In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2005-AR2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR2 UNDER THE POOLING AND SERVICING AGREEMENT DATED NOVEMBER 1, 2005, et al.,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Treatises

Key:

R. Record on Appeal

R. Exh. Page number indexed by the Court Clerk for the Trial Exhibits, Volumes. 4-5 of the Record on Appeal.

T. Transcript of Trial located at R. 275 and again at Volume 6 of the Record on Appeal

STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure case in which DEUTSCHE BANK NATIONAL TRUST COMPANY ("the Bank" or "Detusche Bank") seeks to take the home of [redacted] and [redacted] (the "Homeowners").

The trial in this case is a prime example of a financial institution's flippant disregard of the Rules of Evidence which has come to typify foreclosure trials in Florida. Here, as is done in most residential foreclosure trials, the Plaintiff bank presented a single professional testifier (or document "reader") to testify regarding every aspect of the case, including recordkeeping practices about which he had no personal knowledge. Worse, for the amounts due and owing, the witness merely read entries off a proposed judgment prepared by the Bank's attorney.

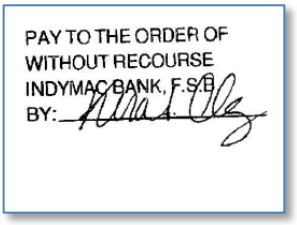
In short, this case presents the trial equivalent of "robo-signing." Robo-signing was the systematic execution of summary judgment affidavits by bank employees without personal knowledge of the facts—a bank practice universally condemned by the courts and the public. The question posed here is whether that same defective testimony, only now presented live at trial, should also be denounced as contrary to every due process fiber of our judicial system.

II. The Homeowners' Statement of the Facts

A. The pleadings

The Complaint in this case seeks to enforce an Adjustable Rate Note evidencing a debt that the Homeowners owed to IndyMac Bank, F.S.B.—a now defunct entity. The Bank claimed that it "owns and holds the Note and Mortgage or is a person entitled to enforce the Note within the meaning of Chapter 673, Florida Statutes,"[1] even though it also claimed that the Note was lost at the time of filing.[2] The Complaint was not accompanied by a copy of the Note.

A year later, the Bank, having apparently located the Note, dropped its count to reestablish the instrument, and filed what it claimed to be the original Note, Mortgage, and Acceleration Letter.[3] The Note was adorned with what appears to be an endorsement in blank by someone whose name and title is not printed below the signature:



The Homeowners denied the allegations of the Complaint and raised lack of standing as an affirmative defense.[4]

---

[1] Complaint, filed August 4, 2009, ¶ 8 (R. 2).

[2] Complaint, Count 1 (R. 1).

[3] Notice of Withdrawal of Count I of Plaintiff's Complaint, served August 10, 2010 (R. 36); Notice of Filing, served August 10, 2010 (R. 38).

[4] Defendants' Answer and Affirmative Defenses, served October 1, 2010 (R. 82).

B. The trial court denies the Homeowners' discovery, motion for continuance and motion in limine.

The trial court *sua sponte* set the matter for trial to take place June 10, 2013.[5] The Homeowners moved to compel responses to previously propounded discovery and to compel depositions of the twelve witnesses identified in the Bank's Witness List.[6] The Homeowners also moved for a continuance based in part on the outstanding discovery.[7]

The trial court (Judge Diana Lewis) denied the Motion to Compel Discovery as moot because the Bank filed responses to the written discovery, but the court did not address the pending request to depose the Bank's witnesses.[8] The court also denied the Motion to Continue Trial.[9] The Homeowners moved for reconsideration of the court's denial of their depositions and further asked that any witnesses not produced for deposition be precluded from testifying.[10]

On the day of trial, the Homeowners argued the *in limine* aspect of their motion for rehearing, which was initially granted by the trial judge (Judge

---

[5] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, dated May 2, 2013 (R. 94).

[6] Motion to Compel Discovery served June 5, 2013 (R. 109).

[7] Motion to Continue Trial served June 5, 2013 (R. 137).

[8] Order, dated June 12, 2013 (R. 159); Transcript of Hearing Before Judge Diana Lewis, June 12, 2013 (R. 256).

[9] Order, dated June 12, 2013. (R. 160).

[10] Defendants' Motion for Rehearing as to Production of Witnesses at Deposition Plead in Motion to Compel Discovery (R. 161).

