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

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-FM2,

Plaintiff,

vs.

[redacted]
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FREMONT INVESTMENT & LOAN; UNKNOWN TENANT #1; UNKNOWN TENANT #2,

Defendants.
_____/

GENERAL JURISDICTION DIVISION

CASE NO. 50 2008 CA 016037XXXX MB

Division: AW

MEMORANDUM IN SUPPORT OF [redacted] AND [redacted] MOTION FOR INVOLUNTARY DISMISSAL AND MOTIONS TO STRIKE EXHIBITS AND TESTIMONY

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STATEMENT OF THE CASE AND FACTS

I. INTRODUCTION

This is a foreclosure case in which HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA HOME EQUITY LOAN, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-FM2 (the "BANK") seeks to take the home of [redacted] 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. Worse, for the amounts due and owing, the witness merely read entries off a proposed judgment prepared by the BANK's attorneys.

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 Complaint in this case alleged that the BANK "owns and holds" a note and mortgage which the HOMEOWNERS gave to Fremont Investment & Loan (not a party to this action).[1] The Complaint was not accompanied by a copy of the promissory note. It alleged, instead, that the note was lost and that the BANK would be reestablishing the instrument.[2]

The HOMEOWNERS initially filed their own answer *pro se*, which was later amended after they retained counsel.[3] After the *pro se* answer, the BANK dropped its lost note count.[4] Two months later—and over a year after the Complaint was filed—the BANK filed what it claimed was the "original"

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[1] Complaint, filed June 2, 2008, ¶ 3 (R.__).

[2] Compliant, Count II (R.__).

[3] Answer to Complaint for Mortgage Foreclosure, filed June 11, 2008 (R.__) [Docket Entry 9]; Defendants, [redacted] And [redacted] Amended Answer To The Complaint, Affirmative Defenses and Motion to Dismiss, Motion to Strike, or in the Alternative, Motion for Summary Judgment dated February 13, 2009 (R.__) [Docket Entry 12]; Defendants, [redacted] and [redacted] Motion for Leave to Amend Answer and Affirmative Defenses and Motion to Dismiss Complaint, March 5, 2013 (R.__) [Docket Entry 54]; Order On Defendants' Motion for Leave to Amend Answer and Affirmative Defenses and Motion to Dismiss Complaint, dated April 3, 2013 (R.__) [Docket Entry 56]; Defendants, [redacted] and [redacted] Amended Answer to Complaint and Affirmative Defenses and Motion to Dismiss Complaint dated May 3, 2013 (R. __) [Docket Entry 67].

[4] Notice of Dropping Count II, dated June 18, 2009 (R. __) [Docket Entry 24].

promissory note and mortgage.[5] The note now bore an endorsement in blank from the original lender. The BANK did not amend its Complaint to attach a copy.

B. The trial court denies the HOMEOWNERS' motions in limine.

The Chief Judge of the 15th Circuit ordered the case to a fifteen-minute trial to take place in May of 2013.[6] Because the case was not at issue, the order was vacated and the case was immediately reset for a fifteen-minute trial on June 26, 2013.[7] On that day, the HOMEOWNERS moved in limine to exclude the BANK's witnesses and exhibits because it had violated disclosure provisions of the Trial Order.[8] The trial court denied the motion, but instead granted a continuance of trial to August 9th "based on the Court's finding regarding pre-trial discovery."[9]

As the new trial date approached, the HOMEOWNERS again moved in limine (or for sanctions) on the grounds that the BANK had once again failed to

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[5] Notice of Filing Original Note; Original Mortgage dated August 19, 2009 (R. __) [Docket Entry 29].

[6] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, dated April 5, 2013 (R. __) [Docket Entry 57].

[7] Order On Motion to Vacate Trial Order, dated May 14, 2013 (R. __)[Docket Entry 70]; Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, dated May 14, 2013 (R. __) [Docket Entry 71].

[8] Defendants, [redacted] and [redacted] Motion in Limine, dated June 25, 2013 (R. __)[Docket Entry 90].

