In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

BANK OF AMERICA, N.A. et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. The Pleadings

Countrywide Home Loans Servicing, L.P. N/K/A BAC Home Loans Servicing, LP ("Countrywide" or "the Servicer") brought this foreclosure action against [redacted] ("the Homeowner") claiming to be entitled to enforce a Note and Mortgage (as a holder or otherwise) that he signed with a different entity, First Magnus Financial Corporation.[1] Attached to the Complaint was a "Certified Copy" of the First Magnus Note that was devoid of any endorsement.[2] The Servicer also attached an Assignment of Mortgage in which the mortgagee, Mortgage Electronic Registration Systems Incorporated ("MERS") purported to assign the mortgage "together with the Note" to the Servicer.[3]

The Homeowner moved to dismiss because (among other reasons) the attached unendorsed Note negated the Servicer's claim to be a holder under Article 3 of the Uniform Commercial Code ("UCC").[4] The court denied the motion.[5]

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[1] Mortgage Foreclosure Complaint, May 27, 2009 (R. 1).

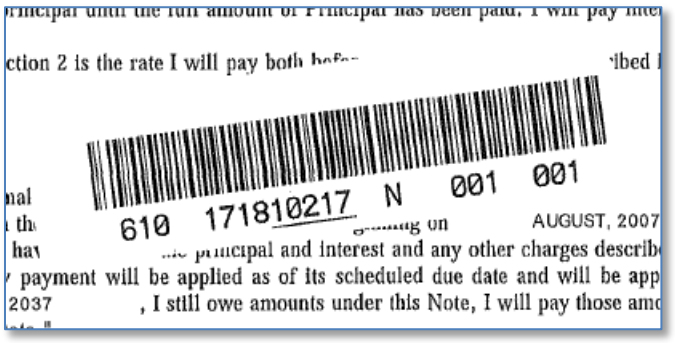
[2] Note, dated June 27, 2007 (R. 26).

[3] Assignment of Mortgage, May 14, 2009 (R. 29).

[4] Defendant, [redacted] Motion to Dismiss Mortgage Foreclosure Complaint, January 5, 2010 (R. 145).

[5] Order on Motion to Dismiss, May 20, 2010 (R. 258).

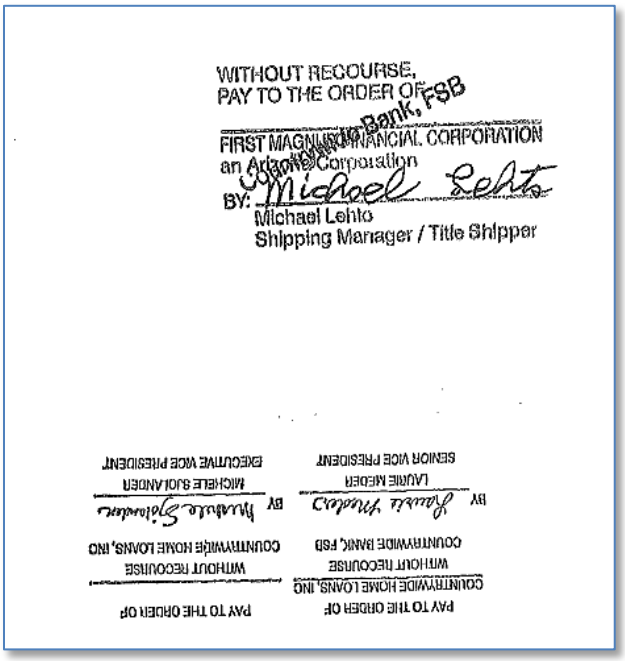
Over four years after filing the Complaint, the servicer filed a response to a request for production disclosing a new version of the Note, without the "Certified Copy" stamp of the one attached to the Complaint, but with a bar code sticker across the front:[6]



The copy now contained an additional page (which, from the bleed through that can be seen on the last page of this version of the Note, appears to be a copy of the back side of that last page).[7] The page showed, for the first time, a purported chain of endorsements starting with First Magnus, proceeding through two different Countrywide entities—neither of which were the Plaintiff servicer—and ending in a blank endorsement:

[6] Plaintiff's Responses to Defendant's Request for Production Regarding Entitlement to Enforce Loan Documents, July 17, 2013 (R. 442); Note at R. 448.

[7] Compare R. 450 with R. 451. Notably, no bleed through is apparent on the original version attached to the Complaint.


WITHOUT RECOURSE,
PAY TO THE ORDER OF
Countrywide Bank, FSB
FIRST MAGNUS FINANCIAL CORPORATION
an Arizona Corporation
BY: Michael Lehto
Michael Lehto
Shipping Manager / Title Shipper

PAY TO THE ORDER OF
COUNTRYWIDE HOME LOANS, INC
WITHOUT RECOURSE
COUNTRYWIDE BANK, FSB
BY
LAURIE NEDER
SENIOR VICE PRESIDENT

PAY TO THE ORDER OF
WITHOUT RECOURSE
COUNTRYWIDE HOME LOANS, INC
BY
MICHELE SJOLANDER
EXECUTIVE VICE PRESIDENT

An undated endorsement in blank purports to have been executed by Michelle S. Sjolander, an executive vice president of Countrywide Home Loans, Inc.[8] A few weeks later, the Servicer produced another copy of the Note containing the endorsements, but without the bar code sticker on the front.[9]

Around this same time, Bank of America, N.A.[10] appeared and moved to substitute itself as the Plaintiff.[11] The Homeowner agreed to the motion, reserving the right to challenge the standing of any and all of the plaintiff entities.[12]

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[8] *Id*.

[9] Plaintiff's Responses to Defendant's Pre-Trial Request for Production, August 7, 2013 (R. 464); Note at R. 466.

[10] As the successor plaintiff, Bank of America will also be referred to as "Servicer" except where the distinction between Countrywide and Bank of America is relevant.

