In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF BVMBS 2004-2, et al.,

Appellees.

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

AMENDED INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. The Pleadings.

This is a foreclosure case in which The Bank of New York Mellon ("the Bank"), in an effort to collect on a loan made by America's Wholesale Lender, seeks to take the property of [redacted] [redacted] [redacted] and [redacted] [redacted] [redacted] [redacted] (collectively "the [redacted] or "the Homeowners").[1]

The Bank, a stranger to the original transaction, filed this action claiming that it "owns and holds the Note and Mortgage.[2] Despite this claim to be a holder of the Note, the copy of the Note attached to the Complaint was not endorsed.

The second count of the Complaint sought to reform the mortgage alleging that it contains an error in its legal description.[3] Whereas, the Mortgage described a single parcel, the Complaint alleged that that it should have described two parcels, where the original language of the Mortgage was "Parcel 1" and the additional new language is labeled "Parcel 3."[4] Parcel 3 describes an easement, the

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[1] Adjustable Rate Note attached to Complaint to Foreclose Mortgage and to Reform Mortgage (R. 25).

[2] Complaint to Foreclose Mortgage and to Reform Mortgage, filed October 21, 2009 ("Complaint"), ¶ 5 (R. 1).

[3] Complaint, ¶¶ 16- 23 (R. 3-4)

[4] Complaint, ¶ 22 (R 3-4).

location of which is not entirely clear without resort to sources outside the appellate record:[5]

PARCEL 3

TOGETHER WITH EASEMENT FOR INGRESS AND EGRESS AS SHOWN IN THAT INSTRUMENT RECORDED IN OFFICIAL RECORD BOOK 96, PAGE 490, PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA.

Over a year and half after filing the Complaint, the Bank, through new counsel, filed what its attorney asserted to be the "Original Note and Original Mortgage."[6] Now, for the first time in the case, the Note was adorned with an endorsement in blank, ostensibly from the original lender.[7]

The Homeowners answered the Complaint admitting that they owned the property, that the attachments to the Complaint appeared to be copies of the Note and Mortgage, and that they had not made all payments as agreed.[8] They denied all other allegations, including the Bank's allegation that it "owns and holds" the Note and that it had complied with conditions precedent.[9] They raised affirmative

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[5] *Id.*

[6] Notice of Filing, filed May 5, 2011 (R. 86).

[7] R. 91.

[8] Defendants' Amended Answer to Complaint and Affirmative Defenses, filed May 17, 2012 (R. 346).

[9] *Id.* at ¶¶ 5, 8 (R. 347).

defenses, including one that detailed the basis for their denial of the Bank's conditions precedent allegation. The Homeowners specified that they had not received the notice of acceleration required under Paragraph 22 of the Mortgage, and therefore, contested whether the Bank had ever sent it.[10]

II. The Trial—The Bank's "Document Reader."

At trial, the Bank relied upon a single (late disclosed) witness, Christine K. Sahyers, to prove its entire case. Sahyers testified that she works for a loan servicer, Nationstar Mortgage, as a "Default Case Specialist."[11] She works in the "Trials and Mediation Department" and her job duties are to "review loans for purposes of loss mitigation, mediations and trials."[12] Ninety-five percent of her job is testifying in trial. Having started at Nationstar only six months before trial, she had never worked in any other department there.[13] She works remotely—her office is her home.[14] She can be in trial for part of each and every day.[15] She would "probably" never work on a case that is not going to be litigated.[16]

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[10] Second Affirmative Defense (R. 350-51).

[11] T. 29.

[12] T. 99, 14, 116.

[13] T. 101, 116.

[14] T. 99-100.

[15] T. 99.

[16] T. 100.

The foundation laid for her testimony about the documents in this case was that she had reviewed them before trial.[17] There was no testimony that she personally located and printed any of the "records" that she had read. In fact, she testified that she did not see the payment records or a copy of the Note until two or three days before trial and she did not know who printed out the payment records.[18]

Sahyers testified that Nationstar had only been the servicer for about six months.[19] Prior to Nationstar, Bank of America ("BOA") and Countrywide had serviced the loan.[20]

Sahyers' Lack of Personal Knowledge

All the Bank's exhibits that were not judicially noticed were introduced through Sahyers, even though she repeatedly testified that she never worked for the department, or even the company, that would have generated the document in question:

[17] T. 30-31.

[18] T. 104, 125.

[19] T. 101.

[20] T. 31, 82.

Exhibit	Testimony
1. Copy of Note	She never worked for the lender, America's Wholesale Lending or Countrywide (T. 102). She did not know the date the endorsement was made (T. 106).
3. Payment History	She has never made a payment entry into Nationstar's system (T. 101, 128). She never worked for the previous servicer, BOA (T. 102). She has never been responsible for creating BOA's records (T. 103). While Nationstar was servicing, some entries would "probably" be made by the Cashiering Department (for which she has never worked) (T. 127, 130). Other entries would be made by the Escrow Department (for which she has never worked) (T. 131-133, 134). Still other entries would be made by the Corporate Advance Department (for which she has never worked) (T. 134). She did not know what department was responsible for creating the BOA letter (R. Exh. 42) or other BOA entries (R. Exh. 43; T. 136-137). Neither she, nor her department, nor anyone under her supervision was responsible for verifying that the BOA records were accurate (T. 139).
4. Notice of Acceleration (by Countrywide)	She has never created a demand letter for Nationstar (T. 101). She never worked for Countrywide, which allegedly sent the letter (T. 102, 112).

