In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

TD BANK, NATIONAL ASSOCIATION, et al.,

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Counsel for Appellants
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] and [redacted] ("the Homeowners") appeal the final summary judgment of foreclosure rendered in favor of TD Bank, National Association ("the Bank"). The Homeowners present two issues for this Court's review:

- Whether the Bank's motion for summary judgment should have been denied on procedural grounds;
- Whether the Bank's motion for summary judgment should have been denied on evidentiary grounds.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this action when it filed its one-count complaint for mortgage foreclosure.[1] According to the complaint, the Bank was the owner and holder of the note and mortgage pursuant to a specific endorsement to it from the

[1] Complaint, October 15, 2012 (R. 11-56).

Federal Deposit Insurance Corporation ("FDIC") who purportedly acted as receiver for the original lender Riverside National Bank of Florida ("Riverside").[2]

The Homeowners answered the Bank's complaint and alleged as an affirmative defense, among others, that the Bank lacked standing.[3]

B. The Bank's Motion for Summary Judgment

The Bank filed a motion for summary judgment and supporting affidavit.[4] The affidavit referenced the Bank's "loan accounting system,"[5] the "records for the subject loan,"[6] and the Bank's "business records"[7]—but failed to attach sworn or certified copies of these records. What was attached to the affidavit was:

- A copy of the "receiver order" from the Office of Comptroller of the Currency ("OCC") appointing the FDIC as receiver for Riverside (Exhibit 1);

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[2] Complaint, October 15, 2012, ¶ 20 (R. 14); Note attached to the Complaint, October 15, 2012, Exhibit 4 (R. 28).

[3] Affirmative Defenses, July 22, 2014, ¶ 2 (R. 228-229).

[4] Plaintiff's Motion for Final Default and Summary Judgment, November 21, 2014 (R. 253-318).

[5] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 2 (R. 268).

[6] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 3 (R. 269).

[7] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 4 (R. 269).

- A copy of the legal description (Exhibit 2);
- A copy of the note (Exhibit 3);
- A copy of the mortgage (Exhibit 4);
- A copy of an assignment of mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") to the Bank (Exhibit 5);
- A copy of a limited power of attorney given by the FDIC (Exhibit 6);
- A copy of an assignment of mortgage from the FDIC to the Bank (Exhibit 7);
- A copy of the default notice (Exhibit 8); and
- A copy of a payoff quote and escrow "breakdown" (Exhibit 9).

The affiant, Nancy Harman, averred that the previous owner of the loan, Riverside, maintained payment histories and communications logs about the loan in a computer system called "Jack Henry." She also claimed that Riverside maintained "servicing records." But no payment histories, communication logs or "servicing records" (other than an escrow history) were attached.

Notably, she testified that the Bank merely adopted the Riverside records by inheriting the entire Jack Henry computer platform.[8] There was, therefore, no

[8] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 5 (R. 269-70).

"boarding" process where the accuracy of the records could be verified while being copied into a new system.

The only testimony regarding verification of Riverside records was that some unidentified person "reviewed the records [concerning just this loan]…and all seemed in order and consistent with our review of the other documents concerning the Loan."[9] The affiant did not state exactly what records were reviewed, who reviewed them, when they were reviewed, or what it means to be "consistent with other documents concerning the Loan." Nor was there any testimony regarding the motivation for the alleged "review" of the records for this loan—i.e. whether it was for a business purpose or a litigation purpose.

Although she claimed that Riverside "routinely input data into these servicing records, entered by people with personal knowledge of the data being entered at or around the time the data is received or created," she never explained how she would have such knowledge. Moreover, the affiant also did not attempt to lay a foundation for the authenticity of, or a business records hearsay exception for, documents created by the OCC, the FDIC, or MERS.

[9] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 5 (R. 269-270).

The Homeowners filed a motion to strike the affidavit and a memorandum in opposition to the Bank's motion for summary judgment.[10] The Homeowners' motion alleged, in part, that the Bank's affidavit was inappropriate for summary judgment purposes because it referenced, but failed to attach, documents from the loan accounting system, the records for the subject loan, and the Bank's business records.[11] In short, the Homeowners alleged that it was impossible to determine whether the Bank actually attached any or all of the documents its affiant relied upon or whether it merely attached copies it felt that the trial court needed to render judgment.[12] The Homeowners also argued that the affidavit improperly relied on mere summaries; specifically, they contended that the payoff quote (Exhibit 9) was a mere summary of principal, interest, escrow, fees, and expenses.[13]

At the hearing on the Bank's motion, the Homeowners also asserted that the affidavit was impermissible hearsay because the affiant did not lay the foundation

[10] Defendants' Motion to Strike Affidavit and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, January 19, 2015 (R. 424-428).