Harrison).[11] After further argument, however, Judge Harrison sent the parties to argue the motion to Judge Lewis, who apparently stood by her denial of the continuance and the depositions.[12] As a result, the parties reconvened before Judge Harrison who now denied the motion *in limine*.[13]

C. The trial.

1. The Bank's document reader, George Kanuck.

The Bank called only one of its twelve listed witnesses at trial, George Kanuck—a meteorologist by education and vocation prior to starting his employment with OneWest Bank roughly three-and-a-half years ago.[14] He asserted that his employer, OneWest, was the servicer for the loan.[15] Kanuck answered a series of leading questions designed to establish a business records exception to hearsay—regarding all the OneWest records he had reviewed in the case even though the specific documents had not yet been identified:

> Q And are you familiar with the recordkeeping system of OneWest Bank?
>
> A Yes, I am.

---

[11] Transcript of Proceedings Before Judge Howard Harrison, June 19, 2013, at T. 17.

[12] T. 20-22.

[13] T. 22.

[14] T. 61-62, 25, 29.

[15] T. 24.

Q Have you personally reviewed the records relating to the loan given to the borrower [redacted]

A Yes, I am.

Q And are those records that you reviewed maintained under the direct, under the direction and control of OneWest Bank?

A Yes.

Q Are those records made at or near the time of the transactions reflected therein?

A Yes.

Q Are they made by somebody with personal knowledge of the information contained within those records?

A Yes.

Q And are they made within the regular and ordinary course of OneWest business?

A Yes.[16]

The Bank then sought to show a myriad of documents to the witness prompting a hearsay objection from the Homeowners.[17] The Homeowners also asked that Kanuck's testimony be stricken "because [he] has not indicated that he has ever worked with IndyMac."[18]

[16] T. 25-26.

[17] T. 27.

[18] T. 28.

2. *Voir Dire* demonstrates Kanuck's lack of personal knowledge.

On *voir dire*, Kanuck confirmed that he worked for OneWest Bank, not the lender, IndyMac Bank, F.S.B, or the plaintiff, Deutsche Bank.[19] He never maintained the books and records for IndyMac and could not give the name of anyone "who would have had something to do with the inputting of information into the IndyMac system.[20]

It was his view that Deutsche Bank had purchased the loan and that OneWest had inherited IndyMac's servicing rights after IndyMac was shut down by the Federal Deposit Insurance Corp. ("FDIC") in 2008.[21] He admitted, however, that this transfer of servicing rights and the "platform" (the servicing records computer system) happened six months before he began working for OneWest.[22] While it was his "understanding" that OneWest adopted the IndyMac servicing platform in its entirety,[23] he admitted that he did not work there and did not participate in any "mechanism" relating to the transfer of the servicing platform.[24] He "believed" that his description of Deutsche Bank's ownership

[19] T. 29, 32, 33.

[20] T. 33.

[21] T. 32, 34.

[22] T. 30.

[23] T. 32.

[24] T. 31, 34.

interest in the loan and OneWest's interest in the servicing rights was contained in a Pooling and Servicing Agreement ("PSA")[25]—a document which was never admitted (or even offered) as an exhibit.

In addition, he admitted that he did not know the regularly conducted business practices of Deutsche Bank.[26] His knowledge of IndyMac's business practices came from "training" provided by his employer, OneWest.[27]

3. The trial court admits the Bank's exhibits over objection.

After *voir dire*, the Homeowners again raised their hearsay objection to the documents brought by the Bank and specifically advised the court that the witness was not competent to lay the foundation for a business records exception.[28] The court ruled that Kanuck was competent to so testify.[29]

The court then allowed Kanuck to shuttle all the Bank's exhibits into evidence over repeated objections:

- Modification Agreement as of October 20, 2005 (Exhibit 1);[30]
- Power of Attorney (Exhibit 2);[31]

---

[25] T. 32.

[26] T. 34.

[27] T. 34-35.

[28] T. 36-41.

[29] T. 41.

[30] T. 28, 41; (R. Exh. 2).

[31] T. 43.

- The Notice of Filing of the original Note and Mortgage (Exhibit 3);[32]
- Residential Construction Loan Agreement (Exhibit 4);[33]
- Acceleration Letter (Exhibit 5);[34]
- Payment history (Exhibit 6).[35]

The Modification Agreement—never attached to the Complaint—was between IndyMac Bank, F.S.B. and the Homeowners (although, like the original Note, it was signed only by [redacted] The modified agreement has a variable interest rate (including the default rate) of 2.750 percent over the "Current Index" (weekly average yield on one year U.S. Treasury securities).[36]

The Homeowners renewed their objections to all but the Notice of Filing (Exhibit 3) on the grounds that the exhibits predated Kanuck's "involvement and personal knowledge" and were, therefore, hearsay.[37]

4. Kanuck reads the amounts due and owing from a proposed final judgment not in evidence.

The Bank then handed the witness a document which counsel described as a "final judgment," but which was never marked for identification or offered as an

[32] T. 44.