5. Routing History for Collateral File of BOA (the file that would contain the original documents, such as the Note and Mortgage)	She never worked for BOA (T. 102). She admitted she would not know if there were any endorsements on the original documents in 2004 because she never worked there (T. 108). It was not her responsibility to send the collateral file from BOA to the law firm and she did not know whose responsibility it was (T. 109). She has never had any responsibility for BOA at any point during her career and has never been responsible for creating any of its records (T. 103). She did not have with her a record of the date and time that the image was uploaded into the system (T. 108).
6. Pooling and Servicing Agreement between Bellavista Funding Corporation, Countrywide, and BOA. (Admitted only for the purpose of showing the closing date. T. 74-75).	She never worked for Countrywide or BOA (T. 102, 112). There was no testimony she ever worked for Bellavista. There was no testimony that she personally located the PSA among Nationstar's records.
7. Limited Power of Attorney	She does not know which department in Nationstar created the document (T. 124). She did not oversee anyone who created the document and it has never been her responsibility to prepare such a document for Nationstar (T. 124-25).

Witness Training

Additionally, Sahyers testified that what little she did "know" about the documents had been told to her by other Nationstar employees as part of her job training:

Exhibit	Testimony Regarding Training
3. Payment History	She is trained by her supervisor and former BOA and Countrywide employees on Nationstar's staff (T. 102). Her testimony that the BOA entries were made at or near the time the information was received was based on her training (T. 138).
4. Notice of Acceleration (by Countrywide)	She had been trained by Nationstar on Countrywide's policies and procedures for sending the notice of acceleration (T. 50, 54). She was trained so she would be "able to testify to the necessary business records that have been boarded over from prior servicers" (T. 54)
5. Routing History for Collateral File of BOA	She has been trained on BOA's policies and procedures for the creation of this business record (T. 62, 64). She "would assume" that the entries were created by someone with personal knowledge because she was told in training that they would have such knowledge (T. 107). She is trained by Nationstar on the policies and procedures of prior loan services for which it has received boarded records (T. 141-42, 147-48).

This "training" that Sahyers undertook to perform her job as a Bank testifier is perhaps best exemplified by her testimony on cross-examination about how she "knew" that the entries on the Routing History (Exhibit 5) were created by someone with personal knowledge of the transactions:

Q. [Homeowners' counsel] Who created the entries in that record?

A. The entries in this record would be created by Bank of America's employees.

Q. Do you know who at Bank of America created it?

A. I do not know.

Q. Do you know who created it or had personal knowledge of those entries?

A. I would assume they would have to in order to create the entries.

Q. You would assume they had to based on what?

A. In order to create the entry of the information page they would have to have the knowledge to create the entry.

Q. Is that something you were told in your training?

A. Yes.[21]

Similarly, Sahyers "knew" that entries made by BOA in the payment history were created near the time that the information was received because that was what she was told during training:

Q. Do you know what company made that entry?

A. Bank of America

Q. Do you know what department at Bank of America?

A. I do not.

Q. Do you know what individual made that entry?

A. I do not.

[21] T. 106-07.

Q. Do you know if the entry was made at or near the time that the information was received?

A. Yes, because that's Bank of America's policy.

Q. That you know from training, correct?

A. Correct.

Q. That you were told?

A. Correct.[22]

Notice of Intent to Accelerate

Sahyers admitted that the Countrywide document labeled Notice of Intent to Accelerate (Exhibit 4) indicated it was mailed to an address similar to the property address, but in the City of West Palm Beach, rather than the City of Palm Beach Gardens:[23]

[22] T. 137-138.

[23] T. 113.

She did not know why the previous servicer would have sent the letter to West Palm Beach.[24] She asserted it "would be sent to the address that the borrowers would give us [actually, Countrywide] to send their mail to."[25] The Mortgage requires that such notices be sent to the property address unless the borrower designates in writing "a substitute notice address."[26] But Sahyers did not have any indication in any of the records that the Bank brought for her to testify from that the borrowers had ever designated a different address.[27] She did not know what address the Homeowners provided Countrywide for such notice.[28]

Exhibits judicially noticed or admitted as self-authenticating.

In addition to the records introduced through Sahyers, the court admitted the Mortgage (Exhibit 2) and the original Note (as opposed to the copy of the Note that was marked and admitted as Exhibit 1) by taking "judicial notice of its own court

[24] T. 113.

[25] T. 113.

[26] Paragraph 15 of Mortgage (Exh. R. 14-15).

[27] T. 113.

[28] T. 112-13,

file."[29] In other words, the court found the documents to be admissible because the Bank's counsel had previously filed them.[30]

The court also took judicial notice of merger documents (Exhibit 9)[31] which showed changes in servicers—that Countrywide had become BAC Home Loans Servicing, LP., which then merged into BOA. The court also admitted various deeds and a power of attorney as self-authenticating documents (Exhibit 8).[32] One of the deeds was the original transfer to the Homeowners at the time of the loan. It showed a simultaneous transfer of three numbered parcels: 1) the parcel mentioned in the Mortgage; 2) a parcel that the Bank did not seek to add to the Mortgage by reformation; and 3) a parcel that the Bank did seek to add to the Mortgage by reformation.[33] The other deeds and the power of attorney were dated well after the parties entered into the loan agreement.[34]

After the Bank rested its case, the Homeowners renewed all objections to the evidence and moved for an involuntary dismissal.[35] The court denied the motion.[36]

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[29] T. 40, 162.

[30] *Id.*

[31] T. 75-81.

[32] T. 88-92.

[33] Exh. R. 284-86.

[34] Exh. R. 287-98.

[35] T. 148.

The defense

In the defense case, the Homeowner, [redacted] [redacted] testified that he had never received the Notice of Intent to Accelerate (Exhibit 4)[37] and had never asked the servicer to change his mailing address for correspondence about the loan prior to the date on the acceleration letter.[38] He also testified that the legal description in the Mortgage accurately represented his intent—that he did not intend to encumber any other parcels.[39] The defense then rested.

After closing argument, the judge announced her findings, which included, among other things:

- The Bank was the owner of the note and the note contained a blank endorsement at the time the case was filed.[40]
- The reformation count was proven by the deeds because "[t]he parcels have always been together" and because Mr. [redacted] testimony as to his own intent "is not credible."[41]

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[36] T. 165-66.