[9] Order on Defendants' Motion in Limine, dated June 26, 2013 (R. __) [Docket Entry 93].

comply with the trial order's disclosure requirements.[10] Specifically, the BANK's witness list, filed only six business days prior to trial, had listed 38 potential witnesses. Although the BANK informally indicated only one witness would be testifying, it would not produce her for deposition until the afternoon before trial. Additionally, the BANK did not provide copies of the exhibits they intended to use.[11] The trial court denied the motions without explanation.[12]

C. The Trial.

1. The BANK's professional witness.

The BANK called only one witness at trial—an admitted "professional witness," Louise Plasse, who was trained by in-house counsel as to what answers to give to questions posed at trial:

> Q [By HOMEOWNERS' attorney] Did you receive any training regarding testifying at trials?
>
> A [By the BANK's witness, Ms. Plasse] Yes, I did.
>
> Q What kind of training would that be?
>
> A I had a whole -- quite a few lengthy days of training from superior attorneys that work directly in our firm in preparation to prepare us for trials.

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[10] Defendants, [redacted] and [redacted] Motion for Sanctions for Failure to Comply with Court Order or in the Alternative Motion in Limine, dated August 8, 2013 (R. __) [Docket Entry 100].

[11] *Id.*

[12] Transcript of Trial Before the Honorable Eli Breger August 9, 2013 ("T. __"), at 19.

Q When you say your firm, you mean in-house counsel?

A Yes.

Q Did that include role playing?

A Yes.

Q Did you ever receive any written materials or videos, anything other than role playing?

A Yes, we did receive some information. It was just basically on different depositions and how to handle, you know, ourselves in different situations whether it's depositions, mediations, or trial.

Q How to answer certain types of questions?

A Right.[13]

* * *

Q And your knowledge of what you call the industry standards has really come from that training that you've received; correct?

A Yes.[14]

* * *

[After conceding that the "bulk" of her job involves testifying at trials or depositions:]

Q Because you testify so much you are almost like a professional witness; correct?

A More or less.[15]

[13] T. 65-66.

[14] T. 66.

[15] T. 66-67.

Ms. Plasse was a "Loan Analyst" employed by the BANK's servicer, Ocwen Financial Services, not the Plaintiff BANK.[16] Her authority to testify on the behalf of the Plaintiff BANK was based on a document neither proffered as evidence nor even present in the courtroom.[17] Her knowledge about any documents in the case came from reading them after being assigned to testify.[18]

2. The witness disclaims any personal knowledge of the creation and maintenance of the records.

The function of the professional testifier in this case was to lay the foundation for the four documents introduced into evidence: 1) the allegedly original promissory note; 2) the mortgage; 3) an alleged default letter; and 4) documents prepared by the servicer for the litigation. Laying the foundation consisted of taking the witness through a rote series of five leading questions intended to establish a "business record" exception to the hearsay objections being raised by the HOMEOWNERS. For example:

> BY MS. DEUTCH [BANK's counsel]:
>
> **Q And do you have personal knowledge of these records** [unidentified Ocwen records] **with respect to this loan?**
>
> MS. LUNDERGAN [HOMEOWNERS' counsel]: Same objections [hearsay, lack of authenticity, lack of foundation].
>
> THE COURT: Overruled.

[16] T. 24-25.

[17] T. 75.

[18] T. 84-85.

THE WITNESS: Yes, I do.

BY MS. DEUTCH:

Q Are these records input contemporaneously when a transaction occurs?

MS. LUNDERGAN: Same objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, they are.

BY MS. DEUTCH:

Q Are these records made by a person with knowledge of such records?

MS. LUNDERGAN: Same objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, they are.

BY MS. DEUTCH:

Q Are these records kept in the ordinary course of business and regular conducted business activity?

MS. LUNDERGAN: Same objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, they are.

BY MS. DEUTCH:

Q And is it your regular business practice to keep such records?

