In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

NATIONSTAR MORTGAGE LLC, et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] (collectively, "the Homeowners") appeal the final judgment of foreclosure rendered in favor of Nationstar Mortgage, LLC ("the Servicer") after a non-jury trial. The Homeowners present two issues for the Court's review:

- Whether the trial court erred in denying their motion for involuntary dismissal at trial; and
- Whether the trial court abused its discretion in denying their motion to dismiss as a sanction for the false verification found in the initial complaint.

II. Appellants' Statement of the Facts

A. The Pleadings and the Discovery

Aurora Loan Services, LLC ("Aurora") initiated this action when it filed its one-count mortgage foreclosure complaint.[1] The allegations of the complaint were verified under penalty of perjury by Neva Hall ("Hall"), who claimed to be a vice-

[1] Complaint, July 22, 2010 (R. 1-38).

president of Aurora.[2] These verified allegations included an allegation that Aurora owned the subject note and mortgage.[3]

The note attached to the complaint identified the lender as First Southern Bank, a Florida Banking Corporation ("First Southern") and did not include any endorsement, either in blank or specifically to either Aurora or the Servicer.[4] No other endorsement, either in blank or specifically to the Servicer, was on the note.[5]

The Hall Deposition

The Homeowners deposed Hall regarding her verification in this case and in factually similar cases the Homeowners' counsel was defending.[6] During her deposition, Hall testified that

1. When signing verifications, she would merely review the attachments to the complaint and nothing else.[7]
2. She did not know whether she read the complaint Aurora filed in this case and that she did not always read complaints word for word.[8]

[2] Verification of Complaint, July 22, 2010 (R. 4).

[3] Complaint, ¶5, July 22, 2010 (R. 2).

[4] Note attached to Complaint, March 14, 2012 (R. 6-10).

[5] *Id.*

[6] Deposition of Neva Hall, August 4, 2011 ("Hall Depo.") (R. 345-600).

[7] Hall Depo., p. 6 (R. 448).

3. She did not recall whether she did or did not look at the Homeowners' note and mortgage prior to verifying the complaint, and did not always do so.[9]
4. She did not know if the original note had an endorsement on it or an allonge attached to it.[10]
5. She did not know for sure, but guessed that the notes and mortgages were probably not always attached when she verified complaints.[11]
6. She did not know how she verified the allegation that Aurora owns and holds the note and mortgage as alleged in paragraph five although she admitted that she would "rely on counsel" for this information.[12]
7. That she was incorrect when she verified that Aurora owned the note and mortgage.[13]
8. That she didn't understand the difference between owning and holding a note.[14]

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[8] Hall Depo., p. 7 (R. 449).

[9] Hall Depo., pp. 9-10 (R. 451-52).

[10] Hall Depo., p. 14 (R. 456).

[11] Hall Depo., p. 10 (R. 452).

[12] Hall Depo., p. 19 (R. 461).

[13] Hall Depo., pp. 34-36 (R. 476-78).

[14] Hall Depo., p. 46 (R. 488).

9. She did not know what would constitute conditions precedent to acceleration and foreclosure (other than a default) although she relied on counsel to "have done the proper process."[15]

10. She did not know whether she verified that the Homeowners owed $800,000 in principal as alleged in paragraph ten of the complaint and that she did not always verify the principal amount due and owing on the debt.[16]

11. She did not verify any of the title work performed even though she verified paragraph twelve of the complaint alleging that the claims of all known defendants were inferior to the claim of Aurora.[17]

Based on Hall's testimony, the Homeowners moved the trial court to dismiss the case as a sanction for failing to comply with Fla. R. Civ. P. 1.110(b).[18] After a hearing, this motion was denied.[19]

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[15] Hall Depo., pp. 22-23 (R. 464-65).

[16] Hall Depo., p. 24 (R. 466).

[17] Hall Depo., pp. 34-36 (R. 476-78).

[18] Defendants' Motion for Sanction of Dismissal or Dismissal for Unclean Hands, September 15, 2011 (R. 635-52).

[19] Order Denying Defendants' Motion to Dismiss, September 19, 2011 (R. 653).

The Materialization of the Floating Allonge

While the Homeowners were attempting to procure Hall's deposition, Aurora filed a motion for leave to file an amended complaint.[20] This motion alleged that that it had been "authorized" by the owner of the note and mortgage to institute the foreclosure action.[21] Additionally, the amended (and still as yet unverified) complaint attached to the motion included a different copy of the original note—this time, the note included an allonge with a chain of endorsements from the original lender and ending in an endorsement in blank.[22] Notably, the allonge appears at the end of the note and five pages of addenda.[23] Aurora did not make any allegation when the allonge was affixed to the note or provide any document which supported Aurora's contention that the owner of the loan had authorized it to sue the Homeowners.[24]

[20] Motion for Leave to File Amended Complaint, March 31, 2011 (R. 179-200).

[21] *Id.* at ¶3, March 31, 2011 (R. 179).

[22] Note attached to Amended Complaint, March 3, 2011 (R. 186-196).

[23] R. 196.

[24] Amended Complaint, August 10, 2011 (R. 300-341).