The Homeowner's answer denied that the Servicer was the Article 3 holder of the Note when it filed the action. The Homeowner also denied that "[a]ll conditions precedent to the acceleration of the Mortgage Note and foreclosure of the Mortgage have been performed or have occurred."[13] In addition, the Homeowner raised an affirmative defense challenging whether the Servicer held the Note when it filed suit.[14]

II. The Trial – the Servicer's document reader

The Servicer called a single witness, Sandra Prestia, to prove every aspect of its case. Ms. Prestia was an employee of Bank of America whose job duties were to "maintain a portfolio of loans that are in default as well as review of the business records in preparations for trial."[15] Since joining Bank of America, she had always worked in the bank's litigation department and had always worked on cases that were in litigation.[16] Ms. Prestia had served in this role for twenty-seven

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[11] Motion to Substitute Party Plaintiff, July 25, 2013 (R. 457).

[12] Agreed Order to Substitute Party Plaintiff, November 19, 2013 (R. 519).

[13] Defendant, [redacted] Amended Answer to Complaint and Affirmative Defenses (R. 509), deemed filed as of November 19, 2013 (Agreed Order On Defendant, [redacted] Motion for Leave to Amend Answer and Affirmative Defenses, R. 521).

[14] Second Affirmative Defense (R. 511).

[15] Transcript of Trial before Judge Howard Harrison, March 5, 2014 ("T. __"), p. 9.

[16] T. 12-13.

months, before which she worked for a structured settlement company.[17] She had never worked for Countrywide.[18] Ms. Prestia had never worked in the banking industry in any other capacity.[19]

Her job duties include serving as a witness at trial, which could be on a daily basis or could be three times a week.[20] She has testified in court "a lot"—more than fifty times in the ten months before trial.[21]

She first saw the documents relating to this case "a couple of weeks" before trial.[22] Ms. Prestia had "no familiarity with this note other than [her] preparation for this case."[23] She had never worked in any of the numerous departments at the Servicer (Bank of America or Countrywide) that were responsible for entering information into the computer systems that generated the documents offered into evidence at trial.[24] Ms. Prestia was unsure what computer systems were

[17] T. 12.

[18] T. 19.

[19] T. 107.

[20] T. 14.

[21] T. 16.

[22] T. 17, 29, 73.

[23] T. 102.

[24] T. 113-114.

involved.[25] Ms. Prestia also testified that she has access to view different screens, but is prohibited from actually entering data.[26]

On the issue of the endorsements, Ms. Prestia admitted that nothing on the endorsements themselves indicated when they had been placed there and she had no idea what the condition of the Note was in 2010.[27] She did not work in the vault where she claimed the Note had been stored before being sent to the Servicer's lawyers.[28] She did not know any of the endorsers and had no interaction with the original lender.[29]

Ms. Prestia nevertheless claimed that records that were not in evidence showed that "we received the endorsement in July of 2007" and that, because Countrywide ceased to exist in April of 2009, the Countrywide endorsement had to have been made before the Complaint was filed in May of 2009.[30] She admitted that this conclusion depended upon the stamps being authentic.[31] Likewise, she did not know the signatures of the endorsers and simply allowed "the document to

[25] T. 114.
[26] T. 54-55.
[27] T. 17, 21.
[28] T. 18.
[29] T. 20.
[30] T. 21.
[31] T. 22.

speak for itself" and assumed that "they wouldn't be stamping it if they did not have the authority to do so."[32] The Homeowner's motion to strike that portion of her testimony based on documents not in evidence was denied.[33]

Ms. Prestia did not know when the Assignment of Mortgage (Exhibit 3) was stored in the computer system.[34] She did not know any of the signatories on the Assignment[35] and was not present when it was executed.[36] And even though the Assignment of Mortgage purported to transfer the Mortgage "together with the Note" to Countrywide, Ms. Prestia testified that Countrywide no longer existed when the assignment was executed.[37]

Ms. Prestia then introduced an Instance Summary screen shot that, according to her, showed that the Servicer had received the endorsed Note nearly two years before the Complaint was filed:

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[32] T. 23.

[33] T. 22.

[34] T. 36-37.

[35] T. 35.

[36] T. 36.

[37] T. 37.

The title of the document had the name of "Bank of America Home Loan" (rather than the current Plaintiff and servicer "Bank of America, N.A."). The body of the document identifies two entities as the "Custodian/Current Location," neither of which was the current or former Plaintiff. One was "Recon Trust Company" and the other "McCalla Raymer, LLC"—the law firm which first appeared in this case nearly four years after it was filed.[38]

On direct examination, Ms. Prestia testified that this Instance Summary showed that Bank of America had possessed the Note before the case was filed (rather than the Plaintiff that filed the action, Countrywide).[39] She later clarified that she meant Countrywide had received the original endorsed Note prior to filing and then still later, said that the screen shot showed that it "was actually a

[38] Notice of Appearance as Co-Counsel, April 5, 2013 (R. 423).

[39] T. 44.

custodian, Recon Trust, that received [the original endorsed note] on that date.[40] Recon Trust Company, she said, is owned by Bank of America.[41] Moments later, despite the inclusion of the word "Company" in its moniker, she said it was a department of Bank of America.[42] She had never worked for Recon Trust.[43]

The data, she said, had been entered by unknown employees of Countrywide.[44] She believed that these employees worked for the "Collateral Team"—a department for which she had never worked.[45] She was unsure as to where the corresponding department of Bank of America was physically located, let alone that of Countrywide.[46] She did not even print the screen shot herself—she testified that it was printed by her attorney.[47]

Ms. Prestia then introduced another document with the "Bank of America Home Loan" caption called a "Document Detail" (Exhibit 5):

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[40] T. 48, 55.

[41] T. 57.

[42] T. 57.