MS. LUNDERGAN: Same objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, it is.[19]

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. The trial court also denied all the hearsay and authenticity objections to the documents themselves.[20]

On cross-examination, 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. For example, with respect to a document dubiously[21] identified as a "payment history" (Exhibit 4), the BANK witness testified on direct examination that:

- She had personal knowledge of the record;
- It was input contemporaneously when a transaction occurs;
- It was kept in the ordinary course of business practice.[22]

On cross-examination, the witness admitted that Exhibit 4 contained, not only an incomplete summary of records from her employer, Ocwen, but records

[19] T. 28-30 (emphasis added).

[20] T. 24-60.

[21] The witness later confessed that the so-called "payment records" did not reflect any payments at all.

[22] T. 48-49.

from the previous servicer, Litton Loan Servicing, for which she had never worked.[23] As to Litton's records, the witness confessed:

- She was never in charge of the department that created the records;
- She was never in charge of maintaining the records;
- She was never involved in inputting the information into the computer;
- She knew nothing about the Litton computer programs and systems;
- She did not know a single person involved in creating the records;
- She did not know the Litton policies and procedures for posting payments and had never seen it;
- She did not know whether the Litton documents were made at or near the time the payments were received (directly contrary to her testimony on direct);
- She did not know whether the Litton documents were created by someone with personal knowledge;
- She did not know whether they were kept in Litton's ordinary course of business (directly contrary to her testimony on direct).
- She was not an employee of the department that boarded the Litton information onto Ocwen's system.
- And perhaps most importantly, that the so-called "Litton Payment History" did not actually have any payments listed at all, including any that the witness admitted had been made.[24]

As to Exhibit 3 (the alleged default letter), the BANK's witness admitted on cross-examination that it was created by a third party that she did not work for and

[23] T. 80.

[24] T. 80-84.

that it was actually a re-creation of the purported letter rather than a copy.[25] The witness didn't know who prepared the letter, whether the letter was made at or near the time that the information was received or whether it was prepared by somebody with personal knowledge or kept in the ordinary course of business.[26] She did not know the third-party's policies and procedures regarding the sending of default letters.[27] The trial court, nevertheless, denied a motion to strike the letter from evidence, as well as a motion to strike Exhibit 4 from evidence.[28]

Notably, the witness's testimony that the default letter was sent April 1, 2008 as required by the mortgage was based solely on her reading that date on Exhibit 3 which had been admitted into evidence over multiple objections. She had never seen any records that corroborate that the letter was mailed that day or on any day.[29]

3. The witness testifies she has "no idea" when the original lender endorsed the promissory note in blank.

One of the principal issues being tried was the BANK's standing—whether it had come into possession of the promissory note (and whether it was endorsed in blank by the original lender) before the Complaint was filed. On direct, the BANK

[25] T. 60-61.

[26] T. 61, 85.

[27] T. 61-62.

[28] T. 64, 86-88.

[29] T. 62-63.

showed the witness the document that had been earlier filed with the Court. The witness testified over objection (hearsay, speculation and authenticity) that the plaintiff was "in possession of this original blank endorsed note prior to the filing of this suit."[30]

On cross-examination, the witness admitted that the Complaint avers that the note was lost at that time and that the BANK, therefore, was not in custody or control of the note at some point.[31] The witness had no knowledge as to when the note was lost, where it was during the time it was lost, or who may have found it.[32] When asked point blank whether the witness had any knowledge as to whether the note had ever been found, the trial court sustained an "objection" by the BANK's counsel that presumed the very factual issue to be determined—that "[w]e have the original note and mortgage here today."[33]

The witness went on to reveal that her employer, Ocwen, was not the servicer when the Complaint was filed and that Ocwen was never involved in any transfer of the original documents.[34] The witness also confessed that she had "no idea" when the purported endorsement on the promissory note was created, or

[30] T. 38.

[31] T. 68.

[32] T. 68.

[33] T. 69-70.

