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. Introduction

[redacted] ("the Homeowner") appeals the final judgment of foreclosure rendered in favor of the Bank of America, N.A. ("the Servicer") after a non-jury trial. The Homeowner presents two issues for this Court's review:

- Whether hearsay may be used to establish a hearsay exception.
- Whether there was competent evidence to support the Servicer's standing to sue and compliance with conditions precedent.

II. Appellant's Statement of the Facts

A. The Pleadings

The Servicer initiated this action when it filed its verified one-count mortgage foreclosure complaint.[1] According to the complaint, Federal National Mortgage Association ("Fannie Mae"), the owner of the note, had "authorized" the Servicer "to bring [the] present action."[2] And according to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the

[1] Complaint, August 29, 2012 (R. 1-33).

[2] Complaint, August 29, 2012, ¶ 3 (R. 2).

Homeowner written notice of default with a thirty-day opportunity to cure prior to acceleration and foreclosure:

> 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 … The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property….[3]

The Homeowner answered the Servicer's complaint and alleged that he was without knowledge and therefore denied the allegation that Fannie Mae owned the note and had authorized the Servicer to sue him.[4] He also specifically denied that the Servicer had complied with all conditions precedent to foreclosure.[5] And as affirmative defenses, the Homeowner pled that the Servicer failed to comply with the notice provisions contained in Paragraph 22 of the mortgage;[6] that it lacked

[3] Mortgage attached to the Complaint, August 29, 2012, ¶ 22 (R. 25).

[4] Answer, November 6, 2013, ¶ 3 (R. 120).

[5] Answer, November 6, 2013, ¶ 9 (R. 120).

[6] Affirmative Defenses, November 6, 2013, ¶2 (R. 122-123).

standing;[7] and that it was not the real party in interest.[8] The court then set the matter for trial.[9]

B. The Trial

At trial, the Servicer called Sandra Prestia, its first and only witness, to the stand.[10] Prestia testified that she had been employed with the Servicer since January, 2012[11] and that her duties required her to review the Servicer's documents and prepare for trial.[12] She admitted that, in working for the Servicer, the only department she ever worked in was the litigation department.[13] She also admitted that she only worked on litigated cases[14] and that her sole job function was to testify in court.[15] In fact, she expressly admitted that the only time she ever "reviewed" loan documents (the Homeowner's or otherwise) was when she was

[7] Affirmative Defenses, November 6, 2013, ¶ 3 (R. 123-124).

[8] Affirmative Defenses, November 6, 2013, ¶ 4 (R. 124-125).

[9] Order Setting Residential Foreclosure Non-Jury Trial (R. 261-267).

[10] Transcript of Trial Before Judge Roger B. Colton, August 5, 2014 (Supp. R. 1; "T. __"), at 8.

[11] T. 9.

[12] T. 10.

[13] T. 63.

[14] T. 65-66.

[15] T. 66.

called to testify in court.[16] Prior to her employment with the Servicer she worked for Peachtree Settlement Funding for one year, and prior to that, she worked for a nursery and landscaping company.[17]

Through Prestia and over the Homeowner's hearsay and authenticity objections, the Servicer introduced the following documents which composed the majority of its case:

- An Instance Detail from the Servicer's "AS400" system which Prestia testified showed when the Servicer was in "possession" of the note (Exhibit 4);[18]
- A loan payment history (Exhibit 5);[19]
- A notice of default and accompanying return receipt (Exhibit 6);[20]
- An Account Information Statement (Exhibit 7);[21] and
- A Service Transfer Letter indicating that the servicing of the loan had been transferred from BAC Home Loans Servicing, LP ("BAC") to the Servicer (Exhibit 8).[22]

[16] T. 66-67.
[17] T. 10.
[18] T. 31.
[19] T. 44.
[20] T. 50.
[21] T. 53.

But on cross examination, Prestia admitted that the Instance Detail (Exhibit 4) indicated that Recon Trust, NA ("Recon") housed the original note.[23] And while she testified that she "knew" that Recon was the Servicer's "trustee" and its "company,"[24] she admitted that she did not have any documents which shows the relationship between Recon and the Servicer.[25] And while she testified that the Servicer was in "possession" of the note on May 21, 2012, she could not testify who had possession of the note on August 29, 2012.[26]

More importantly, she admitted that Fannie Mae owned the note[27] and that Fannie Mae actually owned the loan when the Servicer acquired BAC (who itself was a prior servicer of the loan).[28] And on a direct question as to how the Servicer had the right to bring the action, Prestia testified that the Servicer had the right to bring the action on Fannie Mae's behalf:

> A As the servicer for Fannie Mae, we have the right to bring this action on their behalf.[29]

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[22] T. 57.