[37] T. 172.

[38] T. 179.

[39] T. 177.

[40] T. 206.

[41] T. 207-08.

- The testimony of Mr. ▇ that he did not receive the notice of acceleration was not credible.[42]
- Mailing of the notice of acceleration to an address with the wrong city was "substantial compliance."[43]

The court entered judgment and this appeal ensued.[44]

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[42] T. 208.

[43] T. 208.

[44] Final Judgment of Foreclosure, dated January 30, 2014 (R. 816); Notice of Appeal filed February 12, 2014 (R. 828).

SUMMARY OF THE ARGUMENT

The trial court erred in failing to grant the Homeowners' motion for involuntary dismissal of the Bank's reformation count. The Bank did not present any evidence—much less, "clear and convincing" evidence—of a mutual mistake in the drafting of the legal description attached to the Mortgage. Because the foreclosure judgment levies against Parcel 2, which was not included in the original lien, it must be reversed.

The trial court also erred in failing to grant an involuntary dismissal because there was no admissible evidence to prove: 1) standing at inception; 2) compliance with conditions precedent; or 3) the amount of damages. The bulk of the Bank's exhibits were inadmissible because they were introduced through a professional testifier hired and trained by the Bank's servicer to read documents to the factfinder—alleged records she did not herself locate and copy. Moreover, the records purport to be from various companies with which she had no personal connection. Her knowledge of the documents and policies was not gained through actual experience with them in the course of a business-related duty (as opposed to a litigation-related duty). Instead it was hearsay knowledge of the worst kind because it was imparted to her for the very purpose of this litigation.

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 Trial Court Erred in Granting Reformation of the Mortgage Where the Bank Adduced No Evidence of a Mutual Mistake in the Legal Description.

Due to the strong presumption that a written agreement accurately expresses the parties' intent, the party seeking reformation based on a mutual mistake must prove its case by clear and convincing evidence. *BrandsMart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc.*, 901 So. 2d 1004, 1006 (Fla. 4th DCA 2005). *Watkins v. DeAdamich*, 187 So. 2d 369, 371 (Fla. 2d DCA 1966) ("In a suit for reformation much stronger and clearer evidence is required than in an ordinary action for damages."). The clear and convincing standard requires that the evidence be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Bone & Joint Treatment Centers of Am. v. HealthTronics Surgical Services, Inc.*, 114 So. 3d 363, 366 (Fla. 3d DCA 2013). A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument." *Am. Fed'n of State, County v. Miami-Dade County Pub. Sch.*, 95 So. 3d 388, 391 (Fla. 3d DCA 2012).

Here, Sahyers did not testify regarding either the original lender's intent or the Homeowners' intent, nor would she be qualified to do so. *See W. Edge II v. Kunderas*, 910 So. 2d 953, 954 (Fla. 2d DCA 2005) (party seeking reformation did not have personal knowledge sufficient to testify about intent of the opposing party). The only testimony about the Homeowners' intent was that of Thomas who unequivocally asserted that he did not intend to lien Parcel 3—the parcel that the Bank sought to add to the legal description.[45]

The trial court, however, rejected this testimony as "not credible" and inferred the opposite intent from a series of deeds and a power of attorney that were admitted as self-authenticating public documents. All of these documents involved transfers to and from the Homeowners, and therefore, provide no information as to the intent of the original mortgagee.

The Bank argued that the documents show the intent of the Homeowners because the documents, according to the Bank, show the Homeowner treating Parcels 1 and 3 together as one, where Parcel 1 is the property described in the original recorded Mortgage. In reality, the first deed shows that all three parcels (Parcels 1, 2, and 3) were simultaneously deeded to the at approximately the

[45] T. 177.

same time as they executed the subject Mortgage.[46] The power of attorney also involves all three parcels.[47] While one quitclaim deed shows a transfer of Parcel 1 and 3 together,[48] the other shows a transfer of Parcel 2 along with the exact language of Parcel 3 (except without the "Parcel 3" title):[49]

Exh.R	Date	Description	Party 1	Party 2	Parcels
284	11/1/04	Trustee's Deed	Dalberg trust		1, 2, 3
289	7/22/05	Quitclaim Deed			2 (Lot 10)[includes exact language of Parcel 3]
291	7/22/05	Quitclaim Deed			1 (Lot 9), 3
287	3/6/06	Warranty Deed		Intercostal Park LLC	12935 South Shore Dr. Lot 10
293	10/30/08	Warranty Deed		Trust	1, 3
296	10/30/08	Power of Attorney	Jennifer	Thomas	1, 2, 3

The reason why Parcel 3, which appears to be an easement, is designated and transferred as a separate "Parcel" was not developed at trial and there may well be an error in the underlying deed that requires reformation. In fact, because one quitclaim deed describes Parcel 2 (also "known as Lot 10") as including a legal

