."); § 673.3081 Fla. Stat. (2012) ("an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.") (emphasis added). No affidavit, including the Late Affidavit, even attempted to lay the foundation that the "original" Note was what it purported to be—an "original." The trial court, therefore, was not entitled to consider the Note and its alleged allonges as evidence for summary judgment.

3. Self-authentication does not apply where authenticity is denied.

Even if it had been proper for the trial court to consider the proffered documents as the original promissory note and allonges, the alleged endorsement signatures were not self-authenticating because their authenticity was specifically denied in the [redacted] Answer. Under the UCC, "[i]f the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity…" U.C.C. § 3-308(a) (2002) (enacted in Florida as § 673.3081(1) Fla. Stat. (2012)).

That the [redacted] specifically challenged the authority of the endorsements in their Answer, distinguishes this case from *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010). In *Riggs*, this Court found that the defendant could not attack the validity of the endorsement on the note, because "Subsection 673.3081(1)…provides that '[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings,'" and that defendant did not have a specific denial in the pleadings.

Here, by contrast, the BANK was on notice of the [redacted] specific denial of Causseaux's authority,[38] and as a result, was required to overcome that denial with admissible summary judgment evidence beyond the Note itself. More specifically, the BANK was required to provide evidence that Elizabeth Causseaux had authority to endorse the allonges for both entities on whose behalf she signed. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009) (requiring evidence to refute defenses).

Moreover, DEUTSCHE BANK well knows how to prove such authority, and has done so in the past in connection with transfers from Option One Mortgage

[38] R. 63 ¶ 6 (denying Plaintiff is the current owner); R. 63-64 (as an affirmative defense, challenging Causseaux's authority to act as an officer of two different entities).

Company. In *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So. 3d 495, 496 (Fla. 4th DCA 2011), DEUTSCHE BANK combined the original note with an affidavit from a representative of Option One's successor in interest confirming its ownership. Here, there is no affidavit from Option One or any identified successor: the only affidavits are from AHMSI as servicer, and neither make any statements regarding a relationship with Option One. Because the BANK did not make a similar showing here, the judgment must be reversed. On the strict summary judgment standard, the BANK was not entitled to any presumption of authenticity and was required to provide conclusive evidence of authenticity.

4. Nor is the BANK entitled to a presumption of authenticity and authorization.

It is true that the same UCC provision which places the burden of establishing the validity of the signatures on the BANK also establishes a rebuttable presumption that certain signatures on a negotiable instrument are "authentic and authorized." U.C.C. § 3-308(a) (2002); § 673.3081(1) Fla. Stat. (2012). Here, the BANK is not entitled to any such presumption for two reasons.

a. The presumption of authenticity of a signature on a negotiable instrument applies only to the maker's signature, not to an endorser's signatures.

First, the presumption regarding authenticity was intended to apply only to the signatures of the original makers of a Note, here the [redacted] and not to the signatures of third-party endorsers. Nothing in § 3-308 of the UCC refers to endorsements or signatures of endorsers. The Official Commentary to § 3-308 UCC explains that "[t]he presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant." U.C.C. 3-308 cmt. 1 (2002); § 673.3081, Fla. Stat. Ann. (2012) (emphasis added).[39]. Thus, the drafters of the UCC used the word "signatures" to mean those of "defendants" (i.e. "makers")—the ones denying the authenticity of their own signatures.

[39] The Florida courts regularly rely upon the Official Comments of the UCC to guide their interpretation, in keeping with the goal of ensuring uniform application of the law nationwide. *See, e.g., Nakhal v. Nations Bank*, 796 So. 2d 1281 (Fla. 4th DCA 2001) (relying on official comment to interpret UCC provision); *Union Planters Bank, N.A. v. Peninsula Bank*, 897 So. 2d 499, 500 (Fla. 3d DCA 2005) (same); *Dickason v. Marine Nat. Bank of Naples, N.A.*, 898 So. 2d 1170, 1173 (Fla. 2d DCA 2005) (same); *Cone Constructors, Inc. v. Drummond Cmty. Bank*, 754 So. 2d 779, 780 (Fla. 1st DCA 2000).

Moreover, this "access to evidence" rationale for granting a presumption as to the maker's signature cannot be logically extended to signatures by endorsers, because that evidence will not be "within the control of, or more accessible to, the defendant." Here, the evidence of Causseaux's authority to act for two different companies is solely within the control of the BANK. It would defy logic—as well as any reasonable sense of equity and fairness—to create a presumption as to the authenticity of endorsements based on access to evidence when the makers of the instrument (the [redacted] have no such access.