[23] T. 75.

[24] *Id.*

[25] T. 75-76.

[26] T. 89.

[27] T. 81.

[28] T. 82.

[29] T. 84.

Moments later, however, she admitted that of all the documents she reviewed, none included any authorization from Fannie Mae to sue the Homeowner.[30]

Prestia also admitted that the default notice (Exhibit 6) was created and mailed by a third-party vendor[31]—although she did not even know the name of the company that was responsible for mailing.[32] She also admitted that the Account Information Statement (Exhibit 7) was created by the judgment figures department on July 18, 2014 (approximately three weeks before trial) and she did not work for that department.[33] And she also admitted that the payment history (Exhibit 5) contained information created by a prior servicer Countywide Home Loans ("Countrywide") and that her "familiarity" with Countrywide policies and practices was limited to what she was told by individuals who used to work for Countrywide.[34]

After the close of evidence, the Homeowner moved for an involuntary dismissal, initially reasserting his objections to the admission of the Bank's documents, and arguing that Prestia was unqualified to lay the business records

[30] T. 85-86.

[31] T. 92.

[32] T. 93

[33] T. 99.

[34] T. 113.

predicate.[35] He also argued that the Servicer lacked standing—especially since the Servicer failed to prove the allegation in its complaint that Fannie Mae had authorized it to sue him.[36] The Servicer's lawyer responded that it was "irrelevant" that the paragraphs of the complaint were "not supported."[37]

The trial court denied the Homeowner's motion for involuntary dismissal[38] and, after considering closing arguments, took the matter under advisement.[39] It then rendered judgment in the Servicer's favor.[40]

This appeal follows.

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[35] T. 125.

[36] T. 128.

[37] T. 131.

[38] T. 134.

[39] T. 150.

[40] Final Judgment Foreclosure, August 12, 2014 (R. 321-325).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred when it applied the business records exception to the hearsay rule in this case. The Servicer's witness was a professional document reader wholly incompetent to lay the predicate. Therefore, the Bank's exhibits should have been excluded from evidence.

Additionally, the sufficiency of the evidence, an issue which may be raised for the first time on appeal, does not support the final judgment for two reasons. First, the Servicer failed to establish its standing to sue. Its complaint alleged that Fannie Mae had authorized it to sue the Homeowner and the witness admitted at trial it was prosecuting this action on Fannie Mae's behalf. But the Servicer failed to present any evidence at trial that Fannie Mae joined in the suit or ratified the action taken by the Servicer.

Second, the Bank also failed to provide competent, substantial evidence that it complied with the notice provisions of the mortgage before filing the foreclosure lawsuit.

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

STANDARD OF REVIEW

The *de novo* standard applies when the issue is whether the trial court erred in applying a provision of the Florida Evidence Code (here, § 90.803(6), Fla. Stat.). *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).

Likewise, 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). Furthermore, 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). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). 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).

ARGUMENT

I. The Bank's witness was not qualified to lay the foundation for a business records exception for the exhibits she introduced 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 record-keeping 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, Prestia would have had to be sufficiently familiar with them to testify that they are what the Bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the hearsay objections made to each and every exhibit, the Bank would 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*, 155 So. 3d 499, 506 (Fla. 4th DCA 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 DCA 2011) (holding that a witness was not qualified because the witness "had no knowledge as to who prepared the documents submitted at trial by the bank as he is not involved in the preparation of documents such as the ones proffered by the bank, that he does not keep records as a records custodian, that he has no personal knowledge as to how the information…was determined…"); *Lassonde v. State*, 112 So. 3d 660, 662 (Fla. 4th DCA 2013) ("The customer service clerk's testimony does not meet the requirements of *Yisrael*. While the clerk was able to testify as to how the store re-rings merchandise stolen from the store, this was not his duty nor within his responsibilities."); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (holding that a witness who relied on ledger sheets prepared by someone else was not sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (holding that an

adjuster was not qualified to testify about the usual business practices of sales agents at other offices).

See also Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988) (testimony was insufficient under the business records exception to hearsay because the witness was not the custodian, and was 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.)