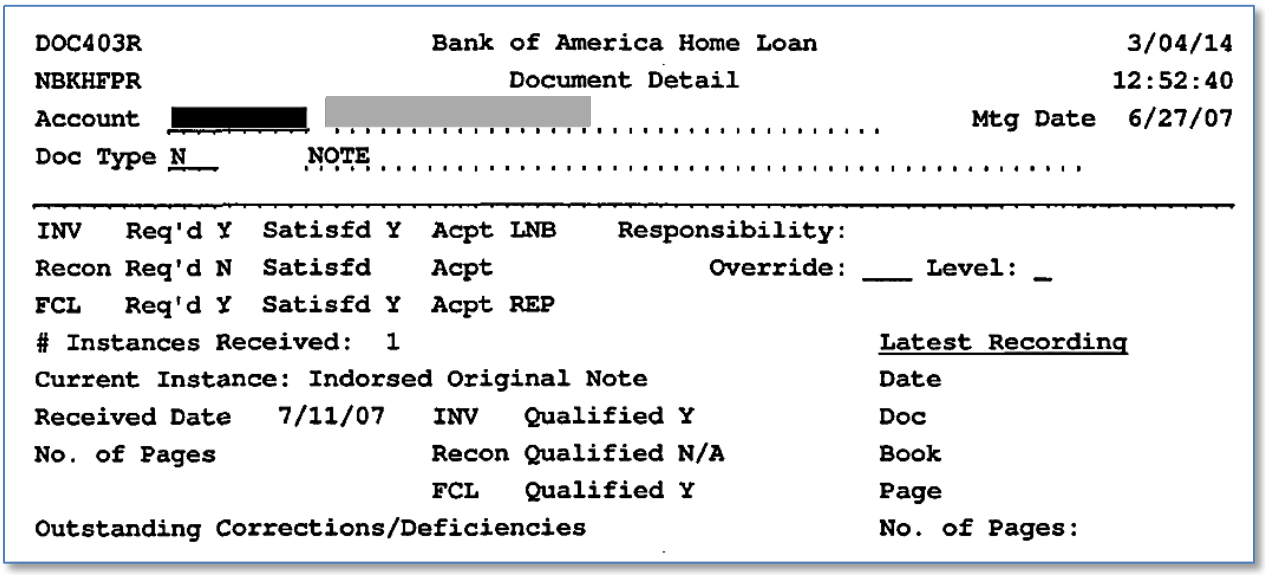
[43] T. 57-58.

[44] T. 48-49.

[45] T. 45.

[46] T. 46-48.

[47] T. 49.



DOC403R Bank of America Home Loan 3/04/14
NBKHFPR Document Detail 12:52:40
Account [redacted] Mtg Date 6/27/07
Doc Type N NOTE

INV Req'd Y Satisfd Y Acpt LNB Responsibility:
Recon Req'd N Satisfd Acpt Override: ___ Level: _
FCL Req'd Y Satisfd Y Acpt REP
Instances Received: 1 Latest Recording
Current Instance: Indorsed Original Note Date
Received Date 7/11/07 INV Qualified Y Doc
No. of Pages Recon Qualified N/A Book
FCL Qualified Y Page
Outstanding Corrections/Deficiencies No. of Pages:

Ms. Prestia testified that this document was simply another screen shot from the same computer system as Exhibit 4—"[t]he only difference it's another screen."[48] This time, she referred to Recon Trust as the "investor."[49] She could not explain what LNB or REP meant on the document.[50] She testified that the document does not state how many endorsements were on the Note when it was received by Recon Trust.[51]

[48] T. 62.

[49] T. 63.

[50] T. 63.

[51] T. 64.

Countrywide's Notice of Acceleration (Exhibit 6)

Ms. Prestia also introduced a document she identified as a notice of intent to accelerate foreclosure.[52] She testified on direct that it "was…the regular practice of Bank of America to make and keep such records."[53] She later testified that the data was produced by Countrywide and the letter itself was created by an unidentified third-party vendor.[54]

Ms. Prestia did not know who the third-party vendor may have been that supposedly created the letter.[55] She "obviously" had never worked for the third-party vendor and conceded that she did not know what its policies and procedures, if any, were.[56] She admitted that she did not know the date the document was produced.[57] In fact, Ms. Prestia had never seen the document offered into evidence as Exhibit 6 until the day of the trial.[58] She said she had first seen an image of the letter in her computer system a few weeks before trial.[59]

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[52] T. 68.

[53] T. 69.

[54] T. 70.

[55] T. 70.

[56] T. 71-72.

[57] T. 73.

[58] T. 72.

[59] T. 73.

Ms. Prestia had never been in charge of any department at either Countrywide or Bank of America that would have instructed third-party vendors to generate such letters.[60] She did not know the process by which information would be sent to the third-party vendor to generate such a letter, and did not have "any knowledge of the contract between Countrywide and the third-party vendor."[61] The trial court admitted the letter into evidence (Exhibit 6) over objection.[62]

Paragraph 22 of the Mortgage required the lender to "give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument."[63] The pre-acceleration notice was required to "specify," among other things: "(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."[64] In Paragraph 15, the Mortgage defines when notice is deemed to have been given to the Homeowner: "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to

[60] T. 74.

[61] T. 75-76.

[62] T. 76.

[63] R. 4: 19.

[64] *Id.*

have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[65]

The letter admitted as Exhibit 6 has the date March 10, 2009 at the top.[66] Under that date, the letter says it was "Sent Certified Mail…Return Receipt Requested."[67] It states amounts that are allegedly past due, as well as late charges, then purports to inform the Homeowner that "[t]o cure the default, on or before April 9, 2009, Countrywide must receive the amount of $22,756.68 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before April 9, 2009."[68]

The "proof" of sending the notice of acceleration (Exhibit 7).

Through Ms. Prestia, the Servicer introduced Exhibit 7, which Ms. Prestia described as a "certified receipt."[69] Under questioning on direct, Ms. Prestia claimed to know that the document met all the criteria for a Bank of America business record that would qualify it for the business record exception to hearsay.[70]

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[65] R. 4: 16.

[66] R. 4: 33.

[67] *Id*.

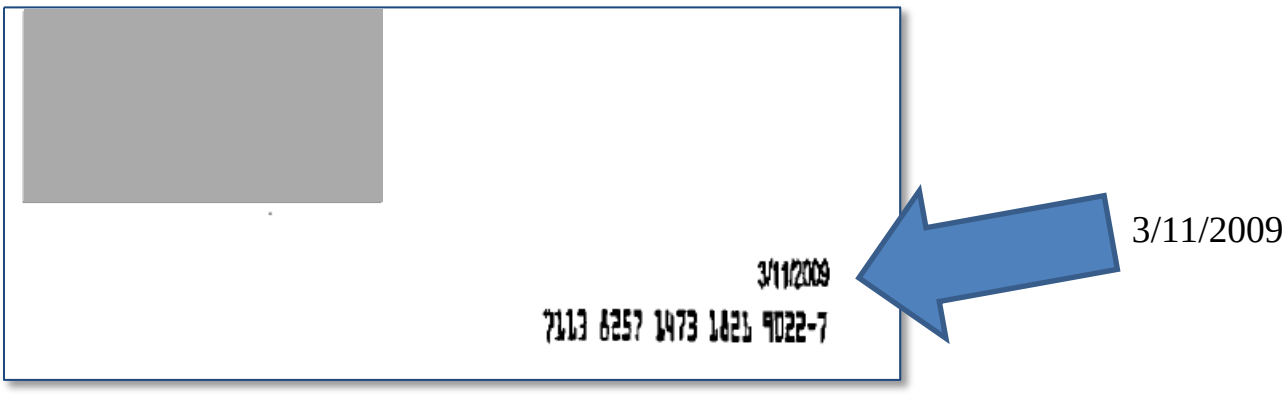
[68] *Id*.

