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, Cassell Swaby and Blossom Swaby's, Motion for Sanctions for Failure to Comply with Court Order or in the Alternative Motion in Limine, dated August 8, 2013 (App. 144) [Docket Entry 100].

[11] *Id*.

[12] Transcript of Trial Before the Honorable Eli Breger August 9, 2013 ("T. 154"), 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 had 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. The Bank called no one (neither an attorney nor an expert) to establish the reasonableness of the attorneys' fees to which the witness testified.

5. The Homeowners' motion for involuntary dismissal.

The Homeowners then moved for an involuntary dismissal on various grounds. Those grounds included the Bank's failure to 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.

Additionally, the Homeowners specifically asked for an evidentiary hearing regarding attorneys' fees to which the court replied "the Court usually reserves jurisdiction for entitlement and amount anyways."[45]

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.[46] The Homeowners' filed an extensive memorandum in support of the 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.[47] The memorandum also renewed the motions to strike exhibits and testimony along with argument that the evidence was inadmissible.[48]

6. The final judgment.

Nevertheless, the trial court entered a final judgment which expressly denied the Motion for Involuntary Dismissal and found that "the allegations contained Plaintiff's complaint have been proved by competent evidence…"[49] Despite having said that the entitlement and amount of the attorneys' fees would be

[45] T. 106.

[46] T. 103-106.

[47] Memorandum in Support of Cassell and Blossom Swaby's Motion for Involuntary Dismissal and Motions to Strike Exhibits and Testimony, dated August 22, 2013 (App. 277).

[48] *Id*.

[49] Final Judgment of Foreclosure, dated September 6, 2013, ¶ 1 (App. 315).

determined at a later time, the court's judgment included the attorneys' fees in the judgment.[50]

The Homeowners timely filed this appeal.

[50] Final Judgment of Foreclosure, dated September 6, 2013, ¶ 5 (App. 315).

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.