[34] T. 70.

whether the signature on the endorsement was genuine or authorized by the original lender.[35]

On redirect, the trial court permitted the witness to testify over objection that she had seen other documents that were not in evidence that indicated the BANK possessed the note prior to filing suit. The trial court also denied motions to strike such hearsay testimony on the grounds that it was based solely on records not in evidence.[36] Even so, the witness still conceded that nothing in those records indicated that the note was actually endorsed and transferred to the BANK prior to the complaint being filed.[37]

4. The trial court permits the witness to read from a proposed final judgment never admitted into evidence.

Because the "Payment History" contained no payment information, there was no direct evidence of what the HOMEOWNERS owed. Instead, the BANK's counsel showed the witness a proposed final judgment and asked her to comment on it.[38] The HOMEOWNERS objected that a witness is not permitted to testify about a document that was not in evidence and that this document would never be

[35] T. 72-73.

[36] T. 94, 96.

[37] T. 95.

[38] T. 54-55.

admissible because it was prepared by the BANK's counsel for purposes of litigation.[39] The trial court overruled the objection several times.[40]

The witness then read a specific dollar figure for the total amount due, stating (over objection) that it comported with some unidentified records that she claimed to have reviewed.[41] The witness also stated (over objection) that the attorneys' fees claimed on this document were accurate, without disclosing what the amount was.[42] The witness did not testify as to the accuracy of any of the various amounts that made up the total, other than the attorneys' fees, or even what those numbers were.

5. The HOMEOWNERS' pending motion for involuntary dismissal.

The HOMEOWNERS then moved for an involuntary dismissal on various grounds. Those grounds included the BANK's failure to establish its standing on the date that the Complaint was filed[43] and that no actual payment history was introduced into evidence.[44]

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[39] T. 55.

[40] T. 55-57.

[41] T. 58.

[42] T. 59

[43] T. 97.

[44] T. 102.

The court took the motion for involuntary dismissal and the verdict under advisement and invited the parties to submit their proposed judgments and any supporting cases.[45] This memorandum is offered in support of HOMEOWNERS' motion for involuntary dismissal, or a verdict in favor of the HOMEOWNERS, on the grounds that the BANK failed to prove the key elements of its case with valid, admissible evidence.

[45] T. 103-106.

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"—which were actually devoid of any payment information—came from a previous servicer for which she had never worked. Likewise, the "regenerated" Notice of Default letter came from a different third-party for which she had never worked.

The only time an amount due on the loan was even mentioned at trial was when Plasse parroted the figures supplied to her by the BANK's counsel. Counsel gave the witness these figures (over objection) in a proposed final judgment that was neither admitted, nor admissible, in evidence.

As a result the BANK's exhibits and 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.

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 an admitted professional testifier.[46] The "bulk" (ninety percent) of her job duties consisted of testifying at trials and depositions.[47] She received "quite a few lengthy days of training" from in-house counsel on how to answer certain types of questions.[48] Her "knowledge" of industry standards came from what she was told at this training.[49] Her only connection with the documents admitted into evidence over objection was that she had read them in preparation for the trial. 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.

To authenticate the documents, 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:

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[46] T. 67.

[47] T. 66.

[48] T. 65-66.

[49] T. 66.

1) the record was made at or near the time of the event;

2) was made by or from information transmitted by a person with knowledge;

3) was kept in the ordinary course of a regularly conducted business activity; and

4) that 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 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*.

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).[50] Nevertheless, this does not mean the BANK was burdened with having to transport witnesses from various distant departments to the courthouse so they could give this foundational testimony for each proposed exhibit. The BANK had the option of establishing this predicate through a certification or declaration by a records custodian or other qualified witness under penalty of perjury. §90.902(11); *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.

The BANK in this case, however, chose not to avail itself of this rule—one which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations

[50] It is at least footnote-worthy to mention that the business records exception to hearsay is not available if "the sources of information or other circumstances show lack of trustworthiness." §90.803(6)(a) Fla. Statutes (2012). The HOMEOWNERS submit that it has become common knowledge following the robo-signing scandal that the purported business records of banks servicing and foreclosing on loans are highly unreliable and untrustworthy. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("many, many mortgage foreclosures appear tainted with suspect documents").

may be admitted into evidence. It is telling that the BANK chose not to supply certifications or declarations from either the Litton or Ocwen employees actually creating or keeping the records, despite the relative ease of doing so.