[33] T. 45.

[34] T. 45.

[35] T. 46.

[36] Modification Agreement, ¶4.(C) (R. Exh. 4)

[37] T. 51-52.

exhibit. Kanuck testified that he had compared the figures in the final judgment to OneWest's business records—which "included" the payment history in evidence—and that "to the best of [his] knowledge" the figures accurately reflected those business records.[38] Over objection, the trial court permitted Kanuck to read the figures into evidence.[39]

5. Cross-examination further exposes Kanuck's lack of personal knowledge of the documents and the computation of the interest rate.

On cross-examination, when questioned about the Power of Attorney between Deutsche Bank and IndyMac (Exhibit 2), Kanuck admitted he had never been an officer of either of those entities[40] and did not know the officers who signed the document. He did not know whether the officer who signed for Deutsche Bank even worked for that entity or whether the officer who signed for IndyMac had the requisite capacity to do so.[41]

When questioned about the Note, Kanuck admitted that he did not know whether the person who signed the endorsement was authorized to do so.[42] He

[38] T. 58.

[39] T. 58-59.

[40] T. 64.

[41] T. 65.

[42] T. 71.

could not even identify the person who endorsed the Note.[43] He explained that, to make the assertion that Deutsche Bank owns the loan, he "goes off of" the PSA, which he did not bring to court.[44]

As for the amount due and owing, Kanuck admitted that he did not know if he knew anyone who contributed information to the loan history[45] Likewise, he did not know if he knew anyone who input the financial data compiled into the proposed judgment prepared by the Bank's lawyer.[46] Nor did he know anyone who actually advanced the payouts (for example, for flood insurance premiums) listed in the history.[47] As summarized in a dialogue between Kanuck and the court itself, Kanuck's testimony as to the amount owed was based solely on what appears in the IndyMac/OneWest payment records:

> THE WITNESS: I rely on the business records.
>
> THE COURT: Okay. You're solely on the basis of what these records say?
>
> THE WITNESS: Correct.[48]

---

[43] T. 77.

[44] T. 80.

[45] T. 81.

[46] T. 63.

[47] T. 86.

[48] T. 87.

When asked about the interest rate, Kanuck first said that "the interest amount that was owed came from a daily rate of 2.75 percent off of the interest."[49] Then he testified that the 2.75 percent was "the rate that the loan could adjust on any given year."[50] Then he testified that the 2.75 percent was the annual interest rate from which the per diem was calculated.[51]

6. The Homeowners move for involuntary dismissal.

At the close of the Bank's case, the Homeowners moved for an involuntary dismissal.[52] Among other things, the Homeowners once again raised the point that Kanuck was not competent to testify about OneWest's business records, much less those of IndyMac or Deutsche Bank:

> MR. ANTHONY [Homeowner's counsel]: …we have a nice fellow today who's come to testify that he doesn't know anything and I don't mean that to trivialize his testimony, but we know what he said and we know what he relied upon and we know that there's people like him that come from Texas or whatever other state to testify about people that they don't know and loans that they haven't really known anything about …[53]

The Homeowners also argued that the Bank had failed to prove its standing at the inception of the case as the holder of the Note because the endorsement—

[49] T. 81.

[50] T. 82.

[51] T. 83.

[52] T. 89.

[53] T. 89-90.

having first appeared a year after the case was filed—was undated.[54] Because the Bank conceded in its initial pleading that the Note was not in its possession (having been lost), then it was not the holder when the case was filed, even if it was endorsed.[55] The Bank responded that it had proven its ownership by Kanuck's testimony that the Bank had come "into ownership" in November of 2005.[56]

The trial court granted judgment in favor of the Bank.[57]

