# In the District Court of Appeal
# Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

NATIONSTAR MORTGAGE, LLC, et al.

Appellees.

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

## INITIAL BRIEF OF APPELLANT

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

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## STATEMENT OF THE CASE AND FACTS

### I. Introduction

[redacted] ("the Homeowner") appeals the final judgment of foreclosure rendered in favor of Nationstar Mortgage, LLC ("the Servicer") after a non-jury trial. The Homeowner presents three issues for the Court's review:

- Whether the trial court erred in sustaining the Servicer's objection to the Homeowner's participation at the trial;
- Whether the trial court erred in denying the Homeowner's motion for involuntary dismissal;
- Whether hearsay may be used to establish a hearsay exception.

### II. Appellant's Statement of the Facts

#### A. The Pleadings and the Discovery

The Servicer initiated this action when it filed its one-count mortgage foreclosure complaint.[1] This pleading alleged that the Servicer was "now the holder of the Mortgage Note and Mortgage and/or is entitled to enforce the

[1]Complaint, June 4, 2013 (R. 1-40).

Mortgage Note and Mortgage."[2] In addition to the borrower, the complaint named the Homeowner ( as a defendant because the Homeowner owned the property that the mortgage secured.[3] Finally, the Servicer's complaint alleged that the borrower defaulted by failing to make the August 1, 2010 payment due under the note and mortgage.[4]

The Homeowner initially challenged the Servicer's allegation that it was the holder "and/or" entitled to enforce the note in its motion for more definite statement.[5] This motion argued that the use of the conjunctive and disjunctive term "and/or" rendered the pleading impermissibly ambiguous as to the Servicer's standing and requested a more definite statement specifying exactly what the Servicer's interest in the note and mortgage was.[6] Along with this motion, the Homeowner served the Servicer with its mortgage loan ownership interrogatories.[7]

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[2] Complaint, ¶4, June 4, 2013 (R. 4).

[3] Complaint, ¶5, June 4, 2013 (R. 4).

[4] Complaint, ¶6, June 4, 2013 (R. 4).

[5] Motion for More Definite Statement of Complaint, December 2, 2013 (R. 110-114).

[6] *Id.*

[7] Notice of Service of Mortgage Loan Ownership Interrogatories, December 2, 2013 (R. 107-109).

After the court denied its motion for more definite statement because the Servicer alleged that it was the "holder,"[8] the Homeowner answered the complaint and alleged that it was without knowledge and therefore denied the Servicer's allegation that it was the holder "and/or" entitled to enforce the note.[9] And in its affirmative defenses, the Homeowner alleged, among other things, that the Servicer lacked standing to maintain the foreclosure action,[10] and that the Servicer had failed to post a cost bond as required by §57.011, Fla. Stat.[11]

Prior to trial, the Servicer responded to the Homeowner's discovery[12] and posted a non-resident cost bond in response to the Homeowner's fourth affirmative defense.[13]

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[8] Order on Defendant's Motion for More Definite Statement of Complaint, December 21, 2013 (R. 123).

[9] Answer, ¶4, February 25, 2014 (R. 149).

[10] Third Affirmative Defense, Plaintiff Lacks Standing, February 25, 2014 (R. 152-153).

[11] Fourth Affirmative Defense, Cost Bond, February 25, 2014 (R. 153).

[12] Plaintiff's Notice of Serving Responses to Defendant, [redacted] Interrogatories, March 12, 2014 (R. 156-157); Notice of Serving Unverified Responses to Defendant's Pretrial Interrogatories, May 30, 2014 (R. 206-207); Plaintiff's Response to Defendant's Request for Production Regarding Entitlement to Enforce Loan Documents, May 30, 2014 (R. 208-212); Plaintiff's Response to Defendant's Pretrial Request for Production, May 30, 2014 (R. 213-215).

[13] Notice of Filing Cost Bond, March 28, 2014 (R. 158-159).

## B. The Trial

### *The Pretrial Ruling on the Homeowner's Ability to Participate*

Despite the Homeowner's status as a named defendant and its active participation in the pre-trial phase of the case, the Servicer opened the trial with an assertion that, as a non-borrower, the Homeowner had no standing to object to the Servicer's evidence at trial:

> Based upon that and the case law in Florida and other jurisdictions, it is plaintiff's position that the defendant, [redacted] Holding, does not have standing to contest this foreclosure action.

The Homeowner pointed out that, even though the borrower had defaulted as to his own liability under the note, the Servicer would, at a minimum, be required prove its standing and damages as against the current property owner, just as it would against any other interest holder.[15] The trial court ruled, however, that the borrower's default somehow admitted the current owner's "liability" to the Servicer:

> But as it relates to the liability, I agree that the default admits liability and [redacted] Holding does not have standing to contest liability. However, I'll give you an opportunity to proffer, so that you have a record.[16]

---

[14] Transcript of Trial Before Judge Susan Lubitz, June 17, 2014 (Supp. R. 1; "T. __"), at 7.

