

1 IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT IN AND
2 FOR PALM BEACH COUNTY, FLORIDA

3 -----X
4 FIFTH THIRD MORTGAGE COMPANY,
5 Plaintiffs,

Case No.:

-against-

502009CA028037XXXXMB

6
7 [REDACTED] [REDACTED]
8 [REDACTED] FIFTH THIRD BANK,
9 CANYON LAKES HOMEOWNERS
ASSOCIATION INC.,

Defendant.

10 -----X

11 205 North Dixie Highway
West Palm Beach, Florida
12 August 15, 2013
13 1:30 P.M

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15 This cause came on for hearing before the
16 Honorable Jack Schramm Cox, Circuit Court Judge, in
17 Chambers Pursuant to Notice.
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25

1 A P P E A R A N C E S :

2

3 ATTORNEYS FOR PLAINTIFF

4 McGLINCHEY & STAFFORD

101 NE 3rd Avenue, # 1500

5 Fort Lauderdale, Florida 33301

BY: Mark New ESQ.

6 Jennifer Chapkin, ESQ.

7

8 ATTORNEYS FOR DEFENDANTS

9 ICE LEGAL

1015 N. State Road 7, Suite C,

10 Royal Palm Beach, Florida 33411

BY: SCOTT HOLTZ, ESQ.

11 THOMAS PRESTIA, ESQ.

AMANDA LUNDERGAN, ESQ.

12

13

14 ALSO PRESENT:

15 Daniel Wasserstein on behalf of Canyon Lakes Homeowners
16 Association

17 Richard Jarolem, Wilson Elser Moskowitz, Edelman &
18 Dicker

19 Videographer, Michael Hollander, US Legal

20

21 E X H I B I T S

22

23 (No Exhibits marked during this hearing.)

24

25

1 THE COURT: So do me a favor. Announce for
2 the record, tell me the name of the case and the
3 case number.

4 MR. NEW: Certainly, Your Honor. It is Fifth
5 Third Mortgage company versus Defendant [REDACTED]
6 [REDACTED] Fifth Third Bank -- you
7 need all of the defendants.

8 THE COURT: No, that's fine. What is the case
9 number.

10 MR. NEW: Sure, it's 2009CA028037.

11 THE COURT: 028037?

12 MR. NEW: Yes.

13 THE COURT: Very good. Tell me your name.

14 MR. NEW: Mark New, N-E-W, with Jennifer
15 Chapkin with McGlinchey & Stafford law firm.

16 THE COURT: Who do you have with you today?

17 MR. NEW: Witness is Linda Kuerzi,
18 K-U-E-R-Z-I.

19 THE COURT: Good to see you.

20 MR. NEW: Defendants are represented by Ice
21 Legal. I will tell you, they have Amanda Lundergan
22 Tom Prestia and Scott Holtz.

23 THE COURT: Okay. What we're going to do is
24 we're going to call for the clerk to bring up the
25 file. So until the file comes up, I am going to --

1 go ahead and we'll be in recess until then. If you
2 see the defense, go ahead, then, and tell them to
3 be prepared to come back in as soon as the file
4 gets here.

5 MR. PRESTIA: Okay.

6 THE COURT: Okay. Good to see you. Thank
7 you.

8 (Short recess taken.)

9 THE COURT: So let's go ahead and go on the
10 record. This is the Fifth Third Mortgage company
11 versus [REDACTED] This is Case Number
12 2009CA028037XXXX Division 8W. So for the -- I
13 already took the appearance for the plaintiff. For
14 the defense, if you'd announce for the record.

15 MR. HOLTZ: Yes, Your Honor. Good afternoon.
16 Scott Holtz from Ice Legal on behalf of Defendants
17 [REDACTED] and [REDACTED]

18 THE COURT: Okay. Good to see you.

19 MR. HOLTZ: Also, who will be present will be
20 Amanda Lundergan from Ice Legal on behalf of the
21 defendants.

22 THE COURT: Where is she now?

23 MR. PRESTIA: She's just on her way up, Your
24 Honor.

25 May it please the Court, Your Honor. Thomas

1 Prestia on behalf -- also on behalf of [REDACTED] and

2 [REDACTED]

3 THE COURT: Okay. Do me a favor and spell
4 your last name for me.

5 MR. PRESTIA: P-R-E-S-T-I-A.

6 THE COURT: Very good. Good to see you.
7 Okay. Very good.

8 So what I've done is I've had the file brought
9 up because the plaintiff indicated that they had
10 filed the original note. Do you know about the
11 time that you filed the original note?