[11] Defendants' Motion to Strike Affidavit and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, January 19, 2015 (R. 425).

[12] Defendants' Motion to Strike Affidavit and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, January 19, 2015 (R. 426).

[13] Defendants' Motion to Strike Affidavit and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, January 19, 2015 (R. 426).

for the documents which were not created by the Bank.[14] Additionally, the Homeowners argued that the Bank's own documents necessarily incorporated Riverside's documents without any foundation laid for admission of those documents.[15] And the Homeowners also reasserted that the Bank failed to attach sworn or certified copies of all the documents referenced in the affidavit.[16] Finally, the Homeowners took issue with the payoff quote (Exhibit 9) because this document was simply a response to a request from the Homeowners for a payoff figure and therefore lacked the trustworthiness of a business record[17] and because of its summary nature.[18]

The trial court was unmoved by these arguments and granted summary judgment in the Bank's favor.[19] The Homeowners timely appealed.[20]

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[14] Transcript of Hearing Before Judge Gary Sweet, January 22, 2015 (Supp. R. 1; "T." ___) at 9.

[15] T. 9-10.

[16] T. 10.

[17] T. 11.

[18] T. 11-12.

[19] T. 16; Final Judgment of Foreclosure, February 6, 2015 (R. 433-440).

[20] Notice of Appeal, February 18, 2015 (R. 465-475).

SUMMARY OF THE ARGUMENT

The trial court should have summarily denied the Bank's motion because of two defects. The first defect was procedural in that the affiant referenced records which were not attached to the affidavit. And by failing to attach sworn or certified copies of documents referenced in the affidavit, the Bank impermissibly circumvented the procedural safeguard designed to prevent this sort of tactic.

The second defect was evidentiary in nature. Specifically, the affiant was wholly unqualified to lay the business records exception for the documents the Bank did attach to the affidavit. Additionally, the payoff quote was a summary which lacked the traditional hallmarks of reliability because it was a document prepared in anticipation of litigation. And without these documents, the Bank could not prove its standing or its measure of damages.

Therefore, the final summary judgment should be reversed.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Allenby & Assocs., Inc. v. Crown St. Vincent Ltd.*, 8 So. 3d 1211, 1213 (Fla. 4th DCA 2009) (citation omitted). When reviewing a ruling on summary judgment, an appellate court must examine the record in the light most favorable to the non-moving party. *Id.* Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* (citing Fla. R. Civ. P. 1.510(c)). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Id.* at 1213 (citation omitted).

ARGUMENT

I. The Bank's motion for summary judgment should have been summarily denied on procedural grounds because the affidavit referenced documents which were not attached.

Subsection (c) of Fla R. Civ. P. 1.510 requires that all summary judgment evidence be admissible. *See also*, Authors' Comment—1967 to Fla. R. Civ. P. 1.510 (it is "the duty of the trial judge to exclude facts which would be inadmissible in evidence").

Subsection (e) of that rule describes the procedure that will permit the court to consider documents at summary judgment (or testimony about documents) even though they would normally be unauthenticated hearsay under the evidence code. Specifically, such documents or testimony can become admissible "summary judgment evidence" by way of an affidavit, so long as the affiant provides copies of the documents that are sworn and certified:

> Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fla. R. Civ. P. 1.510(e); *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (equating the requirement to provide a sworn copy with the admissibility prerequisites of authentication and a hearsay exception).

Thus, where an affiant's knowledge is based on a separate document, an admissible version of that document (i.e. a sworn or certified copy) must be

attached or otherwise provided to the court. Fla. R. Civ. P. 1.510(e), *CSX Transp. Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988).

In *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971), this Court addressed summary judgment affidavits in the context of an action to enforce a promissory note. Although the movant had supplied two affidavits, the Court reversed the order granting summary judgment specifically because neither affidavit complied with Rule 1.510(e):

> However, neither [of the two affidavits] or both in combination are sufficient to warrant a summary judgment. Neither of the affidavits complied with that portion of the summary judgment rule which provides:
>
> > '* * * Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.' (Emphasis added. See Rule 1.510(e), F.R.C.P.)

Id. (emphasis added).