In this case, Prestia testified that she was employed with the Servicer for less than two years prior to trial[41] and that her sole job function was to

[41] T. 8.

testify on behalf of the Servicer.[42] The only department she ever worked in was the Servicer's litigation department.[43] She only worked on litigated cases[44] and the only time she would "review" loan documents was when it was time for her to testify about them at trial.[45]

And for nearly every document she sought to introduce, she had absolutely no experiential familiarity with the department responsible for creating them. For instance, she admitted that entries in the payment history (Exhibit 5) were created by the prior servicer, Countrywide, but she never worked for Countrywide and her only "knowledge" of its policies was what she had allegedly been told by purported former Countrywide employees.[46] Likewise, she never worked in the judgment figures department (who created the Account Information Statement)[47] or the tax or insurance department, whose employees inputted the information into the Account Information Statement.[48]

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[42] T. 46.

[43] T. 63.

[44] T. 65-66.

[45] 66-67.

[46] T. 113.

[47] T. 99.

[48] T. 106-107.

But most troubling was her testimony regarding the acceleration notice (Exhibit 6). She explicitly admitted that that document was created and mailed by a third-party vendor whose name she did not even know.[49] And while the Servicer allegedly "monitored" this vendor through its breach department, she admitted that she neither worked in, nor supervised, anyone in that department.[50]

In short, Prestia was a "robo witness"—one of the hearsay-toting automatons, the use of which this Court explicitly forbade in *Bank of New York v. Calloway*, __ So. 3d __, 40 Fla. L. Weekly D173 (Fla. 4th DCA January 7, 2015). 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 activities constituting usual business practices for creating and maintaining the Servicer's exhibits. Her only connection to the documents was that she had read them and that her "training" taught her how to parrot the business records exception.

"Training" to testify is another word for "hearsay" or worse, "witness coaching."

The Servicer will argue that Prestia was "familiar" with the records—citing to her witness "training" as though it were something laudable. First, "training"

[49] T. 92-93.

[50] T. 93.

which consists of feeding the witness information for purposes of regurgitating it to the factfinder is nothing more than a synonym for "hearsay." In essence, the witness is saying, "My employer told me to testify that the recordkeeping policy of our company—or some other company—was that it met all the criteria required for a business record hearsay exception." The self-serving statement which the Servicer thereby smuggles to the factfinder is not only rank hearsay, but hearsay designed to coax the court to admit other hearsay (the purported records). And it is hearsay of the worst kind because it is deliberately communicated to the witness for the specific purpose of testifying in court. It is improper witness coaching to create a façade of "familiarity" with recordkeeping procedures.

But the law has always required that the familiarity of the otherwise qualified witness be experiential—i.e., that it be gained through an actual job-responsibility tied to the business activity. *See e.g.*, *Lassonde v. State*, 112 So. 3d at 662. Acceptable training would be instruction on how to perform a business-related job, not a litigation-related job. To hold otherwise would have the business record exception swallow the rule because <u>there is no record that a witness cannot be told (or "trained") to say meets the exception</u>.

The myth that bank records are inherently trustworthy.

A 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 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);[51] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[52]

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 documents have a high degree of reliability because businesses have incentives to

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

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

keep accurate records." But that incentive is driven by a profit motive—the desire to keep customers. *See generally 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[53] and themselves (to the extent that they profit from the generation of additional fees, such as late fees or inflated insurance payments[54]). And their principals are motivated only to maximize their return on their investment in the note which means that a servicer's

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[53] Paul 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.

[54] *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.

unreliability is acceptable so long as it is in their favor. When a note 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 or creates are inaccurate. And court rulings that give banks an evidentiary pass only increase the likelihood that their records will be even more untrustworthy in the future.

The Servicer did not provide any testimony regarding boarding.

One such way that the Servicer's records may have been admissible under the business records exception would be under the so-called "boarding" process. In this scenario, the proponent of the evidence clears the "trustworthiness" hurdle of the business records exception by proving a business relationship or contractual obligation with a third party whose documents the proponent seeks to introduce. *Calloway*, __ So. 3d. __, 2015 WL 71816 *5. Alternatively, the proponent can establish trustworthiness by independently confirming the accuracy of the third party's documents upon receipt. *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005).

Here, the Servicer's sole witness offered absolutely no testimony regarding the boarding process for any documents created by previous servicers. Nor did she

provide any testimony that she personally checked the accuracy of any of these records. And without this testimony, the Servicer's exhibits (particularly the demand letter) were merely documents "incorporated" into the Servicer's records – and therefore inadmissible. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015).[55]

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.

[55] *Pin-Pon* was decided by this Court on the same day as *Calloway*.

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, Florida courts, including this Court, have already suggested that foreclosing banks can meet the hearsay

exception requirements in exactly this manner. *Holt v. Calchas*, 155 So. 3d at 506; *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 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.

