In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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ISSUE PRESENTED

Florida Rules of Civil Procedure 1.510(e) requires sworn or certified copies of all papers or parts thereof referred to in a summary judgment affidavit to be attached or served with the affidavit. The Bank's summary judgment affidavit on its face relies upon a loan history which was not sworn or certified. And, being a compilation selected from a larger set of Bank data that was never provided, the loan history was also inadmissible under § 90.956 Fla. Stat. **Was summary judgment proper when the Bank's affidavit does not comply with Rules 1.510(e) and § 90.956 Fla. Stat.?**

STATEMENT OF THE CASE AND FACTS

WELLS FARGO BANK, N.A. (the "Bank"), filed a Complaint to foreclose on the property of [redacted] (the "Homeowner") which had been mortgaged as security for a $400,000 loan. In addition to interest, fees, and costs, the Bank sought to recover $426,265.12 (an additional $26,265.12) as principal on a Note that provided that "deferred interest" will "[f]rom time to time" be added to principal.[1]

The Homeowner's Answer denied the Bank's allegations—including the amount due and owing—and raised several affirmative defenses.[2] The Bank subsequently filed one of three summary judgment motions it filed in this case.[3] Along with the motion, the Bank filed an affidavit[4] and several documents on letterhead of the United States Comptroller of the Currency. A collection of selected computer printouts, referred to as a "loan history" were attached to the affidavit.[5]

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[1] Complaint for Mortgage Foreclosure, filed October 8, 2010 (R. 1); and attached Note ¶ 3(E) (R. 25).

[2] Defendant, [redacted] [Third Amended] Answer to Complaint and Affirmative Defenses, dated September 5, 2012 (R. 419); Agreed Order On Defendant's Motion for Leave to Amend Answer and Affirmative Defenses, dated August 3, 2012 (R. 412).

[3] Plaintiff's Motion for Final Summary Judgment, served January 9, 2013 (R. 434).

[4] Affidavit in Support of Motion for Final Summary Judgment attached to Motion for Summary Judgment ("Thomas Aff.") (R. 446).

[5] *Id*., Exhibit A (R. 450-468).

The Homeowner moved to strike the affidavit on the grounds that the affiant did not attach sworn or certified copies of the documents referred to in the affidavit and that the "loan history" was a summary of underlying business records that are inadmissible without first complying with §90.956 Fla. Stat.[6] The trial court (Judge Diana Lewis) denied the motion, specifically finding that the affidavit was "an admissible affidavit of a records custodian that properly authenticates and lays the foundation for the introduction into evidence the documents attached to the affidavit."[7] The lower court subsequently granted summary judgment for the Bank.[8]

The Owners filed a timely notice of appeal.[9]

[6] Defendant, [redacted] Motion to Strike Affidavit, served January 16, 2013 (R. 471).

[7] Order Denying Motion to Strike Affidavit in Support of Summary Judgment, dated March 3, 2013 (R. 499).

[8] Final Judgment of Mortgage Foreclosure, filed on April 5, 2013 (R. 507). The court entered an Amended Final Summary Judgment of Foreclosure Nunc Pro Tunc to April 5, 2013 (Amended as to Attorney Fee Award Only) on May 6, 2013, for reasons unrelated to this appeal.

[9] Notice of Appeal filed May 6, 2013 (R. 528).

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment based on the Bank's legally insufficient affidavit. Florida Rule of Civil Procedure 1.510(e) requires sworn or certified copies of all papers or parts thereof referred to in a summary judgment affidavit to be attached or served with the affidavit. On its face, the Bank's affidavit relies upon unsworn and uncertified records, and thus, does not comply with Fla. R. Civ. P. 1.510(e).

Moreover, the Bank's loan history is inadmissible as a summary under § 90.956 Fla. Stat. because the Bank refused to produce a complete set of all its original data. Additionally, the witness was not qualified to establish even a "business record" hearsay exception for the original data, much less the predicate for using the culled computer entries.

Based on the non-compliant affidavit, the Court should reverse the final summary judgment and remand to the trial court for further proceedings.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002). The summary judgment standard is well-established. A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file 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." Fla. R. Civ. P. 1.510(c).

In order to determine the propriety of a summary judgment, the Court must resolve whether there is any "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The burden of proving the absence of a genuine issue of material fact is upon the moving party. *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). The Court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party, the Homeowner, and if there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id*.

ARGUMENT

I. The Bank's summary judgment affidavit is legally insufficient because the attached documents were neither sworn nor certified (Rule 1.510(e)).

