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

FIFTH THIRD MORTGAGE COMPANY, Plaintiff, vs. [redacted] UNKNOWN SPOUSE OF [redacted] [redacted] UNKNOWN SPOUSE OF [redacted] ET AL., Defendants. _____/	GENERAL JURISDICTION DIVISION CASE NO. 50 2009 CA 028037XXXX MB Division: AW

[redacted] AND [redacted]
MOTION FOR INVOLUNTARY DISMISSAL, MOTION TO STRIKE EXHIBITS AND TESTIMONY, AND MOTION TO RECONSIDER DENIAL OF MOTION TO AMEND THE ANSWER, AND ALTERNATIVE MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure case in which FIFTH THIRD MORTGAGE COMPANY ("the Bank" or "Fifth Third") filed a foreclosure action 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.

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 "owns and holds the note and subject mortgage,"[1] but also alleged that the Note was lost.[2] Nearly six months later, it filed an unverified First Amended Complaint that dropped the lost note count and attached a copy of the Note.[3] The Homeowners filed an answer that denied the Bank's allegations and raised several affirmative defenses.[4] Subsequently, the Homeowners moved for leave to amend their answer and affirmative defenses.[5] Although the case was not yet scheduled for trial, the court (Judge Harrison) denied the Homeowner's request to amend their pleading.[6] Five days later, the court (Judge Lewis) ordered trial to take place May 16, 2013.[7]

The Bank had sought to amend its own pleading—to substitute the party plaintiff, alleging that the loan had been acquired by DLJ Mortgage Capital, Inc

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[1] Complaint filed August 10, 2009, ¶ 5 (App. 1).

[2] *Id*. at Count II (App. 6).

[3] Plaintiff's first Amended Complaint, served January 29, 2010 (App. 39).

[4] Defendants, [redacted] and [redacted] Answer to First Amended Complaint and Affirmative Defenses, served December 20, 2010 (App. 78).

[5] Defendants, [redacted] and [redacted] Motion for Leave to Amend Answer and Affirmative Defenses, March 8, 2013 (App. 90).

[6] Order On Defendants' Motion for Leave to Amend Answer and Affirmative Defenses, April 3, 2013 (App. 104).

[7] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, April 8, 2013 (App. 107).

("DLJ").[8] The court (Judge Hoy) at first refused to grant the motion until an evidentiary hearing could be held.[9] That evidentiary hearing was effectively held at the trial itself when evidence was adduced, over objection, about the transfer.

The court (Judge Lewis) denied the Homeowners' motion to vacate the trial order on the grounds that defaulted parties had not been served the trial order.[10] In the same order, the court refused the Homeowners' request to shorten the time for the Bank to respond to their discovery requests.[11]

B. The Homeowners win the first trial.

With the trial rapidly approaching, the Homeowners moved in limine to exclude the Bank's witnesses and exhibits. As grounds, the Homeowners pointed out that the Amended Complaint was not verified (making the pleading a nullity) and that the Bank had not complied with pre-trial disclosure requirements.[12] On the day of trial, the court (Judge Harrison) granted the motion in limine and, as result, the Bank declared it was unable to proceed and affirmatively chose to have

[8] Plaintiff's Motion to Substitute Party Plaintiff, served May 6, 2011 (App. 84).

[9] Order on Plaintiff's Motion to Substitute Party Plaintiff, October 26, 2011 (App. 88).

[10] Order On Defendants' Motion to Vacate Trial Order and Defendants' Motion to Shorten Time, May 9, 2013 (App. 113).

[11] *Id*.

[12] Defendants, [redacted] and [redacted] Motion in Limine, served May 15, 2013 (App. 117).

its case involuntarily dismissed.[13] Nevertheless, the Bank moved for rehearing and the court granted the motion without a hearing.[14]

C. The second trial ends in a mistrial.

The court (Judge Rosenberg) reset the trial for August 15, 2013.[15] The court (Judge Cox) began by denying the Homeowners' motion for reconsideration of the order granting the Bank a new trial.[16] The court also denied the Homeowner's new motion in limine and motion for continuance, both based on the untimely disclosure of plaintiff's trial witnesses.[17] The proceedings ended in a mistrial,[18] but not before the court ruled that the bank's witness, Linda Kuerzi, was not qualified to testify that the Note that the Bank presented was, in fact, the original.[19]

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[13] Transcript of Foreclosure Non-Jury Trial Before the Honorable Judge Howard Harrison, May 16, 2013 (App. 125); Order May 16, 2013 (App. 145).

