IN THE CIRCUIT COURT FOR THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST 2005-1,	GENERAL JURISDICTION DIVISION
Plaintiff,	CASE NO. 50 2008 CA 026484XXXX MB
vs.	Division: AW
[redacted] AS TRUSTEE OF THE [redacted] REVOCABLE TRUST UNDER AGREEMENT DATED JANUARY 16, 2006, et al.,	
Defendants. _____/	

DEFENDANTS, [redacted] INDIVIDUALLY AND AS TRUSTEE OF THE [redacted] REVOCABLE TRUST UNDER AGREEMENT DATED JANUARY 16, 2006, AND [redacted] MEMORANDUM IN SUPPORT OF MOTION FOR INVOLUNTARY DISMISSAL AND MOTION TO STRIKE EXHIBITS AND TESTIMONY

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure case in which THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST 2005-1 ("the Bank") seeks to take the home of [redacted] (Individually and as Trustee of the [redacted] Revocable Trust Under Agreement Dated January 16, 2006), and [redacted] (the "Homeowners").

The trial in this case is a prime example of a financial institution's flippant disregard of the Rules of Evidence which has come to typify foreclosure trials in Florida. Here, as is done in most residential foreclosure trials, the Plaintiff bank presented a single professional testifier (or document "reader") to testify regarding every aspect of the case, including recordkeeping practices about which she admitted to having no personal knowledge.

In short, this case presents the trial equivalent of "robo-signing." Robo-signing was the systematic execution of summary judgment affidavits by bank employees without personal knowledge of the facts—a bank practice universally condemned by the courts and the public. The question posed here is whether that same defective testimony, only now presented live at trial, should also be denounced as contrary to every due process fiber of our judicial system.

II. The Homeowners' Statement of the Facts

A. The pleadings

The unverified Complaint in this case alleged that the Bank is the assignee of a mortgage, as well as the "owner and holder" of a note and mortgage, which the Homeowners gave to Novastar Mortgage, Inc. (not a party to this action).[1] The attached Note was not endorsed and no assignment was attached to the Complaint. The Complaint also alleged that the note was lost and that the Bank would be reestablishing the instrument.[2]

The Homeowners moved to dismiss the Complaint on various grounds.[3] The Bank then filed an unverified Amended Complaint which added the [redacted] Revocable Trust as a defendant.[4] The Amended Complaint now claimed that the operative contract that had been breached was a modification of the Note and Mortgage (the Loan Modification Agreement) which the Homeowners had executed to yet another entity, Mortgage Electronic Registrations Systems, Inc. ("MERS").[5] The Bank alleged that it was the "owner and holder of the Note and Mortgage" pursuant to an assignment from Novastar (not the original mortgagee,

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[1] Complaint, filed September 4, 2008, ¶ 9 (App. 1).

[2] Complaint, Third Cause of Action (App. 5).

[3] Defendants, [redacted] and [redacted] Motion to Dismiss Complaint, dated September 25, 2008 (App. 31).

[4] Amended Complaint filed January 29, 2009 (App. 41).

[5] Amended Complaint, ¶ 8 (App. 43).

MERS) which was dated after the Complaint was filed and which had been prepared by the Bank's foreclosure attorneys.[6] Although the Novastar Note was no longer "lost," the copy attached was not endorsed.[7]

The Homeowners moved to dismiss the Amended Complaint which raised, among other things, the Bank's lack of standing, as well as the fact that the Bank was not registered to do business in Florida, and thus, barred from filing the action.[8] The trial court denied the motion.[9]

The Homeowners then answered the Complaint denying the Bank's allegations of standing and raising four affirmative defenses, one of which challenged the Bank's standing, and another which placed the Bank on notice that the authenticity of the Note would be contested.[10] Despite the Homeowners'

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[6] Amended Complaint, ¶ 1 (App. 42); attached Assignment of Mortgage, dated January 1, 2009. (App. 75).

[7] *See*, final page of Note attached to Amended Complaint (App.53).

[8] Defendants, [redacted] Individually and as Trustee of the [redacted] Revocable Trust Under Agreement Dated January 16, 2006, and [redacted] Motion to Dismiss Amended Complaint, dated February 19, 2009 (App. 77).

[9] Transcript of Hearing Before the Honorable Jack H. Cook, May 4, 2009 (App. 84); Order Denying Defendants' Motion to Dismiss Amended Complaint, dated May 4, 2009 (App. 88).

[10] Defendants, [redacted] and [redacted] Both Individually and as Trustee of the [redacted] Revocable Trust Under Agreement Dated January 16, 2006, Answer to Amended Complaint to Foreclose Mortgage and Affirmative Defenses, dated May 18, 2009 ("Answer") (App. 90).

authenticity defense, the court prohibited discovery directed at determining who possessed the Note when the case was filed.[11]

Over three years and eight months after filing its Complaint, the Bank filed a "Notice of Filing Original Note," which for the first time in the case, revealed the existence of an endorsement.[12] The endorsement, however, was from Novastar to JPMorgan Chase Bank as a trustee.[13]

The Bank simultaneously filed a Memorandum intended to explain how it was a successor trustee to the freshly revealed endorsee, JPMorgan Chase Bank. The attachments, however, unequivocally show that the successor trustee was The Bank of New York Company, Inc., not the Plaintiff, The Bank of New York Mellon.[14] The Homeowners then amended their answer to clarify and supplement

[11] Second Note Authenticity/Ownership Interrogatories and Notice of Service, dated April 16, 2009 (App. 97); Motion for Protective Order, dated May 22, 2009 (App. 103); Transcript of Proceedings Held Before Meenu Sasser, September 16, 2009 (App. 107); Order Granting the Bank's Motion for Protective Order, dated September 16, 2009 (App. 110).

[12] Notice of Filing Original Note, dated May 24, 2012 (App. 111).

[13] *Id*. at p. 3 of attached Note (App. 114).

[14] Plaintiff's Memorandum of Law Regarding Successor Trustee Status, dated May 24, 2012 (App. 116).

their defenses. Among those was the Bank's failure to comply with conditions precedent and failure to register.[15]

The Court issued an Order setting trial.[16]

B. The trial.

1. The Bank's professional witness.

The Bank called only one witness at trial, Louise Plasse, a "Loan Analyst" employed by the Bank's servicer, Ocwen Financial Services.[17] Ms. Plasse had never worked for the Plaintiff Bank (The Bank of New York Mellon)—indeed, she could not remember who the Plaintiff was.[18] Nor had she ever worked for the endorsee of the Note (JPMorgan Chase) or the purported successor to the endorsee (The Bank of New York Company, Inc.).[19] She admitted that part of her job description is "professional witness."[20] Her primary duty is to "review documents in preparation for trial."[21] And in a six month period of time, she testified in "100

[15] Defendants, [redacted] and [redacted] Motion for Leave to Amend Answer and Affirmative Defenses, dated March 27, 2013 and attached Proposed Amended Answer ("Amended Answer) (App. 143); Order On Case Management Conference, dated July 3, 2013 (App. 157).

[16] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, dated July 3, 2013.

[17] T. Vol. I, p 25; Vol II, p. 34-35.

[18] T. Vol. I, p. 41.