A little over a month later, Aurora filed what was ostensibly the original note and mortgage.[25] Again, the attached note contained the same allonge which was located after the five pages of addenda.[26]

Three months later, however, Aurora filed the now verified amended complaint which also attached a copy of the note and the allonge—but now the allonge appeared immediately after the note, i.e. before the five pages of addenda.[27]

The Homeowners answered Aurora's amended complaint, specifically denying that Aurora was the holder of the note and pled that they were without knowledge of Aurora's allegation that it had been authorized to pursue the foreclosure and therefore denied the remainder of Aurora's allegation.[28] The Homeowners also asserted the affirmative defenses of lack of standing;[29] failure to join an indispensable party to the action—namely the real party in interest, the owner of the loan;[30] and unclean hands based upon Hall's deposition testimony.[31]

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[25] Notice of Filing Original Documents, May 5, 2011 (R. 237).

[26] R. 250.

[27] R. 309.

[28] Answer to Amended Complaint, ¶6, October 4, 2011 (R. 935).

[29] Second Affirmative Defense, October 4, 2011 (R. 937).

[30] Fourth Affirmative Defense, October 4, 2011 (R. 939-940).

[31] Eight Affirmative Defense, October 4, 2011 (R. 943-944).

Aurora then sought permission to substitute the Servicer as party-plaintiff claiming that the Servicer had become the new servicer of the loan.[32] This motion was granted and the Servicer was substituted as the party-plaintiff in place of Aurora.[33] The matter was then set for trial.[34]

B. The Trial

At the onset of trial, the Homeowners renewed their sanctions motion and requested that the trial court dismiss the case based on Hall's deposition testimony.[35] After hearing argument from counsel, the trial court declined to rehear the motion.[36]

The Servicer called its only witness, one of its employees, Kristen Trompisz, to the stand.[37] Over the Homeowners' hearsay and authenticity objections, the court admitted all the exhibits that constituted the entirety of the Servicer's case:

- The alleged original note (Exhibit 1);[38]

[32] Motion to Substitute Party Plaintiff, November 30, 2012 (R. 1009-1010).

[33] Order Granting Motion to Substitute Party Plaintiff, January 16, 2013 (R. 1013).

[34] Order Setting Non-Jury Trial, November 26, 2013 (R. 1056-1061).

[35] T. 6.

[36] T. 7.

[37] T. 10.

[38] T. 32.

- A screen shot image purporting to show what the original note looked like when Aurora received possession of it on June 4, 2010 (Exhibit 3)—notably, this showed the allonge as immediately following the note, rather than following the addenda as seen in the "original" document admitted as Exhibit 1;[39]
- A report from a system known as "DocTrack" used to track the original note (Exhibit 4);[40]
- A purported copy of the mortgage (Exhibit 5) ;[41]
- Two alleged default letters (Exhibit 9);[42]
- The payment histories (Exhibit 10);[43]
- A "hello" letter and a "goodbye" letter purporting to establish a servicing transfer from Aurora to the Servicer (Exhibit 15);[44] and
- A communication notes log purporting to establish when the default letters were allegedly mailed to the Homeowners.[45]

[39] T. 40.
[40] T. 35.
[41] T. 47.
[42] T. 51.
[43] T. 65
[44] T. 61,
[45] T. 55.

While the Homeowners were not permitted to *voir dire* the witness regarding her knowledge of each document accepted into evidence, on cross-examination, Trompisz admitted that at least half of her job as a "litigation resolution analyst" involves appearing in court for "testimony" while the remainder involves "preparing" for testimony, researching issues for the Servicer's in-house counsel, and mentoring the Servicer's newer employees within the Servicer's mediation group.[46] She neither worked for nor supervised any of the departments responsible for creating any of the exhibits the Servicer sought to be admitted into evidence and admitted that she received training on her responsibilities as a witness,[47] including specific testimony by attorneys on the "dos and don'ts" of testimony.[48]

Trompisz also testified that she had no independent knowledge when the endorsements were added to the allonge[49] and that she had "no idea" when the endorsements were added to the note.[50] She also admitted that the only way the Bank's screenshot (Exhibit 3) would reflect that the allonge had been stapled to the note when it was received by Aurora would be to look at the actual scanned image

[46] T. 85-86.

[47] T. 94.

[48] T. 95.

[49] T. 105-106.

[50] T. 116.

and see whether there were staple marks on the instrument.[51] However, when she was asked to look at this exhibit, Trompisz admitted that she could not tell whether the allonge had been stapled when the note was scanned in by Aurora.[52] Therefore, she admitted that she did not know when the allonge was stapled to the note or even if the allonge was stapled to the note before it was placed in the court file.[53]

The witness also admitted that the Servicer's Exhibit 3 did not include scanned copies of the addenda which comprise an additional six pages of the note.[54] Her testimony also reflected that the pages of the original note filed with the trial court were stapled: 1) the note itself (five pages); 2) the interest-only addendum (two pages); 3) the prepayment addendum (two pages); 4) the addendum to note (two pages); and, finally, 5) the allonge itself (one page).[55]

After the close of the Servicer's case-in-chief, the Homeowners argued that the case should be involuntary dismissed because: 1) the case was initially filed by Aurora on a false pleading;[56] 2) the Servicer's documents accepted into evidence

[51] T. 107.

[52] T. 110-111.

[53] T. 111.

[54] T. 112.

[55] Original Note, April 26, 2011 (R. 239-250).