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 (which also happened to be Litton) 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, not only proves that *Glarum* must govern the outcome here, but illustrates how the robo-signers of yesteryear have moved into the courtroom to become robo-testifiers.

A. The alleged Notice of Default letter and testimony related to it was inadmissible.

Plasse did not create the alleged Notice of Default letter and did not know who did.[51] She never worked for the company that allegedly sent and maintained

[51] T. 60, 61.

the letter.[52] She does not prepare such letters as part of her job duties and did not supervise the maintenance of the letters.[53] She did not know the policies and procedures of the company that purportedly sent the letter and was not an expert in the policies and procedures of the industry.[54] The only time she had even seen the document was in her preparation to testify about it.[55] Worse, she admitted that the document was not even a photocopy of a letter, but was merely a "re-creation."[56]

Nor did she have personal knowledge as to when the outside company allegedly sent the letter. Her testimony that it was sent on April 1, 2008 was based solely on reading the date on the top of the disputed letter itself.[57] This testimony, therefore, was also inadmissible.

B. The HOMEOWNERS' motion for involuntary dismissal should be granted because the BANK failed to adduce admissible evidence that it sent a Notice of Default.

Because Plasse was not a qualified witness who could establish the prerequisites to the admission of the Notice Letter under a business record

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[52] T. 60.

[53] T 61.

[54] T. 61-62. Even if she were qualified to so testify, proof of practice, habit, or custom alone does not constitute performance of an act on a specific occasion. *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). There must also be some proof that practice was followed in the particular circumstance. *Bernstein v. Liberty Mutual Insurance Co.*, 294 So. 2d 63 (Fla. 3d DCA 1974).

[55] T. 61.

[56] T. 60-61.

[57] T. 62-63.

exception to hearsay, it was error to admit the letter or any testimony that it was sent. The HOMEOWNERS had pled an affirmative defense which explicitly alleged that the BANK did not send the notice of default letter required by Paragraph 22 of the mortgage.[58] This specific denial of the BANK's allegation that it complied with this condition precedent shifted the burden to the BANK to prove that it had complied. *Sheriff of Orange County v. Boultbee*, 595 So. 2d 985 (Fla. 5th DCA 1992); 1967 comments to Fla. R. Civ. P. 1.120(c) ("A specific denial of a general allegation of the performance or occurrence of conditions precedent shifts the burden on the plaintiff to prove the allegations."); *Fidelity & Casualty Company of New York v. Tiedtke*, 207 So. 2d 40 (Fla. 4th DCA 1968), *quashed on other grounds*, 222 So. 2d 206 (Fla.1969).

Because the BANK failed to adduce any competent evidence that it had complied with a condition precedent to accelerate its loan and file suit, the HOMEOWNERS are entitled to an involuntary dismissal. *See Day v. Amini*, 550 So. 2d 169, 171 (Fla. 2d DCA 1989) (reversal with instructions to amend judgment where trial court erroneously denied involuntary dismissal—"it is incumbent on the trial judge to grant the motion" where the evidence offered by the plaintiff does not establish a *prima facie* case); *Tylinski v. Klein Auto., Inc.*, 90 So.3d 870 (Fla.

[58] Second Affirmative Defense, Defendants, [redacted] and [redacted] Amended Answer to Complaint and Affirmative Defenses and Motion to Dismiss Complaint, p. 5 (R. __).

3d DCA 2012) (involuntary dismissal "should be granted when there is no reasonable evidence upon which the [fact finder] could legally predicate a verdict in favor of the non-moving party"); *see Mazine*, 67 So. 3d at 1132 (reversing trial court's denial of motion for directed verdict due to bank's failure to submit admissible evidence of its standing).