[19] T. Vol. I, pp. 55-56.

[20] T. Vol. I, p. 43.

[21] T. Vol. I, p. 25.

or more" cases.[22] She was not familiar with the loan or the documents relating to the loan in this case until she was assigned as a trial witness in the case—two or three weeks before the trial.[23]

As a "professional witness," Ms. Plasse was trained by in-house counsel as to what answers to give to questions posed at trial—particularly the "magic words" for the business records exception:

> Q. …There was one-on-one training, was there not?
>
> A. Yes, there was one-on-one training.
>
> Q. And that was a -- with someone from the in-house counsel department?
>
> A. It was training with not only in-house counsel but also with my peers.[24]
>
> * * *
>
> Q. And that would be training -- and the training and role playing was focused on testifying as a witness at trials and depositions.
>
> A. Yes.
>
> Q. And the training that you received in how to testify, it dealt with substantive matters and style matters as well?
>
> A. Yes.

[22] T. Vol. I, p. 26. Ms. Plasse is also the witness in an already existing appeal involving nearly identical issues arising from nearly identical testimony. *Swaby v. HSBC Bank USA, National Association as Trustee for Nomura Home Equity Loan, Inc. Asset-Backed Certificates, Series 2006-FM2*, Case No. 4D13-3325 (Fla. 4th DCA, filed September 11, 2013).

[23] T. Vol. II, pp. 40-41.

[24] T. Vol. II, p. 35.

Q. And the substantive matters, those would include things like the business records of Ocwen?

A. Yes.

Q. How they're kept?

A. Yes.

Q. You were -- in fact, you were told that the records are kept in the normal course of business at Ocwen, were you not?

A. Yes.

Q. And you were told that the documents and the information that Ocwen has in their system is made by someone with knowledge -- personal knowledge about that information, correct?

A. Yes.

Q. And you were told by your trainer or during your training, that those -- that that information was made at or near the time of the events -- whatever events it is supposed to be memorializing, correct?

A. Yes.[25]

* * *

Q. …The testimony that you provided on direct with regard to each piece of evidence, as far as how it was maintained, how that document was created, how it was maintained, whether by who it was made by, when it was made, all that information, your belief for all that testimony is based on your training that you received at Ocwen to be a loan analyst, correct?

A. Yes.

Q. So it's not based on any personal observation of any of those material facts?

[25] T. Vol. II, pp. 36-37.

A. No, I don't –

MR. ROSENTHAL: Objection. Mischaracterizes her testimony in that regard.
THE COURT: Well, she can answer yes or no.

THE WITNESS: No.[26]

Ms. Plasse's knowledge of the policies and procedures of Ocwen departments (in which she had never worked) came from reading documents that were never admitted—or even offered in evidence.[27] She never observed whether the written policies and procedures she claimed to have read were actually followed in the various departments.[28]

Her description of Ocwen's procedures when acquiring records from another servicer as including "a system of checks and balances" to confirm their accuracy came directly from training she received "so that [she] can properly testify in court."[29] This too consisted of reading an Ocwen document that was not in evidence or even offered in evidence.[30]

[26] T. Vol. II, pp. 37-38.

[27] T. Vol. II, pp. 38-39.

[28] T. Vol. II, pp. 38-39.

[29] T. Vol. I., p. 125.

[30] T. Vol. I., pp. 127-128.

2. The witness disclaims any personal knowledge of the documents admitted into evidence.

The only role of the professional document reader in this case was to shuttle seven documents into evidence.[31] The only foundation laid for these documents was a rote series of leading questions intended to establish a "business record" exception to the hearsay objections being raised by the Homeowners—which even the Bank's counsel referred to as the "magic" words.[32] The trial court uniformly denied repeated objections to the complete absence of any showing by the Bank that its witness had sufficient—or any—personal knowledge to give this testimony.

a. The Promissory Note (Exhibit 1)

For example, with respect to the Note (the alleged original of which, the witness had never seen before trial), the witness testified (over objection) to the "magic words" of the hearsay exception without ever establishing she had personal knowledge:[33]

> BY MS. ROSENTHAL [Bank's counsel]:
>
> Q. Okay. How does your employer maintain loan documents in its business records? How are they maintained?

[31] The Bank's Exhibits at trial were: 1) the allegedly original promissory note; 2) a collection of unrelated documents regarding two non-parties—JPMorgan Chase and The Bank of New York Company, Inc.; 3) the mortgage; 4) a purchase agreement between the original lender and JPMorgan Chase; 5) the payment history; 6) an alleged default letter; and 7) a Power of Attorney.

[32] T. Vol. I, p. 27 (Bank's counsel: "Would you like me to ask the magic questions regarding authentication and admissibility one at a time or in a collection?")

[33] T. Vol. I, pp. 32-33.

MR. HOLTZ [Homeowner's counsel]: Object. Improper foundation.

THE COURT: Overruled. You may answer.

MR. HOLTZ: Hearsay

THE COURT: Overruled.

THE WITNESS: Our business records are filed contemporaneously within the time that transacted, you know, a week or so after the transactions have been completed.

BY MR. ROSENTHAL:

Q. Okay. Is this adjustable rate note kept in the course of regularly conducted business activity by your employer?

MR. HOLTZ: Objection. Improper foundation, hearsay, lack of personal knowledge.

THE COURT: Overruled.

THE WITNESS: Yes, it is.

BY MR. ROSENTHAL:

Q. Is it the regular practice of your employer to make documents such as these, including the adjustable rate note in this case?

MR. HOLTZ: Objection. Leading, lack of foundation, lack of personal knowledge and hearsay.

THE COURT: Overruled.

THE WITNESS: Yes, it is.

BY MR. ROSENTHAL:

Q. Was the document made at or near the time or from information Transmitted by a person with knowledge?

MR. HOLTZ: Objection. Same objections.

THE COURT: Overruled. You may answer.

THE WITNESS: Yes, it is.[34]

Notably, the witness testified that it was the regular practice of Ocwen to make promissory notes such as in this case, even though the Note in this case was created by the lender, Novastar—not Ocwen.[35] There was no evidence that the original note was ever in Ocwen's possession, much less, one of their records. Nevertheless, the trial court not only denied objections to this hearsay testimony, it also denied all the hearsay and authenticity objections to the document itself.[36]

b. The Payment History (Exhibit 5)

Similarly, with respect to a document identified as a "payment history," the Bank witness testified (over objection) on direct examination that:

- It was a document kept in the ordinary course of Ocwen's business;
- It was the regular practice at Ocwen to make such loan payment histories;
- It was made at or near the time by information transmitted by a person with knowledge.[37]

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[34] T. Vol. I, pp. 31-32 (emphasis added).

[35] T. Vol. I, p. 40.

[36] T. Vol. I, p. 36. The Homeowners never disputed that they had signed the Note to Novastar. Nor did they dispute the terms of the Note contained in the copy attached to the Complaint. The Homeowner's authenticity objection to the Note was whether the version presented as the original instrument (as required for the Bank to be the "holder") was, in fact, the original. The trial court specifically ruled that the Bank need not prove that it was an original, unless the Homeowners came forward with evidence that it was not. T. Vol. I, p. 35.