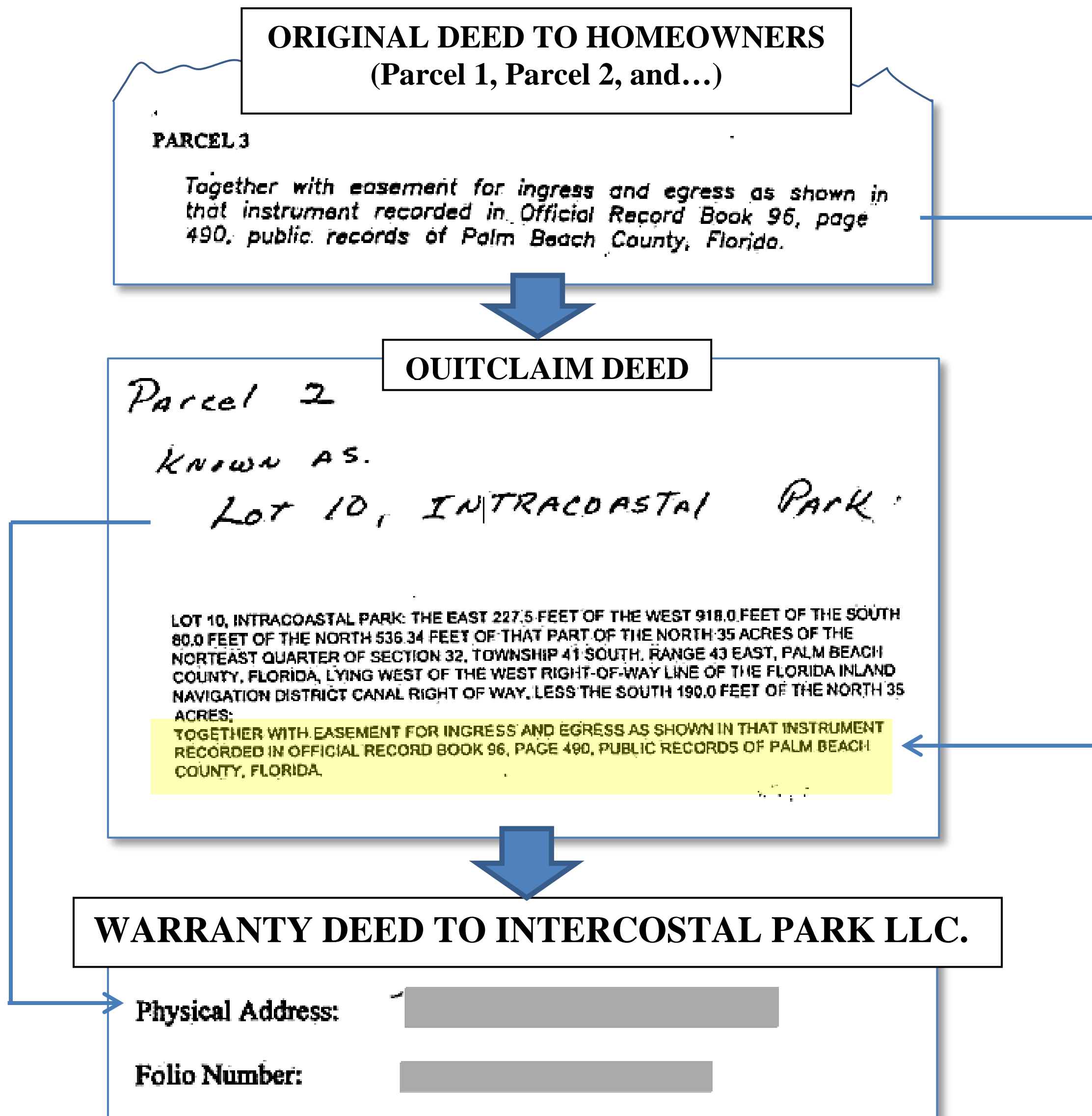
[46] Exh. R. 284.

[47] Exh. R. 296.

[48] Exh. R. 291.

[49] Exh. R. 289.

description that is elsewhere denominated as "Parcel 3,"[50] and because this same "Lot 10" (without further legal description) was later deeded to Intercostal Park LLC [sic],[51] the chain of title arguably makes this non-defendant an owner of Parcel 3:



50 Exh. R. 289.

51 Exh. R. 287.

Regardless of who owns Parcel 3,[52] these deeds (and power of attorney) do not show that the Homeowners consistently treated Parcels 1 and 3 together as one property. Even if they did, it is not logical to infer from these post-loan transfers that the Homeowners intended to encumber Parcel 3 when they signed the Mortgage.

Additionally, the deeds show that Parcel 2 was part of the original transfer apparently funded by the loan. Because the Bank does not claim that its lien extends to Parcel 2, they tacitly concede that the Mortgage encompassed something less than the entire property transfer. And given that an intermediate tract (Parcel 2) was intentionally excluded, it is implausible that a mere scrivener's error was responsible for the exclusion of Parcel 3.

Because the deeds are, at best, ambiguous on the issue of intent, the Bank failed to adduce "clear and convincing evidence" of a mistake on the part of the Homeowners, much less a mutual mistake. The trial court, therefore, committed clear error in granting reformation.

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[52] While beyond the record, in the interest of full disclosure, it is noted that county records differ from the deed to Intercostal Park LLC. Specifically, the Property Appraiser's website shows a slightly different folio (or "parcel control") number, a different address (12907 rather than 12935), and a legal description by "lot and block" rather than "township and section." But the county does associate this parcel with the quitclaim deed containing the Parcel 3 language. Available at: http://www.co.palm-beach.fl.us/papa/Asps/PropertyDetail/PropertyDetail.aspx?parcel=00434132010000100&srchtype=map.

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

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 the record-keeping policies of an entirely different entity which actually created and kept the records.

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.

Sahyers was not a records custodian or otherwise "qualified witness"

Here, the Bank's only witness, Sahyers, was a professional testifier whose job duty with Nationstar was to review loan documents so that she can communicate the hearsay within those documents to the court. Her only connection with the documents admitted into evidence, over objection, was that she had read them. Indeed, there was no evidence that she was even involved in the process of locating and culling the records brought to trial—in fact, she admitted that she did not personally print the payment records from the Nationstar system. And it was abundantly clear that she was as mystified as anyone else in the courtroom as to the meaning of the many codes on the payment records.[53] In short, the only competence she offered the trier of fact was that she was sufficiently literate in the English language to read the documents to the fact-finder (a skill already possessed by the court).

To properly authenticate the documents before admitting them into evidence, Sahyers 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

[53] T. 128-29.

have had 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;

4) It was a regular practice of that business to make such a record; and

5) The circumstances do not show a lack of trustworthiness.

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

But to even be permitted to testify to these threshold facts, Sahyers needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *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'").