Notably, this Court held in *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978) that a movant could comply with the rule by reference to documents already in the court file, as long as the affiant swore that the earlier filed documents "were true and correct copies." Accordingly, the critical portion of this sentence in Rule 1.510(e) is not the "attached thereto or

served therewith" but the "sworn and certified." Stated simply, the affiant must authenticate the document by swearing it is a true and correct copy.

This Court has also held that failure to comply with this rule is a basis for denying summary judgment. *Bifulco v. State Farm Ins. Corp.*, 693 So. 2d 707 (Fla. 4th DCA 1997); *Mack v. Commercial Indus. Park Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989). Further, non-compliant affidavits should be stricken from the record. *Starkey v. Miami Aviation Corp.*, 214 So. 2d 738 (Fla. 3rd DCA 1968).

Here, the Bank's affiant (for its Affidavit in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure) was Nancy Harman, an officer for the Bank. And while Harman averred that she has the responsibility of reviewing the Bank's loan accounting systems,[21] that she was familiar with the Homeowners' loan records,[22] and that her affidavit was based off of the Bank's business records,[23] she did not attach any of these documents (sworn or otherwise) to her affidavit.

[21] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 2 (R. 268).

[22] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 3 (R. 269).

[23] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 4 (R. 269).

Nor did anyone with personal knowledge otherwise vouch for their authenticity—in the affidavit or elsewhere in the record. And without these documents, there is no stated basis for the affiant's allegations that the information in the affidavit was taken from the Bank's properly authenticated "business records."

The only document that could possibly contain numerical figures to support the damage award was the payoff letter and attached "Escrow Only History."[24] Harman did not say that this document—prepared six days before she executed her affidavit—was a business record of the company. While she did say that Exhibit 9 was a "true and correct copy of the payoff quote"—she did not testify that the payoff quote was itself an accurate representation of anything that might have been contained in the Jack Henry system. In any event, the figures in the judgment cannot be computed from the Escrow History. And the figures in the affidavit do not match the numbers in the payoff quote—nor do the figures in the final judgment match either the affidavit or the payoff quote (even when per diem interest is accounted for):

[24] Exhibit 9 to Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014 (R. 306-16).

Payoff Quote (good through 11/28/14)	**Affidavit** (interest through 11/28/14)	**Final Judgment** (2/6/15)
442,458.51	436,392.06	443,552.89 (additional per diem interest only accounts for $3,125.85 of this $7160.83 difference)

Additionally, it is telling that the affidavit was accompanied by a number of exhibits, each of which the affiant swore was a "true and correct" copy of the original. Clearly, the Bank was aware of the Rule's requirement to attach documents referenced in the affidavit and to provide authenticating testimony, but consciously decided not to do so for its accounting system, loan records, and so-called "business records."

II. The Bank's motion for summary judgment should have been denied on evidentiary grounds.

A. The documents attached to the Bank's affidavit were inadmissible because the affiant could not lay the business records exception.

And just as importantly, Harman failed to establish that she was qualified to lay the business records exception for either Riverside's documents (which she claimed were "obtained" when it "acquired the Loan") or for any of the documents created by the OCC, the FDIC, or MERS.

Initially, Harman failed to affirmatively establish that she had personal knowledge of the facts contained in her affidavit—rather, she merely generally averred that the affidavit was made upon such knowledge. But this general averment is insufficient. Authors' Comment—1967 to Fla. R. Civ. P. 1.510 ("the requirement that [the affidavit] show affirmatively that the affiant is competent to testify to the matters stated therein is not satisfied by the statement that he has personal knowledge; there should be stated in detail the facts showing that he has personal knowledge.").

While this Court has made an exception if the affiant is shown to be in a position where he or she would necessarily possess the knowledge,[25] that exception is not applicable here. Indeed, Harman merely averred that she was an "Officer" of the Bank (as are a large percentage of bank employees, including low-level workers). She does not aver what departments she ever worked in (or was officer of), how long she had been employed with the Bank, or even how long she had worked in the banking industry. From the affidavit, Harman could have started to work with the Bank on the day the affidavit was executed as an officer of an "Affidavit-Executing" department.

[25] *See e.g. Carter v. Cessna Finance Corp.*, 498 So. 2d 1319, 1321 (Fla. 4th DCA 1986).

Most importantly, however, Harman failed to aver that she even culled through the records herself to locate those that were attached to her affidavit. If she did not actually find the records herself (as opposed to being handed the records or the affidavit with the records already attached), then any representation that these are even the Bank's records (much less, Riverside's, the OCC's, the FDIC's, or MERS's records) is rank hearsay. The absence of a statement that Harman found these documents eviscerates the implied claim that she is a records custodian or other qualified witness to introduce them into evidence.