[14] Plaintiff's Motion for Rehearing, served May 28, 2013 (App. 146); Order on Plaintiff's Motion for Rehearing, June 20, 2013 (App. 242).

[15] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, June 20, 2013 (App. 244).

[16] Transcript of Hearing Before the Honorable Jack Schramm Cox, August 15, 2013, p. 23 (App. 272).

[17] *Id*. at 34-36 (App. 283-285).

[18] *Id*. at 168 (App. 417).

[19] *Id*. at 120 (App. 369).

D. The third trial.

The court (Judge Cox) began by denying the Homeowner's motion for continuance which had been based upon the court's *sua sponte* imposition of a time limitation on the Homeowner's deposition of the Bank's witness of one hour.[20]

1. The Bank's document reader.

The Bank then called the same witness as at the first second trial, Linda Kuerzi.[21] She testified that she did not work for either of the banks claiming to be the rightful plaintiff (Fifth Third and DLJ), but rather a servicer called Select Porfolio Servicing or "SPS."[22] Kuerzi's job as a "Florida case manager" is to "research defaults and work with counsel to get files ready for trial."[23] She testified that she a reviewed a handful of documents in preparation for trial and that she reviews these types of documents in the course of her job.[24]

The only role of this professional document reader was to shuttle the Bank's documents, or the information in them to the trier of fact, based solely on the fact that she had reviewed them. The only foundation laid for these documents was a

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[20] Transcript of Non-Jury Trial Before the Honorable Jack Cox, September 30, 2013 ("T."), pp. 1-9 (App. 250).

[21] T. 20.

[22] T. 21.

[23] T. 25.

[24] T. 37.

rote series of leading questions intended to establish a "business record" exception to the hearsay objections being raised by the Homeowners. 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.

For example, she testified on direct examination that she has a "general knowledge of the different departments that input information on loans."[25] She did not personally create any entries on the payment history (Exhibit 9).[26] After stating that payment histories are maintained by the Cashiering Department, the witness and the Bank's counsel launched into the business records exception incantation (over objection at every point):

> Q. [By Bank's Counsel] **Can you tell me whether it's the normal course of business of SPS to maintain and store the payment history?**
>
> MR. PRESTIA [Homeowners' counsel]: Objection. Leading. Calls for hearsay. Lack of foundation, and leading.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, it is.
>
> BY MR. NEW:
>
> Q. **Can you tell me whether the people who input the entries in the payment history have any personal knowledge of those entries?**

[25] T. 40, 41.

[26] T. 41.

MR. PRESTIA: Same objection. Leading. Lack of foundation, and hearsay.

THE COURT: Okay. Overruled. Go ahead. You can answer.

THE WITNESS: I believe so.

BY MR. NEW:

Q. **When in proximity are the entries on the payment history created with relation to the date, time, or even the -- the date or time on the payment history?**

MR. PRESTIA: Objection. Leading. Calls for hearsay. Lack of foundation. Lack of personal knowledge.

THE COURT: Overruled. Go ahead.

THE WITNESS: At the time that they -- it's received.

BY MR. NEW:

Q. **Okay. Do you know whether it's the business of SPS to store payment histories?**

MR. PRESTIA: Objection. Lack of foundation. Calls for hearsay. Leading.

THE COURT: Okay. Overruled. You can answer.

THE WITNESS: Yes, they do.[27]

The same dialogue was used with the other exhibits.[28] When asked what is done, if anything, to incorporate the records of the prior servicer into SPS's records, the witness testified, "We rely on the prior servicer records when we board

[27] T. 41-42; motion to be admitted into evidence (T. 107); admitted into evidence (T. 118).

[28] Pay 3 Screen (T. 63-66); Powers of Attorney (T. 66-67); Pay 4 Screen (T. 103-105)

those into our system for accuracy."[29] The witness followed up by saying that they compare the paper information to the electronic information.[30]

The witness testified that she confirmed the accuracy of records by looking at other records, also provided by the prior servicer.[31] The witness was also allowed (over objection) to provide information from documents that were not in evidence:

- Whether there was an escrow balance.[32]
- That the escrow balance was for the payment of taxes and insurance.[33]
- That DLJ was the owner of the loan.[34]
- The impact of an assignment.[35]

Although the court had ruled in the second trial that the witness was not competent to identify whether the Note was an original, in the third trial, the court permitted to do just that.[36] The court refused to require the witness to answer whether the blue ink of the signatures that caused her to assume it was an original

[29] T. 48.
[30] T. 49.
[31] T. 49-51.
[32] T. 45.
[33] T. 46.
[34] T. 58.
[35] T. 60.
[36] T. 77-83.

could have been made by a color copier.[37] She admitted that she did not know who had possession of the alleged original before SPS took over servicing in 2010.[38]

a. "Payment History" (Exhibit 9).