[15] T. 14-15.

[16] T. 17.

***The Testimony and Evidence***

The Servicer called its only witness, Fay Janati, to the stand.[17] She testified that her job responsibilities required her to testify for the Servicer as a corporate witness[18] and that she only became familiar with the account a few weeks before trial when she began to review certain documents.[19]

Janati also testified that all the documents that had to do with the loan were kept by the prior servicer and until "boarded" into the Servicer's system in 2012.[20] She also gave a general description regarding this "boarding" process.[21] When the Homeowner sought to strike this testimony because Janati testified about the prior servicer's intent without explaining her connection to that company, the trial court overruled the objection based on its prior ruling that the Homeowner did not have standing to contest liability.[22]

Over the Homeowners' objection, the court admitted all the exhibits that constituted the entirety of the Servicer's case including:

[17] T. 18.

[18] T. 19.

[19] T. 21.

[20] *Id.*

[21] T. 22-23.

[22] T. 23.

- The alleged original mortgage (Exhibit A);[23]
- The alleged original note (Exhibit B);[24]
- The payment history which the Servicer admitted included data entered by the prior servicer (Exhibit C);[25]
- A default notice allegedly sent by the prior servicer (Exhibit D);[26] and
- An escrow breakdown (Exhibit F).[27]

While the witness would initially testify that the Servicer was the holder of the note over the Homeowner's objection that the question called for a legal conclusion,[28] she would later testify about what she called the "big picture" which was to say that, after origination, the note is endorsed for securitization purposes and then stays with the custodian of the record.[29] And while she could not say for sure, she assumed that the custodian of the subject note was the prior servicer.[30]

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[23] T. 24.

[24] T. 26.

[25] T. 46.

[26] *Id.*

[27] T. 67.

[28] T. 67-68.

[29] T. 76.

[30] T. 77.

Consequently, Janati was unable to testify whether the note ever made its way into the Servicer's possession.[31]

Furthermore, she would later admit that the loan's "investor" was Freddie Mac and that the Servicer was given authority to bring the case on behalf of Freddie Mac through a servicing agreement she did not produce at trial.[32] But when confronted with the Servicer's answers to the Homeowner's ownership interrogatories which alleged that the Servicer was the owner of the note, she could not testify who actually owned the note:

> Q. And does the plaintiff, Nationstar Mortgage, own this or does Freddie Mac?
>
> A. I think it's Freddie Mac. I don't know. I'm going to go back to that document. I didn't go – you know, because I verified the account, you know, I didn't go back to see if it is Freddie Mac or not, but that statement is correct. It's okay. We can act as the owner of the note. We are the plaintiff because we are.
>
> Q. I know Nationstar is the plaintiff. I'm asking you is Nationstar the owner or not?
>
> A. I don't know.[33]

Nor could Janati testify what the alleged escrow advances of $18,439.94 and $9,203.67 on Exhibit F were for.[34] Indeed, Janati was at a loss to explain why the

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[31] *Id.*

[32] T. 80.

[33] T. 82.

entries for these alleged outlays were—unlike the others—simply labeled "escrow advance" without revealing the purpose for which the money was "advanced."[35]

| Loan Number | | | -597678531 |
|---|---|---|---|
| Escrow Balance Breakdown | | | 30,865.17 |
| 12/05/2013 | ESCROW ADVANCE | 08/01/2010 | 30,865.17 |
| 12/05/2013 | RECOVER ESCROW ADVANCE | 08/01/2010 | 30,865.17- |
| 11/08/2013 | COUNTY TAX ADVANCE | 08/01/2010 | 2,477.18 |
| 08/20/2013 | RECOVER ESCROW ADVANCE | 08/01/2010 | 300.00- |
| 07/25/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 1,585.65 |
| 07/25/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 2,973.86 |
| 06/21/2013 | ESCROW ADVANCE | 08/01/2010 | 9,203.67 |
| 06/19/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 131.14 |
| 06/19/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 246.98 |
| 05/21/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 131.18 |
| 05/21/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 04/22/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 131.18 |
| 04/22/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 03/20/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 131.18 |
| 03/20/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 02/20/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 131.18 |
| 02/20/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 01/29/2013 | FLOOD SFR ADVANCE | 08/01/2010 | 929.79 |
| 01/23/2013 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 12/20/2012 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 11/20/2012 | HAZARD SFR ADVANCE | 08/01/2010 | 247.04 |
| 10/04/2012 | HAZARD SFR ADVANCE | 08/01/2010 | 1,009.88 |
| 08/23/2012 | ESCROW ADVANCE | 08/01/2010 | 10,353.02 |
| 08/23/2012 | RECOVER ESCROW ADVANCE | 08/01/2010 | 10,353.02- |
| 07/26/2012 | RECOVER ESCROW ADVANCE | 08/01/2010 | 4,747.81- |
| 07/24/2012 | RECOVER ESCROW ADVANCE | 08/01/2010 | 3,339.11- |
| 07/15/2012 | ESCROW ADVANCE | 08/01/2010 | 18,439.94 |