A. Documents referred to in a summary judgment affidavit must be provided as sworn or certified copies.

Rule 1.510(c) Fla. R. Civ. P. requires that all summary judgment evidence be admissible. Rule 1.510(e) Fla. R. Civ. P. 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. Fla. R. Civ. P. 1.510(e) ("[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); *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).

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

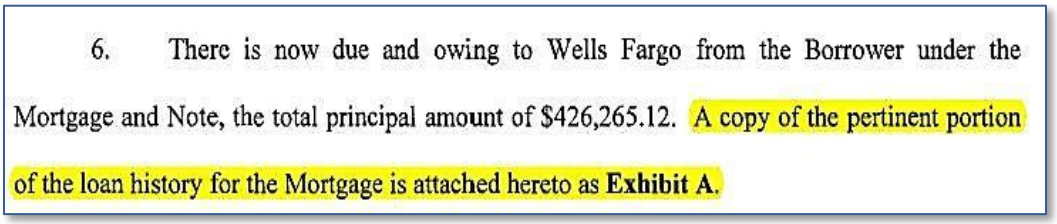
Id. (emphasis added).

This Court has also held that failure to comply with this rule is basis for a denial of 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).

B. The "loan history" was not sworn or certified.

Here, the Bank's affiant was Michele Thomas, a Research Mediation Analyst working for Wells Fargo Bank, N.A. The only statement she makes about the amount due from the Homeowner is in Paragraph 6 of the affidavit. And the

only basis she gives for the statement is a "copy of the pertinent portion of the loan history…attached hereto as Exhibit A."[10]



6. There is now due and owing to Wells Fargo from the Borrower under the Mortgage and Note, the total principal amount of $426,265.12. A copy of the pertinent portion of the loan history for the Mortgage is attached hereto as **Exhibit A**.

Exhibit A comprises a number of documents with different titles and nonconsecutive page numbers (none of which purport to be from the Plaintiff Bank):

1) World Savings Loan History (pages 93764-66 [R. 450-52]);

2) Wachovia Mortgage FKA World Savings Loan History (pages 99222-24 [R. 453-455]);

3) Wachovia Mortgage, FSB Loan History (pages 35193-96 [R. 456-59]);

4) Wachovia Mortgage Loan History (pages 72331-34, 77103-04 [R. 460-65]); and

5) Wachovia Customer Account Activity Statement (pages 1-3 [R. 466-68])

She does not state under oath that any of these "loan history" documents are genuine or a "true and correct" copy of the Bank's records. She does not even say that she had any involvement in locating the records within the Bank's system or

[10] While most of the other documents referenced in the affidavit were neither sworn nor certified, this appeal focuses on the "loan history" as the Exhibit most at the center of the controversy because the Homeowner does not dispute having borrowed money, but does contest how much he owed.

printing them out for submission to the court. Nor does anyone with personal knowledge otherwise vouch for their authenticity—in the affidavit or elsewhere in the record. Thus, they cannot be considered for summary judgment. *Ferris v. Nichols*, 245 So. 2d at 662. And with no other stated basis for the figure, the witness's testimony that the unpaid principal is $426,265.12 is also inadmissible. The judgment in that amount, therefore, is without factual basis in the record.

C. Records from another servicer are hearsay within hearsay.

The Bank's affiant, Michele Thomas, did not provide any information that would qualify her to provide the foundational testimony for the various loan histories provided by predecessor incarnations of the Bank. *Pickrell v. State*, 301 So. 2d 473, 474 (Fla. 2d DCA 1974) ("Computer printouts, like business records, are admissible [i]f the custodian or other qualified witness is available to testify as to manner of preparation, reliability and trustworthiness of the product."); *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) ("In order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony.")

While Thomas hinted that, for some undisclosed amount of time, she held some unidentified position with World Savings and Wachovia in "Loan

Servicing," she did not say that she ever input the credits, debits or interest rate changes into the system—or supervised (or even knew) anyone who did. She did not say she participated in writing or enforcing any policies or procedures for creating and maintaining loan histories. She professed no knowledge of the computer programs and algorithms that compute interest and—most importantly here—decide what amount of interest would be attributed "from time to time" to additional principal.

Because nearly all the computer entries were input when the loan was owned by another bank (World Savings/Wachovia), her recital of the initial "magic words" of the hearsay exception—that she is aware of the manner in which the Plaintiff, Wells Fargo, keeps and maintains its records—is glaringly inapplicable. And while she throws in "or its predecessors" for the remainder of the incantation, there is nothing in the record to establish that she would have any personal knowledge of these assertions.