The error in admitting the evidence was not harmless. As the Florida Supreme Court has explained, when the trial judge in a bench trial erroneously admits evidence over objection, without an express statement that such evidence did not contribute to the final determination, it cannot be presumed to have disregarded the evidence in reaching its decision. *Petion v. State*, 48 So. 3d 726 (Fla. 2010). Because the improperly admitted document and testimony was the sole evidence supporting essential elements of the BANK's claim, due process compels granting of the involuntary dismissal.

C. The remainder of the BANK's key exhibits were also inadmissible.

Just as the Notice of Default was inadmissible, nearly every other BANK exhibit failed to meet the threshold requirements of the authenticity and hearsay rules. Plasse was not a records custodian or otherwise qualified witness to identify and authenticate the exhibits or to lay the necessary predicate for the business

records hearsay exception. Specifically, the trial court also erred in admitting the "payment records" (Exhibit 4) and the promissory note (Exhibit 1).[59]

1. The Payment Records

The composite Exhibit 4 variously described as "payment records" or "payment history" consisted of a printout of selected data from Ocwen's records (from July 2011 forward), as well as the self-servingly titled, "Litton Payment History" from the previous servicer.[60] The Litton records showed fee assessments and escrow adjustments from the inception of the loan through September of 2011, but did not show any of the HOMEOWNERS's payments that the BANK's witness admitted they made.[61]

As to these Litton records, the witness confessed that she did not know who created the records, she was never in charge of the department that created or maintained the records, she was never involved in inputting the information into the computer, and had never seen the Litton policies and procedures for posting payments. More importantly, she disclaimed any knowledge of the four prongs of the business records hearsay exception for the Litton documents—whether they

[59] The only remaining exhibit was the mortgage. While the BANK also failed to lay the foundation for this exhibit, the evidence was irrelevant because the HOMEOWNERS never disputed that they had signed a promissory note to the original lender, Fremont Investment & Loan, and a mortgage to Mortgage Electronic Registration Systems, Inc.

[60] Plaintiff's Exhibit 4 (R. __); T. 80.

[61] T. 83-84.

were created at or near the time the payments were received by someone with personal knowledge, and whether they were kept in Litton's ordinary course of business.[62]

The court may not consider evidence from a witness who did not, and could not, state she had personal knowledge of records from another company *See Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983); *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011).

Additionally, both the Ocwen printouts and the Litton pintouts were summaries or compilations of selected data contained in the computer system.[63] Accordingly, the information was inadmissible hearsay that also violated the rule regarding summaries and compilations. That rule mandated that the BANK provide the HOMEOWNERS timely written notice of its intent to use such a summary, as well as the summary itself and the originals or duplicates of the data from which the summary is compiled. §90.956, Fla. Stat. Florida courts require strict compliance with this notice rule. *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.*

[62] T. 80-84.

[63] T. 80, 84

Valdes, 62 So. 3d 7 (Fla. 3d DCA 2011) (reversing judgment based on admission of summary introduced in violation of trial order and without notice). The trial court also erroneously denied an objection and a motion to strike this evidence on the grounds that the BANK failed to comply with §90.956 Fla. Stat.[64]

2. The Promissory Note

The existence and the terms of the promissory note were never an issue in this case. The only issues regarding the note were those associated with the BANK's claim that it was entitled to enforce the instrument despite being an outsider to the transaction with the HOMEOWNERS. Thus, it was incumbent upon the BANK to prove that the document presented was the original note and that it had been endorsed and transferred to the BANK prior to the filing of the suit.

Plasse admitted that her company, Ocwen, was never the custodian of the note and never had physical possession of it.[65] She conceded that the note had been lost at some point prior to the filing of the Complaint and there was no testimony that the original was ever found.[66] Instead, she speculated that the note that was in the court file—which she had never seen before that day[67]—must be an

[64] T. 87.

[65] T. 67, 70-71.

[66] T. 68-69.

[67] T. 78-79.

original because the signature was blue.[68] The court prevented the witness from saying whether or not the document was merely a color copy.[69]

Even if the Exhibit 1 is the original note, the timing of the endorsement is still dispositive of the BANK's claim of standing as the holder. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (where note attached to complaint is unendorsed and later version of the note bears an undated endorsement, necessary evidence that plaintiff had standing before the suit was filed was lacking); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (undated endorsement with post-complaint assignment failed to establish standing).