**EXHIBIT F**

All she could testify to was that the Servicer could provide such "details," but she had not brought them to court:

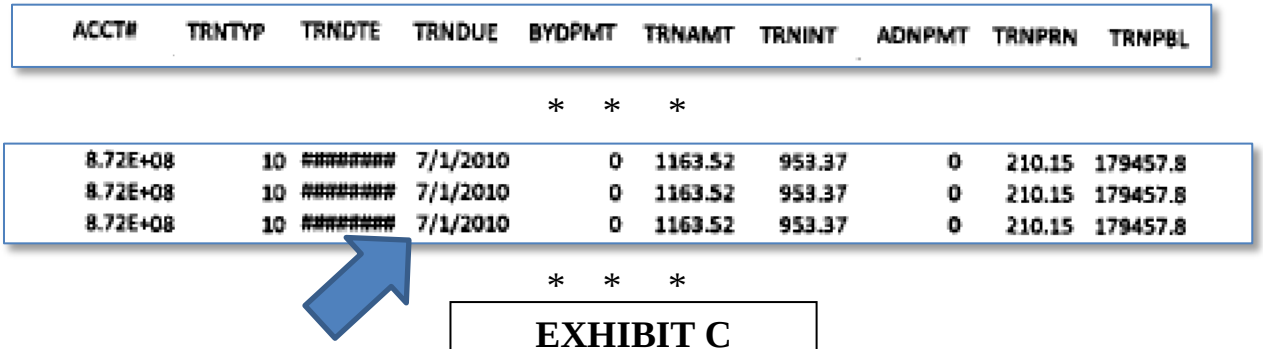
> And we can go back and provide you all of the details … you're fighting me over escrow advances. Right now, it's not in front of me

[34] T. 113, 117.

[35] T. 118.

> because there's certain room only in the system to put what it is. The details, you go back and provide that.[36]

Janati was also unable to explain what many of the columns that appeared on the first page of the payment history (Exhibit C) were for[37] or why the exhibit showed a negative $4,735.50 in one of the columns.[38] And most importantly, she admitted that she could not tell from the payment history when the last payment made was made[39] or when the three payments reflected in the entry for July 1, 2010 (the alleged date of the last payment) were actually made:[40]



| ACCT# | TRNTYP | TRNDTE | TRNDUE | BYDPMT | TRNAMT | TRNINT | ADNPMT | TRNPRN | TRNPBL |
|---|---|---|---|---|---|---|---|---|---|
| | | | | * * * | | | | | |
| 8.72E+08 | 10 | ######## | 7/1/2010 | 0 | 1163.52 | 953.37 | 0 | 210.15 | 179457.8 |
| 8.72E+08 | 10 | ######## | 7/1/2010 | 0 | 1163.52 | 953.37 | 0 | 210.15 | 179457.8 |
| 8.72E+08 | 10 | ######## | 7/1/2010 | 0 | 1163.52 | 953.37 | 0 | 210.15 | 179457.8 |
| | | | | * * * | | | | | |

**EXHIBIT C**

[36] T. 118-119.

[37] T. 121-122.

[38] T. 122.

[39] T. 128-129.

[40] T. 129.

After the close of Janati's testimony, the Homeowner made a motion for involuntary dismissal arguing that the Servicer failed to prove there was a default under the note,[41] the Servicer's standing,[42] the Servicer's entitlement to the escrow amounts,[43] or whether the prior servicer actually sent the default notice as required by the mortgage.[44] The court denied the Homeowner's motion[45] and subsequently entered judgment in favor of the Servicer.[46]

This appeal follows.

[41] T. 134.

[42] *Id.*

[43] T. 136-137.

[44] T. 137-138.

[45] T. 141.

[46] T. 148.

## SUMMARY OF THE ARGUMENT

The trial court's pretrial ruling that the Homeowner lacked standing to contest the foreclosure was patently incorrect because, as the owner of the right of redemption, the Homeowner had absolute authority to contest the damages sought by the Servicer and the Servicer's standing to sue. Additionally, because the Servicer failed to file a reply asserting the Homeowner's lack of standing, it waived this "affirmative defense" to the Homeowner's affirmative defenses.

Furthermore, the trial court should have granted the Homeowner's motion for involuntary dismissal for three separate reasons. First, the Servicer failed to establish that it had standing to sue either on behalf of its principal (and the true holder of the note) or independent of this entity. Additionally, the Servicer failed to prove that it complied with Paragraph 22 of the mortgage, which is a condition precedent to both acceleration and foreclosure. Finally, the Servicer failed to provide any competent, substantial evidence of its damages.