[69] T. 79.

[70] T. 79-80.

On *voir dire*, however, Ms. Prestia admitted that the third-party vendor, not Countrywide or Bank of America, would have done the mailing, and that she did not know who would have been responsible for "filling out and managing the receipts for post or return receipts."[71] She claimed that return receipts would have been returned to Countrywide and imaged into its system, but did not know how long it would have taken to image return receipts after they were received.[72] Over the Homeowner's objection, the trial court admitted Exhibit 7 into evidence.[73]

In the lower right of the second page of Exhibit 7, written above the tracking number, was the date "3/11/2009," indicating that the letter had been sent on March 11, 2009:[74]



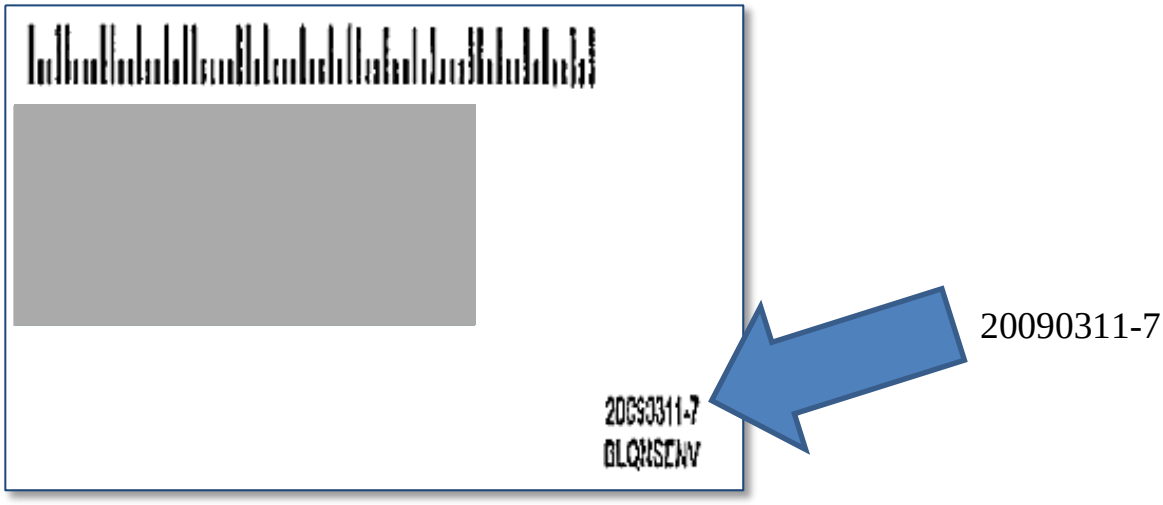
[71] T. 81.

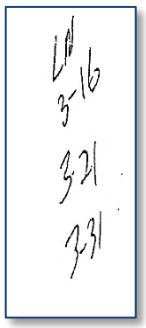
[72] T. 83.

[73] T. 83.

[74] T. 4: 37.

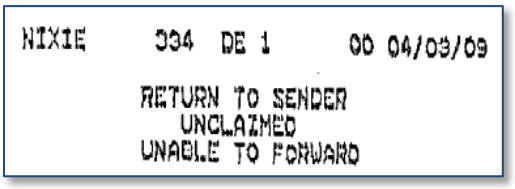
Similarly, below and to the right of the address on the first page of Exhibit 7 is a number that reads "20090311-7," again indicating that the letter had been sent on March 11, 2009:[75]





On the left side of the first page of Exhibit 7 are handwritten notations: "3-16," "3-21," and "3-31," appearing to reflect attempted delivery dates of March 16, March 21, and March 31, 2009.[76]

On the bottom right of the first page of Exhibit 7 is a stamp dated "04/03/09," that states "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD," indicating that the letter was never received by the Homeowner.[77]



[75] R. 4: 36.

[76] R. 4: 36.

Yet, Ms. Prestia testified, over objection, that the "date that it was mailed is the date on the breach letter, March 10, 2009."[78]

Denial of the homeowner's motion for involuntary dismissal and entry of final judgment

At the close the Servicer's case, the Homeowner moved for involuntary dismissal.[79] Among other things, the Homeowner argued that Ms. Prestia was not a qualified witness "to establish the authenticity of the documents that have been presented," and accordingly, that the Servicer had failed to lay a proper foundation for admissibility of the documents as business records.[80] The Homeowner also argued that the evidence "presented in Court does not establish … that the [conditions] precedent to bring this action have been satisfied nor has it established standing by this plaintiff."[81]

The Homeowner's evidence included the deposition transcript of Michelle Sjolander, the supposed signer of the purported endorsement in blank.[82] Ms.

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[77] R. 4: 36.

[78] T. 85.

[79] T. 146.

[80] T. 146-147.

[81] T. 147.

[82] T. 147-148; Transcript of March 14, 2012 Deposition of Michele Sjolander, R. 4: 103-200

Sjolander testified that she had never personally signed or stamped her name on any endorsement.[83] Instead, she allowed others to use a stamp with her name without her supervision.[84]

The trial court denied the Homeowner's motion for involuntary dismissal[85] and entered judgment for the Servicer.[86] This timely appeal followed.

[83] T. 148-150; R. 4: 148-49.

[84] T. 149-150; R. 4: 225-26.

[85] T. 161.

[86] T. 165.

SUMMARY OF THE ARGUMENT

The Servicer failed to submit competent, substantial evidence that it served a pre-acceleration notice in compliance with Paragraphs 15 and 22 of the Mortgage. The Servicer's only evidence on the subject (Exhibits 6 and 7)—even if admissible—showed that the Servicer did not give the Homeowner the required thirty days to cure the alleged default. Nor did the Servicer appropriately specify the action necessary to cure the alleged default. Moreover, the exhibits should not have been admitted into evidence because Ms. Prestia was a professional witness who lacked the personal knowledge necessary to establish the criteria for admission of documents under the business records exception.