On *voir dire*, it was revealed that Kuerzi did not even prepare the printout referred to as the "payment history."[39] The document was prepared by someone else for this litigation.[40] She did not know who entered the transactions.[41] She never worked in the Cashiering Department that entered the transactions and did not supervise anyone who did.[42] Kuerzi's duties did not overlap those of the Cashiering Department.[43] She admitted that the pay history did not go back farther October of 2010, even though the loan payments began five years earlier.[44]

On cross, she admitted that the beginning figures in the payment history came from another servicer and that the numbers are, therefore, "based on what were provided by the prior servicer."[45] Yet she had never boarded a loan at SPS and while she claimed to know that the "general process" involved some sort of

[37] T. 83-84.

[38] T. 84-86.

[39] T. 111.

[40] T. 111.

[41] T. 111.

[42] T. 111-112.

[43] T. 112.

[44] T. 115; 117.

[45] T. 156.

verification of information, she had never been personally involved in any of this verification.[46] Indeed, what little she did know was that the "verification" involved comparing an electronic version of the payment history with a hard copy (paper version) of the payment history, both of which came from the previous servicer.[47] She did not know how long the verification process takes or whether or not it could take place in one day.[48]

At first, Kuerzi testified that DLJ was the prior servicer, and that never having worked for DLJ, Kuerzi did not know DLJ's accounting policies and procedures.[49] She did not know if they used generally acceptable accounting procedures.[50] She could not testify to their system of recordkeeping.[51] Yet, she admitted that the default date (which occurred during the prior servicer's tenure) and the principal and escrow balances due at that time came from the previous servicer's records.[52]

[46] T. 157.

[47] T. 158-159.

[48] T. 184-185, 204.

[49] T. 169.

[50] T. 169.

[51] T. 169.

[52] T. 176-177.

Later, Kuerzi admitted she did not even know who the previous servicer was.[53] And although SPS has always been the servicer during the time that DLJ allegedly owned the loan, she believed that all the prior servicing records came from DLJ.[54] That belief was based on Kuerzi having read the alleged purchase agreement, which was not in evidence.[55]

Nevertheless, the court admitted the pay history into evidence over objection.[56]

b. "Pay 4 Screen" (Exhibit 11).

Kuerzi admitted that the Pay 4 Screen was merely an overview of the Payment History.[57] She could not determine from the Pay 4 Screen what portion of the total interest allegedly due came from the period before SPS began servicing the loan.[58]

The court, nevertheless, admitted this summary of the pay history into evidence over objection.[59]

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[53] T. 179.

[54] T. 179-180.

[55] T. 181.

[56] T. 118.

[57] T. 106, 165-166.

[58] T. 169.

[59] T. 106-107.

c. Exhibit 8 – Alleged Default Letter

As for Exhibit 8, Kuerzi admitted that the letter was generated by Fifth Third—a entity for which she had never worked.[60] She admitted that she could not testify as to the policies and procedures of Fifth Third.[61]

When questioned about the specifics of the letter, she testified that it demanded "past due" amounts for four payments, including one payment that was not actually past due.[62] She could not explain the discrepancy precisely because the document, and the numbers on it, came from an unidentified entity completely separate from SPS.[63]

Nevertheless, the court admitted the letter into evidence over objection.[64]

d. Exhibit 7 – Alleged Fifth Third "Hello" Letter

Kuerzi did not prepare the alleged "Hello" letter (the notification that SPS had taken over servicing).[65] The letter was "probably" created in the loan boarding department. She never worked in that department, never wrote such a letter and never mailed such a letter.[66] Her familiarity with the industry standard for sending

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[60] T. 125.

[61] T. 125.

[62] T. 206.

[63] T. 207.

[64] T. 126.

[65] T. 120.