[37] T. Vol. I, p. 107.

On cross-examination (*voir dire*), it was quickly revealed that, not only did the witness have no personal knowledge regarding the documents or procedures to which she had just testified (over objection on that very ground), she was quite ready to recant the answers she had just given on direct.

Specifically as to the payment records, the witness admitted that the majority of the computer entries comprising Exhibit 5 actually came from the previous servicer, Saxon Loan Servicing, for which she had never worked.[38] As to Saxon's records, the witness confessed:

- She was not familiar with Saxon's policies and procedures with regards to the accepting of payments from customers, the recording of payments, the application of late fees or charges, or the imposition of forced placed insurance;
- She did not know how Saxon came up with certain numbers in the records—she did not know if it represented an application of fees, or the dates such fees would have been incurred or why they would have been incurred;
- The date of default to which she had testified came from the Saxon records;
- Her "knowledge" of Ocwen's boarding process—by which the Saxon records were copied into Ocwen's computer—was based upon a document not in evidence;
- She did not know how Ocwen allegedly checked the data for accuracy;
- She had never worked in the Ocwen department that boarded loans from other servicers or supervised anyone who did—she had not personally checked any of the Saxon information she reviewed for accuracy;

[38] T. Vol. I, pp. 109-111.

- Her only familiarity with the policies and procedures of the boarding department came from something someone told her as part of her training to be a witness.
- She could not identify in the document where it listed any late fees.[39]

The trial court nevertheless admitted the records over objection.[40]

The Saxon records begin in October of 2007, even though the payments on the Note began over two and half years earlier[41] and the payments on the Loan Modification Agreement began eight months earlier.[42] How Saxon arrived at the beginning balance in late 2007 was never explained because Plasse knew nothing about the business practices of any previous servicer or even if there was a servicer before Saxon.[43]

The fact that there was yet another previous servicer, however, is contained within the Pooling and Servicing Agreement ("PSA")—which Plasse claimed to have reviewed.[44] The Bank introduced what it claimed to be a portion of the PSA under the theory that it was a public record.[45] While the Homeowners disagreed that it is a "public record" that can be judicially noticed, they did raise the rule of

[39] T. Vol. I, pp. 110-135; Vol. II, pp. 52-55.

[40] T. Vol. I, pp. 138-39.

[41] Note attached to Amended Complaint, ¶ 3 (App. 51).

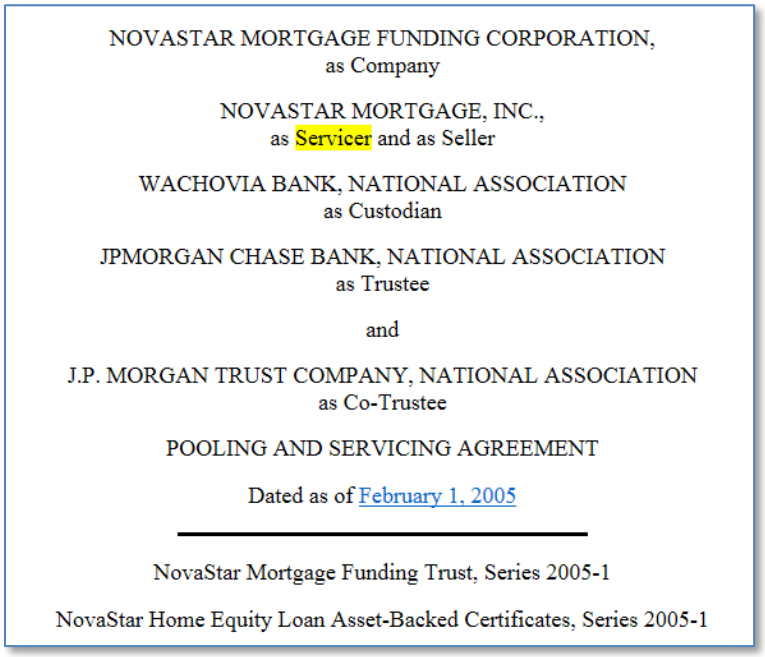
[42] Loan Modification Agreement attached to Amended Complaint (App. 72).

[43] T. Vol. I, p.134.

[44] T. Vol. II, pp. 29-30.

[45] T. Vol. I, p. 49, 69, 92.

completeness.[46] The Homeowners raise the rule again here, and to the extent necessary, ask to reopen their case to receive this evidence now. The very first page of the Pooling and Servicing Agreement—which the Bank did not provide—reveals that the servicer when the loan was pooled into the subject trust was actually Novastar Mortgage, Inc:[47]



NOVASTAR MORTGAGE FUNDING CORPORATION,
as Company

NOVASTAR MORTGAGE, INC.,
as Servicer and as Seller

WACHOVIA BANK, NATIONAL ASSOCIATION
as Custodian

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
as Trustee

and

J.P. MORGAN TRUST COMPANY, NATIONAL ASSOCIATION
as Co-Trustee

POOLING AND SERVICING AGREEMENT

Dated as of February 1, 2005

NovaStar Mortgage Funding Trust, Series 2005-1

NovaStar Home Equity Loan Asset-Backed Certificates, Series 2005-1

Novastar's servicing rights were transferred to Saxon in late 2007,[48] which is consistent with the time at which the Saxon records begin. Despite having

[46] T. Vol. I, p. 66.

[47] Available at: http://www.secinfo.com/d14D5a.z1CY3.c.htm#1stPage.

[48] *See*, form 8-K filed with the SEC describing an October 12, 2007 transfer of servicing rights from NovaStar Mortgage, Inc. to Saxon Mortgage Services, Inc., available at: http://www.sec.gov/Archives/edgar/data/1025953/000092907070006 49/form8k_101807.htm.

reviewed the PSA, Plasse was completely unaware of the first servicer, much less what business policies and procedures it observed. Nor did she testify about any due diligence that Saxon may have applied to Novastar's records, other than that she was trained to say there would have been some "checks and balances."[49]

c. The Substitution of Trustee Documents (Exhibit 2)

The Bank's Exhibit 2 was a composite consisting of: 1) a resignation agreement between two non-parties pursuant to a Purchase Agreement not in evidence; 2) a Form 8-K report to the Securities and Exchange Commission ("SEC") filed by a non-party (The Bank of New York Company, Inc.); and a news release by that non-party.[50]

Over repeated objections, the trial court permitted the witness to testify regarding the contents of these documents before they were admitted into evidence.[51] Even though the witness never worked for either of the non-party companies mentioned in the documents—or the plaintiff, for that matter—the trial court overruled an objection to testimony that it was the regular practice of the "plaintiff" to maintain these records of non-party entities.[52] The trial court also overruled an objection to the news release from one of the non-parties for which

[49] T. Vol. I, p. 134.

[50] Exhibit 2.

[51] T. Vol. I, pp. 49-51.

[52] T. Vol. I, pp. 52-53.

the witness had never worked.[53] The court reasoned that the news in the release had "apparently" been generated by Ms. Plasse as a person acting within the course of a regularly conducted business.[54] Ms. Plasse, however, did not generate the release—nor did she even work for the company who did.[55]

Similarly, she had absolutely no knowledge about how the Resignation Agreement was created or maintained:

> Q. Absolutely. You -- now, since you've already testified that you never worked at JPMorgan Chase Bank or the Bank of New York, you cannot -- you have no personal knowledge, do you, as to how this document would have been created, ordered or maintained at either of those institutions?
>
> A. No, I do not.