Nor is the other rationale for the UCC presumption—that "unauthorized signatures are very uncommon"—applicable to documents submitted by banks in foreclosure cases. As discussed more fully below, it is now common knowledge that "many, many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).

Without applying a presumption to which the BANK was not entitled, there was no evidence before the trial court that the suspicious endorsements were authentic or authorized. The BANK never made any attempt to explain how Elizabeth Causseaux had authority to execute endorsements on behalf of two different companies. "There is no presumption that the endorsements of a prior holder are genuine, and when properly put in issue by the pleadings, the party

seeking to establish the status of holder of order paper must prove the validity of those endorsements on which his status depends." *Ederer v. Fisher*, 183 So. 2d 39, 41 (Fla. 2d DCA 1965). Where a party does not conclusively prove the signer had authority to make the endorsement, summary judgment must be reversed. *Sykes Corp. v. E. Metal Supply, Inc.*, 659 So. 2d 475, 478 (Fla. 4th DCA 1995) (reversing summary judgment due to conflicting evidence regarding scope of signer's authority to endorse instrument).

b. Any presumption of authenticity of the endorsement had been burst.

The second reason the BANK is not entitled to the UCC presumption of authenticity is that —even if it were applicable—it was burst by the BANK's own evidence. According to the UCC Comment, application of the presumption merely means that the defendant is "required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence." U.C.C. 3-308 cmt. 1 (2012); § 673.3081, Fla. Stat. Ann. (2012) (emphasis added). After producing evidence of the grounds of the denial, the presumption is burst and the plaintiff must prove authenticity and authority by the preponderance of the evidence. *Id*.

Here, grounds for the denial were within the endorsements themselves, the very evidence upon which the BANK sought to rely. And while the admissibility of these endorsements is, from the perspective of the BANK, the very issue to be determined, from the perspective of the these documents had become part of their opponent's pleadings, making proof by way of admissible evidence unnecessary. *Fernandez v. Fernandez*, 648 So. 2d 712, 713 (Fla. 1995) ("Admissions in the pleadings are accepted as facts without the necessity of further evidence").

Of course, not only were the entitled to consideration of the suspicious nature of the endorsements themselves, but because this was determined on summary judgment, they were entitled to every reasonable inference from those dubious signatures. *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006) (inference drawn from record evidence favoring non-movant was "sufficient to constitute the scintilla of appreciable evidence required to defeat a motion for summary judgment").

"An inference is a permissible deduction from the evidence which the jury may reject or accord such probative value as it desires." *Little v. Publix Supermarkets, Inc*., 234 So. 2d 132, 133 (Fla. 4th DCA 1970). An unexplained coincidence can be sufficient to raise an inference that precludes summary

judgment. *Tucker v. Am. Employers' Ins. Co.*, 218 So. 2d 221, 223 (Fla. 4th DCA 1969) (reversing grant of summary judgment where unlawful surveillance was so close in time to permissible surveillance so as to give rise to a possible inference that party committed tortuous act); *see also Belden v. Lynch*, 126 So. 2d 578, 580 (Fla. 2d DCA 1961) ("where reasonable minds may differ as to reasonable inferences to be drawn from a given factual situation, then a problem is presented for jury determination.")

What inferences are reasonable is influenced by the common knowledge of the times, or the Zeitgeist, in which the court finds itself. Presently, it is common knowledge that "many, many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of New York Mellon*, 57 So. 3d at 954. It is well-known that unauthorized individuals are signing mortgage-related documents wearing many different corporate hats. *See, e.g., Deutsche Bank Nat. Trust Co. v. Maraj*, 18 Misc. 3d 1123(A), 856 N.Y.S.2d 497 (N.Y. Sup. Ct. 2008) (Judge expressed concern that the person who had signed documents as the Vice-President of two unrelated companies may have "engage[d] in self-dealing by wearing two corporate hats" and that it may be an indication of fraud or malfeasance on the part of the foreclosing plaintiff, Deutsche Bank National Trust Company.); *see also Onewest Bank, F.S.B. v. Drayton*, 29 Misc. 3d 1021, 910 N.Y.S.2d 857 (N.Y. Sup.