[66] T. 121-122.

such letters comes from the training she receives to testify in foreclosure matters.[67] She did not know whether the practice she was told about—sending the letters around the date that they are generated—was actually followed in this case.[68]

Nevertheless, the court admitted the document into evidence over objection.[69]

e. Alleged Purchase Agreement (Exhibit 6)

Exhibit 6 was a purported purchase agreement between two entities (Fifth Third and DLJ) for which Kuerzi had never worked.[70] She confessed to having no personal knowledge of any agreements between Fifth Third and DLJ other than what she could glean from reading the alleged agreement itself.[71] She had no personal knowledge of what was conveyed or transferred between the parties to that agreement.[72] She had no knowledge of the policies and procedures of either of those companies regarding the creation and maintenance of the document.[73]

On cross, she admitted that her sole knowledge of the subject matter—an alleged purchase of loans by DLJ from Fifth Third—came from reading Exhibit 6,

[67] T. 123.
[68] T. 124.
[69] T. 124.
[70] T. 127.
[71] T. 127.
[72] T. 128.
[73] T. 128.

as well as an assignment that had been prepared by SPS.[74] Kuerzi, however, was unfamiliar with the process by which SPS prepares assignments.[75]

Ultimately, even her utility as a document reader was stretched beyond its limits in that she could not determine whether the subject loan was included in the sale because "the writing is so small."[76] For that reason, Alleged Purchase Agreement became the only document excluded by the trial court (even though the witness was permitted to repeatedly rely on it for her testimony).

f. Exhibit 1 – Power of Attorney

Kuerzi's knowledge of the power of attorney from DLJ to SPS was also limited to having reviewed an imaged copy after being assigned to testify in this case.[77] She had never seen an original and was not present when it was executed.

Nevertheless, the court admitted the document into evidence over objection.[78]

g. Exhibit 2 – Power of Attorney

Kuerzi admitted that SPS did not create the power of attorney between DLJ and Fifth Third.[79] When asked whether she could testify to the condition of the

[74] T. 160.

[75] T. 161.

[76] T. 131.

[77] T. 135-136.

[78] T. 138.

[79] T. 139.

document or how it was kept or maintained before it came to SPS, she responded, "I could not. I don't work for them."[80] She also admitted she was not familiar with the business practices of Fifth Third and DLJ.[81]

Nevertheless, the court admitted the document into evidence over objection.[82]

h. Exhibit 3 - The "Original" Note

Although Kuerzi repeatedly testified that the document in the court file was the original of the Note, she had never seen it before seeing it during the second trial.[83] She never knew that there had been a claim that it was lost.[84] She believed that, before it came to be deposited in the court file, it was kept in a secure location by "the custodian"—but did not know who that was.[85] She "believe[d]" that SPS had received the Note from DLJ, although nothing on the Note corroborated that belief.[86] Her belief relied on the alleged purchasing agreement and the Power of

[80] T. 140.

[81] T. 140-141.

[82] T. 141.

[83] T. 194.

[84] T. 193-194.

[85] T. 194.

[86] T. 195.

Attorney between DLJ and SPS.[87] Kuerzi later testified that "[a]s far as I know," the Note has never been in the custody of her employer, SPS.[88]

Notably, even the court acknowledged that Kuerzi had conceded that she did not know where the Note was before DLJ became involved with the loan: "I think the testimony has been she doesn't know. She wasn't involved. I'll accept that."[89]

At the close of the Bank's case, the Homeowner's moved for involuntary dismissal,[90] which the court denied the next day.[91] The court, however, invited the submission of this written Motion for Involuntary Dismissal.[92] In addition, the Homeowners move to strike (and renew previous motions to strike) the testimony of Kuerzi and the Bank's exhibits on the grounds of hearsay and authenticity where the Bank brought no qualified witness to establish a business records hearsay exception for the documents.

[87] T. 195.

[88] T. 199.

[89] T. 198.

[90] T. 209.

[91] T. 348.

[92] T. 348-349.

SUMMARY OF THE ARGUMENT

The Bank's sole witness, Linda Kuerzi, 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. Kuerzi 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 never worked. Thus, there was no competent evidence of the amount due on the loan.

As a result, the Bank's exhibits and the testimony related to them were inadmissible and should be stricken. Aside from the absence of admissible bookkeeping records, there was no competent evidence that Fifth Third had sent a default letter as required by the Mortgage, or that it had standing (the Complaint was never amended to substitute DLJ as the party plaintiff). Therefore, the trial court should grant an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.