Second, the Servicer failed to submit competent, substantial evidence that it had standing at the time suit was filed. The assignment of mortgage submitted as Exhibit 3 was to a non-existent entity from an entity that had already endorsed its own interest in the Note to another entity, and thus, had no interest to assign. Additionally, the Servicer adduced no evidence to show the date on which an endorsement in blank was stamped on the Note or that the Note was in its possession at the time it was filed.

The judgment in favor of the Servicer should be reversed and the case remanded for entry of an involuntary dismissal.

STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for competent, substantial evidence. *Airport Plaza Ltd. P'ship v. United Nat'l Bank*, 611 So. 2d 1256, 1257 (Fla. 3d DCA 1992). To be substantial, evidence must "establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). To be competent, "the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id*.

The Court generally "review[s] a trial court's ruling on the admissibility of evidence for an abuse of discretion." *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 620 (Fla. 4th DCA 2013). However, the trial court's discretion "is limited by the rules of evidence." *Id*. Thus, rulings interpreting and applying the rules of evidence are reviewed *de novo*. *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011) ("[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review."); *Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

ARGUMENT

I. There was no competent, substantial evidence that the servicer sent a notice of acceleration as required by the mortgage.

To prove its entitlement to foreclose on the subject property, the Servicer was required to prove that it served a pre-acceleration notice on the Homeowner as a condition precedent to filing suit. Under Florida law, "a mortgagee's right to the security for a mortgage is dependent upon its compliance with the terms of the mortgage contract, and it cannot foreclose until it has proven compliance." *DiSalvo v. Suntrust Mortg., Inc*., 115 So. 3d 438, 439 (Fla. 2d DCA 2013). The Servicer failed to carry that burden, and instead, presented a pre-acceleration letter that did not comply with the requirements of the Mortgage.

A. The Homeowner was given fewer than thirty days to cure.

Paragraph 22 of the Mortgage required the lender to "give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument."[87] And the notice was required to specify, among other things, "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured."[88]

[87] R. 4: 19.

[88] *Id.*

The "date the notice is given" is defined in Paragraph 15 of the Mortgage. That section states that notice to a borrower (but not the lender) is "deemed to have been given…when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[89] In other words, together Paragraphs 15 and 22 require the pre-acceleration notice to specify a date by which the default can be cured that is not less than thirty days from the date the notice is mailed if sent by first class mail, or delivered, if sent by another method of delivery.

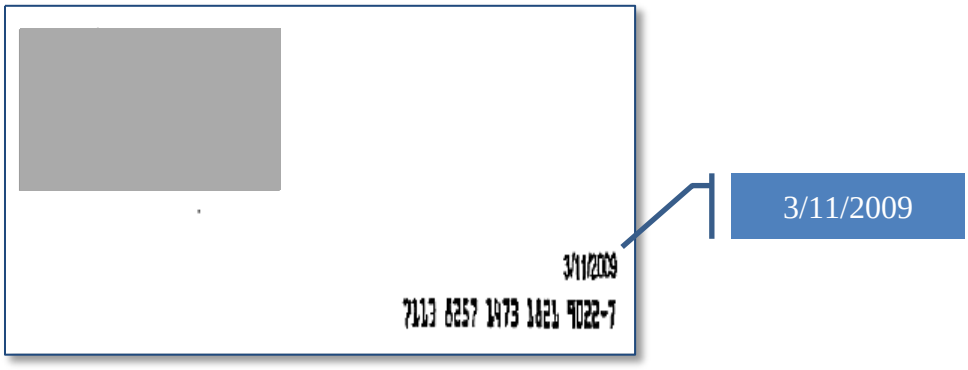
Even if the Servicer's evidence regarding notice would have been admissible (and as demonstrated below, it was not), the evidence showed that the Servicer failed to comply with the requirement of sending a notice that provided a date for curing the default that was thirty days from the date notice was given. The letter the Servicer submitted as Exhibit 6 to prove that pre-acceleration notice was sent to the Homeowner states that the alleged default must be cured by April 9, 2009.[90]

But Exhibit 7—the certified receipt—shows that the letter was sent on March 11, 2009 (the day after the date on the letter):[91]

[89] R. 4: 16.

[90] R. 4: 33.

[91] R. 4: 36, 37.



Notably, the Servicer's counsel asked Ms. Prestia to read this date into the record as "the date that this certified mail was sent out." The witness, however, evaded the question and instead answered (over objection) that it was sent out on the day mentioned in the acceleration notice:

> BY MR. HORA [the Servicer's lawyer]:
>
> Q And on the bottom half of -- bottom right half of the certified mail receipt, can you please state the date that this certified mail was sent out?
>
> MR. ACKLEY: Same objection, Your Honor.
>
> THE COURT: Overruled.
>
> MS. PR[E]STIA: The date that it was mailed is the date on the breach letter, which is March 10, 2009.[92]

So even if there had been admissible evidence that the letter had been sent by first class mail—such that, under Paragraph 15 of the Mortgage, notice would be considered to have been given on the date of mailing—the notice would be

[92] T. 84-85.

required to specify a date for curing the default that was not less than thirty days from March 11, 2009. The date stated in the letter, April 9, 2009, less than thirty days after March 11, 2009.[93]

Florida law is clear that lenders must comply with all of the mortgage's requirements for giving notice, including providing the thirty-day notice and cure period, to be entitled to file suit and foreclose. *See Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (summary judgment reversed

[93] Moreover, both Exhibits 6 and 7 show that the purported notice was not sent by first class mail, but rather, was sent by "Certified Mail…Return Receipt Requested." Certified mail is a special service mail offered on first class mail which has the effect of delaying the delivery because a letter carrier must attempt to obtain the recipient's signature. If the recipient is not home, the carrier will leave a note requiring the recipient to go to the post office to claim it—a process the carrier will repeat three times before the letter is sent back as unclaimed. Here, the handwritten notations to the left of the address on the envelope suggest that the first delivery attempt was Monday, March 16th. This delay of five days is significant when the lender claims to have already started the clock on the thirty-day cure period. In agreeing to Paragraph 15's one-sided provision that notices from the lender (but not the borrower) are "deemed to have been given …when mailed by first class mail," the borrower did not agree to the delays (or the risk of non-delivery) caused by the use of the return receipt requested service.