Finally, the Servicer's witness was wholly incompetent to lay the business records hearsay exception for Servicer's documents admitted through her testimony and therefore these exhibits should have been excluded from evidence.

Therefore, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

## 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 required *de novo*. *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st 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); *see also*, *Blazina v. Crane*, 670 So. 2d 981, 983 (Fla. 2d DCA 1996).

The *de novo* standard also applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code. *See Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011); *see also Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review).

## ARGUMENT

### I. The trial court erred when it ruled that the Homeowner lacked standing to contest the foreclosure.

The court's pretrial ruling on the Homeowner's standing to contest the foreclosure was predicated on the Servicer's argument that the Homeowner was not the borrower under the loan documents. However, since it was undisputed that the Homeowner owned the property at the time the lawsuit was filed, the Homeowner had an unequivocal right to contest the alleged damages and the Servicer's standing to sue.

#### A. As the owner of the right of redemption, the Homeowner had the absolute right to challenge the damages sought by the Servicer and the Servicer's authority to sue.

The genesis of the trial court's error is found in the fact that as the owner of the property, the Homeowner owned the "right of redemption"—that is, the right to prevent a foreclosure sale upon payment of the amount of the debt specified in the foreclosure judgment. §45.0315, Fla. Stat. (providing the holder of "any subordinate interest" with the right to cure the mortgagor's indebtedness). And because the Homeowner was the owner of the right of redemption, the Homeowner had the absolute right to challenge the Servicer's claim of damages. *Beauchamp v. Bank of New York*, 150 So. 3d 827 (Fla. 4th DCA 2014) (holding that mortgagor had standing to contest damages sought in foreclosure lawsuit even though he did

not sign the note since he was the owner of the equity of redemption);[47] *Clay County Land Trust No. 08-04-25-0078-014-27, Orange Park Trust Services, LLC v. JPMorgan Chase Bank, Nat. Ass'n*, 152 So. 3d 83 (Fla. 1st DCA 2014) (holding that property owner had standing to contest damages sought in foreclosure lawsuit as owner of the equity of redemption even though the owner was not a party to the mortgage).

This result is eminently logical given that the law cannot allow a foreclosing plaintiff to simply name any dollar figure it wishes without fear of any challenge by a subordinate interest holder because every dollar in the judgment beyond the true amount which would have made the Bank whole comes directly from the pocket of the subordinate interest holder (here, the property owner). Due process, therefore, requires that the Homeowner have its day in court to contest the Servicer's claim as to what that true amount of the lien is.

But the Homeowner's standing to contest the foreclosure did not end just with its right to challenge the Servicer's alleged damages. Rather, it extended to the right to challenge the Servicer's standing to bring the lawsuit in the first place. This is because standing requires that the party asserting the claim have a sufficient

[47] The Homeowner notes that at the time the trial took place below, this Court had not yet released *Beauchamp* and therefore the trial court did not have the benefit of its ruling.

stake in the outcome of the controversy to warrant that the court consider its position. *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) ("Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation.") And if the Servicer had no ability to foreclose the mortgage in the first instance, then it had no claim to any damages whatsoever.

And while the original borrower may have defaulted on the issues of standing and damages, that default was of no moment to the Homeowner's defense against the foreclosure of its property rights. *Khazaal v. Browning*, 717 So. 2d 1124, 1125 (Fla. 5th DCA 1998) (default of one foreclosure defendant did not affect co-defendant's position—"[co-defendant's] defenses remained to be tested by trial and cannot be disposed of by [the first defendant's] default").

Therefore, the court erred in ruling the Homeowner did not have standing to contest the foreclosure. Overturning that ruling also means that the evidentiary rulings based upon that must be overturned. This Court, therefore, should reverse and remand for a new trial.

**B. The Servicer waived any challenge to the Homeowner's standing.**

As pointed out by the Homeowner's counsel, the first time the Servicer raised the issue of the Homeowner's standing was during opening statements at

trial.[48] In fact, the Homeowner's attorney noted that there was not even a memorandum made in opposition to the Homeowner's affirmative defense.[49] And the failure to contest the Homeowner's affirmative defenses acted as a waiver of any subsequent right to assert that the Homeowner lacked standing to contest the foreclosure.

This is because standing is an affirmative defense. *Jaffer v. Chase Home Finance, LLC*, Case No. 4D13-1597 (Fla. 4th DCA January 7, 2015); *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893, 895 (Fla. 4th DCA 2012). And when a party asserting affirmative relief seeks to avoid an affirmative defense (like the Servicer did at trial), it must file a reply. Fla. R. Civ. P. 1.100(a) ("If an answer…contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance.")

In this sense, a reply is thought of as an affirmative defense to an affirmative defense. *Crosslands Properties, Inc. v. Univest Crossland Trace, Ltd.*, 516 So. 2d 320, 322 (Fla. 2d DCA 1987); *Hertz Commercial Leasing Corporation v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981). But where a party seeking affirmative relief fails to file a reply, it waives the right to later assert an

[48] T. 12.