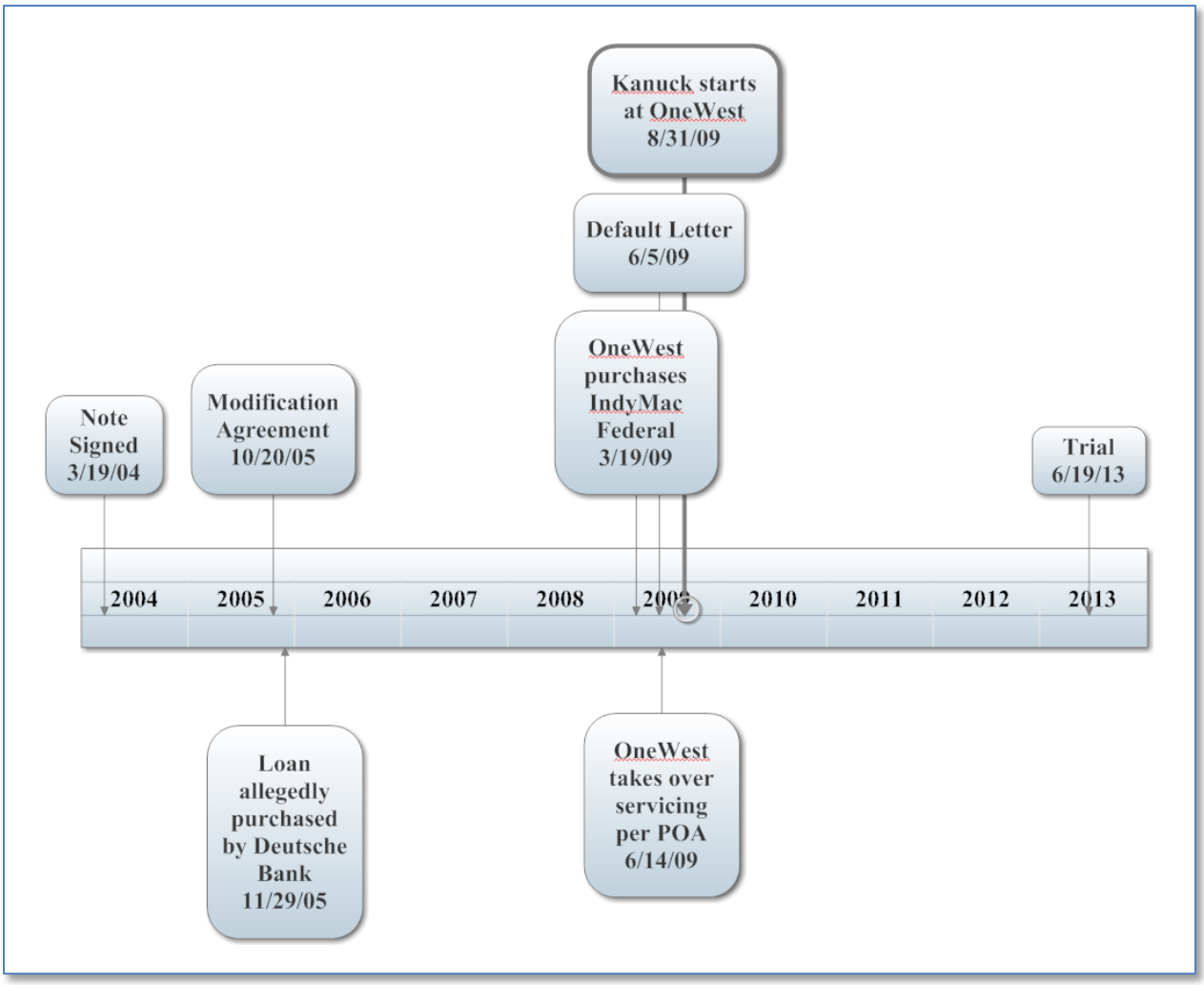
[54] T. 98.

[55] T. 89, 92

[56] T. 93, 94.

[57] T. 101.

TIME LINE OF KEY EVENTS



SUMMARY OF THE ARGUMENT

The Bank's sole witness, George Kanuck, was hired and trained by the loan servicer to shuttle documents into evidence. Previously a meteorologist, he was hired after every relevant event regarding the subject loan had occurred. His only connection to those documents was that he had read them when he was assigned to this trial. Kanuck was not a "qualified" witness with personal knowledge of the documents or how and when they were created. Indeed, the majority of the "payment records," as well as the Notice of Default letter, came from a previous servicer for which he had never worked.

The only time an amount due on the loan was even mentioned at trial was when Kanuck parroted the figures supplied to him by the Bank's counsel. Counsel gave the witness these figures in a proposed final judgment that was neither admitted, nor admissible, in evidence.

As a result the Bank's exhibits and testimony related to them were inadmissible and should have been stricken. There was no competent evidence that the Bank had standing or had complied with an essential condition precedent. Nor was there competent evidence of the amount due on the loan. The trial court should have granted an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.

STANDARD OF REVIEW

Although a trial court's decision to admit evidence is generally reviewed for abuse of discretion, the *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *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). Because the Homeowners challenge the trial court's application of the Florida Evidence Code, § 90.803(6), Fla. Stat., the *de novo* standard of review applies. *See 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).

The standard of review for a trial court's ruling on a motion for involuntary dismissal is also *de novo*. *Lizio v. McCullom,* 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.,* 996 So. 2d 877, 881 (Fla. 4th DCA 2008)). The burden is on the plaintiff to establish a *prima facie* case. *Tillman v. Baskin,* 260 So. 2d 509, 512 (Fla. 1972).