This court should hold that the use of certified mail return receipt requested does not comply with Paragraph 15. Without proof that a duplicate notice of acceleration was also mailed separately by first class—without a return receipt requested—the Servicer was required to prove the date that the notice was actually delivered and the thirty-day right to cure period would start from there.

In reality, Exhibit 7 proves that the notice was never delivered to the Homeowner's hands. But even if attempted delivery were sufficient, the first attempt on March 16 would not have provided the Homeowner thirty days to cure the default.

where notice stated that acceleration had already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011) (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). Because the evidence submitted by the Servicer, even if admissible, showed that the plaintiff did not comply with the thirty-day notice requirement, the trial court erred in entering judgment for the Servicer.[94]

B. The notice purported to impose cure requirements that were inconsistent with the mortgage.

Paragraph 22 of the Mortgage also required the pre-acceleration notice to "specify… (b) the action required to cure the default."[95] The letter contained in Exhibit 6 states amounts that are allegedly past due, as well as late charges.[96] But the letter fails to specify any sum certain that must be paid to cure the default. Instead, it tells the Homeowner that "[t]o cure the default, on or before April 9,

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[94] In a non-jury trial, no objection is necessary to preserve insufficiency of the evidence as an issue for appeal. Fla. R. Civ. P. 1.530 (e); *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___ So. 3d___, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014); *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d at 823.

[95] *Id*.

[96] R.4: 33.

2009, Countrywide must receive the amount of $22,756.68 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before April 9, 2009."[97] The letter does not "specify"[98] what the amount of those additional payments, late charges, fees and charges might be. This, of course, would leave the unwary borrower subject to acceleration if he or she made all the payments before April 9, 2009 but was unaware of—or simply miscalculated—the "late charges, fees and charges."

More importantly, the letter failed to comply with the requirements of the Mortgage because it attempted to provide notice—and start the thirty-day "cure" clock—for a breach that had not yet occurred: the April payment.

Paragraph 22 of the Mortgage upon which this foreclosure action is based, prohibits accelerations until after thirty days from a notice sent after a breach. Stated differently, it contemplates that the Homeowner will always have a minimum of thirty days to cure a breach:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The

[97] R.4: 33.

[98] Specify means to mention specifically in full and explicit terms or to tell or state precisely or in detail so that misunderstanding is impossible. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

> 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 and sale of the Property. …[99]

Thus, the plain wording of the Mortgage requires that notice of breach be given only after the breach, and that acceleration cannot occur until thirty days after that. Here, the evidence shows that Countrywide purported to provide notice that was not only prior to the breach, but which provided the Homeowner less than thirty days to cure that breach. That is because the future breach would not occur until April 1st, leaving the Homeowner only 8 days to cure this additional breach. In other words, Countrywide impermissibly tried to start the thirty-day clock to cure a default on the April payment nineteen days before it was even due.

Countrywide's attempt to include a future breach was obviously intended as an unauthorized shortcut to providing the required notice after an April default. There is no reading of Paragraph 22 that would permit such a shortening of the time between breach and acceleration. Thus, even if Exhibit 6 were admissible, the notice would be defective as a result of Countrywide's own overreaching.

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—Countrywide rendered the

[99] R.4: 33 (emphasis added).

alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the Mortgage, to "specify" the default and to precisely identify the action to cure. The alleged notice does not specify "the default," but refers to two that it claims must both be cured by the deadline.

Accordingly, even if the Servicer's evidence of notice was admissible, the trial court erred in granting judgment in favor of the Servicer because there was no competent, substantial evidence that it had given notice in compliance with the contractual condition precedent.

C. The Servicer failed to lay a foundation for the admissibility of Exhibits 6 and 7 as business records.

The Servicer failed to submit proper proof of giving pre-acceleration notice in compliance with the Mortgage for an even more fundamental reason: Exhibits 6 and 7 were hearsay and the Servicer failed to make the showing required to satisfy the business records exception to the rule against hearsay. As such, the trial court erred in admitting those documents in evidence, and relying on them to find the Servicer had complied with the condition precedent of providing such notice.

Personal knowledge of how, when and why the records were created and kept is an essential requirement of due process.

This issue presents the question of 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 asks 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 allow hearsay for establishing a hearsay exception, and thus, to make the hearsay rule superfluous. To hold that a witness may testify about recordkeeping policies and procedures which he or she learned solely in preparation for litigation is to make all business records admissible—because there is no record that a witness cannot be told to say meets the business records exception.

Ms. Prestia was not a qualified witness to lay a foundation for the admissibility of records created by an unknown vendor.

The Servicer's only witness, Ms. Prestia, was a professional testifier whose job duty with Bank of America was to review documents pertaining to the subject loan so that she could 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, she testified that she was only permitted to read documents in the Servicer's system, and was prohibited from creating such documents herself.[100]

To properly authenticate documents before admitting them into evidence, Ms. Prestia would have needed to be sufficiently familiar with them to testify that they are what the Servicer claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to the acceleration letter (as well as the "certified receipt," Exhibit 7), the Servicer would 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;

[100] T. 54-55.

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).

And Florida law requires the proponent of the evidence to demonstrate these conditions for admission of business records "through a records custodian or other qualified person." *Glarum v. LaSalle Bank N.A.*, 83 So. 3d 780, 782 (Fla. 4th DCA 2011).

Thus, to be permitted to testify to the threshold requirements for admission, Ms. Prestia would have needed to be a records custodian or an otherwise "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. *See Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819, 823 (Fla. 1st DCA 2014) ("Proper authentication by a witness requires that the witness demonstrate familiarity with the record-keeping system of business that prepared the document and knowledge of how the data was uploaded into the system."); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152, 155 (Fla. 1st DCA 2014) (finding witness unqualified where "It was never suggested that he ever

worked for Washington Mutual or had any knowledge about the creation of the letter or about Washington Mutual's business practices regarding such letters, as would be required to admit the hearsay document as a business record."); *Holt v. Calchas, LLC*, 39 Fla. L. Weekly D2305 (Fla. 4th DCA November 5, 2014) (witness was not qualified to introduce bank's payment records over hearsay objection);[101] *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 MortgageIT's record-keeping procedures. Absent 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 MortgageIT regularly made such records, or, indeed, whether the records belonged to MortgageIT in the first place."); *Mazine v. M & I Bank*, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011) (holding that a witness was not qualified where 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

[101] Notably, in *sua sponte dicta*, the panel in *Holt* declared that an assignment of mortgage and a notice of acceleration would be admissible over a hearsay objection as "verbal acts." *Id*. at *7, n. 2. This decision was simply incorrect because, as in this case, 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.