Additionally, the court should reconsider the erroneous denial of the Homeowners' request to amend the answer to include the affirmative defense of inducement to default. Involuntary dismissal should be granted because the evidence in support of this defense was uncontradicted.

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, Kuerzi, was a professional testifier whose job duty with the servicer, SPS, 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 shortly before trial. 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.[93]

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

[93] *E.g.*, T. 45, 46, 58, 60.

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, Kuerzi 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 Kuerzi 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*.

The Fourth District recently reaffirmed and clarified the requirements for a qualified witness to introduce documents in *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013). In this criminal case, the trial court had permitted a store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The Fourth District held that it was reversible error to admitting the receipt as a business record because the clerk was not qualified to testify concerning the receipt. *Id*. at 661.

After outlining the basic requirements of the business records hearsay exception, the court noted that "[i]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id.* at 662. The court went further to say that, to be a qualified person to introduce business records, the person must be someone who "by the very nature of that person's job responsibilities and training, knows and understands the business records sought to be introduced." *Id*. at 663. Thus, because the store clerk "had no responsibilities regarding the business

practices of the [store]" he was not qualified to introduce the receipt as a business record. *Id.* The appellate court sympathized with the plight of the prosecution—in that the qualified witness, the manager, did not appear to testify (and was, as a result, held in contempt)—but steadfastly decreed that "the rules of evidence must be observed." *Id*.

Here, Kuerzi was similarly unqualified to testify about the so-called business records of SPS. She "had no responsibilities" regarding the business practices of SPS in generating its bookkeeping records. The nature of her job responsibilities—reading records to judges—does not demonstrate that she knows and understands the manner in which SPS creates and maintains the records to be introduced.

Accordingly, Kuerzi was not a qualified witness to lay the foundation for the records from the many SPS departments (such as the "Cashiering Department") where she had never worked. This alone was sufficient to exclude the proffered evidence.

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

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

- **Exhibit 9 (Payment History):** While the entries in this record were presumably made by the SPS Cashiering Department beginning in 2010, the vast majority of the "history" was merely an entry of the current balances carried over from years of bookkeeping records (which were not in evidence) from a previous servicer.
- **Exhibit 11 (Pay 4 Screen):** Because this was merely a summary of the inadmissible payment history (Exhibit 9), it was inadmissible for all the same reasons.
- **Exhibit 8 (Alleged Default Letter):** The Default Letter was, on its face, prepared by Fifth Third—a company for which Kuerzi had never worked. She admitted she could not testify as to the policies and procedures of Fifth Third.
- **Exhibit 6 (Alleged Purchase Agreement):** While this document was ultimately excluded, much of Kuerzi's testimony about whether this particular loan was ever transferred to DLJ was based on this document.

None of this testimony was admissible because the document was inadmissible—she never worked for Fifth Third or DLJ and could not testify about their recordkeeping.

- **Exhibit 2 (Power of Attorney between DLJ and Fifth Third):** Again, Kuerzi was not qualified to talk about a document between entities for which she had never worked.

B. Records from another servicer are hearsay within hearsay.

Kuerzi was singularly unqualified to provide the necessary testimony for a business records exception to hearsay for the records of her own employer, SPS, because she had no experience in the departments that actually generated them. When the "SPS records" were merely copies of records from other servicers (or worse, copies of nothing more than current balances at the time of transfer), 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.

Incredibly, Kuerzi did not even know who the previous servicer was, and thus could not testify to that entity's bookkeeping policies and procedures. Even when she thought the previous servicer was DLJ, she had no personal knowledge of DLJ's bookkeeping policies and procedures.

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, Kuerzi did not have any personal responsibility or experience with the process of transferring the records from the previous servicer to SPS. While she was trained to say that there were verification checks, all she could suggest is that the electronic computer entries were compared against the printed version of the same computer entries. She did not know how long it took to perform this task. At best, this insured that the entering of the current balance information into the SPS computer was a faithful duplication of the prior servicer's current balance—whether that information was accurate or not.

In the end, there was no testimony that the "verification" actually involved internal consistency checks, interest rate confirmations, interest re-calculations, review and confirmation of receipts for tax and insurance payments or even whether the years of bookkeeping records by the previous servicer matched the current balance information it provided to SPS.

Accordingly, Kuerzi's lack of personal knowledge 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. The myth that providing admissible evidence from qualified witnesses is "impractical."

Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989). The foreclosing banks often argue, however, that the court should not follow binding precedent (*Glarum*, *Yang*, and *Lassonde*) because it would be impractical for the banks to comply with the Florida hearsay exception rule when the paperwork has been prepared by different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on 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

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 Fifth Third or DLJ 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 Cashiering Department who could personally describe what, if any, measures were taken to ensure the accuracy of its records and those of the previous servicer.

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.

D. The myth that bank records are inherently trustworthy.

Another common bank argument is that bank records are commonly viewed as particularly trustworthy, and therefore, the hearsay rules should be loosened as to them.

There can be no doubt that the business records hearsay exception is conditioned upon the records being considered "trustworthy." The Florida rule itself provides that records of regularly conducted business activity are admissible "unless the sources of information or other circumstances show lack of trustworthiness." § 90.803(6)(a), Fla. Stat. Trustworthiness, therefore, is an

additional requirement for admissibility, not a shortcut that bypasses the other criteria.

Moreover, the 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 foreclosures appear tainted with suspect documents."); Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness);[94] Press Release of the

[94] 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.

Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings.[95]

Here, the Bank's own witness conceded that that major lenders within the mortgage lending industry have been accused of forging documents with regards to filings in foreclosure cases across the country.[96] Even the court itself suggested its own awareness of this betrayal of the public trust when it commented:

> But not just generally in the [mortgage banking] industry, because quite frankly, generally, in the industry, there's fraud going on on the other side too… We're not doing that here either.[97]

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.

II. Involuntary Dismissal Should Be Granted Because There Was No Admissible Evidence That the Bank Complied With Conditions Precedent.

For the reasons shown above, the Bank failed to adduce admissible evidence that it had sent a "default letter" or "notice of acceleration" as required under Paragraph 22 of the Mortgage. Kuerzi was unqualified to lay the predicate for the

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

[96] T. 190-192.

[97] T. 192 (emphasis added).

Fifth Third document proffered by the Bank and it was erroneously admitted. The Homeowners testified (without contradiction) that they never received such a letter, which is circumstantial evidence that it was never sent as required by the Mortgage. Accordingly, the case should be dismissed for a failure of proof of compliance with conditions precedent.

III. Involuntary Dismissal Should Be Granted Because the Bank Never Had its Motion to Substitute Party Plaintiff Granted.

The Bank's motion to substitute party plaintiff was still undetermined at the start of the trial. While the Bank attempted to adduce evidence of a transfer of the subject loan from Fifth Third to DLJ, it never obtained a ruling from this court. If the Bank's inadmissible evidence is to be believed, then the Plaintiff, Fifth Third, is not the owner of the loan and the Bank has failed to prove its own standing. Moreover, it would be highly prejudicial to the Homeowners to entertain such a motion to amend the Bank's pleading post-trial, especially since the Homeowners' request to amend their pleadings nearly six months before trial (and before trial was set) was denied.

IV. Motion to Reconsider Denial of Motion to Amend the Answer, Or In the Alternative, Motion to Amend the Pleadings to Conform to the Evidence.

To the extent that the court would consider allowing the Plaintiff to amend its Complaint, the Homeowners' request that the court reconsider its denial of the Homeowner's motion to amend its answer. Granting either of the parties' motions

would reopen the pleadings and any judgment based on a trial that took place before the case was at issue would be a nullity. The denial of the Homeowner's motion to amend their answer—which should have been freely granted—was reversible error.

Rule 1.190(a) Fla. R. Civ. P. provides that when a party seeks to amend a pleading, "[l]eave of court shall be freely given when justice so requires." In accordance with Rule 1.190, Florida Courts have held that "[l]eave to amend should be freely given, the more so ... when the amendment is based on the same conduct, transaction and occurrence upon which the original claim was brought." *Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla., Inc.*, 637 So. 2d 968, 970 (Fla. 5d DCA 1994) (citing *Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp.*, 353 So. 2d 137, 141 (Fla. 3d DCA 1977)). Furthermore, Florida's Fourth District Court of Appeals has held that "[l]eave to amend should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile." *Life Gen. Sec. Ins. Co. v. Horal*, 667 So. 2d 967, 969 (Fla. 4th DCA 1996).