ARGUMENT

I. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Document Reader Who Is Not a "Qualified" Witness.

The Bank's only witness, George Kanuck, was an employee of the servicer. His job was to review loan documents so that he can communicate the hearsay within those documents to the court. Having started his employment at the bank after every relevant event in the history of the subject loan, his only connection with the documents admitted into evidence over objection was that he had read them before trial. As a degreed meteorologist by education, the only compentency established by the witness was that he was possessed of at least a college-level proficiency in reading. In short, he offered the trier of fact nothing that the court did not already have for itself.

To authenticate the documents before admitting them into evidence, Kanuck needed to have been 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 exhibit, the Bank would have to first lay the predicate for the "business records" exception. There are five requirements for such an exception:

1) the record was made at or near the time of the event;

2) the record was made by or from information transmitted by a person with knowledge;

3) the record was kept in the ordinary course of a regularly conducted business activity; and

4) it was a regular practice of that business to make such a record.

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, Kanuck needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or well enough acquainted with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor 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) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also 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 Mortgage, Inc.*, Case No. 3D12-2994 (Fla. 3d DCA December 4, 2013) (witness who familiarized herself with the mortgage file after being assigned to testify was incompetent to authenticate documents).

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) the court addressed the admissibility of computerized records virtually identical to those in this case. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The testimony was insufficient under the business records exception to hearsay because the manager, like Kanuck in this case, did not testify that he prepared the documents or that he supervised anyone who did:

> [The manager] Darby was not the custodian of the statement. He was not an otherwise qualified witness. Darby was not "in charge of the activity constituting the usual business practice." He admitted that neither he nor anyone under his supervision prepared such statements. Darby was not "well enough acquainted with the activity to give the testimony." He admitted that he was not familiar with any of the transactions represented by the computerized statement.

Id. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not a

qualified witness to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

This Court recently reaffirmed and clarified the requirements for a qualified witness to introduce documents in *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013). In this criminal case, the trial court had permitted a store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The Fourth District held that it was reversible error to admitting the receipt as a business record because the clerk was not qualified to testify concerning the receipt. *Id*. at 661.

After outlining the basic requirements of the business records hearsay exception, the court noted that "[i]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id.* at 662. Thus, because the store clerk "had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce the receipt as a business record. *Id*. The appellate court sympathized with the plight of the prosecution—in that the qualified witness, the manager, did not appear to testify (and was, as a result, held in contempt)—but steadfastly decreed that "the rules of evidence must be observed." *Id*.

Here, Kanuck was similarly unqualified to testify about the so-called business records of OneWest. There was no testimony that he had any responsibilities regarding the business practices of OneWest in generating its bookkeeping records. The nature of his job responsibilities—reading records to judges—does not demonstrate that he knows and understands the manner in which OneWest creates and maintains the records to be introduced.

Accordingly, Kanuck was not a qualified witness to lay the foundation for the records from OneWest.

A. Kanuck was even less qualified to lay the foundation for documents from entities where he had never worked.

Many of the documents that the Bank offered as evidence were not OneWest records, but came from completely different entities (where Kanuck had never been employed). This even further distanced him from any personal knowledge of how they were created or maintained. Specifically:

- **Payment History (Exhibit 6):** While the entries in this document after March of 2009 were presumably made by OneWest, the first five years of the payment history consisted of data kept by the previous servicer, IndyMac. While Kanuck had been trained to say that the servicing platform had not changed during the transition, he did not begin working at OneWest

until six months after the transition, making this testimony rank hearsay.[58] Moreover, his testimony is belied by the very different formatting of the data of Exhibit 6 prior to 2011 and different transaction code numbers for the same expenses (such as 30 and 630 for attorney fee advances).[59]

- **Alleged Default Letter (Exhibit 5):** The Default Letter was, on its face, prepared by IndyMac—a company for which Kanuck had never worked. He admitted he had no knowledge of IndyMac's regularly conducted business practices other than what he was trained to say.[60]

B. Records from another servicer are hearsay within hearsay.

Kanuck was singularly unqualified to provide the necessary testimony for a business records exception to hearsay for the records of his own employer, OneWest, because he professed no experience in the departments that actually generated them. When the "OneWest records" were actually those of another servicer, his lack of personal knowledge was so glaring that it was abusively disrespectful of the court system to even lead him through the "magic words" of the hearsay exception.

In the case of *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011), this Court specifically disapproved of testimony from one servicer's

[58] T. 30-34.

[59] Compare R. Exh. 93-97 with R. Exh. 98-108.