[56] T. 152.

were inadmissible;[57] 3) the Servicer had failed to prove it had standing when it filed the case since it was not established when the endorsements were added to the note or when the allonge was affixed to the instrument;[58] 4) the Servicer was not the real party in interest as contemplated by Fla. R. Civ. P. 1.210;[59] and 6) the Servicer's unclean hands (in connection with the allegations and attachments of Aurora's initial pleading) prevented foreclosure.[60]

The Court reserved ruling on this issue[61] and the Homeowners took the stand. They both testified that they did not recall seeing the Servicer's default letters prior to the filing of the lawsuit.[62]

At the close of the evidence, the Homeowners renewed their motion for involuntary dismissal which the trial court denied.[63] Judgment was thereafter entered in favor of the Servicer.[64] This appeal follows.

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[57] T. 153.

[58] T. 153-154.

[59] T. 155.

[60] T. 158-160.

[61] T. 160.

[62] T. 167, T. 168.

[63] T. 171.

[64] Final Judgment of Foreclosure, February 28, 2014 (R. 1114-1117).

SUMMARY OF THE ARGUMENT

The trial court erred in denying the Homeowners' motion for involuntary dismissal. The Servicer failed to prove its standing because neither the Servicer nor the original Plaintiff, Aurora, joined their undisclosed principal in the action and neither proved that the note owner had authorized them to sue on its behalf. While servicers cannot be note holders under the Uniform Commercial Code, even if they could, there was no admissible evidence that Aurora was in possession of a properly endorsed on the day the lawsuit was filed because: 1) the witness was hopelessly unqualified to provide testimony and introduce records; and 2) even if the witness had been qualified, there was no evidence that the allonge containing the endorsements was actually affixed to the note when Aurora filed this case.

Additionally, the Servicer failed to establish compliance with conditions precedent because even if the default letters were actually sent, they did not meet with the unambiguous requirements of Paragraph 22 of the mortgage.

Finally, the trial court abused its discretion in denying the Homeowners motion to dismiss for Aurora's false verification. Where, as here, the foreclosing lender admits to making false statements in its pleading, the only reasonable means of enforcing the requirement is to dismiss the case.

STANDARD OF REVIEW

A trial court's ruling of a motion for involuntary dismissal is reviewed *de novo*. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). Likewise, a party's standing to bring a foreclosure action is reviewed *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014).

In a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987)

An appellate court reviews a trial court's decision to admit evidence for abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008).

Similarly, an order on a motion to dismiss imposed as a sanction for fraud on the court or other violations of the rules of procedure is reviewed under the abuse of discretion standard. *Bass v. City of Pembroke Pines*, 991 So.2d 1008 (Fla. 4th DCA 2008).

ARGUMENT

I. The trial court erred in denying the Homeowners' motion for involuntary dismissal.

When confronted with the Homeowners' motion for involuntary dismissal, the trial court was required to determine whether the Servicer had made a *prima facie* showing of foreclosure based on competent, substantial evidence. *Crowe v. Crowe*, 763 So. 2d 1183, 1183-84 (Fla. 4th DCA 2000). Because no view of the evidence or testimony presented at trial establishes this, the trial court erred in denying the motion.

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

Although the Servicer alleged that it was merely a "designated holder" that was "authorized to prosecute this foreclosure action,"[65] it made no effort at trial to prove it had any authority from the note owner. In fact, it never even identified the note owner. It apparently sought to establish at trial that it, and its predecessor, Aurora, were actual (rather than "designated") noteholders under Article 3 of the Uniform Commercial Code ("UCC"). These servicers, however, as agents of the owner, could never be Article 3 holders.

[65] Verified Amended Complaint, ¶ 6 (R. 301).

1. The two servicers lacked standing because they were not Article 3 holders of the note.

Under Article 3 of the Uniform Commercial Code ("UCC") a servicer which is acting solely as an agent is not a "holder" of the Note. This is because, when an agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent.")[66]

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

In fact, the use of an agent to possess the instrument on behalf of the holder is such a common banking practice that it was officially authorized by the 1998 amendments to Article 9 of the UCC[67] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[68]). The drafters' Comment 3 to § 9-313 explicitly equated possession by an agent with actual possession by the principal. § 679.3131, Fla. Stat. Ann. ("if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession").

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

[68] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at:* http://dirt.umkc.edu/files/newart9i.htm. (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees "without the bother of taking physical possession of the notes in question, a process that they often consider irksome"); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9*, *available at:* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46 (revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

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

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

2. The two servicers had no standing because they were agents who neither joined their principal in the action or provided evidences of authorization to bring this action.

Alternatively, because the Servicer and Aurora were indisputably agents of some undisclosed note owner (and holder), the Servicer had the option of proving standing by: 1) joining its principal in the action; or 2) demonstrating that they had

been authorized by this mystery entity to bring and prosecute this case on its behalf.

This Court has unequivocally held that a servicer may only be considered a party to a foreclosure action if its principal has joined in or ratified its conduct. *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012). Here, the servicers, the Servicer and Aurora, neither joined the principal[69] nor submitted any evidence that the principal; ratified the action. In fact, the principal was never even identified at trial. Accordingly, the Servicer was not a real party in interest at the time of judgment and Aurora was not a real party in interest at the time the case was filed.

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

[69] The Homeowners raised the affirmative defense that the Servicer had failed to join its principal under Fla. R. Civ. P. 1.210(a) (Defendants, [redacted] and [redacted] Answer to Amended Complaint and Affirmative Defenses, p. 6; R. 939). The failure to require such joinder is separate point of error subsumed within this argument.