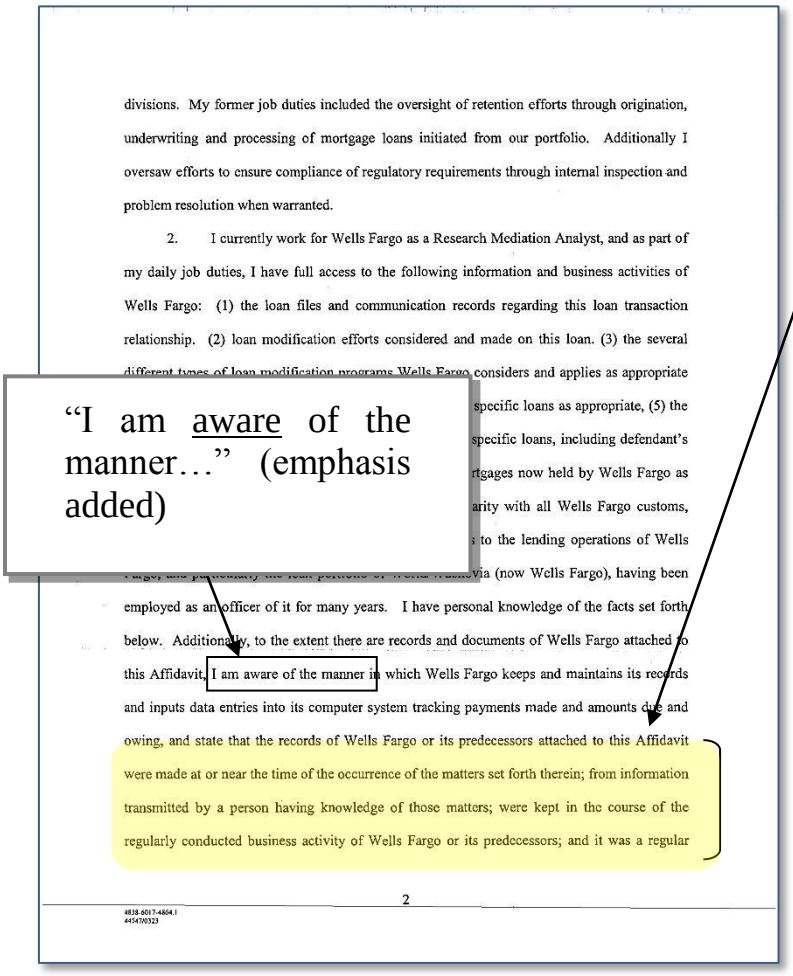
Additionally, Thomas's only job with the acquiring entity, Wells Fargo, N.A., was as a "Research Mediation Analyst." She does not represent that this position provided her any personal knowledge of how computer entries from the absorbed company, World Savings/Wachovia, were imported to Wells Fargo, N.A., and what, if anything, Wells Fargo did to verify the accuracy of those entries and computations.

In the case of *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011), the Fourth District specifically disapproved of testimony from one servicer's employee about the records of a previous servicer when, as here, the witness had no personal knowledge as to when or how the entries were made:

> He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Orsini had no knowledge of how his own company's data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

Id. at 783; *see also Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318 (Fla. 4th DCA 2013) (use of the "magic words" of the business record exception to hearsay insufficient where witness did not know the prior management company's practice and procedure and "had no way of knowing" whether the data obtained from that company was accurate. *Id*. at *3-4). *See also, Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment reversed where affiant did not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

D. The affiant failed to affirmatively show she had personal knowledge of how the records were created or kept.



In this case, the Bank's affiant, Thomas, parroted the "magic words" of the business records hearsay exception.[11] But leading up to the business records incantation, she represents only that she is "aware of the manner in which Wells Fargo keeps and maintains its records and inputs data entries into its computer system tracking payments made and amounts due and owing…"[12] Ignoring for the moment that mere "awareness" is insufficient when based on hearsay, she only has such awareness "to the extent there are records and documents of Wells Fargo attached to this affidavit."[13] This

[11] Thomas Aff., ¶ 2.

[12] Thomas Aff., ¶ 2 (emphasis added).

[13] Thomas Aff., ¶ 2.

disclaimer suggests that the affidavit is simply a form and that she makes this claim regardless of what, if any, documents are actually attached.