The court overruled the objection "given [the witness's] relationship with the plaintiff."[56]

d. Mortgage Schedule (Exhibit 4)

As with the Agreement of Resignation, the Mortgage Schedule was not a record of Plasse's employer, Ocwen. Yet, the Bank still elicited the "magic

[53] T. Vol. I, pp. 54-55.

[54] T. Vol. I, p. 54.

[55] T. Vol. I, pp. 55-56, 60-61.

[56] T. Vol. I, p. 74.

words" substituting "the Plaintiff" (for which Plasse never worked[57]) for "employer":

> Q. Is the mortgage loan purchase agreement and the Exhibit 1, initial mortgage loan schedule, is that document maintained in the regularly conducted business activity of the plaintiff?
>
> MR. HOLTZ: Objection. Calls for a hearsay response, lack of personal knowledge, lack of foundation.
>
> THE COURT: Overruled.
>
> BY MR. ROSENTHAL:
>
> Q. You can answer.
>
> A. Yes.
>
> Q. Is it the regular practice of the plaintiff to make a document such as the mortgage loan purchase agreement and the attached initial mortgage loan schedule?
>
> MR. HOLTZ: Same objection and calls for speculation.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, it is.
>
> BY MR. ROSENTHAL:
>
> Q. Is this document made at or near the time by or from information transmitted by a person with knowledge?
>
> MR. HOLTZ: Same Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, it is.[58]

[57] T. Vol. I, p. 89.

[58] T. Vol. I, p. 83 (emphasis added).

On cross-examination, the witness conceded that she had never prepared loan schedules for the Bank or her employer, Ocwen.[59] She admitted that Ocwen does not even produce mortgage loan schedules.[60] She was not familiar with the Plaintiff Bank's policies and procedures to create such documents.[61] She further testified that the schedule is not a public document.[62] It is an exhibit to a purchase agreement between non-parties, which were neither Plasse's employer nor the Plaintiff Bank.[63] She conceded that nothing in the document indicated that the Plaintiff Bank was the trustee.[64] Plasse's recantation of the testimony she had given on direct was complete and unreserved:

> Q. So your testimony earlier on this voir dire that this has to do with Bank of New York Mellon, is incorrect?
>
> A. Well, it has the same series of numbers as Bank of New York Mellon.
>
> Q. Okay. But you don't actually know because you never worked for Bank of New York Mellon?
>
> A. No.
>
> Q. So you're not familiar with their records?
>
> A. No, I'm not.

[59] T. Vol. I, pp. 89-90.

[60] T. Vol. I, p. 90.

[61] T. Vol. I, p. 90.

[62] T. Vol. I, p. 92.

[63] T. Vol. I, pp. 92-93.

[64] T. Vol. III, pp. 7-8.

Q. You['re] not familiar with any documents that are produced or kept by Bank of New York Mellon?

A. No, I'm not.

Q. Just like you're not familiar, personally with the records kept by JPMorgan Chase Bank, are you?

A. No.

Q. And you're not familiar with the policies and procedures at either institution for the maintenance and recording of such documents and information, are you?

A. No, I'm not.[65]

The trial court initially sustained the Homeowner's objection.[66] It reversed its ruling later, however, expressing concern that requiring the Bank to comply with the evidentiary rule would not be "practical" for the financial industry.[67]

e. The Default Letter (Exhibit 6)

As to Exhibit 6 (the alleged default letter), Plasse testified that it was a Saxon document "found" within the Ocwen records.[68] She again testified that Ocwen has some unspecified "checks and balances" to confirm the accuracy of the records of other servicers.[69]

[65] T. Vol. I, pp. 93-94.

[66] T. Vol. I, p. 103.

[67] T. Vol. II, pp. 78-80.

[68] T. Vol. II, p. 5.

[69] T. Vol. II, pp. 8-9.

On cross, Plasse admitted that she did not know whether the letter was even prepared by Saxon or some third party.[70] She defended her testimony by opining that Saxon is a reputable business and must adhere to certain guidelines. But she admitted that she had no personal knowledge of Saxon's business practices and not everyone follows those guidelines.[71] In fact, she confessed, there has been a large scale crisis involving fraudulent activity conducted by mortgage loan servicers.[72] Plasse did not have any personal knowledge that the default letter was ever sent[73] and did not present any document—other than the letter itself—that said it was. The Exhibit was not even a photocopy, but rather a computer re-generation of the letter.[74]

3. There was no evidence that the Bank is the owner or holder of the Note or the Loan Modification Agreement.

Plasse testified that the successor to the endorsee (The Bank of New York Company, Inc.) is not the same as the Plaintiff, the Bank of New York Mellon.[75] Not once during the entire trial did the Bank mention the Loan Modification Agreement, which had been signed by a vice-president of Novastar in early 2007.

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[70] T. Vol. II, p. 9.

[71] T. Vol. II, pp. 9-10.

[72] T. Vol. II, p. 10.

[73] T. Vol. II, p. 11.

[74] T. Vol. II, p. 12.

[75] T. Vol. II, p. 57.

In that document, Novastar is referred to as the "Lender" who will be receiving the modified payments even though the Bank claimed that Novastar had sold the Note to JPMorgan Chase nearly two years before.[76]

* * *

At the end of Plasse's testimony, the Homeowners renewed their motion to strike all of her testimony based on hearsay, lack of personal knowledge, and lack of foundation, as well as all the exhibits on the same grounds. The court denied the motion.[77]

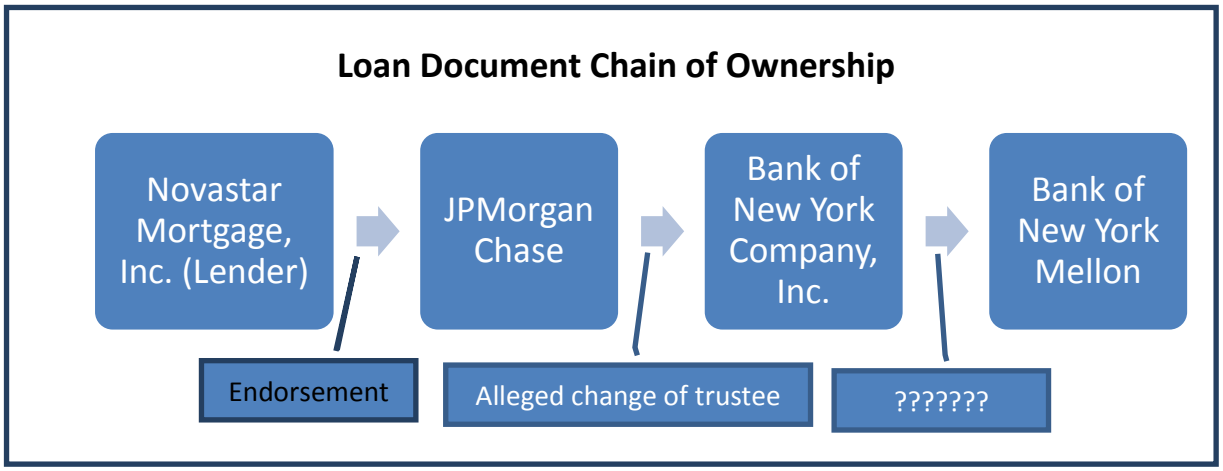
4. The Homeowners' motion for involuntary dismissal.