Here, the Servicer (and Aurora) brought and prosecuted the case in their own name for the benefit of an unidentified real party in interest. But the ability of an agent to prosecute an action in its own name is not without conditions. One such condition is that the real party in interest must still be joined as a party unless the relationship between that party and the nominal plaintiff fits in to one of six categories: 1) a personal representative; 2) an administrator; 3) a guardian; 4) a trustee of an express trust; 5) a party with whom or in whose name a contract has been made for the benefit of another; or 6) a party expressly authorized by statute to sue in that party's own name without joining the party for whose benefit the action is brought. Fla. R. Civ. P. 1.210(a).

The servicers' agency relationship with their principal—the real party in interest—is not one of these six enumerated categories. Neither servicer was: 1) a personal representative; 2) an administrator; 3) a guardian; 4) a trustee of an express trust; 5) a party to a third party beneficiary contract; or 6) someone expressly authorized by statute to sue on the principal's behalf. That the rule expressly lists the types of representatives that may sue in their own name without joining the real party in interest implies the exclusion of other agency relationships. *See Biddle v. State Beverage Dept.*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966) (applying '[e]xpressio unius est exclusio alterius'—the mention of one thing

implies the exclusion of another). Accordingly, under the plain language of Rule 1.210(a), the servicers were required to join their phantom principal.

This comports with, and provides the basis for, this Court's holding in *Elston/Leetsdale* that required joinder of the principal as one of two options for complying with the real party in interest rule. The other option, ratification by the principal, is a judicial gloss upon Rule 1.210(a)—which does not expressly mention ratification. The gloss arises from decisions such as *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d at 1185 (affidavits unequivocally show that principal ratified and endorsed agent's action in bringing suit on principal's behalf) and *Juega ex rel. Estate of Davidson v. Davidson*, 8 So. 3d 488, 490 (Fla. 3d DCA 2009) (standing established by affidavit indistinguishable from the affidavit of the principal in *Kumar*). These cases may be harmonized with Rule 1.210(a) by treating the authorization affidavit (or other ratification) as an assignment, which would transform the servicer into a real party in interest in its own right. *See E. Investments, LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d DCA 2007) (citing to *Kumar* for the conclusion that the plaintiff's lack of standing could be remedied by an assignment from the signatory of the contract).

Accordingly, involuntary dismissal should have been granted because there was no evidence that either servicer was an owner (and neither can be Article 3

holders), and because they failed to either join their principal in the action or show authorization to act on behalf of the principal.

3. The evidence and testimony at trial failed to prove that the allonge was affixed to the note before the lawsuit was filed.

Even if the Servicer (and Aurora) could enforce the note independently of their principal as Article 3 holders in their own right—a circumstance that would fly in the face of the facts and the pleadings—the Servicer still failed to prove Aurora had become such a holder before filing the Complaint.

First, it is black letter law that one must acquire standing before filing suit. *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance*, 141 So. 3d at 755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.) (Citations omitted).

If the foreclosing plaintiff is not the original lender, standing (to enforce the note[70]) may be established by submitting the promissory note with a blank or

[70] Many written opinions simply state, without analysis or careful draftsmanship, that establishing oneself as a holder of the note under Article 3 of the Uniform

special endorsement, an assignment of the note, or an affidavit that proves the plaintiff's noteholder status. *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013). Nevertheless, this evidence must be established on the day of the foreclosure lawsuit was filed. *Id.*

Here, attached to the initial complaint was what Aurora verified to be a correct copy of the original note which was made payable to First Southern and which contained no endorsement, either in blank or specifically to either the initial plaintiff Aurora or to the Servicer.[71] There was also no allonge attached to the complaint, either affixed to the note or otherwise incorporated into the pleading. [72] Therefore, because the note was made payable to First Southern, that party was the

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Commercial Code ("UCC") is sufficient to foreclose as if the UCC applies to non-negotiable instruments such as mortgages. In reality, the plaintiff must also prove itself to be the mortgagee to enforce the mortgage lien. Although mortgages are said to "follow the note," equity (and the case law) contemplates that only the owner, not the holder, of the note could be the beneficiary of such automatic transfers.

[71] Complaint, July 22, 2010 (R. 6-10).

[72] *Id*. An allonge is a piece of paper annexed to a promissory note on which to write an endorsement when there is no more room to write the endorsement on the note itself; this paper must be so firmly affixed to the note that it becomes a part of the instrument. *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So 3d 495, 496 n. 1 (Fla. 4th DCA 2011); *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618, 623 n. 2 (Fla. 5th DCA 2010). This definition, particularly that an allonge must be "affixed" to the note, is the crux of this portion of the Homeowners' first argument.

only entity with standing to enforce the instrument. Fla. Stat. §673.2051(1); *Dixon v. Express Equity Lending Group, LLP*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013).

Aurora subsequently moved for leave to file an amended complaint in which it alleged that it was merely a servicer which had been "authorized" by the owner of the note and mortgage to institute the foreclosure action.[73] And while the verified amended complaint attached to the motion included a purported allonge with a blank endorsement, the allonge was in a significantly different place than it was when Aurora verified the filing. The version attached to the motion and the version later filed as the "original" had the allonge appearing after five pages of addenda. The version attached to the verified complaint, however, had the allonge before the addenda.[74] Neither the motion nor the amended complaint included any allegation when the allonge was affixed to the note or any document which supported Aurora's contention that the owner of the loan had authorized it to sue the Homeowners.[75]

Thus, even if the Servicer could show standing by way of Article 3 of the UCC, it needed to provide competent and substantial evidence that Aurora had come into possession of a properly endorsed note prior to filing suit. To do so, it

[73] Motion for Leave to File Amended Complaint, ¶3, March 31, 2011 (R. 179).