[49] T. 13.

affirmative defense to an affirmative defense. *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (holding that plaintiff seeking to avoid the defendant's statute of limitations affirmative defense on the grounds of tolling waived the "affirmative defense to the affirmative defense" by failing to assert it in a reply).

Here, as in *Dober*, the Servicer was put on notice of the Homeowner's affirmative defenses of lack of standing and failure to comply with conditions precedent. Nevertheless, the Servicer failed to file a reply asserting that the Homeowner lacks standing to assert these affirmative defenses. Since it failed to do this, it waived any challenge to the Homeowner's standing to contest the foreclosure. Therefore, not only did the Homeowner have standing to contest the foreclosure, all of its affirmative defenses should have been considered by the trial court.

## II. The trial court erred in denying the Homeowner's motion for involuntary dismissal.

When confronted with the Homeowner's 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 witness testified that Freddie Mac "may" have been the owner of the note (although she was not sure if this was even true),[50] the Servicer made no effort at trial to prove it had any authority from the note owner. It apparently sought to establish at trial that it was the "noteholder" under Article 3 of the Uniform Commercial Code ("UCC"). The Servicer, however, as agent for the owner, could never be an Article 3 holder.

#### 1. The Servicer lacked standing because it was not an Article 3 holder of the note.

Under Article 3 of the 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

[50] T. 80, 82. The witness's reference to "Freddie Mac" was undoubtedly a reference to the Federal Home Loan Mortgage Corporation, a public government-sponsored enterprise that buys residential mortgages on the secondary market. Jean L. Cummings and Denise DiPasquale, *Developing a Secondary Market for Affordable Renting Housing: Lessons From the LIMAC/Freddie Mac and EMI/Fannie Mae Programs*, Cityscape, Vol. 4, No. 1, Multifamily Financing (1998) at 19.

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.")[51]

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[52] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[53]). The drafters'

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

[52] 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.

[53] 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*

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").

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 Freddie Mac (or whatever entity has bought the note) and not the Servicer, because Freddie Mac (or other purchaser) is the principal which has always been in possession of the Note through its agent, 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

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*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).

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), therefore, never became a holder, even if it has proven they were in possession of a properly endorsed note.

Lastly, Article 3 was never designed as a means of creating agency relationships and its terms are not a stand-in for proof of agency or authorization. If mere possession of a note by an admitted agent were sufficient, then this Court's holding in *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012)—that a servicer must join, or show authorization from, its principal—would be nullified.

**2. The Servicer had no standing as an agent because it did not join its principal or submit evidence of ratification.**

Because the Servicer was an agent of some entity (possibly Freddie Mac), the Servicer had the option of proving standing by: 1) joining that entity in the action; or 2) demonstrating that it had been authorized by that 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.* Here, the Servicer neither joined the principal nor

submitted any admissible evidence that Freddie Mac (or anyone else) ratified the action.[54] Accordingly, the Servicer was not a real party in interest at the time of judgment or when 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 Servicer brought and prosecuted the case in its own name but apparently for the benefit of Freddie Mac (although the witness was not sure). 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

[54] The only plausible evidence of Freddie Mac's approval was the witness's hearsay statement to a "servicing agreement." Leaving aside that Freddie Mac was never proven to be the note owner or holder (constructive or otherwise), the alleged document upon which the witness based her hearsay statement was not admitted into evidence, this cannot be considered competent, substantial evidence that the entity with the right to foreclose ratified the action. *Beauchamp*, 150 So. 3d at 828-29.

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).

A servicer's agency relationship with their principal—the real party in interest—is not 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 the Servicer was the owner (nor can it be an Article 3 holder), and because it failed to either join its principal (the note owner and holder) in the action or show authorization to act on behalf of that entity.[55]

### 3. The evidence and testimony at trial failed to prove that the Servicer ever had possession of the note in the first instance.

Even if the Servicer could enforce the note independently of Freddie Mac as an Article 3 holder in its own right—a circumstance that would fly in the face of

[55] It is worthwhile to note that the default notice admitted at trial (Exhibit D) provides that the prior servicer "services the home loan…on behalf of the holder of the promissory note ("the Noteholder.")" It further warns that if the default asserted in the notice was not cured, the Noteholder, and not the prior servicer, may pursue a deficiency judgment against the borrower. This is further evidence that the Servicer and its predecessors did not act as Article 3 noteholders.

the witness's testimony—the Servicer still failed to prove that the note was transferred to it from the prior servicer.