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); *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. 3dDCA 2014) (holding that without the proper foundation, the documents relied upon by the professional witness were indisputably hearsay.)

This Court has made clear that it is not enough for a witness to simply recite the "magic words" required to meet the requirement for admissibility. Records cannot be admitted unless the witness is qualified to testify based on personal knowledge that the conditions of the exception were satisfied:

> [T]he witness employed all of the "magic words." She testified that the ledger entries were made at or near the time the charges were incurred, by a person with knowledge of the information, and were kept in the course of business as part of the Association's business practice. On cross-examination, however, the witness testified that the records prior to the 2008 takeover were maintained by the prior accountant, that she started with an account balance from outside records, that she did not know the prior accountant's practice and procedure, and that she never worked for that accountant. She could not testify as to the accuracy of the starting balances.
>
> ***
>
> She never worked with the prior accountant, and was unfamiliar with how the records were kept..

Yang v. Sebastian Lakes Condo. Ass'n, 123 So. 3d at 621.

Like the witness in *Yang*, Ms. Prestia recited the "magic words" when asked about Exhibits 6 and 7 on direct.[102] But when cross-examined about Exhibit 6, Ms. Prestia admitted that she did not even know the identity of the third-party that supposedly created the letter.[103] She had never worked for the third-party vendor

[102] T. 69, 79-80.

[103] T. 70.

and conceded that she did not know what its policies and procedures, if any, were.[104] Nor did she know the date the document was produced.[105]

Ms. Prestia did not know whether the person that created the letter had any knowledge about the accuracy of the contents of the letter.[106] She had never been in charge of any department at either Countrywide or Bank of America that would have instructed third-party vendors to generate such letters.[107] She did not know the process by which information would be sent to the third-party vendor to generate such a letter, and did not have "any knowledge of the contract between Countrywide and the third-party vendor."[108]

Similarly, as to Exhibit 7, Ms. Prestia admitted that the mystery third-party vendor, not Countrywide, would have done the mailing, and that she did not know who would have been responsible for "filling out and managing the receipts for post or return receipts."[109] She claimed that return receipts would have been

[104] T. 71-72.

[105] T. 73.

[106] T. 74.

[107] T. 74.

[108] T. 75-76.

[109] T. 81.

returned to Countrywide and imaged into its system, but did not know how long it would have taken to image return receipts after they were received.[110]

In short, Ms. Prestia had no personal knowledge as to the creation of Exhibits 6 and 7—she did not even know what entity had created them—and consequently, she was not qualified to testify as to whether they were created in a manner satisfying the requirements for reliability under §90.803(6). Her lack of personal knowledge of the recordkeeping practices of the unknown vendor disqualified her from laying a foundation for admission of the records it created. *See Glarum* 83 So. 3d at 782 (finding witness unqualified because he "did not know who, how, or when the data entries were made."); *Mazine v. M & I Bank*, 67 So. 3d at 1131 (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…").

The nature of Ms. Prestia's job responsibilities—reading records to judges—is insufficient precisely because her "familiarity" was artificially created in anticipation of trial. Having never participated in the process of creating records,

[110] T. 83.

any "knowledge" she could possibly have of it was not personal, but told to her so she could perform her job as a professional witness. Information fed to a witness for the purpose of regurgitating it to a fact-finder is not only hearsay, but hearsay created by improper witness coaching. The trial court erred in permitting Ms. Prestia to testify to the requirements of §90.803(6), and in admitting Exhibits 6 and 7 into evidence.

II. There was no competent, substantial evidence of the Servicer's standing at the time it filed the case.

The trial court also erred in granting judgment to the Servicer because there was no competent, substantial evidence that the original plaintiff had standing to sue at the time it filed this lawsuit.

Florida law is clear that "[a] crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose"—not only at the time of trial, but also at the time the lawsuit was filed. *McLean v. JP Morgan Chase Bank N.A.*, 79 So. 3d 170, 172 (Fla. 4th DCA 2012); *accord, Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012); *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010); *Verizzo v. Bank of N.Y.*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010); *Philogene v. ABN Amro Mortg. Group Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006); *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014); *Zimmerman v.*

JPMorgan Chase Bank, N.A., 134 So. 3d 501, 502 (Fla. 4th DCA 2014); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990).

And when the plaintiff has failed to present competent, substantial evidence to carry its burden of proving standing, the trial court cannot enter judgment in favor of the plaintiff. *Klemencic v. U.S. Bank Nat'l Ass'n*, 142 So. 3d 983, 984 (Fla. 4th DCA 2014); *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965, 968 (Fla. 4th DCA 2013).

As noted, although Bank of America, N.A. was later substituted as plaintiff, Countrywide was the entity that filed this lawsuit. The Servicer failed to submit competent, substantial evidence that Countrywide had standing when it did so. To prove standing, "the plaintiff must show it held or owned the note at the time the complaint was filed." *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014). That means the plaintiff must present admissible "evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer." *Stone v. Bankunited*, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010); *accord, Hunter*, 137 So. 3d at 574; *McLean*, 79 So. 3d at 172. Standing may be proven by the plaintiff's possession of an original note endorsed in blank only if the plaintiff proves that it was in possession of the original note on

the date the complaint was filed. *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014). (Although, as we shall see below, this is only true when the plaintiff is not an agent of the real party in interest.)

Here, no competent, substantial evidence was submitted to show that Countrywide acquired ownership of the Note prior to filing suit, or was the holder of the Note when this case was filed.