[74] *Compare*, R. 196, 250, and 309.

[75] Amended Complaint, August 10, 2011 (R. 300-341).

was required to adduce evidence that the note was endorsed—that the allonge containing the endorsement—was affixed to the note before the lawsuit commenced.

Here, the Servicer's witness had no independent knowledge of when the allonge—which was nowhere to be found in the note attached to Aurora's original complaint—was created. Instead, the Servicer sought to have the witness introduce a document that would purportedly date the allonge: the screen prints from the imagining system Aurora utilized when it scanned the original note into its system (Exhibit 3). Putting aside the fact that the witness was incompetent to introduce this document (which she was), at best, it establishes only that the allonge existed a scant fifteen days before this suit was filed. But it fails to establish an essential fact—that the allonge was affixed to the note at the lawsuit's inception. Indeed, if Exhibit 3 is to be believed, the allonge traveled back and forth, to locations before and after the addenda to the note:

DATE	LOCATION OF ALLONGE	RECORD
6/7/2010	Before the addenda	R. Exh. 11
3/31/11	After the addenda	R. 196
5/5/11	After the addenda	R. 250
8/11/10	Before the addenda	R. 309

This fact is crucial because where, as here, a foreclosing plaintiff's standing hinges on an allonge, it must prove that the allonge "took effect" on or before the day the lawsuit was filed. *Cutler v. U.S. Bank*, 109 So. 3d 224, 226 (Fla. 2d DCA 2012). And in order for an allonge to "take effect," it must be affixed to the note it accompanies. Fla. Stat. §673.2041 (1) ("[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument"); *Issac*, 74 So. 3d at 496 n. 1.

Apparently, no Florida court has articulated what is considered a legally sufficient mode of annexing or affixing an allonge to an instrument, although a body of case law has developed on this issue in other states. *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 604 n. 4 (Fla. 1st DCA 2013). This body of case law is clear that, despite the exact mode of affixation, the allonge must somehow be physically made part of the note. *See e.g. Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163 (3d Cir. 1988) (mere folding of the alleged allonge around the note insufficient); *HSBC Bank USA v. Thompson*, 2010 Ohio 4158 (Ohio App. 2010) (unattached pages cannot be an allonge); *In re Weisband*, 427 B.R. 13 (Bkrtcy.D.Ariz. 2010) (same).

The common law actually required gluing. ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114 (1946), reprinted in 2 Elizabeth Slusser

Kelly, Uniform Commercial Code Drafts 311, 424 (1984) ("[t]he indorsement must be written on the instrument itself or an allonge, which, as defined in Section _____, is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it.") Modern courts have equated stapling with gluing. *Lamson v. Commercial Credit Corp.*, 531 P. 2d 966, 968 (Co. 1975) ("Stapling is the modern equivalent of gluing or pasting. Certainly as a physical matter it is just as easy to cut by scissors a document pasted or glued to another as it is to detach the two by unstapling"); *accord Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex.1997). In any event, the law appears well-settled on the issue: the allonge must somehow be physically attached to the note in order for it to be affixed. Otherwise, it is just a useless piece of paper.

At trial, the Servicer failed to prove that the allonge in question had any more legal effect than any other stray piece of paper. Initially, Trompisz admitted that she had no independent knowledge when the endorsements were added to the allonge[76] and that she had no idea when the endorsements were added to the note.[77] And she further admitted that the only way the imaging system would reflect whether the allonge had been stapled to the note when it was scanned would be to

[76] T. 105-106.

[77] T. 116.

look at the image and see whether the scan reflects stapling since the computer screen does not make any notation regarding stapling.[78]

But when she was asked to look at Exhibit 3 and testify whether the allonge was stapled to the note on the day it was scanned into the system, Trompisz admitted that she did not know when the allonge was stapled to the note or even if the allonge was stapled to the note before it was placed in the court file.[79]

The evidence and testimony therefore failed to establish the Servicer's standing at the inception of the lawsuit because the Servicer was required to prove not only its "physical possession" of the note prior to the day the lawsuit was filed, but that the note was also properly endorsed. *Kiefert v. Nationstar Mortgage, LLC*, Case No. 1D13-5998, slip op. at 2-3 (Fla. 1st DCA December 16, 2014). Without testimony or evidence showing that the allonge was physically affixed to the note on or before the day the lawsuit was filed, the Servicer failed to present a *prima facie* case for mortgage foreclosure and the trial court was required to grant the Homeowners' motion for involuntary dismissal. *May v. PHH Mortgage*, Case No. 2D13-1786, slip op. at 3-4 (Fla. 2d DCA 2014) ("May's motion for involuntary

[78] T. 107.

[79] T. 110-111.

dismissal could only have been denied if the court found that the Servicer presented competent substantial evidence to establish a prima facie case.")

4. The proper remedy on remand is reversal.

Where a foreclosing plaintiff fails to establish its standing at the inception of the lawsuit, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Lacombe v. Deutsche Bank Nat. Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

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

B. The Servicer failed to prove compliance with conditions precedent to foreclosure.

1. Even assuming they were sent, the default notices do not comply with the mortgage's unambiguous requirements.

Paragraph 22 of the Homeowners' mortgage provides that the borrower must be given thirty days' notice to cure a default before the lender may bring a foreclosure action:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.