Thomas also makes broad, sweeping, but ultimately empty, statements that she has "personal knowledge of the facts set forth below"[14] and "extensive personal familiarity" with all Wells Fargo customs, practices and protocols, including its lending operations and loan portfolio.[15] But in describing her job duties, she states only that she has "full access" to the Bank's information and business activities regarding loan files, loan modification efforts and programs, and the "amounts due and owing under notes and mortgages."[16] Having "access" to records is not the same as having personal knowledge about the creation and maintenance of those records.

Bald claims of personal knowledge are insufficient. There must be an affirmative showing that the affiant is competent to testify to the matters stated in the affidavit. Fla. R. Civ. P. 1.510(e) and the Author's Comment to that Rule ("The requirement that it 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." [emphasis added]); *Carter v. Cessna Fin. Corp.*, 498 So. 2d 1319,

[14] Thomas Aff., ¶ 2.

[15] Thomas Aff., ¶ 2.

[16] Thomas Aff., ¶ 2.

1320 (Fla. 4th DCA 1986) (quoting Author's Comment and finding affidavit opposing summary judgment legally insufficient).[17]

In the end, despite a page describing the affiant's work history, she never once claimed to be a records custodian (or otherwise "qualified" witness) for loan histories from the Plaintiff, Wells Fargo, N.A., much less computer printouts from World Saving Bank and Wachovia. Nor did she claim to have any knowledge beyond reading the records themselves that would qualify her to testify about how and when they were created. In short, the only competence she offered the court was that she was sufficiently literate in the English language to read the titles and dates on the documents.

[17] *Carter* also states that "[a] factual basis for the affiant's knowledge need not be set out where the affiant is shown to be in a position where he would necessarily possess the knowledge[; f]or instance, a bank vice president could submit an affidavit regarding a loan transaction based solely upon his representation of personal knowledge." *Carter v. Cessna Fin. Corp.*, 498 So. 2d at 1321. Here, the affidavit touts the affiant's position as "Vice President of Underwriting" at Wachovia and a Vice President at World Savings Bank (Thomas Aff., ¶1). However, the Bank itself admitted that these labels are meaningless: "there are many Bank employees who are given the title 'Vice President' where, as here, such designation is for position identification and/or title purposes only." The title does not mean they are "Bank officers or managing agents." Affidavit of Michael Dolan, dated June 15, 2012, ¶ 8 (R. 301).

II. The Bank's summary judgment affidavit is legally insufficient because the Bank refused to provide the data from which the attached documents were compiled (§ 90.956 Fla. Stat.).

A. A self-serving selection process adds a third level of hearsay.

Thomas herself represents that only a portion of the loan history is attached to her affidavit. On their face, the documents indicate that intervening pages are missing even within the same titled document (the "Wachovia Mortgage Loan History" skips from page 72334 to 77103 [R. 460-65]).

More importantly, they do not include the documents attached to another of the Bank's summary judgment affidavits—that of Emerald Guzman, a Vice President of Loan Documentation.[18] She too claimed to be familiar with the business records maintained by Wells Fargo. She too uttered the magic words and attached an unsworn copy of the records. These printouts, however, look nothing like the printouts attached to Thomas's affidavit. Like the Thomas records, the Guzman records are incomplete on their face. The Mortgage Loan History stops at "page 004 of 014" and states that the oldest transaction is January 21, 2009, even though the loan was apparently paid faithfully from its inception in 2006 up through 2010.[19]

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[18] Notice of Filing Affidavit of Amounts Due and Owing, September 2, 2011 (R. 125).

[19] R. 151.

Both sets of printouts attached to the Guzman and Thomas affidavits respectively are different from those attached to yet another summary judgment affidavit filed several months earlier by the Bank.[20] This affidavit was executed by another Vice President of Loan Documentation, Robert Hussmann.[21] He too claimed to be familiar with the business records maintained by Wells Fargo. He too uttered the magic words and attached an unsworn copy of the records. The Hussmann records are also incomplete on their face, including only one out of ten pages of the "3270 Explorer Mortgage Loan History," and only one of four pages of "Screen 5" of that document.[22]

[20] *See*, Table of Affidavit Documents following this Brief for a comparison of the computer printouts attached to each affidavit.

[21] R. 61.