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 admitted that he was not the custodian and did not prepare the statements, nor supervise 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 qualified to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

The case of *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014) is virtually identical to this case. There, the trial court admitted evidence from a "document reader" (Gergeceff) over multiple authenticity and hearsay objections. Gergeceff testified she had only seen the subject note for the first time the day of trial. *Id*. at 826. Gergeceff testified she had only become familiar with the mortgage file when she learned the case was being tried. *Id*. As in this case, the defendants objected to the witness's authentication of the note, mortgage, and other documents because she was incompetent to testify. *Id*.

Although the plaintiff bank in *Kelsey* filed what the opinion described as a "proper concession of error," the Third District wrote an opinion expressing its agreement with the concession and illuminating the error that had occurred below:

> Without the proper foundation, the documents Gergeceff relied upon to establish the amount due on the note were indisputably hearsay and were not properly authenticated. § 90.803, Fla. Stat. (2012); *Yisrael v. State,* 993 So.2d 952, 956 (Fla.2008). …

Id. The court agreed that the trial court had "erred in allowing the documents, as they are hearsay without the proper authentication." *Id*. As in *Kelsey*, this Court should also reverse the judgment below as having been based on pure hearsay.

Being told about record-keeping procedures is not a substitute for personal knowledge ("training" is another word for "hearsay").

The Bank will argue that Sahyers was sufficiently "familiar" with Nationstar's records to testify about them because Nationstar had "trained" her what to say about the documents. However, "training" for purposes of regurgitating information to the fact-finder is nothing more than a synonym for "hearsay." Had the witness said, "My boss told me to testify that the policy was that these records are made at or about the time of the event by persons with knowledge…" there would be no question that her "knowledge" is not personal, but rather based on rank hearsay. And it is hearsay of the worst kind because it is deliberately communicated to her for the specific purpose of testifying in court. It is improper witness coaching to create the façade of familiarity. Simply substituting "my boss trained me" for "my boss (or my company) told me" does not alter the fact that the witness has no personal knowledge.

Hearsay knowledge cannot be allowed to substitute for personal knowledge gained through an actual job-responsibility tied to the business activity. Hearsay

knowledge specifically imparted for purposes of litigation is doubly suspect. To hold otherwise would have the business record exception swallow the rule because <u>there is no document that a witness cannot be told (or "trained") to say meets the exception.</u>

This Court has already held that "familiarity" with records is something that must be gained in the course of experience—performing or supervising the business activity in question. In *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013), 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 Court held that it was reversible error to admit the receipt as a business record because the clerk was not qualified to introduce the exhibit. *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*. "While the clerk was <u>able</u> to testify as to how the store re-rings merchandise stolen from the store, <u>this</u>

was not his duty nor within his responsibilities." *Id.* (emphasis added). This 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.* *See also Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (testimony about business practices was legally incompetent without showing that witness was in charge of, or well enough acquainted with, the activity).

Here, Sahyers was similarly unqualified to lay the foundation for the records from the Nationstar departments for which she received "training," but for which she had never worked. She "had no responsibilities" regarding the business practices of the Bank in generating its bookkeeping records. The nature of her job responsibilities—reading records to judges—is insufficient precisely because her familiarity with those records was not gained in the course of performing or supervising the business activity in question. Instead, her "familiarity" was artificially created specifically for the purpose of litigation.

Accordingly, because Sahyers was not a qualified witness, her testimony, and the Bank exhibits introduced through her, should have been excluded.

Sahyers was even less qualified to lay the foundation for documents from entities where she had never worked ("hearsay within hearsay").

The key documents that the Bank offered as evidence were not Nationstar records at all, but records purportedly from companies for which Sahyers had never been employed (Bank of New York, Countrywide, Bank of America). This even further distanced her from any personal knowledge of how they were created or maintained. Specifically, those documents were:

- **Exhibit 3 (Payment Records and Payoff Statement)**— Records consisted mostly of those from previous servicers, such as Countrywide and BOA for which she had never worked.[54]
- **Plaintiff's Exhibit 4 (Notice of Acceleration)**—a document purportedly sent by Countrywide. Sahyers did not know why the letter was sent to an address different than the property address.[55]
- **Plaintiff's Exhibit 5 (Routing History)**—a document purportedly created by Bank of America.[56]

[54] Exh. R. 29-65.

[55] T. 113.

[56] Exh. R. 72; T. 62.

- **Exhibit 6 (PSA)**—a written agreement between Bellavista Funding Corporation as Depositor, Bank of New York as Trustee and Countrywide as Master Servicer.[57] Sahyers never worked for any of these entities.

To the extent that these records were found by someone (apparently not Sahyers) among a collection of documents or images kept by Nationstar, they are hearsay upon hearsay. They are out-of-court statements by some unidentified person about the contents of the Nationstar files, which themselves adopt records from other companies, and thus, are out-of-court statements about the contents of those files. Even if Sahyers had been qualified to lay the foundation for a business records exception to the Nationstar records (the first level of hearsay), she was spectacularly unqualified to do so for the records of other companies (the second level of hearsay).

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 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

[57] Exh. R. 76.

> 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.*, 123 So. 3d 617 (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 621. As in this case, on direct examination (and over objection), the witness in *Yang* "employed all the 'magic words'" of the business record exception to hearsay. Cross-examination revealed a different story—that she did not have personal knowledge of the prior management company's practice and procedure and had no way of knowing whether the data obtained from that company was accurate. *Id.* This 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.*; *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).

Additionally, Sahyers' lack of personal knowledge of the transition process (as opposed to hearsay knowledge acquired for purposes of litigation) distinguishes this case from *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005), upon which the trial court relied.[58] 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.