It is black letter law that this language in the mortgage is clear, unambiguous, and creates conditions precedent to foreclosure. *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283 (Fla. 2d DCA 2011). Where, as here, a mortgage contains specific requirements for the contents of the pre-acceleration notice that must be given, a plaintiff is not entitled to foreclosure unless the evidence shows that it provided notice in a form that included all of the required contents. *Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (finding notice insufficient for failing to "advise of the default, provide an opportunity to cure, or provide thirty days in which to do so"); *Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192 & n.1 (Fla. 5th DCA 2014) (finding notice insufficient for failing to meet mortgage's requirements of informing the borrower of "the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-

existence of a default or other defense of borrower to acceleration and foreclosure"); *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (finding notice insufficient for failing to inform borrowers "of their right to reinstate after acceleration").

Because the notices admitted into evidence at trial do not comply with Paragraph 22 for two distinct reasons, the Homeowners motion for involuntary dismissal should have also been granted even if the Servicer had been able to prove that the notice was sent.

The notice improperly included a breach that had not even occurred.

The plain language of Paragraph 22 of the mortgage required that the Servicer send the Homeowners a notice <u>following</u> their alleged breach which specifies the breach they allegedly committed and which specifies a date not less than thirty days after the notice was sent which the Homeowners could cure the breach (Exhibit 5).

The notices the Servicer submitted at trial, however, do not comply with the mortgage's notice requirements because it warns of a future breach—one that had not yet occurred—if Aurora did not receive the next payment. Aurora therefore attempted to provide notice that was not only prior to the breach, but which

provided the Homeowners less than thirty days to cure that breach and a future breach which had not even occurred. This is because the alleged future breach could not have occurred until May 1, 2010, leaving the Homeowners only 19 days from the date of the notice to cure this additional breach. In other words, Aurora impermissibly tried to start the thirty-day clock to cure a default of the May 1, 2010 payment nine days before the payment was even due.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—Aurora rendered the alleged notice defectively ambiguous. The notices were designed, according to the parties' express agreement in the mortgage, to "specify" the default and to precisely identify the action to cure. And specify means to mention specifically in full and explicit terms so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (explaining that "'Specify' means [t]o mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another…"Specify" means a statement explicit, detailed, and specific so that misunderstanding is impossible.") (Citations omitted). The alleged notices do not specify "the default," but refer to two that they claim must both be cured by the deadline.

Nor do the notices specify a definite course of action to cure because they do not unambiguously state an amount that must be paid to avoid foreclosure. Instead, they allude to other "payments, charges, and fees" that are not identified in the notices. This, of course, leaves the unwary borrower subject to foreclosure if he or she makes all the payments before the thirty-day clock expired but is unaware of—or simply miscalculates—the other "payments, charges, or other fees."

It is black letter law that the thirty day notice must be strictly observed. *See Kurian*, 114 So. 3d at 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, at 1285 (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter).

Therefore the notice does not comply with paragraph 22 of the mortgage.

The notice does not specify the default.

Paragraph 22 is also clear that the notice must specify the default the Homeowners committed. But the notices admitted at trial only generally allege that a default has been committed by stating that the Homeowners' "loan is in

default." And while the notices give a purported "due date" in the subject line, it is unclear what this subject line is even referring to. Therefore, because the notices fail to specify the default, they fail to comply with Paragraph 22 of the mortgage. *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1288-89 (Fla. 2d DCA 2012) (finding notice insufficient because it only generally stated that a breach had occurred but "failed to specify the breach").

2. The proper remedy on remand is involuntary dismissal.

The demand letter was a key element of the Servicer's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Servicer sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand.

This Court's *sua sponte* holding in *Holt v. Calchas, LLC*, Case No. 4D13-2101 (Fla. 4th DCA Nov. 5, 2014) concluding that failure to comply with the demand letter requirements of a mortgage does not require dismissal of the foreclosure action but rather prevents acceleration of the balance due under the

note overlooks both the plain language of the mortgage (assuming it was the same as in this case) and established case law. Indeed, the second-to-last sentence of Paragraph 22 of the mortgage expressly provides that

> If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this security instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

Emphasis added.

Stated another way, the lender was not authorized to commence foreclosure proceedings unless notice was given and the default specified in the notice was not cured on or before the date specified in the notice. The notice is therefore a condition precedent to both acceleration and foreclosure. *See Dominko v. Wells Fargo Bank, N.A.*, 102 So. 3d 696, 698 (Fla. 4th DCA 2012) (reversing summary judgment of foreclosure where genuine issue of material fact regarding Paragraph 22 existed because "Paragraph 22 of the mortgage sets forth a pre-suit requirement that the lender give the borrower thirty days' notice and an opportunity to cure the default prior to filing suit."); *Konsulian*, 61 So. 3d at 1285 ("The word 'shall' in [paragraph 22 of] the mortgage created conditions precedent to foreclosure, which were not satisfied.")

Additionally, *Holt's* holding also overlooks Paragraph 20 of the mortgage which explicitly prohibits either the borrower or the lender from commencing,

joining, or being joined to any judicial action that alleges the other party breached any term of the mortgage until notice has been given to the other party.

Finally, *Holt* overlooked established precedent holding that failure to comply with the notice requirements of the mortgage requires dismissal of the foreclosure action. *Rashid v. Newberry Fed. S & L Ass'n.*, 526 So. 2d 772 (Fla. 3d DCA 1988) (holding that implicit in a prior decision by the Court reversing summary judgment of foreclosure for failure to give the required notice of default prior to instituting the foreclosure proceeding was that the case be dismissed on remand.)