Ct. 2010) (In light of media attention about bank "robo-signers," judge required additional showing of authority of signer). It may certainly be argued (although not directly applicable here), that the robo-signing scandal and resulting settlement between leading banks and multiple state attorneys general indicates that bank records, as a whole, are not sufficiently reliable to qualify for the business records exception to hearsay. § 90.803(6) Fla. Stat. (2012) (records of regularly conducted business are an exception to hearsay "unless the sources of information or other circumstances show lack of trustworthiness"). At the very least, the fact that bank foreclosure documents are notoriously unreliable supports the reasonability of—if not compels—an inference in the favor that the multi-hatted endorser was not authorized to transfer the Note. The BANK, therefore, must prove up the validity of endorsements to obtain summary judgment when, as here, their authenticity has been denied.

5. Self-authentication is merely an admissibility threshold and cannot support a summary judgment in the face of contrary inferences.

Moreover, even if the document and endorsement signatures qualify as self-authenticated for the threshold purpose of admission into evidence, the Note and allonges still do not meet the BANK'S evidentiary burden to disprove the defenses. Self-authentication is intended to provide a "*streamlined*

alternative to the more tedious authentication procedure," not to provide any additional evidentiary weight to documents so authenticated. *Sunnyvale Mar. Co., Inc. v. Gomez*, 546 So. 2d 6, 7 (Fla. 3d DCA 1989). Thus, even if the allonges (and the signatures thereon) met the requirements of "self authentication" under the evidence code and the UCC to be admissible as summary judgment evidence, that does not mean they constituted conclusive evidence of Causseaux's authority. As the *Sunnyvale* court explained, "admission into evidence of a matter merely indicates initial sufficiency for presentation to the trier of fact." *Id.* However, "[o]nce the matter is in evidence the opposing party is free to challenge its genuineness. The court or the jury may find it to be not genuine." *Id.*, *citing*, M. Graham, Handbook of Florida Evidence § 901.0, at 761 (1987) ("The ultimate decision as to whether a person, document, or item of real or demonstrative evidence is as purported is for the trier of fact.").

Here, because the [redacted] affirmative defense challenged Causseaux's authority, the Court was required to draw all inferences in favor of them and deny summary judgment. Under the UCC, as adopted in Florida, generally "an unauthorized signature is ineffective." § 673.4031(1), Fla. Stat. (2012). Thus, the [redacted] defense that the BANK lacks standing would be proven if they were

eventually able to show that Causseaux lacked authority to sign as an officer of both Option One and H&R Block.

Again, because the BANK is seeking the extraordinary remedy of judgment without a trial on the merits, the BANK has a duty to "demonstrate *conclusively* that the appellants could not prevail." *Tamm v. Bradley*, 696 So. 2d 816 (Fla. 2d DCA 1997) (emphasis in original). In so doing, if there is even the "possibility of an issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Id.*, *citing Gomes v. Stevens*, 548 So.2d 1163, 1164 (Fla. 2d DCA 1989). That the same person signed as an officer of two unrelated entities headquartered across the country from each other is inherently suspect.

In short, simply deeming the endorsements to be admissible does not wipe away the natural inference that they were made without authority. This competing inference precludes summary judgment. The summary judgment standard put the burden squarely on the BANK to conclusively prove Causseaux's authority. The BANK failed to even attempt to meet this high standard.

B. The BANK failed to prove it was the proper entity to foreclose <u>at the time it filed suit.</u>

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *McLean v. JP Morgan Chase National Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). No matter how standing to enforce a note and foreclose a mortgage is obtained, "a party's standing is determined <u>at the time the lawsuit was filed</u>." *Id.*, *citing Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005) (emphasis added). The assignment or transfer that provides a party with the right to sue "must pre-date the filing of a foreclosure action." *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group*, LLC, 75 So. 3d 773, 776 (Fla. 4th DCA 2011).

Because the BANK is not the initial Lender on either the Note or the Mortgage, its only basis for standing in the record is the undated allonges endorsing the Note first to a third party, and then in blank.[40] *Riggs*, at 933. Because the allonges fail to show when a transfer of possession to the BANK occurred—i.e., that it was prior to the initiation of this lawsuit—the BANK failed

[40] R. 1-22.

to adduce even an iota of evidence on the single most important element of standing.

C. The Late Affidavit also failed to prove standing.

The BANK's untimely effort to meet its obligation to refute the affirmative defenses was, in any event, insufficient as a matter of law to prove standing. The Affidavit stated, in the present tense, that "Plaintiff is in possession of the original note indorsed in blank."[41] The affiant's specific choice of the present tense "is" when speaking about Plaintiff's possession, implies that a statement that Plaintiff "was" in possession when the case was filed would be false.