Here, Plasse testified that she had "no idea" when the endorsement was created.[70] She also specifically stated she had no "knowledge as to whether or not the original endorsed note was actually transferred to them prior [to the filing of the Complaint.]"[71]

The BANK, therefore, did not adduce any evidence that the note was endorsed in blank (and thus, that the BANK was its holder) before it filed the Complaint. Involuntary dismissal should be granted on this narrow issue alone

[68] T. 74-75.

[69] T. 75.

[70] T. 72.

[71] T. 95.

(recognizing that the true owner or holder would not be barred from pursuing foreclosure).

II. THE WITNESS'S PARROTING OF FIGURES IN THE PROPOSED FINAL JUDGMENT PREPARED BY COUNSEL WAS INADMISSIBLE.

In this case, the BANK completely neglected to adduce direct evidence—whether by way of an exhibit or testimony—of the amounts owed by the HOMEOWNERS. Instead, in a bizarre ritual quite foreign to any evidentiary rules, the BANK's counsel handed her witness a document which she identified as a "proposed final judgment" and asked the witness to agree that the total amount listed there was "accurate."[72]

First, the trial court erred in permitting the testimony over the HOMEOWNERS' objection that the document from which the witness was reading was not in evidence. *Sas v. Fed. Nat. Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (Error to permit bank witness to testify about the contents of business records when the records were not in evidence.); *McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003) (where original evidence is available, best evidence rule bars "substitutionary" evidence, such as oral testimony about the original evidence). The BANK never moved to have the document (which was not on its exhibit list) admitted into evidence.

[72] T. 54-59.

Nor could the trial court have admitted the document without committing reversible error. It would be difficult to imagine a document that would fit the description of "prepared for the purpose of litigation" more than a proposed final judgment. Such documents do not qualify for the business records exception—or any other exception—to hearsay. *See McElroy v. Perry*, 753 So. 2d 121, 125-26 (Fla. 2d DCA 2000) ("when a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized"). *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA. 1985) (same) *citing* 1 C. Ehrhardt, Florida Evidence § 803.6, at 490-91 (2d ed. 1984). Moreover, the "final judgment" would also be nothing more than a summary of data, which is inadmissible without first complying with §90.956 Fla. Stat., which the BANK did not do here.

Second, the final judgment, and Plasse's testimony about it, was merely a backdoor attempt to introduce numbers from documents that were not in evidence. The sum total of Plasse's testimony on the amount due and owing was that the figures in the proposed judgment were "accurate according to the business records [she] reviewed prior to today."[73] While the trial court refused to require the witness to identify what business records she was referring to,[74] it could not have

[73] T. 56.

[74] T. 58.

been the so-called payment records improperly admitted into evidence. By the witness's own admission, those payment records did not document the HOMEOWNERS' payments and the number to which she testified ($399.383.49) appears nowhere in those records. Nor can it be computed from any of the figures in that document.

Thus, the outlandish ritual of bootstrapping the final judgment—known only to foreclosure trials—is merely an attempt to do what is prohibited by *Sas v. Fed. Nat. Mortg. Ass'n*. and the hearsay rule. In saying that the figures are "accurate" when compared to some unidentified records that she reviewed, the witness is merely testifying from documents that are not in evidence.[75]

[75] The witness's reading of attorneys' fees figures from the proposed final judgment (over objection) was equally inappropriate. There were no documents in evidence that would have provided the underlying data for the amount read to the finder of fact. It is not addressed here because the court specifically reserved jurisdiction to later determine entitlement and amount of such fees. (T. 106).

CONCLUSION

There simply was 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. Accordingly, the court should grant the HOMEOWNERS' motion for involuntary dismissal, or in the alternative, issue a verdict in favor of the HOMEOWNERS.

Dated: August 22, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this August 23, 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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