[22] R. 67, 68. The Bank will argue that this Court cannot consider the Guzman and Hussmann affidavits because it withdrew those from consideration as having been filed in support of superseded motions for summary judgment. (Notice of Withdrawing Affidavits, served February 11, 2013; R. 494). Tellingly, the Bank used its "withdrawal" of the Hussmann affidavit to avoid the Homeowner's unclean hands defense that alleged that Hussmann had falsely represented that he had personal knowledge of the matters to which he attested (Plaintiff's Motion for Final Summary Judgment, ¶ 20; R. 441). While the Bank may have chosen not to rely on these affidavits as support for its motion for summary judgment, it did not, and could not, physically remove them from the file. The affidavits and the act of having filed them were not redacted from the record before the Court. *See Charles E. Burkett & Associates, Inc. v. Vick*, 546 So. 2d 1190, 1191 (Fla. 5th DCA 1989) (Withdrawal of motion for summary judgment from consideration did not remove it or the accompanying affidavit from the court file and thus was "on file" at the time of the hearing, creating a genuine issue of material fact.).

Because three different affiants filed three different versions of the records—all of which were incomplete on their face—it was all the more incumbent on the Bank to attach a "sworn and certified" version to its summary judgment affidavit to dispel any confusion as to which, if any, of the documents were genuine.

But additionally, the abridged collection attached to the Thomas affidavit was a presentation of the "contents of voluminous writings" or records by way of a condensed digest or "summary" under § 90.956 Fla. Stat. While the process of selecting or culling information to be presented introduces its own hearsay, § 90.956 provides an exception when the proponent of the information complies with certain prerequisites:

- It must be introduced by a qualified witness;
- The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court;
- That party shall also make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying;

Here, the Bank did not comply with any of these requirements. Thomas never testified she was qualified to testify about the quality or accuracy of underlying computer entries that she did not produce, or the culling process that led to the presentation of some pages rather than others. The example of a

"qualified witness" given in the Law Revision Council Note—1976 is an "expert accountant" investigating the bookkeeping records:

> When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an expert accountant, who has made examination and analysis of the books and figures, may testify as a witness and give summarized statements of what the books show as a result of his investigation, provided the books themselves are accessible to the court and parties.

Quoting, *Scott v. Caldwell*, 37 So.2d 85 (Fla.1948) .

The Bank also did not explicitly announce that it intended to use less than the full complement of available data. And even if the filing of the affidavit itself could serve as tacit notice, the Bank did not provide "the originals or duplicates of the data from which the summary is compiled." It refused to do so even after the Homeowner raised this point in his Motion to Strike the affidavit.[23] It refused to do so even when requested by the Homeowner by way of a Request for Production.[24]

In that discovery request, the Homeowner sought "[a]ll documents, records or computerized data files reviewed or relied upon by the Affiant, Michele Thomas, in the preparation and execution of the Plaintiffs Affidavit…" The Bank replied that all the documents she had reviewed were attached to the affidavit or

[23] Defendant, [redacted] Motion to Strike Affidavit, served January 16, 2013, p. 3 (R. 473).

[24] Plaintiff's Response to Defendant's Request for Production Regarding Indebtedness, served February 19, 2013 (R. 495).

the Complaint.[25] The Homeowner then asked for all other data that either supported, or were compiled into, the records that Thomas reviewed:

> 2. To the extent not produced in response to Request No. 1, all receipts, records, computerized data files or other documents maintained by the Servicer supporting, substantiating or are otherwise compiled or summarized into the records or data files reviewed by the Affiant in the preparation and execution of the Affidavit in Support of Its Motion for Final Summary Judgment filed by Plaintiff.
>
> The Bank responded: **None. See Response to Request No. 1.**[26]

These responses are impossible to square with Thomas's sworn statement that only a portion of the loan history was attached to her affidavit—unless of course, the Bank is saying that the missing pages do not support (i.e. contradict) those that were attached. The Bank's game of thimblerig with its own data underscores both the rationale behind the § 90.956 requirement that the Bank produce <u>all</u> its records, as well as the importance of Rule 1.510(e)'s mandate that the winnowed records it did produce be sworn and certified.

Not surprisingly, Florida courts require strict compliance with § 90.956 Fla. Stat. *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991). Damages proved only through a summary for which no notice was given may not be properly awarded. *Id*; *see also Valdes v. Valdes*, 62 So. 3d 7 (Fla. 3d DCA 2011) (reversing judgment based on admission of summary introduced in violation

[25] Plaintiff's Response to Request No. 1 (R. 495).