12 MR. NEW: Your Honor, I think it probably
13 would have been in 2010. I want to say, 2009,
14 2010.

15 THE COURT: The clerks file doesn't come with
16 a set of tabs in it and quite frankly it doesn't
17 come with an index. I'm not sure why the clerk
18 doesn't do that. I am in 2010, let me see if --

19 MR. NEW: Judge, it's December 28, 2009, if
20 you could find that '09-2010 break.

21 THE COURT: It is chronological.

22 (Ms. Lundergan entered the courtroom.)

23 THE COURT: Hi, how are you?

24 MS. LUNDERGAN: Hi, Your Honor.

25 THE COURT: Tell me who you are.

1 MS. LUNDERGAN: Amanda Lundergan from Ice
2 Legal.

3 THE COURT: Okay. Good to see you.

4 Are you fairly convinced that it is in the
5 court file?

6 MR. NEW: Yes.

7 THE COURT: Okay. Because as I was thumbing
8 through here I saw what appears to be a count for
9 the reestablishment of a lost document. I'm not
10 sure, but let me keep looking.

11 MR. NEW: We didn't file a complaint but it
12 was filed with that lost note count, Judge.

13 THE COURT: Okay. So it should be close.

14 MR. NEW: Judge, I am looking at the actual
15 meeting, the Certificate of Service. The clerk's
16 got it docketed on January 5, 2010, if that -- it's
17 still right around that same time period, though.

18 THE COURT: I am pretty close to that. I am
19 in December. I saw a certified copy of the --

20 MR. NEW: Mortgage?

21 THE COURT: Yes. So I'm going to assume I'm
22 fairly close.

23 Here we go. So what I'm going to ask y'all to
24 do before we get started is let you come up here
25 and let you look at the file, and I have it marked

1 now, I've located it, the original note, so y'all
2 come on up.

3 MR. NEW: Thank you, Judge.

4 THE COURT: So everybody can get a chance to
5 see.

6 Okay. I will keep it marked so we don't lose
7 it. All right. Very good.

8 MR. NEW: We had stipulated to the
9 admissibility of the note but the defendant's
10 reserving objections to relevance and what have
11 you, but I wanted to move it in as 1.

12 THE COURT: Okay. Any objection?

13 MR. HOLTZ: Your Honor, I don't think that's
14 exactly -- I do have an objection. I said that
15 theoretically it could be admissible but I
16 specifically reserved any objections that we might
17 make to its admissibility.

18 THE COURT: Okay. So let's just stop for a
19 second. So here we are. I'm ready to hear.
20 What's your objection?

21 MR. HOLTZ: Your Honor, we specifically
22 reserved in our affirmative defense the
23 authenticity of the signatures in the document. We
24 challenge the authenticity of the signatures.

25 THE COURT: Are your clients here today?

1 MR. HOLTZ: They are present, Your Honor.
2 They are present in the area. I don't know if they
3 are in the courthouse.

4 THE COURT: Are they going to come and testify
5 that that's not their signature?

6 MR. HOLTZ: If the evidence bears it out. If
7 they cannot -- if the plaintiff cannot establish,
8 but we believe that by raising the issue we have
9 now shifted the burden to plaintiff to establish
10 the authenticity.

11 THE COURT: That's kind of what I'm asking you
12 right now. So here we are at trial. Today is the
13 day for trial. So what I'm asking you is do you
14 have time -- do you have a witness here today that
15 is going to be putting on evidence, primarily your
16 clients, that they did not sign this note.