[60] T. 34-35.

employee about the records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made:

> He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Orsini had no knowledge of how his own company's data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

Id. at 783.

This Court recently confirmed that *Glarum* applies in the context of a foreclosure bench trial. *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, ___ So. 3d ___, 2013 WL 4525318 (Fla. 4th DCA 2013). In *Yang*, the plaintiff's witness had testified about account balances found in the records of a prior management company, even though she had never been employed there. *Id*. at *1. As in this case, on direct examination, the witness "employed all the 'magic words'" of the business record exception to hearsay. As in this case, cross-examination revealed a different story—that the witness did not know the prior management company's practice and procedure and "had no way of knowing" whether the data obtained from that company was accurate. *Id*. at *3-4. The District Court reversed the trial court's final judgments of foreclosure and remanded for entry of a directed verdict in favor of the condo owners. *Id*. at *4; *see also, Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment

reversed where affiant could not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

In the end, there was no testimony that anyone (much less, the witness) did any verification of the data that was purchased from IndyMac—a company whose business practices forced the FDIC to shut it down. There was no testimony about any internal consistency checks, interest rate adjustment confirmations, interest re-calculations, or review and confirmation of receipts for advances, such as tax and insurance payments.

Accordingly, Kanuck's lack of personal knowledge about the data transfer process distinguishes this case from *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005). In that case, the WAMCO witness was personally involved in overseeing the collections of the subject loans and "described the process that [his employers] use to verify the accuracy of information received in connection with loan purchases." *Id*. at 233.

C. 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 not follow binding precedent (*Glarum*, *Yang*, and *Lassonde*) 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 non-parties, Florida law has already provided a practical, efficient means for 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 notice sixty days before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of these rules which seem 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, despite the relative ease of doing so, the Bank chose not to supply certifications or declarations from Deutsche Bank or former IndyMac employees (presumably now OneWest employees) who actually created or kept the records. Nor did it seek to admit the payment history with a certification from someone who could personally describe what, if any, measures were taken to ensure the accuracy of its records and those of the previous servicer.

Even if it were proper for a court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, this Court need not change its own binding decisions or rewrite the rules of evidence.

D. The myth that bank records are inherently trustworthy.

Another frequent 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 time that 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 it may be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) (case involving the same plaintiff as this case in which the court commented: "…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);[61] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[62]

Arguably, this 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 the criteria of the business-record exception because banks are somehow worthy of the court's trust.

Another reason that banks claim that the records must be trustworthy is because they "relied" upon them for their own business purposes. At best, this is a circular argument, because the records allegedly being relied upon are of a non-performing loan. There is no business purpose other than to collect the loan in a legal action. The Bank's only demonstrated "reliance," therefore, is upon the court

[61] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf.; *see also*, Memorandum No. 2012-AT-1801 of the Office of the Inspector General of the Department of Housing and Urban Development, March 12, 2012 regarding one of the banks in the ownership chain, JPMorgan Chase Bank, N.A., available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1801.pdf.

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

to enforce the note in accordance with the records in question—whether they are accurate or not. This is all the more true, in cases such as this, where the servicing agent is the keeper of the payment history of other, defunct servicers. Because it did not itself invest in the loan, any financial incentive to ensure the accuracy of these second-hand records is highly attenuated, if it exists at all. Stated plainly, the record is devoid of any suggestion that the servicer proffering this evidence suffers any financial penalty if the records it inherits are inaccurate.

Thus, the Bank's arguments that the documents it presents in the courtroom are worthy of trust are deceptively misplaced. So too, would be any temptation to change the rules of evidence to benefit any particular industry.

E. The witness's parroting of figures in the proposed final judgment prepared by counsel was inadmissible.

Oddly, the Bank did not have its witness testify from the inadmissible documents already in evidence. Instead, in a bizarre ritual quite foreign to any evidentiary rules, the Bank's counsel handed his witness another document which he identified as a "final judgment" and asked the witness whether it accurately reflected unspecified business records of OneWest.[63]

First, the trial court erred in permitting the witness to read the contents of this document prepared by the Bank's attorney into evidence as "refreshed

[63] T. 58.

recollection."[64] The recollection being refreshed must be of something independent of the document itself or else § 90.613, Fla. Stat. (Refreshing the memory of a witness) could be used to vitiate all the rules of evidence simply by showing the witness any inadmissible information before trial. *See Claussen v. State, Dept. of Transp.*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999) (improper to use rule for refreshing recollection to admit written information into evidence where there was "no memory to refresh").