[26] Plaintiff's Response to Request No. 2 (R. 496).

of trial order and without notice). *See also McKown v. State*, 46 So. 3d 174, 175 (Fla. 4th DCA 2010) (summary of bank statements erroneously admitted over hearsay objection where "'[n]o evidence was adduced identifying who had made the compilation, nor was any further predicate shown that would render it admissible as a summary pursuant to section 90.956, Florida Statutes (2001).'"), *quoting*, [redacted] *v. State*, 856 So. 2d 1085, 1087 (Fla. 5th DCA 2003) (same).

The opinions in *McKown* and [redacted] reveal that the evidentiary problem with the use of a compilation is twofold: 1) the compilation is a separate document that must be authenticated by a person who made it; and 2) the compilation is a hearsay statement by the person who is (perhaps self-servingly) selecting the data. *See* [redacted] *v. State*, 856 So. 2d at 1087 ("Nevertheless, the trial court erroneously relied upon the [compilation] over a timely objection based upon hearsay."). Here, Thomas never says who culled the records or who determined what portion was "pertinent."

These dual concerns—authenticity and hearsay—are the very same concerns sought to be addressed by the "sworn and certified" requirement of Fla. R. Civ. P. 1.510(e). That the Bank would miss the mark on both due-process safeguards raises grave concerns as to whether the loan history is complete and accurate.

* * *

To summarize, the partial loan history is inadmissible for at least four different reasons, three of which correspond to the three levels of hearsay:

LEVEL	HEARSAY	REASON INADMISSIBLE
1	The initial hearsay of the bookkeeping records (data entries) themselves as out-of-court statements about the timing and amount of payments, interest rates applied and apportionment to principal.	Wells Fargo witness (Thomas) is unqualified to lay foundation for business records exception to hearsay for World Savings/Wachovia data.
2	The out-of-court statements of the original servicer (World Savings/Wachovia) to Wells Fargo about the bookkeeping entries it had made when the companies merged.	No testimony that the Wells Fargo witness was involved in the transfer of data or accuracy checks, if any.
3	The out-of-court statement inherent in the culling or selection process	Use of a summary impermissible under § 90.956 Fla. Stat. because complete records were never provided.

The primary, overarching reason the printouts are not admissible is that even the partial records were not authenticated for summary judgment purposes due to the nonexistence of sworn and certified copies under Rule 1.510(e) Fla. R. Civ. P. The conspicuous absence of any attempt to comply with this rule—despite the ease by which a witness with actual personal knowledge could do so—casts a pall of untrustworthiness over the alleged loan history.

It is not surprising, then, that the records the Bank has filed with the Court throughout the case are inconsistent and self-described as "suspect" even though the computation of the additional principal amount ($26,265.12) has always matched exactly that which was claimed.

B. The Bank's calculations of additional principal are suspect.

The Bank produced and attached very different documents to its three summary judgment affidavits, yet the amount of the additional principal (deferred interest) remained exactly the same.

This superficial consistency must be considered in the context of a sea change in the Bank's demand for damages that occurred after the Homeowner raised the specter of an unclean hands defense (related to Hussmann's affidavit),[27] and tried (unsuccessfully) to depose Hussmann and Guzman[28] While the Bank's

[27] Defendant, [redacted] [First Amended] Answer to Complaint and Affirmative Defenses, dated February 22, 2011 (R. 78).

[28] Notices of Deposition of Robert Hussmann and Emerald Guzman, dated November 11, 2011 (R. 271, 274); Certificates of Non-Appearance for both, filed December 14, 2011 (R. 280, 284); Defendant, [redacted] Motion for Sanction of Dismissal (for failure to attend deposition), dated December 29, 2011 (R. 288); Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motion for Sanction of Dismissal, served June 14, 2012 and the supporting affidavit of Michael Dolan served June 15, 2012 (arguing that the Homeowners needed to subpoena the two "Vice Presidents," because they were not, in fact, "officers" of the corporation)(R. 304, 298); Order [Denying] Defendant's Motion for Sanction of Dismissal, June 21, 2012 (R. 302).

Complaint specifically sought interest and costs in addition to principal,[29] its third summary judgment motion suddenly abandoned those damages. While the Bank's first two affidavits catalogued an additional $29,419.45 (Hussmann) and $39,343.19 (Guzman) for post-default interest, alleged payments for hazard insurance taxes, property inspections and late charges, the Bank withdrew those and substituted a third affidavit (Thomas) which never mentions those purported damages.