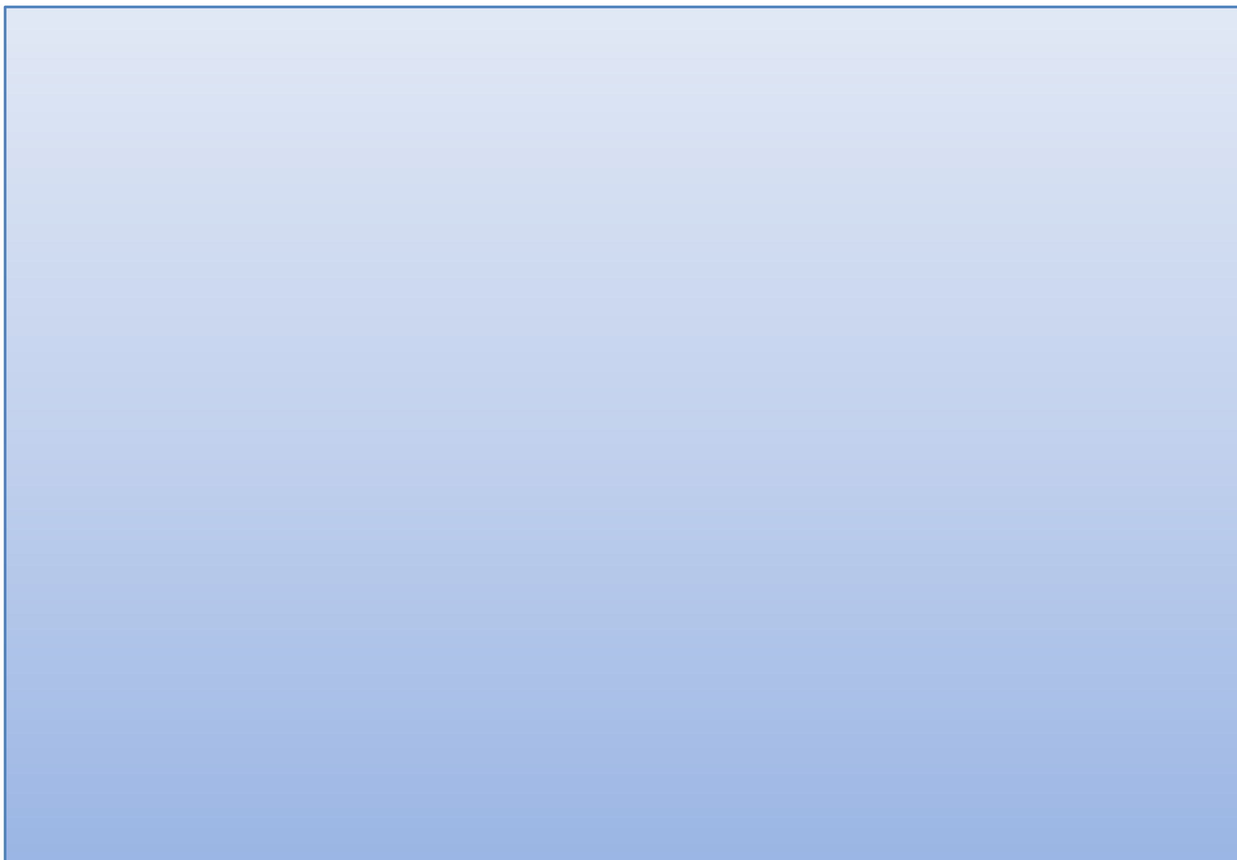
The myth that providing admissible evidence from qualified witnesses is "impractical."

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 nonparties,

[58] T. 52-53, 55-56, 162.

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"):



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, 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 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 (because apparently, many of the employees who could provide the testimony still work for Nationstar[59]). Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses than to attempt to train one person on all aspects of the Bank's business.

Most egregious is the Bank's dismissive reliance on the testimony of an employee of its servicer, Nationstar, when the document to be admitted was that of the Plaintiff itself—Bank of New York Mellon. The Plaintiff Bank chose not to bring its own representative, or a certificate from its own record custodian, to authenticate the PSA—a document to which the Bank of New York (the Plaintiff's predecessor according to the style of the case) was a signatory.[60] Nor did the Bank

[59] "We have employees on staff that actually worked at Bank of America Countrywide…" T. 102.

[60] Exh. R. 213.

ask any of its own employees actually involved in the securitization transaction to attest to any other documents (such as the trustee's certifications) that would have shown whether the Note and Mortgage were actually received in accordance with the PSA.

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

The myth that bank records are inherently trustworthy.

Another 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) (case involving the same plaintiff and original plaintiff's counsel 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

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

court filings.,[62] including the consent judgment regarding two of the servicers here, BOA and Countrywide.[63]

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 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.

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 relate to 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 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 created by other, defunct servicers. Because it did not itself invest in the loan, any financial incentive to ensure the

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

[63] Available at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf.

accuracy of these second-hand records is highly attenuated, if it exists at all. 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 are inaccurate.

The point is best illustrated by the testimony in this case. Although she was unqualified to make the statement, Sahyers testified twice that Nationstar relies upon the records of prior servicers to conduct its business.[64] In the one instance where she was qualified to speak on the subject, she testified that she relies upon such records to perform her duties and job functions[65]—which, of course, is reading records to the court. Here, in the absence of any evidence to the contrary, the "business" of Nationstar is identical to that of Sahyers—convincing the court that third party records are reliable.

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. Accordingly, the trial court erred in admitting the Bank's exhibits and the testimony about them because it was unmitigated hearsay.

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[64] T. 46, 63.

[65] T. 148.

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

A. There was no admissible evidence that the Bank had acquired standing before it filed the case.

There was no admissible evidence that the necessary endorsement was placed on the Note before the case was filed.

A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose. *Verizzo v. Bank of N.Y.*, 28 So.3d 976, 978 (Fla. 2d DCA 2010). In addition to showing standing as of the time of trial, the foreclosing party must show that it had standing before it filed the case. *See Marianna & B.R. Co. v. Maund*, 62 Fla. 538 (Fla. 1911) ("plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action."); *Stegemann v. Emery*, 146 So. 650 (Fla. 1933) ("suit may not be maintained upon an after-acquired right.").