* * *

In summary, the court erred in admitting the Servicer's exhibits, the predicate for which Prestia attempted to lay. The most egregious of these was the alleged acceleration notice which she claimed was sent by an entirely different company whose name she did not know. Because the acceleration letter was not

admissible through this witness, the case must be remanded for dismissal. *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015) ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case.").

II. Even if it had been admissible, the evidence admitted at trial is insufficient to support the judgment and therefore the judgment must be reversed with instructions to enter an involuntary dismissal.

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

Although the witness testified that the Servicer was authorized to sue on behalf of Fannie Mae,[56] the Servicer made no effort at trial to prove it had any authority from the note owner. In fact, Prestia expressly admitted that she did not see a single document which granted the Servicer this right.[57] Thus, the Servicer apparently sought to establish at trial that which was never pled—that it was the "noteholder" under Article 3 of the Uniform Commercial Code ("UCC"). The Servicer, however, as agent for Fannie Mae, could never be 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 that 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

[56] T. 84.

[57] T. 86.

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.")[58]

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[59] (which brought mortgage loans within its

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

[59] 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.

purview for the specific purpose of facilitating securitization[60]). 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").

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 Fannie Mae and not the Servicer, because Fannie Mae is the principal which has always been in possession of the Note through its agent, the Servicer.

[60] 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).

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

In fact, the Servicer's own evidence establishes that Fannie Mae, not the Servicer, has always been, and still is, the Article 3 holder. The demand letter itself was written long after the note was allegedly the possession of BAC's agent.[61] Yet, it states that BAC "services the home loan described above on behalf

[61] The Servicer's witness declared that the note didn't move from the Recon Trust Company vault during the acquisitions and mergers from Countrywide to BAC to Bank of America. (T. 80-83, 120). Thus, if Article 3 does not allow one to be a holder by way of "constructive possession" (i.e. where an agent is in physical custody of the note), then Recon—not the Servicer—was the holder at all relevant times. If, however, constructive possession is sufficient under Article 3, then Fannie Mae was the holder at all relevant times. This is because each servicer was merely an agent of Fannie Mae such that the note was always physically in the custody of its agent's agent (Recon).

of the holder of the promissory note."[62] The Servicer is bound by its own evidence that Fannie Mae was the noteholder.

2. The Servicer had no standing because it was an agent who neither joined its principal in the action nor submitted evidence of ratification.

Because the Servicer was an agent of Fannie Mae, the Servicer needed to prove standing either by: 1) joining its principal, Fannie Mae, in the action; or 2) demonstrating that it had been authorized by its principal 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 been joined in the case or has expressly authorized or ratified the servicer's act of bringing the suit. *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012). Here, the Servicer neither joined the principal nor submitted any admissible evidence that Fannie Mae authorized or ratified the action. 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

[62] Demand Letter Dated July 19, 2010, Plaintiff's Exhibit 6 (Exh. R. 49).

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 for the benefit of Fannie Mae. But the ability of an agent to prosecute an action belonging to another 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).

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 Servicer was required to join Fannie Mae.

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)—the rule itself 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 the 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, the Servicer was not the owner (nor can it be an Article 3 holder), and it failed to either join Fannie Mae in the action or show authorization to act on behalf of that entity. Therefore, the Servicer failed to prove its standing.

3. The allegations of the complaint bound the Servicer to its agency theory.

And not only did the Servicer fail to prove that it had authority from Fannie Mae to prosecute the action, its own allegations made in its complaint required it to prove this theory. Indeed, the Servicer alleged that Fannie Mae had authorized it sue the Homeowners in its complaint.[63] And since the Homeowners denied this allegation in their answer,[64] this was a fact that the Servicer had to prove. *Gee v. US Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove."). *See also Berg v. Bridle Path Homeowners Association, Inc.*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002) ("It is well-settled in Florida law that the plaintiff is required to prove every material allegation of its complaint which is denied by the party defending against the claim.").

[63] Complaint, August 29, 2012, ¶ 3 (R. 2).

[64] Answer, November 6, 2013, ¶ 3 (R. 120).

Furthermore, the Servicer was not at liberty to run from the allegations of its complaint; rather, it was bound by them. *United Bank v. Farmers Bank*, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987) ("Farmers Bank is thus bound by the allegations of the pleading it framed, and will not be permitted to alter its theory of the stated cause of action at the appellate stage in order to defeat United Bank's venue privilege."); *U.S. v. Century Fed. Sav. & Loan Ass'n of Ormond Beach*, 418 So. 2d 1195, 1197 (Fla. 5th DCA 1982) ("The parties to an action are bound by the allegations in their pleadings...."). Thus, the statement by the Servicer's lawyer at trial that the complaint's allegations are "irrelevant"[65] is wholly incorrect.