The Homeowners then moved for an involuntary dismissal on various grounds. Those grounds included the Bank's failure to prove standing based upon missing links in the chain of ownership and the inadmissibility of the non-party records.[78] Specifically, the Homeowner's pointed out that the evidence—albeit inadmissible—had merely established a chain between the original lender, Novastar, and a non-party, The Bank of New York Company, Inc. There was no evidence of any relationship between the Bank of New York Mellon and the subject loan:

[76] Loan Modification Agreement (App. 72).

[77] T. Vol. II, p. 63.

[78] T. Vol. II, pp. 94-102.



The Bank argued that the court should not take the word of its own witness that the two banks with "New York" in their name were separate entities.[79] According to counsel, they were the same entity.[80] The court reserved ruling and invited the parties to submit memoranda.[81]

The Homeowners also pointed out that Plasse had testified that the Bank was a corporation registered in New York.[82] Because it was not registered to do business in Florida, it was prohibited from bringing the action.[83] The court immediately rejected the request to enforce the registration requirement on the grounds that the Bank was not conducting business at the courthouse that day.[84]

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[79] T. Vol. III, p. 13.

[80] T. Vol. III, p. 15.

[81] T. Vol. III, pp. 16-17.

[82] T. Vol. II, p. 34.

[83] T. Vol. II, pp. 81-84.

[84] T. Vol. II, p. 86.

SUMMARY OF THE ARGUMENT

The Bank's sole witness, Louise Plasse, was a professional testifier hired and trained by the loan servicer to shuttle documents into evidence. Her only connection to those documents was that she had read them when she was assigned to this trial. Plasse was not a "qualified" witness with personal knowledge of the documents or how and when they were created. Indeed, the majority of the "payment records" came from a previous servicer for which she had ever worked. That servicer relied on the recordkeeping of an even earlier servicer unknown to the witness and whose records are not in evidence. Likewise, the "regenerated" Notice of Default letter came from a non-party for which she had never worked.

As a result, the Bank's exhibits and the testimony related to them were inadmissible and should be stricken. There was no competent evidence that the Bank had standing or had complied with an essential condition precedent. Nor was there competent evidence of the amount due on the loan. The trial court should grant an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.

Even if the Bank's evidence were admissible, it proved only that an entity other than the Bank owns the loan and that the Bank is, in any event, a New York corporation unregistered in Florida, and thus, prohibited from bringing this action.

ARGUMENT

I. The Trier of Fact May Not Consider Information in Documents Merely Because They Were Read by a Professional Testifier Who Was Not a "Qualified" Witness.

The Bank's only witness, Plasse, was a professional testifier who—reminiscent of robo-signers who executed thousands of documents a day—had testified in a hundred or more cases over a six month period. Her job duty with the servicer, Ocwen, is to review loan documents so that she can communicate the hearsay within those documents to the court. Her only connection with the documents admitted into evidence over objection was that she had read them after being assigned as a witness sometime during the two or three weeks before trial. She was trained by in-house counsel as to what answers to give to questions posed at trial—particularly the "magic words" for the business records exception. Her "knowledge" of Ocwen policies and procedures—and industry standards generally—came exclusively from what she was told by others or by reading manuals or other documents not in evidence. In short, the only competence she offered the trier of fact was that she was sufficiently literate in the English language to read the documents to the court.

First, to testify about the contents of the documents, it was critical that they first be admitted into evidence. *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (abuse of discretion to allow witness to testify over objection

about the contents of business records to prove the amount of the debt without having first admitted those business records). The trial court erred in repeatedly allowing the witness to testify about documents not in evidence.[85]

Second, to authenticate the documents before admitting them into evidence, she would have 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 to first lay the predicate for the "business records" exception. There are four requirements for such an exception:

> 1) the record was made at or near the time of the event;
>
> 2) the record was made by or from information transmitted by a person with knowledge;
>
> 3) the record was kept in the ordinary course of a regularly conducted business activity; and
>
> 4) it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008). But to even be permitted to testify to these thresholds facts, Plasse needed to be a "qualified" witness—one who is in charge of the activity constituting the usual business practice or well enough acquainted with the activity to give the testimony. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench

[85] *E.g.*, T. Vol. II, pp. 38-39; T. Vol. I., pp. 127-128; T. Vol. I, pp. 49-51.

trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor 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) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also 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'").

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) the court addressed the admissibility of computerized records virtually identical to those in this case. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The

testimony was insufficient under the business records exception to hearsay because the manager, like Plasse in this case, admitted that he was not the custodian and did not prepare the statements, nor supervise anyone who did:

> [The manager] Darby was not the custodian of the statement. He was not an otherwise qualified witness. Darby was not "in charge of the activity constituting the usual business practice." He admitted that neither he nor anyone under his supervision prepared such statements. Darby was not "well enough acquainted with the activity to give the testimony." He admitted that he was not familiar with any of the transactions represented by the computerized statement.

Id. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not a qualified witness to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

Accordingly, Plasse was not a qualified witness to lay the foundation for the records from the many Ocwen departments where she had never worked. This alone was sufficient to exclude the proffered evidence.

A. The witness was even less qualified to lay the foundation for documents from entities where she had never worked.

Many of the documents (such as Exhibits 2 and 4) that the Bank offered as evidence were not Ocwen records, but came from completely different entities (where Plasse had never been employed). This even further distanced her from any personal knowledge of how they were created or maintained. Specifically:

- **Exhibit 2 (Composite):** The Agreement of Resignation may have been a document in the custody of The Bank of New York Company, Inc. or JPMorgan Chase, but certainly not Ocwen or the Plaintiff. Likewise, the 8-K report to the SEC and the news releases were never shown to be Ocwen records. While the Bank also argued that these latter two documents may be judicially noticed as public records, nothing in §§ 90.201 or 90.202 Fla. Stat. applies to bank news releases or reports filed with the SEC. Nor do they qualify for the public records exception to hearsay since they do not set forth the activities of the SEC, matters observed pursuant to duty, or factual findings resulting from an SEC investigation. *Benjamin v. Tandem Healthcare, Inc.*, 93 So. 3d 1076, 1082 (Fla. 4th DCA 2012).
- **Exhibit 4:** The select pages of a document entitled Mortgage Loan Purchase Agreement and heavily-redacted loan schedule were also never shown to be in the Ocwen records. The witness claimed that they were the Plaintiff Bank's records, even though she was not sure who the Plaintiff Bank was.

B. Records from another servicer are hearsay within hearsay.

Plasse was singularly unqualified to provide the necessary testimony for a business records exception to hearsay for the records of her own employer, Ocwen, because she had no experience in the departments that actually generated them. When the "Ocwen records" were merely copies of records from other servicers, her lack of personal knowledge was so glaring that it was abusively disrespectful of the court system to even walk her through the "magic words" of the hearsay exception.