Where, as here, the foreclosing plaintiff—a stranger to the original transaction—chooses to demonstrate standing by showing it is a holder under Article 3 of the Uniform Commercial Code, there must be evidence that it became the holder before it filed suit. *McLean v. JP Morgan Chase Bank, N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2011) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor

of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed.").

To prove that it was a holder, the Bank must do more than show that it currently possesses the note, or even that it possessed the note before it filed the foreclosure case. It must show that the requisite endorsement was placed on the note prior to filing suit. *See Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 377, n. 2 (Fla. 2d DCA 2012) (noting that "even if U.S. Bank had properly amended its complaint to travel on the original note endorsed in blank, it would have needed to prove the endorsement in blank was effectuated before the lawsuit was filed."); *Cutler v. U.S. Bank Nat. Ass'n*, 109 So. 3d 224 (Fla. 2d DCA 2012) (summary judgment reversed where allonge was not dated and there was no evidence that the allonge took effect prior to the date of the complaint); *Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453, 455 (Fla. 2d DCA 2012) (summary judgment reversed where the bank filed a note that contained a new endorsement after it filed suit, because there was "no evidence in the record establishing that the endorsement in blank was made to [the plaintiff bank] prior to the filing of the foreclosure complaint."); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) ("the indorsement in blank did not establish that the Bank had the right to enforce the note when it filed suit, because the indorsement was undated.");

Gonzalez v. Deutsche Bank National Trust Company, 95 So. 3d 251, 252 (Fla. 2d DCA 2012) (same).

Here, the endorsement in blank first appeared in the case over a year and half after the case was filed.[66] And most importantly, Sahyers admitted that she could not testify as to when the Note was endorsed and made no effort to determine when it was done.[67] Tellingly, Sahyers claimed that she had seen an imaged copy of the collateral file which "shows that the endorsement is in place"[68] and includes "a date and time when the images are uploaded into the system."[69] But she did not bring those records to the trial.[70] Not only is there no evidence or testimony as to when these alleged images were created and updated, Sayhers flatly admitted that she could not testify that the endorsement was present in 2004 (the earliest date for which the Bank claims to have a record that the Note had been transferred):

> Q. [Homeowners' counsel] Do you know what -- if there were any endorsements on the original documents in 2004?
>
> A. None that I can recall.

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[66] Notice of Filing, filed May 5, 2011 (R. 86).

[67] T. 106.

[68] T. 143.

[69] T. 108.

[70] T. 108.

Q. You wouldn't know because you never worked there [at BOA], right?

A. That's correct.[71]

In the end, Sahyers' testimony that the Note was endorsed before the case was filed hangs from a single thread of supposition that begins with the Routing History (Exhibit 5) created by the previous servicer BOA. According to Sahyers, this exhibit shows that the Note was sent to the Law Offices of David Stern before the Complaint was filed:[72]

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DOC444R              Bank of America Home Loan              1/28/14
NBKIF05                  Routing History                    07:15:48

  Account No   : ________
  File (F4)    : __
  Document(F4) : __
  Instance(F4) : __ Type:          Status:          Received:
                                                          --Receipt--
  Type  Date/Tm/  Destination/Source/     User/Reason/ Trans.#  STS   Date
        Trk Date  Trk#                    Carrier
  CF    001-CollFile
  XRCV 11/16/04  RECON TRUST COMPANY, N.  CTS              0
  XSND 12/15/04  GUARANTEED RATE INC,     CTS              0     I  12/25/04
  UPD  02/25/05  BNY WESTERN TRUST COMPA  DOC627R          0
_ RCV  06/25/09  DMS-Release/Reinstateme  CSERRAN2  003234832
_ SND  06/25/09  DNU - LAW OFFICE OF DAV  CSERRAN2  003234866   I  07/09/09
  D1    001-Original
_ SND  02/01/05  FMS Shipping             IGONZALE  002111543   E  02/02/05
_ RCV  02/02/05  FMS Shipping             EMALDON2  002113163
                                                               More...

D=Trans Detail   X=Select
F2=Navigate  F3=MainMenu  F4=List  F7=Fold/Drop  F11=Unroute  F12=Exit

   a                                                            11/005
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XRCV 11/16/04  RECON TRUST COMPANY, N.
XSND 12/15/04  GUARANTEED RATE INC,
UPD  02/25/05  BNY WESTERN TRUST COMPA
RCV  06/25/09  DMS-Release/Reinstateme
SND  06/25/09  DNU - LAW OFFICE OF DAV
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[71] T. 108.

[72] T. 107; Exh. R. 72 (color inverted for legibility).

From this, she speculated that the Note was already endorsed because "foreclosure counsel has no authority to affix an endorsement on an original note."[73] Leaving aside the irony that the referenced foreclosure counsel was disbarred, in part, for submitting false foreclosure documentation to the court,[74] this presumption by Sahyers does not eliminate the possibility that others did not "affix an endorsement" after the case was filed. This is so because the Note was filed by a different law firm over a year and a half after it was sent to the Law Offices of David J. Stern (which is at least one transfer not shown on the Routing History). What path the Note took after the collapse of the Stern law firm—and through whose hands it passed—is anyone's guess.

There was no admissible evidence that the Note (endorsed or not) was delivered to the Plaintiff's trust before the case was filed.

And while the Routing History does nothing to establish when the endorsement first appeared on the Note, it actually contradicts the Bank's theory that the Note was transferred to the Plaintiff Bank's trust before the closing date. First, although Sahyers testified that the record showed that "Plaintiff" received the

[73] T. 143.

[74] *The Florida Bar v. Stern*, 133 So. 3d 529 (Fla. 2014).