The Bank never moved to have the document (which was not on its exhibit list) admitted into evidence. Nor could the trial court have admitted the document without committing reversible error. It would be difficult to imagine a document that would fit the description of "prepared for the purpose of litigation" more than a proposed final judgment. Such documents do not qualify for the business records exception—or any other exception—to hearsay. *See McElroy v. Perry*, 753 So. 2d 121, 125-26 (Fla. 2d DCA 2000) ("when a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized"). *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA. 1985) (same) *citing* 1 C. Ehrhardt, Florida Evidence § 803.6, at 490-91 (2d ed. 1984). Moreover, the "final judgment" would also be nothing more than

[64] T. 58.

a summary of data, which is inadmissible without first complying with § 90.956, Fla. Stat., which the Bank did not do here.

Second, the final judgment, and Kanuck's testimony about it, was merely a backdoor attempt to introduce numbers that apparently cannot be divined from documents that were in evidence. The sum total of Kanuck's testimony on the amount due and owing was that the figures in the proposed judgment were, "to the best of [his] knowledge," an accurate reflection of OneWest's business records that would "include"—which would imply "not limited to"—the loan payment history (Exhibit 6) in evidence.[65]

For example, the figure $118,273.91 for accrued interest does not appear in Exhibit 6. The exhibit states that the interest rate is 5.125 percent, rather than the 2.75 percent as Kanuck testified.[66] Kanuck's shifting answers as to whether the rate of 2.75 percent was a cap on the amount the interest would adjust in a given year or the actual interest that was applied demonstrates his lack of knowledge of how interest was computed.[67] In fact, while he settled on the idea that 2.75 percent was the actual annual interest rate applied, the Modification Agreement states that 2.750 percent is just the additional interest that the borrower must pay over and

[65] T. 58.

[66] R. Exh. 93; T. 81-83.

[67] T. 81-83.

above the Current Index rate.[68] Nor does the 2.75 percent rate to which Kanuck testified yield the $118,273.91 of interest awarded in the judgment.[69] The awarded interest corresponds to a 3.73% annual interest rate.[70]

Another example is the attorneys' fees awarded. The transactions marked as "Attorney Advances" in the OneWest portion of Exhibit 6 and "Adv Attorney Fee" in the IndyMac portion do not add up to the $ 4,616.25 awarded in the judgment. Accordingly, if there is any support to be found in the numbers that Kanuck read to the court, it is not to be found in Exhibit 6 or any document in evidence. *See Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (Error to permit bank witness to testify about the contents of records not in evidence.); *McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003) (where original evidence is available, best evidence rule bars "substitutionary" evidence, such as oral testimony about the original evidence).

Thus, the outlandish ritual of bootstrapping the final judgment—known only to foreclosure trials—is merely an attempt to do what is prohibited by *Sas v. Fed. Nat. Mortg. Ass'n*. and the hearsay rule. In saying that the figures are (to his

---

[68] Paragraph 4.(C) of the Modification Agreement (R. Exh. 4).

[69] Using the formula to which he testified at T. 83: ($737,000 x .0275 / 365) yields a per diem of $55.53. Over the 1,572 days between March 1, 2009 to June 19, 2013, the interest would be $ 87,289.07—over twenty-five percent less than that awarded in the judgment.

[70] $118,273.91 / 1572 (days) x 365 (days/yr) / $737,000 = .0373.

knowledge) "accurate" when compared to some unidentified records that he claims to have reviewed, the witness is, at best, testifying from documents that are not in evidence. At worst, the figures read to the judge from the proposed judgment are made out of whole cloth.

F. The error in admitting the summaries was exacerbated by the court's abuse of discretion in denying the deposition of the Bank's witness.

At trial, the court proceeded without requiring the Bank to produce Kanuck for deposition.[71] Had the deposition taken place, the Homeowner would have been able to identify the underlying source documents and taken steps to obtain them. The Homeowners would not have been ambushed by Kanuck's claim to have reviewed, and gleaned information from, records not in evidence (such as the PSA and the alleged source documents for the proposed judgment). The Homeowners would have had an opportunity to explore the many avenues of demonstrating even further that Kanuck was neither a custodian nor a qualified witness capable of introducing the Bank's exhibits.