For example, the default letter (Exhibit 6) and a majority of the payment records (Exhibit 5) came from a different servicer, Saxon Loan Servicing. 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. The remarkable similarity of *Glarum* to this case, proves that *Glarum* must govern the outcome here. But it also illustrates how the robo-signers of yesteryear have moved into the courtroom to become robo-testifiers.

The Fourth District recently confirmed that *Glarum* applies in the context of a foreclosure bench trial. *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318 (Fla. 4th DCA 2013). In *Yang*, the plaintiff's witness had testified about account balances found in the records of a prior management company, even though she had never been employed there. *Id*. at *1. As in this case, on direct examination (and over objection), the witness "employed all the 'magic words'" of the business record exception to hearsay. As in this case, cross-examination revealed a different story—that she 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. The District Court reversed the trial court's final judgments of foreclosure and remanded for entry of a directed verdict in favor of the condo owners. *Id*. at *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 could 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).

Notably, Plasse was trained to testify that Ocwen used a system of "checks and balances" to insure the accuracy of the Saxon payment history.[86] On cross-

[86] T. Vol. I, p. 131.

examination, however, she could not describe a single process by which the accuracy was allegedly checked:

Q. Okay. You don't know how they check it for accuracy?

A. No, I don't know specifically how they check it.

Q. You personally don't check it for accuracy?

A. No, I'm not in that department.[87]

Accordingly, Plasse's complete ignorance of the boarding process distinguishes this case from *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005). In that case, the WAMCO witness was personally involved in overseeing the collections of the subject loans and "described the process that [his employers] use to verify the accuracy of information received in connection with loan purchases." *Id*. at 233.

C. Records from still another servicer would be triple hearsay.

That Plasse, the Ocwen employee, was unable to lay the foundation for Saxon records was bad enough. That the Saxon payment history (improperly admitted into evidence) begins nearly three years after the loan payments started suggests that the history is incomplete or itself based on recordkeeping that is even more remote.[88] Plasse could not testify whether the records of yet another servicer

[87] T. Vol. I, pp. 130-31.

[88] Exhibit 5.

prior to Saxon had been incorporated in the Saxon documents, and if so, what method was used to verify the accuracy of Saxon's starting balance.[89]

In reality, under the rule of completeness, to the extent that the court takes judicial notice of the Bank's Exhibits 2 and 4—which the Bank claimed were portions of the PSA[90]—the court should also observe that the first page (and many pages thereafter) declares that Novastar Mortgage, Inc. was the servicer when the trust was formed in 2005. Despite claiming to have reviewed the PSA, Plasse was complete unaware that Novastar had been the servicer for nearly three years.

Plasse was eminently unqualified to describe what, if any, due diligence was performed by a servicer for which she never worked (Saxon) to check the accuracy of payment records of a prior servicer she never knew existed (Novastar). Having been the servicer for nearly three years, Novastar's record-keeping was critical to computing the final debt allegedly owed. Because Ocwen's records contained these three levels of hearsay, they should have been excluded.

[89] T. Vol. I, p.134.

[90] T. Vol. I, pp. 58, 80.

D. 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). But the court was persuaded not to follow binding precedent (*Glarum* and *Yang*) by out-of-state decisions which included an unreported opinion from an Illinois federal trial court judge,[91] an opinion from a Massachusetts court construing that state's evidentiary statute,[92] and an unpublished opinion from an Illinois court.[93] Coaxed by these decisions, the trial court reasoned that it would be impractical for the banks to comply with the Florida hearsay exception rule.[94] Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on non-parties, Florida law has already provided a practical, efficient means for the bank to introduce records from far-flung departments or corporate affiliates.

Section 90.902(11) Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for

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[91] *Krawczyk v. Centurion Capital Corp.*, 06-C-6273, 2009 WL 395458 (N.D. Ill. 2009).

[92] *Beal Bank, SSB v. Eurich*, 831 N.E.2d 909 (2005).

[93] *Texas 1845, LLC v. Dvorkin*, 2013 IL App (2d) 120330-U (Ill. App. 2013) (referenced as "Voyer" in the transcript at T. Vol. II, pp. 67-68, 76-77). Unlike the witness in this case, the witness in *Dvorkin* had personally verified the documents through a due diligence investigation. *Id*. at *6.

[94] T. Vol. II, pp. 67-68, 78-79.

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 notice sixty days before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

In this case, however, the Bank chose not to avail itself of these rules 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 Bank chose not to supply certifications or declarations from either the Bank of New York or Ocwen employees actually creating or keeping the records, despite the relative ease of doing so. Nor did it seek to admit the payment history with a certification from someone in the boarding department who could personally describe what, if any, measures were taken to ensure the accuracy of the Saxon records.

Even if were proper for the trial court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, the court need not ignore binding precedent from its own District Court or rewrite the rules of evidence. The rules already contemplate and address the difficulty which troubled the trial judge—the "practicalities of the situation and these kinds of large business transactions for this huge movement of paper…"[95]

[95] Judge Oftedal also expressed concern that it would be "impossible" to find a qualified witness from the other financial entities whose documents were submitted as evidence, because the companies may no longer exist, having gone bankrupt or out of business. T. Vol. II, p. 79. There was no evidence that Saxon or Bank of New York Company, Inc. no longer exists or that the employees of any organizations that are defunct cannot be located.

E. The myth that bank records are inherently trustworthy.

The essential premise running through the out-of state cases upon which the trial court relied is twofold: 1) that the polestar of the business records exception to hearsay is the reliability or trustworthiness of the records sought to be introduced;[96] and 2) that bank records are "commonly viewed as particularly trustworthy."[97]

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.

However, the time that 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 it may be judicially noticed. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) (case involving the same plaintiff as this case in which the court commented: "…many, many mortgage

[96] *Krawczyk v. Centurion Capital Corp.*, 06-C-6273, 2009 WL 395458 (N.D. Ill. 2009)

[97] *Beal Bank, SSB v. Eurich*, 831 N.E.2d at 914.

foreclosures appear tainted with suspect documents."); Consent Order against Morgan Stanley regarding irregularities ("unsound banking practices") in the servicing of residential mortgages through its subsidiary Saxon Mortgage Services;[98] 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);[99] Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings, including the JPMorgan Chase Consent Judgment.[100]

Here, the Bank's own witness conceded that there has been a "large scale crisis involving fraud and fraudulent activity conducted by mortgage loan services and mortgage providers."[101] Even the court itself commented that this betrayal of

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[98] Available at: http://www.federalreserve.gov/newsevents/press/enforcement/enf20120403a1.pdf

[99] Available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1803.pdf.; *see also*, Memorandum No. 2012-AT-1801 of the Office of the Inspector General of the Department of Housing and Urban Development, March 12, 2012 regarding one of the banks in the ownership chain, JPMorgan Chase Bank, N.A., available at: http://www.hudoig.gov/sites/default/files/Audit_Reports/2012-CH-1801.pdf.

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

[101] T. Vol. II, p. 10.

the public trust is common knowledge: "I think we're all generally aware of the problems in the industry."[102] Arguably, this 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 the criteria of the business-record exception because banks are somehow worthy of the court's trust.