A. The Assignment of Mortgage was ineffective and inadmissible.

The Servicer attempted to prove standing by submitting an assignment dated May 14, 2009, purporting to transfer the Mortgage and Note from MERS as nominee for First Magnus Financial Corporation to Countrywide Home Loans Servicing, L.P. But by Ms. Prestia's own testimony, Countrywide was no longer in existence when the assignment was executed.[111]

Moreover, rather than submitting a certified copy of a recorded document, the Servicer attempted to admit the document as a business record through Ms. Prestia. Ms. Prestia, however, was not a qualified witness to lay a foundation for the document's admissibility.

As noted above, Ms. Prestia is simply a professional witness and document reader who has had no experience creating or maintaining any of the Servicer's

[111] T. 37.

business records, including assignments of mortgages. She did not even know when the Assignment of Mortgage was stored in the computer system.[112] She did not know any of the signatories to the Assignment.[113] And Ms. Prestia was not present when it was executed.[114]

In short, Ms. Prestia lacked the personal knowledge necessary to testify to the circumstances of the document's creation as would be necessary to establish satisfaction of the requirements for admission as a business record.

In addition, the Servicer submitted evidence contradicting the claim that either MERS or First Magnus was the owner of the Note on date the Assignment of Mortgage was purportedly executed. The original Note admitted into evidence contained three undated endorsements, the first of which purported to transfer the Note from First Magnus to Countrywide Bank, FSB—a different entity from the plaintiff.[115]

Although Ms. Prestia was unable to date any of the endorsements, the Servicer submitted evidence (Exhibit 4) that the Note contained at least one

[112] T. 36-37.

[113] T. 35.

[114] T. 36.

[115] R.4: 1.

endorsement as of July 11, 2007.[116] Since an endorsement from First Magnus would have needed to precede the other endorsements, it had to have been the first endorsement. It follows that—if Ms. Prestia were even qualified to introduce Exhibit 4—the First Magnus endorsement must have occurred on or before July 11, 2007.

If First Magnus endorsed the Note to Countrywide Bank, FSB in 2007, Countrywide Home Loans Servicing could not have acquired standing via a subsequent assignment of mortgage from First Magnus (or its agent or "nominee") in 2009. *See, e.g., Richards v. HSBC Bank United States*, 91 So. 3d 233, 235 (Fla. 5th DCA 2012) (holding bank had failed to demonstrate standing based on assignment of mortgage from Century 21 to HSBC because an allonge showed the note had been assigned from Century 21 to a different entity). That is because through the endorsement, First Magnus ceded its own standing.

For this additional reason, the Assignment of Mortgage was not substantial, competent evidence that the Servicer had standing.

[116] R.4: 28. Recall that Exhibit 4 appears to say that the Note had at least one endorsement on that date, but puts its location as "McCalla Rayner, LLC"—a law firm that did not appear in this case until nearly four years after the suit was filed.

B. 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.").[117]

[117] *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[118] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[119]). 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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[118] 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.

[119] 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 Countrywide or Bank of America, N.A., because it is the principal which has always been in possession of the Note through its agents, the servicers.

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 a 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 agents (in this case, Countrywide and Bank of America), therefore, never became holders, even if it had been proven that they were in possession of a note endorsed in blank.

C. The two servicers had no standing because they were agents who neither joined their principal in the action nor provided evidence of authorization to bring this action.

Because the servicers were indisputably agents of some undisclosed note owner (and holder), the Servicer's only option of proving standing was by either:

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, Countrywide and Bank of America, neither joined the principal nor submitted any evidence that the principal ratified the action. In fact, the principal was never even identified at trial. Accordingly, Bank of America was not a real party in interest at the time of judgment and Countrywide 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).

Here, the servicers 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 into 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).

Neither servicer's agency relationship with its principal—the real party in interest—is one of these six enumerated categories. 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.

D. There was no evidence that the Note was endorsed in blank or in Countrywide's possession when it filed suit.

Even if Countrywide could be an Article 3 holder, the Servicer failed to submit substantial, competent evidence that the Note was endorsed in blank at the time suit was filed—i.e. that the endorsement from Countrywide Bank to

Countrywide Home Loans, Inc. as well as the endorsement in blank purportedly executed by Countrywide Home Loans, Inc. preceded the filing of the complaint. Ms. Prestia admitted that nothing on the endorsements themselves indicated when they had been placed there and she had no idea what the condition of the Note was in 2010.[120]

Although Ms. Prestia testified that the Bank of America Home Loan screenshot admitted into evidence as Exhibit 4 showed that the Note was endorsed at the time it was received by Recon Trust, she admitted that the document does not state how many endorsements were on the Note at that time.[121] Thus, without any documents or testimony to establish when the endorsement in blank was executed, there was no substantial, competent evidence to show that it was endorsed in blank before the Servicer filed suit.

Additionally, the Servicer failed to submit competent, substantial evidence that the Note was in Countrywide's possession at the time it filed suit. Exhibit 4—which Ms. Prestia admitted was an incomplete record of the loan[122]—was the only evidence the Servicer submitted purporting to show its possession of the Note on that date. But that document showed only two entities ever coming into possession

[120] T. 17, 21.

[121] T. 64.

[122] T. 57.

of the Note, neither of which was the Servicer. One was "Recon Trust Company," an entity that Ms. Prestia variously claimed was an investor, a custodian, a subsidiary, or a department of Bank of America.[123] The other was a law firm, "McCalla Raymer, LLC,"—which did not represent the plaintiff in this case when suit was filed and first appeared in this case nearly four years after it was filed.[124] No entry in that document or any other showed that the Note was ever in Countrywide's possession.

Because the Servicer failed to adduce substantial, competent evidence showing that the Note was endorsed in blank (or to the Servicer) at the time suit was filed, and failed to produce evidence that it had the Note in its possession at that time, the Servicer failed to carry its burden of proving standing. As such, the trial court erred in finding the Servicer had proven its entitlement to foreclose. This Court should reverse.

[123] T. 63, 55-57.

[124] Notice of Appearance as Co-Counsel, April 5, 2013 (R. 423).

CONCLUSION

Because the Servicer failed to submit competent, substantial, admissible evidence showing that it served a pre-acceleration notice in compliance with the requirements of the Mortgage, and because the Servicer failed to submit competent, substantial evidence that it had standing at the time it filed suit, the trial court erred in denying the Homeowner's motion for involuntary dismissal, and in entering judgment for the Servicer. This Court should reverse and remand for dismissal.

Dated: January 22, 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 22, 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 22, 2015.

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