Never having worked at Riverside and without any explanation as to how she could have any knowledge of Riverside's practices, Harman was exceptionally unqualified to speak about Riverside's recordkeeping procedures. Accordingly, Harman could not have introduced those records had she actually attached them to her affidavit. Nor does her testimony about their contents qualify as evidence, because the source documents themselves were inadmissible.

And since the payoff quote and the figures in the affidavit itself could only have been computed from Riverside's records, they should have been excluded from evidence. *See* Fla. R. Civ. P. 1.510(e) (requiring that affidavits made in support of a motion for summary judgment be based on personal knowledge); *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011) (reversing

summary judgment where affiant was unqualified to lay the business records exception for the documents attached to the affidavit made in support of the motion.); *Doss v. Steger & Steger, P.A.*, 613 So. 2d 136 (Fla. 4th DCA 1993) (reversing summary judgment where affidavit was based nearly entirely on hearsay and therefore did not comply with Fla. R. Civ. P. 1.510(e)); *Alvarez v. Florida Ins. Guaranty Association*, 661 So. 2d 1230, 1232 (Fla. 3d DCA 1995) ("The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief.").

See also Hunter v. Aurora Loan Servs., LLC, 137 So. 3d 570, 573 (Fla. 1st DCA 2014); *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 did not meet the requirements of the business records exception because "[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.)

This Court's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015)—often cited in support of admitting bank records—actually supports the Homeowners' argument that the documents were inadmissible. As this Court noted in *Calloway*, documents that are created by a previous servicer do not come with the traditional hallmarks of "reliability" a normal record might have. *Id*. at 1071.

Calloway goes on to say that mere reliance by the business adopting the records is insufficient by itself to establish trustworthiness. *Id*.; *Channell v. Deutsche Bank National Trust Co.*, __ So. 3d __, 2015 WL 3875949, * 2 (Fla. 2d DCA June 24, 2015) (same). There must be evidence of a continuing business relationship between the two entities (*Id*.)—which is not present here especially given that the affidavit expressly provides that the acquisition was part of a purchase between the Bank and the FDIC.[26] In other words, the Bank did not even have a business relationship with Riverside.

Here, the Bank never established that it relied upon the accuracy of the prior servicer's records for a business purpose. And without this business reliance—as opposed to a litigation reliance—there is no "substantial incentive for accuracy" that is free from any litigation self-interest as required by *Calloway*.

[26] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014 ¶ 5 (R. 269).

Rather, Riverside's exhibits attached to the affidavit were merely documents allegedly "found" (by some unidentified person) amongst the prior servicer's records—and therefore inadmissible hearsay. *Landmark American Insurance Company v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015) (documents which were merely incorporated into a subsequent business's records do not fall within the business records exception).[27]

There was no boarding process during which the accuracy of Riverside records was checked.

The affiant testified that the Bank merely adopted the Riverside records by inheriting the entire Jack Henry computer platform.[28] There was, therefore, no "boarding" process where the accuracy of the records could be verified while being copied into a new system.

The only testimony regarding verification of any Riverside records was that, at some time following the acquisition of the loan, some unidentified person "reviewed the records [concerning just this loan]…and all seemed in order and consistent with our review of the other documents concerning the Loan."[29] The

[27] Notably, *Pin-Pon* and *Calloway* were decided on the very same day.

[28] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 5 (R. 269-70).

[29] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 5 (R. 269-270).

affiant did not state exactly what records were reviewed, who reviewed them, when they were reviewed, or what it means to be "consistent with other documents concerning the Loan." Nor was there any testimony regarding the motivation for the alleged "review" of the records for this loan—i.e. whether it was for a business purpose or a litigation purpose.

Because there was no "boarding" process coupled with a business-motivated accuracy check, the case of *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005)—a regular feature of banking industry briefs—is inapplicable. Moreover, Harman bears no resemblance to the witness in *WAMCO* because that witness personally verified the accuracy of a prior servicer's records before boarding the information into the current servicer's records and provided specific information about the verification process. *Id*. at 233. *See also Le v. U.S. Bank*, __ So. 3d __, 2015 WL 2414456 * 1 (Fla. 5th DCA May 22, 2015) (specific testimony regarding current servicer's verification process sufficient evidence of the trustworthiness of the prior servicer's records.); *Channell*, at * 2 (damages vacated where witness did not testify that the records had been checked or verified or that the witness had knowledge of the prior servicer's record keeping system).