[102] *Id*.

II. Involuntary Dismissal Should Be Granted Because the Bank Failed to Adduce Evidence of Its Standing.

A. The Bank did not adduce any evidence of the Loan Modification Agreement.

The Bank amended its Complaint in 2009 to specifically allege that it was proceeding under a Loan Modification Agreement dated January 29, 2007.[103] The modification, however, was never introduced into evidence and the word "modification" was never mentioned during the trial.

Thus, the Bank adduced no evidence of the primary theory of its case and never established who had the right to enforce the new contract.

B. The Loan Modification and other attachments to the Complaint eviscerate the Bank's theory of ownership.

Had the Bank introduced the Loan Modification, it would have eviscerated their theory that the Note was pooled into a trust in 2005.

Because the Loan Modification Agreement was attached and specifically referenced in the Amended Complaint, the document became part of the pleadings to which the Bank is bound. *See Nicholas v. Ross*, 721 So. 2d 1241, 1243 (Fla. 4th DCA 1998). The Homeowners were not required to move the Loan Modification Agreement into evidence to use its contents against the Bank. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of

[103] Amended Complaint, dated January 29, 2009, ¶ 8 (App. 43) and attached Loan Modification Agreement dated January 29, 2007(App. 72).

their pleadings and … admissions contained in the pleadings … are accepted as facts without the necessity of supporting evidence"); *Pac. Mills v. Hillman Garment, Inc.*, 87 So. 2d 599, 601 (Fla. 1956) (a party is bound by the allegations of its complaint).

The Loan Modification Agreement indicates that it was executed in January of 2007—almost two years after the Note was allegedly sold to JPMorgan Chase. The modification purports to be between the Homeowners and the original mortgagee, MERS, as nominee for NovaStar Mortgage, Inc. (not the alleged note holder at that time, The Bank of New York Company, Inc.). It is signed by a Vice President of Novastar Mortgage, Inc. on a signature line marked "Lender." The modification requires the Homeowners to pay the "Lender" the new monthly amount.

Additionally, the Assignment of Mortgage ("together with the promissory note") attached to the Amended Complaint is between Novastar Mortgage, Inc. and the Bank of New York Mellon. It was executed in January of 2009, but "effective November 1, 2007." Thus, the Bank's own pleadings establish that Novastar thought it had the right to assign the Mortgage and the Note almost three years after it claims to have sold the Note to JPMorgan Chase.

The Bank specifically alleges that it is the "owner and holder of the Note and Mortgage pursuant to the assignment"[104]—never mentioning purchase agreements or trustee substitutions. The Amended Complaint mentioned nothing about a transfer of an endorsed instrument under Article 3 of the Uniform Commercial Code ("UCC")—the purported first transfer to JPMorgan Chase. Nor could it. The endorsed version of the Note first appeared more than three years after the Amended Complaint, and thus, was never attached to any pleading in this action.

Because the Bank is bound by these representations in its pleadings, the court must reject the Bank's evidence (that was, in any event, inadmissible) that contradicted its assignee theory of standing. And because the Bank chose not to put the assignment into evidence, there was no evidence to support the Bank's pleadings. If nothing more, the Loan Modification Agreement, the Assignment, and the suspiciously late appearance of the endorsement corroborate the lack of trustworthiness of the documents that Plasse read to this court. They also constitute the evidence that the Note presented—and the endorsement on it—were not authentic, such that it was error to prevent the Homeowners from challenging the authenticity of the Note.[105]

[104] Amended Complaint, ¶ 9 (App. 44).

[105] T. Vol. I, p. 35.

C. At best, the Bank proved that the Note is owned by Bank of New York Company, Inc.—which is not a party to this action.

Even if Plasse was qualified to introduce the self-servingly selected portions of the PSA—or the original Note with the endorsement—and even if this evidence were not belied by the Bank's own pleadings, and even if this case were about the Note rather than the Modification, at best, the Bank has proven that a stranger to this litigation owns the Note. The Bank neglected to show that the Plaintiff Bank (The Bank of New York Mellon) is now the trustee. Instead it merely showed that The Bank of New York Company, Inc. is the trustee.

Similar sounding names is insufficient to show ownership. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (rejecting standing for plaintiff "M & I Bank" where name on the note and mortgage was "M & I Marshall & Ilsley Bank). Even if the Bank were to now belatedly prove that the two Banks of New York are somehow related, it would not make the named Plaintiff the real party in interest. *See Reynolds Am., Inc. v. Gero*, 56 So. 3d 117, 120 (Fla. 3d DCA 2011) ("It is, of course, well settled that "[a] parent corporation and its wholly-owned subsidiary are separate and distinct legal entities."); *Am. Intern. Group, Inc. v. Cornerstone Businesses, Inc.*, 872 So. 2d 333, 336 (Fla. 2d DCA 2004) (parent-subsidiary relationship does not make two corporations interchangeable for purposes of bringing a lawsuit.)

D. The contradictory evidence on standing demonstrates that the trial court erred in denying the Homeowners' discovery on that issue.

The Bank's inability to establish its own standing—even when given free rein to introduce any evidence it pleased—underscores the importance of the Homeowners' discovery on that issue. The Note Authenticity/Ownership Interrogatories were aimed at determining who had possession of the Note immediately prior to the case being filed.[106] Possession of the Note, of course, would have been essential for the Bank's claim that it was a holder under the UCC or a successor to the holder. § 671.201(21), Fla. Stat. ("holder" is a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession").

The Bank argued that the discovery was irrelevant because "we have the note"[107]—even though the endorsed version did not appear until years later. Of course, even possession of the endorsed version would not have established that the Bank had standing when it filed the case. *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012); *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So.3d 773, 776 (Fla. 4th DCA 2011) ("A party must have standing to file suit at its inception and may not remedy this defect by

[106] Second Note Authenticity/Ownership Interrogatories and Notice of Service, dated April 16, 2009 (App. 97).

[107] Proceedings Held Before Meenu SasseR September 16, 2009, p. 7 (App. 108).

subsequently obtaining standing."); *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (same). Who possessed the Note immediately prior to suit was, therefore, extremely relevant. The trial court nevertheless denied the discovery.[108]

III. The Case Should Be Abated Because the Bank Failed to Register with the State of Florida.

In their Motion to Dismiss the Amended Complaint, the Homeowners pointed out that the Bank is barred from prosecuting this action because it was not registered to do business in Florida.[109] The court denied the motion without hearing argument from the Bank.[110] The Homeowners raised the issue again as its Sixth Affirmative Defense.[111]

Under Florida law, a foreign corporation is "a corporation for profit incorporated under laws other than the laws of this state." § 607.01401(12), Fla. Stat. "A foreign corporation may not transact business in this state until it obtains

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[108] *Id*. at 9 (App. 109); Order on Plaintiff's Motion for Protective Order, dated September 11, 2009 (App. 110).

[109] Defendants, [redacted] Individually and as Trustee of the [redacted] Revocable Trust Under Agreement Dated January 16, 2006, and [redacted] Motion to Dismiss Amended Complaint, dated February 19, 2009, p. 4 (App. 80).