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[56]) may be established by submitting the promissory note with a blank or special endorsement, an assignment of the note, or an affidavit that proves the

[56] 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 Commercial Code ("UCC") is sufficient to prove standing 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) contemplate that only the owner, not the holder, of the note could be the beneficiary of such automatic conveyances (called "equitable transfers"). To explicitly hold otherwise—that there is no need for a plaintiff to prove it is a mortgagee—would be to overturn cases dating back to at least the nineteenth century that foreclosure is an equitable action.

plaintiff's noteholder status. *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013). Nevertheless, this evidence must establish this status as of the day the foreclosure lawsuit was filed. *Id*; *Sosa v. U.S. Bank Nat. Ass'n*, 39 Fla. L. Weekly D2554 (Fla. 4th DCA December 10, 2014).

Here, the witness could not testify that the note was ever transferred from the prior servicer to it. In fact, she expressly testified that the note did not have to make its way into the Servicer's possession.[57] But this is simply not true because in order to be a "holder" of an instrument the person must, by definition, be in possession of the note. §671.201(21)(a), Fla. Stat. (defining a holder as the person in possession of a negotiable instrument made out to that party or to bearer).

Therefore, even if the Servicer could sue independently of Freddie Mac, it failed to prove that it was in physical possession of the properly endorsed note on the day the lawsuit was filed. *Kiefert v. Nationstar Mortg., LLC*, 39 Fla. L. Weekly D2591 (Fla. 1st DCA Dec. 16, 2014). The trial court was consequently required to grant the Homeowner's motion. *May v. PHH Mortgage Corporation*, 150 So. 3d 247, 248 (Fla. 2d DCA 2014) ("May's motion for involuntary dismissal could only have been denied if the court found that the bank presented competent substantial evidence to establish a *prima facie* case."

[57] T. 77.

#### 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 Joseph v. BAC Home Loans Servicing, LP*, 40 Fla. L. Weekly D171 (Fla. 4th DCA January 7, 2015); *Fischer v. U.S. Bank Nat. Ass'n*, 40 Fla. L. Weekly D154 (Fla. 4th DCA January 7, 2015); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So.3d 152 (Fla. 1st DCA 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 presented insufficient evidence to support its measure of damages.

#### 1. The principal award and interest award is not supported by competent, substantial evidence.

The judgment awarded $179,247.66 in principal and $45,256.66 in interest to the Servicer. This award, however, was based upon the July 1, 2010 default alleged in the complaint. The payment history admitted at trial (Exhibit C),

however, reveals three payment entries of $1,163.52 in the "transaction amount" column for July 1, 2010.[58] Janati, however, could not testify when these three payments were actually made.[59] Just as importantly, she admitted that the payment history did not even reflect the date the last payment was made.[60]

And if the payment history could not reveal the date the last payment was made then the Servicer was not entitled to a finding that the borrower defaulted on July 1st of 2010. Without this finding, the Servicer was not entitled to a principal and interest award based upon a July 1, 2010 default.

**2. The escrow award is not supported by competent, substantial evidence.**

The judgment also awarded the Servicer $30,865.17 in escrow advances. The only evidence adduced as to these advances, however, was the escrow breakdown (Exhibit F). But Janati could not even testify what the alleged payments of $18,439.94[61] and $9,203.67[62] found on the exhibit were for. Indeed,

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[58] T. 121.

[59] T. 129. In addition to the three payment entries made in the July 1, 2010 transaction amount column, Exhibit C also reveals two postings of $1,163.52 for April 1, 2010, May 1, 2010, and June 1, 2010; two postings of $763.52 for April 1, 2010; two postings of $400.00 for April 1, 2010; two postings of $163.52 for May 1, 2010; and three postings for $1,000.00 for June 1, 2010. None of these numbers were explained by her testimony.

[60] T. 128-129.

[61] T. 113.

Janati was at a loss to explain why the exhibit merely labels these particular alleged outlays as "escrow advance" without revealing the purpose for which the money was "advanced":

> Q. Can you provide proof [of what the money was used for] here today?
>
> A. No.
>
> Q. Why does it just say escrow advance and not flood or hazard or county tax or recover, why does it just say escrow advance?
>
> A. I don't know.[63]

In short, Janati admitted that she had no idea what $27,643.61 of the $30,865.17 awarded to the Servicer even consisted of. There was therefore no competent, substantial evidence to support the escrow award.

But Janati's inability to testify substantively as to any of these documents points to a larger issue—that she was simply unqualified to lay the business records exception for any of the Servicer's exhibits.

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[62] T. 117.

[63] T. 118.

## III. The witness was not qualified to lay the foundation for a business records exception for the exhibits because hearsay cannot be used to establish a hearsay exception.

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

The question at the core of this issue is what may constitute the "personal knowledge" required for a witness to authenticate documents and to lay the foundation for a business records exception to hearsay for those documents. Specifically, it presents the question whether the party offering those documents as evidence may convey information to its otherwise unknowledgeable witness to create a veneer of "personal knowledge" with two simple preparatory steps:

- having its witness read the documents before trial; and
- telling its witness what to say in court about its record-keeping practices.