These allegations prove a salient fact: that the Servicer's authority with respect to the loan was subject to limitations. It did not have the entire bundle of rights in the note that an Article 3 holder would enjoy. These allegations are admissions upon which the Homeowners could rely. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence").

And these allegations actually comport with Prestia's testimony at trial. Indeed, she admitted that Fannie Mae had been the owner of the note since at least

[65] T. 131.

July 19, 2010—back when BAC was servicing the loan.[66] In fact, Prestia went so far as to testify that Fannie Mae owned the loan back when the loan was current.[67] This is clear evidence that Fannie Mae held the note for years until giving it to the Servicer solely to prosecute this action on behalf of Fannie Mae.

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*, 155 So.3d 444 (Fla. 4th DCA 2015): *Fischer v. U.S. Bank National Association*, 152 So. 3d 1289 (Fla. 4th DCA 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.

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[66] T. 94.

[67] T. 95.

B. The Servicer presented insufficient evidence to support compliance with the notice provisions of the mortgage.

Even if it had been admissible, the notice improperly included a breach that had not even occurred.

The plain language of Paragraph 22 of the mortgage required that the Servicer send the Homeowner a notice following his alleged breach which specifies the breach he allegedly committed and which specifies a date not less than thirty days after the notice was sent which the Homeowner could cure the breach.

The notice admitted into evidence, however, does not comply with the mortgage's notice requirements because it includes an amount not yet due in the cure amount:[68]

> You have the right to cure the default. To cure the default, on or before August 18, 2010, BAC Home Loans Servicing, LP must receive the amount of $3,968.08 plus any additional regular monthly payment or payments, late charges, fees and charges which become due on or before August 18, 2010.

BAC therefore attempted to provide notice that was not only prior to this assumed future breach, but which provided the Homeowner less than thirty days to cure that breach. This is because the alleged future breach could not have occurred until August 1, 2010, leaving the Homeowner only seventeen days from the date of

[68] Letter entitled Notice of Intent to Accelerate, Exhibit 6, dated July 19, 2010 (Exh. R. 49).

the notice to cure this additional breach. In other words, BAC impermissibly tried to start the thirty-day clock to cure a default of the August 1, 2010 payment 14 days before the payment was even due.[69]

To make matters worse, by including unnecessary (and not-yet-true) information—the reference to a potential future breach—BAC rendered the alleged notice defectively ambiguous. The notice was designed, according to the parties' express agreement in the mortgage, to "specify"[70] 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.

It is black letter law that the thirty day notice must be strictly observed. *See Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (summary judgment reversed where notice stated that acceleration had

[69] Notably, this was exacerbated by BAC's use of certified mail rather than normal first class mail as specified in Paragraph 15 of the mortgage. Certified mail is a special service offered on first class mail which requires the recipient to be at home to sign for the letter before it is actually delivered. Here, it delayed the bargained-for delivery time by two days. (Compare receipt signed five days after mailing [Exhibit 6] with the service standard of three days. 39 CFR 121.1). 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 Homeowner never agreed to the delays (or the risk of non-delivery) caused by the use of something other than simple, unadorned first class mail.

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

already occurred and was dated only six days before the complaint was filed); *Konsulian v. Busey Bank, N.A.*, 61 So. 3d at 1285 (reversing summary judgment where suit was filed three days after the bank sent an acceleration letter); *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1191 (Fla. 2d DCA 2011) (summary judgment reversed where suit filed two days after default letter).

Therefore the notice does not comply with Paragraph 22 of the mortgage even if the Bank could have proven that the notice was actually sent.

The proper remedy of remand is involuntary dismissal.

The demand letter was a key element of the Bank's *prima facie* foreclosure case. *Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("To establish its entitlement to foreclosure, [the bank] needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrowers'] outstanding debt on the note.") Therefore, in order for there to be sufficient evidence to support the judgment, it necessarily follows that the Bank sent the Homeowners a sufficient Paragraph 22 notice. Short of this, involuntary dismissal must be entered on remand. *Holt*, 155 So. 3d at 507 ("[I]nsufficient evidence of compliance with paragraph twenty-two justifies dismissal of the entire case."); *Blum v. Deutsche Bank Trust Co.*, __ So. 3d. __, 2015 WL 895268, at *1

(Fla. 4th DCA March 4, 2015) (holding that failure to comply with notice provisions of mortgage requires dismissal of the case).

CONCLUSION

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

Dated: April 2, 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 April 2, 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 April 2, 2015.

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