As an aside, it should be noted that, in attempting to disprove the Homeowner's unclean hands defense, the Bank actually argues that "[t]o the extent Mr. Hussmann's affidavit was not based on personal knowledge, such lack of knowledge does not constitute trickery or fraud, but merely makes the affidavit inadmissible, hardly a basis for unclean hands."[30] This, of course, would require this Court to forget the first line of Hussmann's affidavit line in which he claims to have personal knowledge[31]—a statement which would be perjury.

The Bank also argued that the Homeowner does not contest that the statements are not true—which would require the Court to forget the Homeowner's answer which contests these amounts and "demands strict proof thereof." While the Homeowner did not offer his own affidavit, he would have no personal

[29] Verified Mortgage Foreclosure Complaint, ¶ 9 (R. 2).

[30] Plaintiff's Motion for Final Summary Judgment, ¶ 22 (R. 441).

[31] Hussmann Aff., ¶ 1 (R. 61).

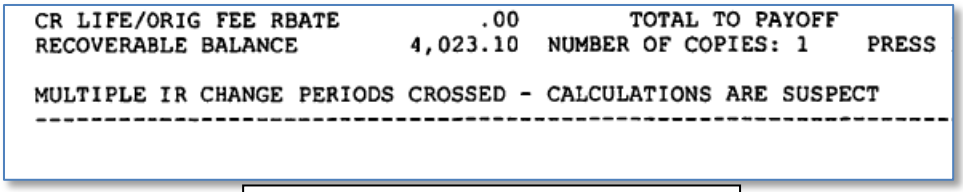
knowledge as to how to determine what interest rate and calculation to use when the rate changed every month (and perhaps he was more circumspect than the Bank in asserting personal knowledge where there was none).

Whatever reason the Bank may have had for jettisoning nearly $40,000 in accrued interest and costs, it did not relieve the Bank of proving the proper interest rate to be used each month and the calculation used to compute both the interest and the portion that was deferred. Had the Bank chosen to pursue only principal of the Note, the accuracy of the interest calculations would be irrelevant and the Bank would have successfully distanced itself from its first two affidavits. But it chose to pursue the additional principal which can only be painstakingly calculated over years of monthly changes in the interest rate. Thus, the real significance of the withdrawn affidavits is the fact that the documents attached to the Hussmann affidavit calls its own interest calculations "suspect."

Specifically, the Payoff Calculation Totals[32] and the 3270 Explorer: Payoff Calculation Totals (PAY4) attached to the Hussmann affidavit[33] both display the warning that its own interest calculations are suspect because they cross multiple interest rate change periods:

[32] R. 63.

[33] R. 65.



```
CR LIFE/ORIG FEE RBATE          .00        TOTAL TO PAYOFF
RECOVERABLE BALANCE        4,023.10  NUMBER OF COPIES: 1    PRESS

MULTIPLE IR CHANGE PERIODS CROSSED - CALCULATIONS ARE SUSPECT
-------------------------------------------------------------------
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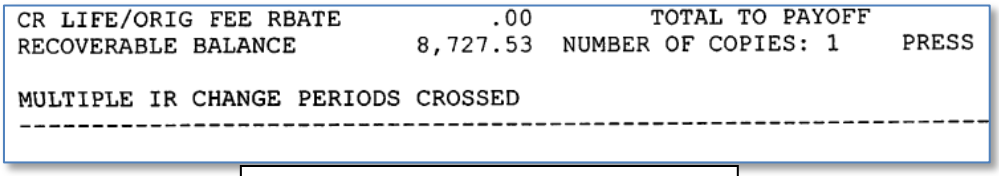
HUSSMANN VERSION

The similar document produced by Guzman still warns that "MULTIPLE IR CHANGE PERIODS [HAVE BEEN] CROSSED" but the description of the computations as "SUSPECT" is now missing:[34]



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CR LIFE/ORIG FEE RBATE          .00        TOTAL TO PAYOFF
RECOVERABLE BALANCE        8,727.53  NUMBER OF COPIES: 1    PRESS

MULTIPLE IR CHANGE PERIODS CROSSED
-------------------------------------------------------------------
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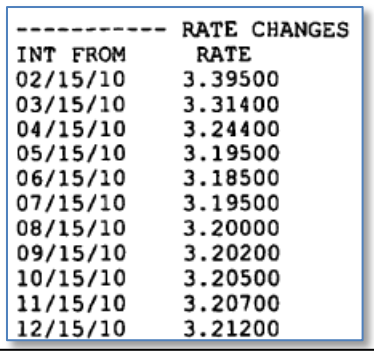
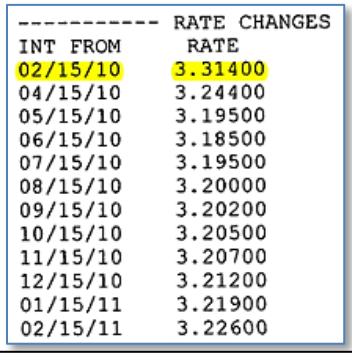
GUZMAN VERSION

Moreover, in the Guzman version, the column displaying the monthly changes to the interest rate shows no entry for a rate in March of 2010, while that which Hussmann produced does. Additionally, the rates shown for February of 2010 differ:[35]