At trial, the Bank specifically objected to evidence that the Homeowners were induced to default—an affirmative defense raised in the proposed

amendment.[98] The Homeowners proffered the testimony they would have provided had they been permitted to amend.[99]

In the alternative, the Homeowners' move to amend the answer to conform to this proffered evidence as the only means of at least partially curing the error of denying the amendment.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fla. R. Civ. P. 1.190. If, as here, evidence is objected to at trial on the grounds that it is not within the issues made by the pleadings, leave to amend the pleadings to conform to the evidence shall be given freely when it permits the merits of the cause to be more effectively presented and the objecting party cannot demonstrate unfair prejudice. *Id*.; *cf*. *Smith v. Landy*, 402 So. 2d 441 (Fla. 3d DCA 1981) (affirming decision in favor of mortgagor in foreclosure action on estoppel grounds although it was not raised as an affirmative defense in the answer, because it was supported by the evidence and tried by the implicit consent of the parties); *Thompson v. Gross*, 353 So. 2d 191, 192 (Fla. 3d DCA 1977) (affirming decision to permit an amendment of the answer to conform with the

[98] T. 262-263.

[99] T. 264-267; 298-302.

evidence where plaintiffs did not object to testimony aimed at establishing the missing affirmative defenses and did not show they would be prejudiced).

In *Anglo Am. Auto Auctions, Inc. v. Tuminello*, 732 So. 2d 1218 (Fla. 5th DCA 1999), the defendant had moved prior to trial to amend its answer to assert an additional affirmative defense—just as the Homeowners did here. In that case, the trial court initially granted the motion, but later struck the amended answer before trial. At trial, after the plaintiff adduced evidence relevant to the stricken affirmative defense, the defendant moved to amend the answer to conform to the evidence—just as the Homeowners did here. The appellate court reversed the judgment in favor of the plaintiff because "it was an abuse of discretion to deny appellants the opportunity to amend their pleadings to assert the [affirmative defense]." *Id*. at 1221. The appellate court found—as this court should here—that the plaintiff could not have been surprised or prejudiced by the affirmative defense since the issue had been raised before trial began. *Id.*

Accordingly, the Homeowners request that their Answer be amended to include the affirmative defense that they were induced to default.

V. The Case Should Be Involuntarily Dismissed Because the Homeowners Were Induced to Default.

Provided the Homeowners are permitted to amend their answer, then the evidence was undisputed that the Homeowners were induced to default. The Homeowners testified, without contradiction, that the Bank (Fifth Third) advised

them that, it was Bank policy that they could not qualify for a loan modification unless they were in default.[100] They intentionally extracted fifteen months of reserve payments in an automatic pay account so that a default could occur and the loan modification process could begin—all with the knowledge of Bank representatives.[101]

Here, inducement default was raised as both an "unclean hands" equitable defense and an estoppel defense. Because foreclosure invokes the equitable jurisdiction of the court, it will not be granted where the plaintiff has "unclean hands." *Limner v. Country Pines Condominium Ass'n*., 709 So. 2d 154 (Fla. 4th DCA 1998). Foreclosure can be denied if the party seeking to enforce the note has unclean hands or if the foreclosure would be unconscionable. *Knight Energy Services, Inc. v. Amoco Oil Co*., 660 So. 2d 786 (Fla. 4th DCA 1995).

The three elements of estoppel are: 1) the party must have made a representation about a material fact that is contrary to a position it later asserts; 2) the party claiming estoppel must have relied on that representation; and 3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it. *Watson Clinic, LLP v. Verzosa*, 816 So. 2d 832, 831 (Fla. 2nd DCA 2002)(citations omitted). Here the evidence was

[100] T. 299-300.

[101] T. 300-301.

undisputed that: 1) the Bank represented to the Homeowners that they did not qualify for a loan modification unless they were in default and that they would be considered for a loan modification thereafter; 2) the Homeowners specifically relied on the representations of the Bank; and 3) Homeowners applied for but were not offered a loan modification. Instead the instant foreclosure action was filed against them. Accordingly, this Court should deny Plaintiff the equitable remedy of foreclosure.

To the extent that the court prohibited the Bank from cross-examining the proffered the testimony, the court may always—at the request of the Bank—reopen the case for additional evidence. *See,* Fla. R. Civ. P. 1.530.

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, such as the amount of damages and conditions precedent. The Bank had its day (or multiple days) in court and the case should be dismissed with prejudice.

Alternatively, the Bank failed to prove its standing to bring this action. 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 amend its Complaint to substitute DLJ, the court should permit the Homeowners to likewise amend their pleading. In that event, a mistrial would be appropriate because the case will not have been "at issue."

Dated: October 11, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this October 11, 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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