Note in November of 2004,[75] on its face, it appears to show transfers of the collateral file between entities unrelated to (or at least, unmentioned in) this case: Recon Trust Company, Guaranteed Rate Inc., BNY Western Trust Company, and FMS Shipping. Of course, Plaintiff's trust did not exist until December of 2004[76] and the BOA Routing History entries could not have been contemporaneously created because BAC Home Loans Servicing, LP did not exist for another four years.[77]

More importantly, it does not show a transfer to the Depositor of the trust (Bellavista Funding Corporation), which, according to the PSA, delivered the loan documents to the Plaintiff (Bank of New York).[78] And instead of a transfer to the Plaintiff, Bank of New York, it indicates a transfer to an entity called BNY Western Trust Company (not mentioned in the PSA) two months after the closing date of the Plaintiff's trust.

Notably, the Bank's own evidence (the PSA itself) establishes the existence of at least three documents that are conspicuously absent here—documents that would show whether the subject loan was ever among the loans in the Plaintiff's

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[75] T. 65-66.

[76] PSA (Exhibit 6; Exh. R. 76).

[77] Certificate of Amendment to the Certificate of Limited Partnership (Exhibit 9; Exh. R. 301).

[78] Section 2.01, PSA, p. 44 (Exh. R. 138).

trust, and if so, whether a properly endorsed Note was ever actually transferred to the trust. For example, if the subject loan was part of the Plaintiff's trust, it would be found on a master list called a Mortgage Loan Schedule.[79] The Bank did not seek to introduce the Mortgage Loan Schedule for its trust as an exhibit.

Additionally, on the closing date, the Trustee (the Plaintiff Bank) made an "Initial Certification" indicating receipt of the loan documents listed there.[80] Ninety days after that, the Bank made a "Final Certification" in which it listed as exceptions the loans that do not meet the requirements of Section 2.01 (the conveyance provision)[81]—a list which would include those with Notes lacking the proper endorsement.[82] As with the list of mortgages itself, the Bank offered neither of its own certifications as evidence at trial.

Accordingly, even if the Routing History and PSA were admissible, they do not prove that the Note was endorsed or delivered to the Plaintiff's trust before the case was filed. In fact, they establish just the opposite. The trial court, therefore, erred in failing to grant the Homeowners' motion for involuntary dismissal on the issue of standing at inception.

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[79] Section 1.01, PSA, p. 19 (Exh. R. 113).

[80] Section 2.02, PSA, p. 48 (Exh. R. 142).

[81] *Id*.

[82] Section 2.01(c)(i)(A), PSA, p. 44 (Exh. R. 138).

B. There was no admissible evidence that a notice of acceleration was sent to the Homeowners' notice address.

The Bank also failed to adduce admissible evidence that it had sent the Notice of Acceleration required under Paragraph 22 of the Mortgage.[83] Sahyers was unqualified to lay the predicate for the Countrywide document proffered by the Bank as the acceleration notice and it was erroneously admitted. Without such evidence, the Bank did not establish a *prima facie* case for foreclosure. *See*, Complaint ¶ 8 (alleging that all conditions precedent to acceleration have been fulfilled); *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) (listing "an acceleration letter" as one of the documents needed to establish entitlement to foreclosure).

Even if the Countrywide letter were admissible, it showed that it was not sent to the notice address as required by Paragraphs 15 and 22 of the Mortgage. The Bank proffered no evidence that the letter would reach the Homeowners despite having been mailed to the wrong city. In *Star Lakes Estates Ass'n, Inc. v. Auerbach*, 656 So. 2d 271 (Fla. 3d DCA 1995), the court reversed a summary judgment of foreclosure in favor of a condominium association because there was no evidence to prove the specific address to which it claimed to have sent a notice of special assessment:

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[83] Mortgage, Plaintiff's Exhibit 4, Exh. R. 39.

> Although we recognize that proof of mailing normally raises a rebuttable presumption that mail was received, [internal citations omitted] such a presumption only arises where there is proof that the mail is being sent to the *correct address.*

Id. at 274 (emphasis original).

Coupled with Mr. [redacted] uncontradicted testimony that he did not receive the letter (which is, at least, circumstantial evidence that the erroneous address prevented delivery), the trial court should have granted an involuntary dismissal for failure to prove compliance with conditions precedent.

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

Likewise, Sahyers was unqualified to authenticate or lay the foundation for a business records exception to hearsay for the payment records from BOA and Countrywide. Without these documents, or Sahyers "testimony"—her reading of these records to the court—there is no evidence to support the amount of contractual damages in the judgment. Without admissible evidence of the amount due and owing, the Bank failed to prove a *prima facie* case. *See Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___So. 3d. ___, 39 Fla. L. Weekly D1159, at *3 (Fla. 2d DCA May 30, 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.").

CONCLUSION

This Court should reverse and remand for entry of judgment in favor of the Homeowners on the reformation issue. On the issues of standing at inception and conditions precedent, the Court should reverse and remand for entry of an order granting the Homeowner's motion for involuntary dismissal.

Dated: September 3, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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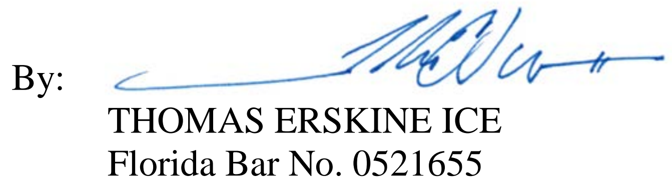
By: 

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 3, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this September 3, 2014.

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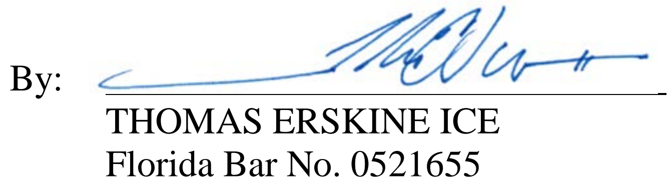
By: 

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