```
---------- RATE CHANGES
INT FROM      RATE
02/15/10     3.39500
03/15/10     3.31400
04/15/10     3.24400
05/15/10     3.19500
06/15/10     3.18500
07/15/10     3.19500
08/15/10     3.20000
09/15/10     3.20200
10/15/10     3.20500
11/15/10     3.20700
12/15/10     3.21200
```

HUSSMANN VERSION



```
---------- RATE CHANGES
INT FROM      RATE
02/15/10     3.31400
04/15/10     3.24400
05/15/10     3.19500
06/15/10     3.18500
07/15/10     3.19500
08/15/10     3.20000
09/15/10     3.20200
10/15/10     3.20500
11/15/10     3.20700
12/15/10     3.21200
01/15/11     3.21900
02/15/11     3.22600
```

GUZMAN VERSION

[34] R. 141.

[35] Compare R. 141 with R. 63.

These interest figures appear to differ from that displayed in the Thomas documents, although those printouts are so vastly different from the Hussmann and Guzman records, the comparison cannot be made reliably.[36]

While the calculations shown on these pages are post-default and do not directly influence the additional principal figure, the amount claimed was necessarily computed in the same manner—across multiple interest rate periods. If the Bank is so unsure of its own calculations that it drops its demand for over $20,000 of interest, then the additional principal figure is equally suspect.

These inconsistencies raise a reasonable inference of computational inaccuracies. Because every inference must be taken in the Homeowner's favor, this creates an issue of fact that required that the summary judgment be denied. *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 213 (Fla. 5th DCA 2011) ("the court must draw 'every possible inference in favor of the non-moving party"); *Edwards v. Simon*, 961 So.2d 973, 974 (Fla. 4th DCA 2007) (same).

But more importantly, it again illustrates the importance of insuring authenticity by requiring the affiant, Thomas, to swear or otherwise certify that the documents she attached (and purportedly relied on) are true and correct—and to demonstrate that she has the personal knowledge to do so. No mere technicality,

[36] Compare R. 464-465 showing interest rates of 3.46300 and 3.39500 for February and March of 2010, respectively.

this requirement is an essential element of procedural due process that must be strictly observed when a party decides to take the shortcut of summary judgment.

Accordingly, the reversible error occurred in this case even before summary judgment when the court refused to strike the affidavit for failure to attach sworn or certified copies of the partial loan history (Fla. R. Civ. P. 1.510(e)) or to require the Bank to produce the balance of that self-selected data (§ 90.956 Fla. Stat.).[37]

[37] Order Denying Motion to Strike Affidavit in Support of Summary Judgment, dated March 3, 2013 (Judge Lewis) (R. 499).

CONCLUSION

Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings.

Dated October 8, 2013

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TABLE OF AFFIDAVIT DOCUMENTS

HUSSMANN	GUZMAN	THOMAS
Payoff Calculation Totals ("CALCULATIONS ARE SUSPECT")	Payoff Calculation Totals	
3270 Explorer: Delinquency 1 (DLQ1/COM2)	Q9 Delinquency	
3270 Explorer: Payoff Calculation Totals (PAY4) ("CALCULATIONS ARE SUSPECT")		
3270 Explorer: Fee Activity Ledger (FEE1)	Fee Activity Ledger	
3270 Explorer: Mortgage Loan History (P309)	3270 Explorer: Mortgage Loan History (P309) (Screen 5)	
	Mortgage Loan History	
	Foreclosure Statement of Indebtedness	
	Loan Status	
	FOR Tracking	
	Mortgage Insurance	
		World Savings Bank Loan History
		Wachovia Mortgage FKA World Savings Loan History
		Wachovia Mortgage, FSB Loan History
		Wachovia Mortgage Loan History
		Wachovia Customer Account Activity Statement
		3270 Explorer: Loan Transfer History (LNTH)

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully 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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this October 8, 2013 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.

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