This is especially evident given that the affiant consciously chose to use the past tense in another phrase in the same paragraph, stating that "Plaintiff had the right to enforce the note prior to the filing of the Complaint."[42] This conclusion, however, is expressly based upon his review of unidentified, unattached, and unsworn business records.[43] Such a conclusory statement, derived entirely from hearsay, cannot form an evidentiary basis for summary judgment—even if it had been timely filed and served—because it is not based upon personal knowledge.

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[41] R. 129 ¶ 6 (emphasis added).

[42] *Id.*

[43] *Id.* (emphasis added).

Under Rule 1.510(e), Florida Rules of Civil Procedure, "affidavits must be based on personal knowledge, set forth facts which would be admissible in evidence, and show 'the affiant is competent to testify to the matters stated therein.'" *Coleman v. Grandma's Place, Inc.*, 63 So. 3d 929, 932 (Fla. 4th DCA 2011), quoting Fla. R. Civ. P. 1.510(e). "All documents referenced in the affidavit must be sworn or certified and attached to the affidavit." *Id.* (court could not have relied on insufficient affidavit that did not attach business records). In this case, the affiant swore that Plaintiff had the right to enforce the note prior to the filing of the complaint, but did not attach sworn or certified copies of the business records to support that statement. Without copies of those mysterious records, the statement is inadmissible hearsay and not competent summary judgment evidence.

Moreover, current possession of the Note endorsed in blank does not prove that the BANK had possession at the time it filed suit. Thus, under the authority of *McLean v. JP Morgan Chase National Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012), the Late Affidavit did not bridge the evidentiary gap in the BANK's proof of standing.

III. The Interest Awarded in the Final Judgment Is Not Supported by the BANK's Summary Judgment Evidence.

The Judgment must also be reversed because the interest calculations both in the Affidavit of Indebtedness and the Final Judgment "def[y] simple arithmetic." *Spencer v. EMC Mortgage Corp*., ____ So. 3d ___, No. 3D11-136, 2012 WL 3705166 (Fla. 3d DCA August 29, 2012). In *Spencer*, the court brought into focus the importance of ensuring that the mathematical calculations in a foreclosure judgment are correct, and admonished attorneys to "be handy with a calculator" when handling mortgage foreclosure actions. *Id.* at *4. The court applied the simple formula of multiplying the stated *per diem* daily interest amount times the number of days the note had been in default, and determined that the interest calculation on the face of the summary judgment affidavit greatly exceeded the proper total interest calculation. *Id.* at *1-2. The Court also noted that the final judgment "compound[ed] the error" by adding additional, faulty interest charges on top of the affidavit's incorrect calculation. Although the court ultimately reversed on other grounds, it noted that the faulty calculation also would have required reversal. *Id*. at *3.

Here, as in *Spencer*, the interest calculation set out in the Affidavit of Indebtedness "defies simple arithmetic." *Id.* at *2. Multiplying the *per diem*

interest of $62.94 times the number of days between the last payment prior to default and the calculation end date stated in the Affidavit simply does not add up to the amount claimed. Moreover, as in *Spencer*, the final judgment "compounds the error" incorrectly calculating the interest that allegedly accrued between the date of the affidavit and the date of the judgment. *Id.* at *3.

These faulty calculations and the contradictory allegations regarding the applicable interest rate within the BANK's affidavit clearly preclude entry of summary judgment. "If there is even the slightest doubt as to the existence or nonexistence of a genuine issue of material fact, that doubt must be resolved against the movant." *Burroughs Corp. v. Am. Druggists' Ins. Co.*, 450 So. 2d 540, 544 (Fla. 2d DCA 1984).

CONCLUSION

The BANK's procedural failure to timely file and serve summary judgment evidence violated due process. In any event, the Late Affidavit failed in its purpose—to rebut that which even the BANK recognized had been left un-rebutted by the original affidavit: the [redacted] affirmative defenses. Additionally, the Late Affidavit was not accompanied by copies (much less, sworn copies) of the bank records upon which the affiant purportedly relied to say that the BANK had the right to enforce the Note and Mortgage at the time it filed the complaint. And finally, the judgment contained internal inconsistencies and mathematical errors—or at least, unsubstantiated and undisclosed computations—that tainted the judgment. For all of these reasons, the final judgment should be REVERSED.

Dated: October 12, 2012

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully 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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this October 17, 2012 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 October 17, 2012.

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