The personal knowledge required to introduce a company's records is not familiarity with what the records say, but with the facts of how, when, and why the records were created and kept. To hold that the personal knowledge requirement for authenticity and the business records hearsay exception can be satisfied by reading the records themselves, is to make all records admissible and the hearsay rule superfluous. And to hold that a witness may be trained what magic words to say about the company's alleged recordkeeping practices so as to appear to meet

the business records exception—even if the witness has no personal knowledge whether such practices actually exist—is to admit hearsay based on hearsay.

To properly authenticate the documents before admitting them into evidence, Janati would have had 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 each and every exhibit, 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 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).

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*, 148 So. 3d 819 (Fla. 1st DCA 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.*, 149 So. 3d 152 (Fla. 1st DCA 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*, 4D13-2101, 2015 WL 340554 (Fla. 4th DCA January 28, 2015) (witness was not qualified to introduce bank's payment records over hearsay objection).

*See also 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); *Mazine v. M & I Bank*, 67 So.3d 1129, 1131 (Fla. 1st DCA2011) (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*…[w]hile 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 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.)

Here, the Servicer's witness admitted that she only became familiar with the account a few weeks before trial[64] and that she did not even work in the department responsible for inputting the information into the Servicer's own records.[65]

[64] T. 21.

[65] T. 36.

Instead, she testified that she had done "quality control" for the Servicer,[66] which she described as "verifying" that the entries were accurate and had been entered into the system by an "authorized" employee.[67] She then confessed that she did not actually check the authority of each of the "hundreds of people [who] work the account."[68] She merely made an assumption based on the existence of a record entry: "The fact that I see their name on the entry means they are authorized."[69]

And although she had initially stated that her quality control included verification that the entries themselves were accurate, upon further questioning, she confessed that she would be lying if she said she verified the numbers on the documents:

> Q. So when you're doing your very thorough review of these documents, are you doing anything through quality control of these documents besides how they look?
>
> A. Well, I don't understand what's your question. I have to tell you that after working 16 years for Nationstar Mortgage, I trust my company, you know, we don't just go in -- I can prove by the late charges exist as of today, did I go verify it, no, I would be lying if I said I did verify it. But I can [prove] it to you that it's accurate, you

[66] T. 37.

[67] T. 39.

[68] T. 38.

[69] T. 39.

> know, corporate advances, we don't make up numbers. We are not here to make up numbers. …[70]

In reality, all Janati did was "trust" that the other, unknown employees who prepared the numbers for her were authorized, knowledgeable and conscientious, as exemplified by her testimony regarding the Servicer's payoff quote (marked for identification as Exhibit E):

> Q. How do you know this was made at or near the time as someone with knowledge, if you don't know exactly when it was created?
>
> A. Sir, I'm just going to go back and say to you, even if I don't know the exact date, I have to trust that whoever created these, they were authorized to enter the building, they were authorized to log into the system, they have resources, they know how to prepare payoff quote and they have received proper training to create the payoff quote.[71]

Janati's testimony also encompassed exhibits of the prior servicer, Bank of America with which she was even less familiar. While she had never worked for Bank of America, Janati proclaimed she received "training" about its recordkeeping policies.[72] This "training," however, was nothing more than a phone call she had with a former a Bank of America employee whose own personal experience with those policies was completely unknown to her[73] (which is

[70] T. 107-108.

[71] T. 101.

[72] T. 35.

[73] T. 35-36.

perhaps the most obvious example as to why so-called "training" is simply hearsay, and perhaps hearsay upon hearsay). And it was hearsay of the worst kind because it was deliberately communicated to Janati for the specific purpose of testifying in court—i.e. improper witness coaching to create the façade of familiarity.

Janati repeatedly testified that she simply "trusted" the prior servicer's records and nothing more.[74] She also explicitly admitted that she did not work on any "boarding" of the prior servicer's records[75] and that the boarding process itself simply trusts that the information "boarded up" is accurate.[76] This is a far cry from "independently confirming the accuracy of the third-party's business records upon

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[74] T. 34 ("So I trust that mortgage – Bank of America is the same as Nationstar."); T. 89 – 90 ("I trust Bank of America, they're a very reputable big bank, if the borrower gave another mailing address to Bank of America, Bank of America would have certainly sent the demand letter to the borrower's mailing address."); T. 90 ("I don't know. I didn't know until you brought it up to my attention, but I'm going to trust Bank of America's records."); T. 112 ("I'm going to trust that Bank of America was really good at servicing and they did follow policies and procedures.")

[75] T. 33.

[76] T. 111. As this Court suggested in *Bank of New York v. Calloway*, 40 Fla. L. Weekly D173, at *5 (Fla. 4th DCA January 7, 2015), a successor servicer's "reliance" on the records of its predecessor is something more than Janati's blind "trust" that they are accurate. Ordinarily, there should be proof of "a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy." *Id*. at *5.

receipt" as mentioned in *Bank of New York v. Calloway*, 40 Fla. L. Weekly D173, at *5 (Fla. 4th DCA January 7, 2015).