And to state that the records were "in order" (i.e. not in disarray or properly sequenced) is not to say that the Bank confirmed the accuracy of the contents of those records. The most logical interpretation of the statement is that the documentation that would be expected for such a loan was present. Such a statement does not speak to whether the documentation was accurate. And because all inferences must be taken in favor of the non-movant, this is the interpretation that must be applied at the time of summary judgment. *Bratt v. Laskas*, 845 So. 2d 964, 966 (Fla. 4th DCA 2003) ("All doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available.").

But just as importantly, Harman did not lay, or even attempt to lay, the business records foundation for the documents produced and maintained by the OCC, the FDIC, and MERS (Exhibits 1 and 5-8). And without these documents there was no basis for the affiant's statement that the Bank was the owner and holder of the note.[30] This too requires reversal of the final summary judgment. *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (reversing summary judgment where bank failed to prove standing at inception).

[30] Affidavit of Nancy Harman in Support of Plaintiff's Motion for Summary and Default Judgment of Foreclosure, November 21, 2014, ¶ 13 (R. 272).

B. The payoff quote should have been excluded as a summary document prepared in anticipation for litigation.

Furthermore, the payoff quote should have been excluded because it was a summary record which was made in anticipation for litigation. Indeed, the exhibit itself—prepared just before the affidavit was executed—exclaims that "[p]ayoff figures have been requested on the loan for the borrower and property described below."[31] And as the Homeowners' counsel explained during the hearing, the document was produced during the course of the litigation in response to the Homeowners' request.[32]

Under § 90.956 Fla. Stat., summaries of business records may only be admitted if it is authenticated by the party who prepared it and the presenting party complies with the notice requirements of the statute. *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014). Here, the payoff quote was not authenticated by the party who prepared it and the Bank did not comply with the notice requirements.

And while, "[p]rintouts of data prepared for trial may be admitted under the business records exception even if the printouts themselves are not kept in the ordinary course of business" this is so only "so long as a qualified witness testifies

[31] Payoff Quote, Exhibit 9 to the Bank's Affidavit in Support of its Motion for Summary Judgment, November 21, 2014 (R. 306).

[32] T. 11.

as to the manner of preparation, reliability, and trustworthiness" of the document. *Cayea*, at 1217. The witness here, who was not a qualified witness, said nothing about the manner of preparation, reliability and trustworthiness of the payoff quote. Moreover, the payoff quote (a letter) is not merely a "printout of data," but rather a "synopsis of the documents especially for purposes of the trial" which *Cayea* implies would be inadmissible. *Cayea*, at 1217.

Thus, the payoff quote should have also been excluded from evidence because it lacked trustworthiness. *See also e.g. McElroy v. Perry*, 753 So. 2d 121 (Fla. 2d DCA 2000) (independent medical report prepared for the purpose of litigation not admissible under business records exception); *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA 1985) (accident reports made solely for the purpose of litigation lack reliability of trustworthiness and therefore are generally not admissible under the business records exception). *Cf. Shorter v. State*, 98 So. 3d 685 (Fla. 4th DCA 2012) (forensic report indicating properly admitted against the State as a business record where State failed to demonstrate that the report prepared by its own retained expert was not trustworthy).

In determining this, it is important to note that this case was disposed of at summary judgment. And "generally the courts hold the moving party for summary

judgment or decree to a strict standard and the papers supporting his position are closely scrutinized…" *Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955, 958 (Fla. 3d DCA 2010) (citations omitted and emphasis added). Closely scrutinizing the payoff quote, prepared during the course of the litigation, and which does not match either the affidavit or the judgment provokes, at the very least, "the slightest doubt that an issue might exist"—a fact which undeniably requires a trial. *Tamm v. Bradley*, 696 So. 2d 816, 817 (Fla. 2d DCA 1997).

CONCLUSION

The Court should reverse the final summary judgment with instructions that the trial court hold a trial on the merits.

Dated: July 29, 2015

ICE APPELLATE
Counsel for Appellants
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 Appellants
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 July 29, 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 July 29, 2015.

ICE APPELLATE
Counsel for Appellants
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

Lawrenece P. Rochefort, Esq.
Tracy T. Segal, Esq.
Erin Maddocks, Esq.
AKERMAN SENTERFITT
777 South Flager Drive
Suite 1100, West Tower
West Palm Beach, FL 33401
lawerence.rochefort@akerman.com
caitlin.saladrigas@akerman.com
tracy.segal@akerman.com
erin.maddocks@akerman.com