[110] Hearing Before the Honorable Jack H. Cook, May 4, 2009, p. 11 (App. 86); Order Denying Defendants Motion for Dismiss Amended Complaint, dated May 4, 2009 (App. 88).

[111] Amended Answer, p. 14 (App. 156).

a certificate of authority from the Department of State."§ 607.1501(1), Fla. Stat. Additionally, "[a] foreign corporation transacting business in this state without a certificate authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." § 607.1502(1), Fla. Stat. Therefore, pursuant to Florida law, the bank was required to register and obtain a certificate of authority from the Department of State to transact business in the state, including securing, collecting, and enforcing debts, mortgages, and security interests.

This rule is most evident in the cases that discuss narrow exceptions, none of which were pled and proven to be applicable here:

NATIONAL BANKS: *770 PPR, LLC v. TJCV Land Trust*, 30 So. 3d 613 (Fla. 4th DCA 2010), (finding that Florida's registration requirement for maintaining a proceeding is federally preempted when the bank is a "national bank"—i.e. registered with the federal government under the National Bank Act), *review dismissed sub nom*, *140 Associates, Ltd. v. Seacoast Nat. Bank*, 67 So. 3d 1019 (Fla. 2011);

DISSOLVED CORPORATIONS: *Nat'l Judgment Recovery Agency, Inc. v. Harris*, 826 So. 2d 1034 (Fla. 4th DCA 2002) (finding that an administratively dissolved corporation could maintain suit to wind up its business affairs under exceptions found in §§ 607.1405(1)(a) and 607.1421(3), Fla. Stat.); *PBF of Fort Myers, Inc. v. D & K P'ship*, 890 So.

2d 384 (Fla. 2d DCA 2004) (same); *Seay Outdoor Adver., Inc. v. Locklin*, 965 So. 2d 325 (Fla. 1st DCA 2007) (same).

INTERSTATE TRANSACTIONS: *Direct Mail Specialist, Inc. v. Terra Mar Group, Inc.*, 434 So. 2d 1027, 1029 (Fla. 2d DCA 1983) (transactions entirely in the stream of interstate commerce exempted), *but see Kar Products, Inc. v. Acker*, 217 So. 2d 595, 599 (Fla. 1st DCA 1969) (foreign corporation dealing in interstate commerce precluded from bringing action to enforce noncompete provision in contract with agent).

Here, the Bank alleged that it was a "national banking association."[112] Presumably, this allegation was intended to provide the Bank with the federal preemption exception in *770 PPR, LLC*.

At trial, the Homeowners asked the court to take judicial notice of the records of the Florida Department of Corporations (Defendants' Exhibit 1) which show that The Bank of New York Mellon is not registered to do business in Florida. The Bank, however, did not introduce any evidence of its own allegation that it was a national banking association. Instead, its witness confessed the opposite—that the Bank was registered in the state of New York.[113] Nor was there

[112] Complaint, ¶ 1 (App. 1); Amended Complaint, ¶ 1 (App. 42).

[113] T. Vol. II, p. 34.

any evidence that the non-party putative holder of the Note, The Bank of New York Company, Inc. is a "national association."

Recognizing this deficiency, the Bank's counsel retreated to another exception that was neither pled nor proven—that it transacts no business in Florida other than those activities specifically exempted in §§ 607.1501(2)(a), (g) and (h) Fla. Stat.[114] However, just as there was no evidence that the Bank is a national association, there was no evidence of the Bank's new claim. Argument of counsel is not evidence. *See, e.g, Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) ("unsworn statements [of counsel] do not establish facts in the absence of stipulation").

It is the Bank's burden to prove that it fits within an exception to the registration requirement. *Batavia, Ltd. v. U. S. By & Through Dept. of Treasury, Internal Revenue Serv.*, 393 So. 2d 1207, 1208 (Fla. 1st DCA 1980) (requiring on remand that foreign corporation allege that the only type of business it transacts in Florida are those that are exempted); *Kar Products, Inc. v. Acker*, 217 So. 2d at 597-98 ("…to be permitted to maintain an action in [Florida] without qualifying to

[114] § 607.1501(2), Fla. Stat.: "(a) Maintaining, defending, or settling any proceeding;" "(g) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property;" and "(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts." T. Vol. II, p. 84.

do business…"the corporation must first show that the only business it transacts in Florida is [exempt]" (emphasis added)).

The reason for requiring the foreign entity to plead the exception it intends to travel under is all too apparent in the ambush tactic that the Bank exploited here. Because the Bank pled that it was a bank registered with the federal government (and having adhered to that representation even in the face of the Homeowner's motion to dismiss and affirmative defense), the Homeowners put on evidence at trial that the bank's allegation was false.

Now the Bank brings a new exception that the Homeowners cannot be expected to have anticipated or to have brought evidence to disprove. Nor can the Homeowners be expected to disprove every possible exception even though it was never pled. If the court is the least bit inclined to hear this new exception after the close of all the evidence, then the case should be reopened for additional evidence—and related discovery—to prove that this new exception is as false as the first.

In that vein, the Homeowners proffer that the Bank itself pled that it is "engaging in business in Palm Beach County, Florida."[115] Although the original Complaint may be a "preliminary pleading" to which the Bank is not bound,[116] its

[115] Complaint, ¶ 1 (App. 1).

[116] *See Vann v. Hobbs*, 197 So. 2d 43, 45 (Fla. 2d DCA 1967).

Amended Complaint never represented anything to the contrary—i.e. that it was not doing business in this county. The Homeowners also proffer that there are many interrelated Bank of New York Mellon entities, some of which are undeniably doing business in Florida. *See*, the company website[117] which describes one such entity as a "global investments company dedicated to helping its clients manage and service their financial assets." The website also lists offices in Florida[118] and posts job openings in Florida.[119] At a minimum, therefore, the Homeowners are entitled to discovery before the Bank may rely on a newly minted excuse for filing an action without having registered, particularly one that flies in the face of its own pleadings.

The action should be dismissed, or at the very least, stayed until the Bank can plead and prove an exception.

[117] http://www.bnymellon.com

[118] http://www.bnymellon.com/locations/unitedstates.cfm?id=18

[119] http://jobs.bnymellon.com/key/bny-mellon-florida-jobs.html

CONCLUSION

There simply is no competent (or credible) evidence upon which to enter a judgment for the Bank. The Bank, with its single, professional document reader, failed to adduce any admissible evidence of the *prima facie* elements of its claim. The Bank had its day in court and the case should be dismissed with prejudice.

Alternatively, the Bank failed to prove its standing to bring this action—having affirmatively shown (albeit through inadmissible evidence) that another entity is the owner of the Note and Mortgage. On this issue, the case should be dismissed without prejudice to the re-filing of the action by the real party in interest. If the Bank requests to reopen its case to introduce more evidence on standing, the court should permit the Homeowners to conduct additional discovery and require the Bank to answer discovery already propounded on the issue (that was wrongly denied).

Lastly, even if the Bank had proven the element of its claim, including standing, it did not prove that it is entitled to an exception to the requirement to register. This point requires dismissal (without prejudice to a re-filing by a registered corporation) or an abatement until the Bank pleads and proves an exception to registration.

Dated: September 27, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 27, 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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