Therefore the proper remedy on remand is involuntary dismissal.

C. The trial court erred in admitting the Servicer's trial exhibits over the Homeowners' objections.

1. The witness could not authenticate any of the exhibits the Servicer offered into evidence.

To properly authenticate hearsay documents under the "business records" exception, the proponent must establish that

1) The hearsay document was made at or near the time of the event;

2) The hearsay document was made by or from information transmitted by a person with knowledge;

3) The hearsay document was kept in the ordinary course of a regularly conducted business activity;

4) It was a regular practice of that business to make such the hearsay document; and

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

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

Furthermore, a witness purporting to establish this predicate at trial must have personal knowledge of the record-keeping practices to be qualified to lay a foundation for their admission into evidence under the business records exception. *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that despite witness's use of "magic words"—the elements of a business records exception to hearsay—records were inadmissible because the witness did not have the personal knowledge required to lay a foundation for business records of an entity for whom she had never worked and about whose record-keeping practices she had no personal knowledge). 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. *Id*.

But to even be permitted to testify to these threshold facts, the witness must be a records custodian or an otherwise "qualified" witness—that is, one who is in charge of the activity constituting the usual business practice or sufficiently experienced with the activity to give the testimony. *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding witness unqualified where

the witness "lacked particular knowledge of a prior servicer's record-keeping procedures and "[a]bsent such personal knowledge, he was unable to substantiate when the records were made, whether the information they contain derived from a person with knowledge, whether [the previous servicer] regularly made such records, or, indeed, whether the records belonged to [the previous servicer] in the first place."); *Burdeshaw v. Bank of New York Mellon*, 39 Fla. L. Weekly D2145 (Fla. 1st DCA Oct. 13, 2014) (reversing and remanding for dismissal because bank failed to establish any foundation qualifying the exhibit as a business record or its witness "as a records custodian or person with knowledge of the four elements required for the business records exception"); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 39 Fla. L. Weekly D2156 (Fla. 1st DCA Oct. 14, 2014) (reversing and remanding for dismissal because bank's witness was not a records custodian for the current servicer or any of the previous servicers); *Holt v. Calchas, LLC*, Case No. 4D13-2101 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection).[80] *See also Mazine v. M*

[80] Notably, in *sua sponte dicta*, this Court in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." Opinion, pp. 9, 10, 2-3 at n. 2. This decision, however, overlooks the fact that the date on the notice of acceleration was offered for the truth of the matter asserted (the implied assertion being that it was mailed on that day), and therefore, was not a verbal act. *See*, Law Revision Council Note—1976 for § 90.801, Fla. Stat., Subsection (1)(c) and cases cited therein. In any event, it is

& I Bank, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.* 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an adjuster was not qualified to testify about the usual business practices of sales agents at other offices). *See also Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was

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undisputed here that the consolidated notes log (Exhibit 19) was offered to prove that the notices were given on the dates reflected in the log.

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

Trompisz admitted on cross-examination that at least half of her job as "litigation resolution analyst" involved appearing in court for "testimony" while the remainder involved "preparing" for testimony, researching issues for the Servicer's in-house counsel, and mentoring the Servicer's newer employees within the Servicer's mediation group.[81] She neither worked for nor supervised any of the departments responsible for creating any of the exhibits the Servicer sought to be admitted into evidence. In fact, Trompisz went so far as to admit that she received

[81] T. 85-86.

training on her responsibilities as a professional witness,[82] including specific testimony by attorneys on the "dos and don'ts."[83]

In sum, Trompisz was not a records custodian nor an "other qualified witness" because she was neither in charge of any of the activities constituting a normal business practice nor reasonably enough acquainted with the activity to give testimony. Her only connection with the documents at issue was that she had read them.

Of course, being "told" what the documents mean and how to lay the records exception for purposes of regurgitating such information to the fact-finder is nothing more than a synonym for "hearsay." And it was hearsay of the worst kind because it was deliberately communicated to Trompisz for the specific purpose of testifying in court—i.e. improper witness coaching to create the façade of familiarity. To hold that such hearsay knowledge can be substituted for personal knowledge gained through an actual job-responsibility tied to the business activity is to allow the business record exception to swallow the rule because there is no document that a witness cannot be told to say meets the exception.

[82] T. 94.

[83] T. 95.

Therefore, Trompisz was incompetent to authenticate the Servicer's exhibits admitted into evidence. These documents remained inadmissible hearsay without this proper authentication. *Kelsey*, 131 So. 3d at 826.

2. The proper remedy on remand is involuntary dismissal.

The Servicer therefore brought no admissible evidence of its standing, its compliance with conditions precedent to acceleration and foreclosure, or the amount of damages to which it would have been entitled. A party may not neglect to bring evidence to prove elements of its damages and be given another bite at the evidentiary apple. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) ("[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." [internal quotation omitted]).

A personal injury plaintiff, for example, cannot ask the appellate court for another chance at proving medical bills he did not bring to the trial. *See Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 355 (Fla. 5th DCA 2012) ("Having proceeded to judgment on legally insufficient proof, Appellee does not get a do-over."); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985) ("Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to a second bite at the apple."); *Loiaconi v. Gulf*

Stream Seafood, Inc., 830 So. 2d 908, 910 (Fla. 2d DCA 2002) (same); *J.J. v. Dep't of Children & Families*, 886 So. 2d 1046, 1050 (Fla. 4th DCA 2004) (where Department did not seek a continuance to secure additional evidence, "[n]o statute or rule permitted the trial court to give the Department a 'do-over'…").