And without testimony that the Servicer had checked the accuracy of the prior servicer's records, Janati was incompetent to lay the business records exception for the prior servicer's records. *See Calloway* (holding that prior servicers' records were admissible if there is testimony that the new servicer reviewed the accuracy of all information transferred to it upon acquiring a loan and if the testimony is not from a "'robo' witness").

In short, Janati was exactly the sort of "robo" witness this Court warned of in *Calloway*. While certainly well trained in the art of giving hearsay testimony, she was not a records custodian or other qualified witness since she was neither in charge of, nor (other than through hearsay) acquainted with, any of the activity constituting usual business practices for creating and maintaining the payment history, the default notice, the payoff quote, and the escrow breakdown. Her only connection to the documents was that she had read them and that she trusted them.

Thus, the Homeowner's objections to these exhibits should have been sustained. The witness's testimony is legally insufficient to support the judgment.

***The myth that bank records are inherently trustworthy.***

Another typical bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the era when banking records were considered trustworthy, at least in the context of foreclosure litigation, is long gone. Now, the banking industry's flagrant abuse of the judicial system with perjured affidavits in which the affiants falsely claimed personal knowledge (robo-signing) has become common knowledge—so much so that a definite absence of trustworthiness may well be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("…many, many mortgage foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the

Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers—which included the prior servicer, Bank of America—had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness);[77] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[78]

Arguably, this well-known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. But at a minimum, the banks cannot be told that they may skip bringing a qualified witness to establish authenticity or to lay the foundation for the business-record hearsay exception because banks are somehow more worthy of the court's trust than the average litigant.

The question remains why experience has proven the unreliability of bank foreclosure records—a finding that runs counter to the experience with records from other businesses, as well as traditional dogma. As this Court noted in *Calloway*, "[t]he rationale behind the business records exception is that such

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

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

documents have a high degree of reliability because businesses have incentives to keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *U.S. v. McIntyre*, 997 F. 2d 687, 689 (10th Cir. 1993) (providing that the underlying theory of the business records exception is "a practice and environment encouraging the making of accurate records.") (Citations omitted). For example, a dry cleaner is motivated to keep careful records of the clothes he receives for cleaning, because a pattern of losing the clothes will result in a loss of customers.

A servicer, on the other hand, has no motivation to keep accurate records for its "customers"—the borrowers—because these customers have no option to go to a different servicer if they find its recordkeeping unreliable. Servicers are motivated only to serve their principals, the owners of the loan[79] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[80]). And their principals are motivated only to

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[79] Paula Fitzgerald Bone, *Toward a Model of Consumer Empowerment and Welfare in Financial Markets with an Application to Mortgage Servicers*, Journal of Consumer Affairs, Vol. 42, Issue. 2, pg. 165 (2008) ("Mortgage servicers act on behalf of the investors holding the mortgage-backed security. Keeping customers satisfied generally means keeping investors, rather than homeowners, satisfied.") *Id*. at 178.

[80] *See for example, JPMorgan $300M Settlement Over Force-Placed Insurance Approved*, Insurance Journal, March 3, 2014, available at, http://www.insurancejournal.com /news/national/2014/03/03/321966.htm.

maximize their return on their investment in the note which means that a servicer's unreliability is acceptable so long as it is in their favor. When a loan is not performing, the only check against absolute fabrication is the courts themselves.

Stated plainly, the appellate record is devoid of any suggestion that the Servicer proffering this evidence suffers any financial penalty if the records it inherits are inaccurate. And court opinions that give banks an evidentiary pass only increase the likelihood that their records are untrustworthy.

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

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should excuse them from the rules because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on nonparties, Florida law has already provided a practical, efficient means for foreclosing banks to introduce records from far-flung departments or corporate affiliates.

Section § 90.902(11), Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.
>
> § 90.902, Fla. Stat.

*See also* § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes reasonable notice before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Servicer chose not to avail itself of this rule which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. It is telling that the Servicer chose to conduct this litigation without any certifications or declarations, despite the relative ease of doing so. Presumably, it would have been as easy—if not easier—to provide these certifications from legitimately qualified witnesses—ones who work in the relevant departments—than to attempt to train one person on all aspects of the Bank's business.

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

## CONCLUSION

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

Dated: February 9, 2015

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

## CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

## CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this February 9, 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 February 9, 2015.

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

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

## SERVICE LIST

Karin L. Posser, Esq.
McGLINCHEY STAFFORD
10407 Centurion Pkwy. N., Suite 200
Jacksonville, FL 32256
kposser@mcglinchey.com
kmoss@mcglinchey.com
*Appellee's counsel*