The trial court's failure to either exclude the testimony or briefly continue the trial to permit the deposition was an abuse of discretion. *See Health Options, Inc. v. Palmetto Pathology Services, P.A.*, 983 So. 2d 608, 617 (Fla. 3d DCA 2008) (prejudice due to surprise use of summary cured by permitting objecting party to

[71] T. 20-22.

depose witness); *Metro. Dade County v. Sperling*, 599 So. 2d 209 (Fla. 3d DCA 1992) (holding that court did not abuse discretion in excluding late-listed witness and noting that, while a deposition might have cured the prejudice, counsel would not have had adequate time to prepare); *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (same); *Cf. In re Estate of Lochhead*, 443 So. 2d 283, 284 (Fla. 4th DCA 1983) (abuse of discretion to exclude testimony of witness because elimination of surprise "could have been achieved in this case by permitting appellees to depose the witness or simply by granting a continuance…"); *Med. Pers. Pool of Palm Beach, Inc. v. Walsh*, 508 So. 2d 453, 454 (Fla. 4th DCA 1987) (trial court did not abuse discretion in refusing to strike surprise testimony where prejudice could have been cured by other means such as a continuance and further discovery—but which were not requested); *Louisville Scrap Material Co., Inc. v. Petroleum Packers, Inc.*, 566 So. 2d 277, 278 (Fla. 2d DCA 1990) (court abused discretion in excluding late-identified witness because aggrieved party had time to depose, and in fact, deposed witness).

II. Involuntary Dismissal Should Have Been Granted Because There Was No Admissible Evidence to Support the Judgment.

A. There was no admissible evidence of the amounts due and owing.

For the reasons shown above, the Bank failed to adduce admissible evidence of its damages. Reading from a proposed judgment is not evidence. The payment history does not support the figures in the judgment, and was in any event,

inadmissible without authentication by a records custodian or otherwise qualified witness.

B. There was no admissible evidence that the Bank complied with conditions precedent.

For the reasons shown above, the Bank failed to adduce admissible evidence that it had sent a "default letter" or "notice of acceleration" as required under Paragraph 22 of the Mortgage.[72] Kanuck was unqualified to lay the predicate for the IndyMac document proffered by the Bank and it was erroneously admitted. Accordingly, the case should be dismissed for a failure of proof of compliance with conditions precedent, as alleged in Paragraph 6 of Count II of the Complaint.[73]

C. There was no admissible evidence of the Bank's standing at the inception of the case.

The original Note bears a purported endorsement in blank signed by someone whose identity and title was undisclosed on the endorsement and unknown to the Bank's witness. Because the Note was lost at the time this case was filed, the undated endorsement did not appear until a year later. The implication, therefore, is that the endorsement did not exist—and that the Bank had no standing—when it initiated the suit. *See McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012); *Green v. JPMorgan Chase Bank,*

[72] R. Exh. 42.

[73] R. 2.

N.A., 109 So. 3d 1285 (Fla. 5th DCA 2013); *Gonzalez v. Deutsche Bank Nat. Trust Co.*, 95 So. 3d 251 (Fla. 2d DCA 2012).

Even assuming that the endorsement pre-existed the filing of the Complaint, that fact, by itself, is insufficient to establish that the Bank was its holder when the case was filed. At best, it means only that the note had become bearer paper and whoever was the "bearer" (in possession) of the actual Note was the "holder." But the Bank did not prove or even allege that it had possession of the actual Note at the time it filed the Complaint. In fact, it alleged the opposite—that the Note was lost and not in its possession.[74]

Stated another way, the UCC requires that there be a "negotiation" (i.e. a "transfer") of the endorsed instrument before one becomes a holder. § 673.2011, Fla. Stat. If one endorses a note, but never transfers possession to the intended recipient, the latter never becomes a holder. Thus, one cannot leap to the conclusion that the Bank was a holder of an instrument endorsed in blank without showing possession at the time. Even if there was a glimmer of an inference of possession to be had from the existence of the endorsement alone, that tiny flicker was definitively extinguished by the Bank's own allegation that the Note was not in its custody or control.

[74] Complaint, Count I (R. 1).

At trial, the only evidence of when the Plaintiff (Deutsche Bank) came into possession of the Note—and the only evidence that it had any ownership interest in the Note at all—was Kanuck's improper testimony about documents not in evidence. Specifically, he testified that his belief that Deutsche Bank owned or had received an interest in the loan was based solely on the PSA which he did not bring to court.[75] Because this testimony was inadmissible, the Homeowners were entitled to an involuntary dismissal of the case.

[75] T. 32, 79-80.

CONCLUSION

There simply was no competent (or credible) evidence upon which to enter a judgment for the Bank. The Bank, with its single, document reader, failed to adduce any admissible evidence of the *prima facie* elements of its claim, such as the amount of damages, conditions precedent and standing. The Bank had its day in court and the case should have been dismissed with prejudice.

Dated: December 6, 2013

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 6, 2013 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.

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

By: 
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Deanne Torres, Esq.
KAHANE & ASSOCIATES, P.A.
8201 Peters Road, Ste 3000
Plantation, FL 33324
dltorres@kahaneandassociates.com
notice@kahaneandassociates.com
mmuniz@kahaneandassociates.com