Therefore, this Court should not give the Servicer a second bite at the apple on remand. The proper remedy is involuntary dismissal.

II. Aurora's false verification also required dismissal of the case.

The trial court should have also dismissed the case because Aurora's false verification permeated the proceedings and made a mockery of the verification requirements found in Fla. R. Civ. P. 1.110(b). Anything short of dismissal would have been tantamount to judicial approval of fraud on the court.

Initially, Hall, the verifier of Aurora's complaint, admitted that when signing verifications, she would merely review the attachments to the complaint and nothing else.[84] In fact, she admitted that she did not know whether she read the complaint Aurora filed in this case and that she did not always read complaints word for word.[85] This was so even though the verification attested, under penalty

[84] Hall Depo., p. 6 (R. 448).

[85] Hall Depo., p. 7 (R. 449).

of perjury, that Hall had actually read the contents of the complaint and that the facts stated in it were true and correct to the best of her knowledge and belief.[86]

Hall also admitted

1. That she did not recall whether she did or did not look at the Homeowners' note and mortgage prior to verifying the complaint, and did not always do so.[87]
2. That she did not know if the original note had an endorsement on it or an allonge attached to it.[88]
3. She did not know for sure, but guessed that the notes and mortgages were probably not always attached when she verified complaints.[89]
4. That she did not know how she verified the allegation that Aurora owns and holds the note and mortgage as alleged in paragraph five although she admitted that she would "rely on counsel" for this information.[90]

[86] Verification of Complaint, July 22, 2010 (R. 4).

[87] Hall Depo., pp. 9-10 (R. 451-52).

[88] Hall Depo., p. 14 (R. 456).

[89] Hall Depo., p. 10 (R. 452).

[90] Hall Depo., p. 19 (R. 461).

5. That she was incorrect when she verified that Aurora owned the note and mortgage.[91]
6. That she didn't understand the difference between owning and holding a note.[92]
7. That she did not know what would constitute conditions precedent to acceleration and foreclosure (other than a default) although she relied on counsel to "have done the proper process."[93]
8. That she did not know whether she verified that the Homeowners owed $800,000 in principal as alleged in paragraph ten of the complaint and that she did not always verify the principal amount due and owing on the debt.[94]
9. That she did not verify any of the title work performed even though she verified paragraph twelve of the complaint alleging that the claims of all known defendants were inferior to the claim of Aurora.[95]

[91] Hall Depo., pp. 34-36 (R. 476-78).

[92] Hall Depo., p. 46 (R. 488).

[93] Hall Depo., pp. 22-23 (R. 464-65).

[94] Hall Depo., p. 24 (R. 466).

[95] Hall Depo., pp. 34-36 (R. 476-78).

In short, in the classic robo-signer tradition, Hall did nothing more than lend her signature to a piece of paper, and did so under the penalty of perjury. But this is clearly not what the Supreme Court had in mind when it amended Rule 1.110(b). *In re Amends. to Florida Rules of Civ. Proc.*, 44 So. 3d 355, 356 (Fla. 2010) ("[R]ule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are…to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate."). Indeed, it is difficult to imagine a more brazen flouting of the new rule than what occurred here—a recidivistic resumption of the very behavior the amendment was designed to discourage.

The Supreme Court has expressly stated that the Rule was intended "to give trial courts more power to sanction plaintiffs who make false allegations in mortgage foreclosure filings…" *Pino v. Bank of New York*, 121 So. 3d 23, 41 (Fla. 2013); *In re Amends*, at 556. And this power should have been exercised here where Hall unabashedly admitted that she did not verify the allegations of Aurora's complaint and that one of the most important allegations (Aurora's claim that it

owned the note and mortgage) was not only untrue, but easily verifiable as untrue.[96]

As such, the trial court abused its discretion in denying the Homeowners' motion to dismiss as a sanction for the false verification. *See Metropolitan Dade County v. Martinsen*, 736 So. 2d 794 (Fla. 3d DCA 1999) (holding trial court abused its discretion in denying defendant's motion to dismiss case based on plaintiff's untruthful sworn statements and remanding for dismissal of the case.). This is because:

> The suggestion that perjury in civil cases is acceptable, or, in the alternative, that it will go unpunished even when discovered, has gained regrettable acceptance among many. I can think of few crimes, however, that strike more viciously against the integrity of our system of justice than the crime of perjury.

Id. at 796. (Sorondo, J., concur). *See also Mendez v. Blanco*, 665 So. 2d 1149, 1150 (Fla. 3d DCA 1996) (holding that the trial court did not abuse its discretion in dismissing the plaintiff's complaint where he "committed serious misconduct by repeatedly lying under oath during a deposition"); *O'Vahey v. Miller*, 644 So. 2d 550, 551 (Fla. 3d DCA 1994) (holding that the plaintiff's repeated lies in discovery, uncovered only by the "assiduous efforts of opposing counsel," "constituted such serious misconduct" that dismissal of the case was required).

[96] Hall Depo., pp. 37-38, 41-45 (R. 479-80, 483-487).

To permit the Servicer a judgment would strike against the integrity of the system as a whole especially where the false verification was only exposed through the efforts of the Homeowners' counsel. Dismissal of the case on remand is therefore, not only appropriate, but essential to the administration of justice.

CONCLUSION

The Court should reverse the judgment and remand for entry of dismissal of the case with prejudice.

Dated: January 6, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 6, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this January 6, 2015.

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