17 MR. HOLTZ: May I have a moment to confer?

18 THE COURT: Yeah. And I just want you to be
19 aware that if that's going to be your position,
20 that they did not sign the note, then I am going to
21 require that your clients be here. I'm going to
22 swear them under oath and under penalty of perjury.
23 If they swear that they didn't sign the note, and I
24 later find out that they did, it's six months --
25 actually five months and 29 days in the Palm Beach

1 County Jail.

2 MR. HOLTZ: Understood, Your Honor.

3 THE COURT: So it's with that understanding,
4 you-all go ahead and decide what you want to do.

5 (Counsel is conferring.)

6 THE COURT: So, Mr. Holtz, what is your
7 position?

8 MR. HOLTZ: Your Honor, our position is that
9 we have to make that determination when we have
10 our --

11 THE COURT: Mr. Holtz, let me just stop you
12 for a minute. I'm going to take a recess for ten
13 minutes. Where is your client located? Where do
14 your clients live?

15 MS. LUNDERGAN: Your Honor, I believe their in
16 Palm Beach County.

17 THE COURT: Okay. Call them on the phone and
18 tell them I want them down here at the courthouse
19 so that they can testify under oath that that's not
20 their signature on the note.

21 MS. LUNDERGAN: Your Honor --

22 THE COURT: Stop for a second. Mr. Holtz and
23 I are talking. So what I want you to do is tell
24 them that I want them to come down here, and I'm
25 going to put them on the stand, I'm going to swear

1 them under oath under penalty of perjury, and
2 they're going to testify that that's not their
3 signature on the note.

4 MR. HOLTZ: I understand, Your Honor. If that
5 is not necessary, if we do not wish to argue
6 that --

7 THE COURT: Just go call them. See if they
8 want to come down. If they do, if your position at
9 trial today is that note was not signed by them,
10 then your clients need to come into court and
11 testify under oath that that's not their signature.
12 And if I find out later that they had committed
13 perjury, I will give them six months, five months
14 29 days in Palm Beach County Jail.

15 MR. HOLTZ: Understood, Your Honor.

16 Okay. So we will take a break for ten
17 minutes. Make the call and tell me what you find
18 out. We will be in recess.

19 THE BAILIFF: The court will be in recess.

20 (Short recess taken.)

21 MR. WASSERSTEIN: Dan Wasserstein on behalf of
22 the Canyon Lake Home Owners Association.

23 THE COURT: Okay. Good to see you,
24 Mr. Wasserstein.

25 MR. WASSERSTEIN: Thank you, Judge.

1 THE COURT: Okay, let's go back on the record.
2 Mr. Holtz, what do you want to do?

3 MR. HOLTZ: Your Honor, I think there was a
4 misunderstanding about our objection and our
5 position. We are not saying that the signatures on
6 the document are not our clients, and I don't know
7 if our clients would testify to that. Our
8 objection is this: That that very well may be a
9 copy, a color copy of the original note, that
10 because it is filed as an original note, it is
11 purported original and that it may be admissible,
12 but that would be subject to the plaintiffs having
13 proved that it is in fact the authentic original
14 note.

15 That may appear to be the signatures of our
16 clients, but that may not actually be the original
17 note and a color copy or any other facsimile is not
18 sufficient in evidence for them to proceed in the
19 foreclosure matter. That's one of the objections
20 that we had reserved with respect to the note.

21 THE COURT: So you're aware, obviously, that
22 as a member of the bar any time you take a position
23 you have a reasonable basis for asserting the
24 position that you take. Do you have a reasonable
25 basis, and if so, please tell me what it is to

1 believe that the note that is in the file, which is
2 marked as the original, is in fact something other
3 than an original of the note. Can you tell me what
4 your reasonable basis is for that?

5 MR. HOLTZ: Your Honor, may I allow
6 Ms. Lundergan to continue this portion of the
7 argument or the discussion? She has had more
8 experience with that particular issue.

9 THE COURT: Well, let me just ask you, I mean,
10 you are the one that started it and y'all are in
11 the Civil Division. Let me just follow up on this,
12 and I don't mean any disrespect. This isn't
13 foreclosure. This is a circuit civil courtroom.
14 This is a trial division. That's all I do here is
15 try cases. And I try cases from anything from
16 \$15,000 to well, well over \$15,000 and I do it at a
17 very, very high level.

18 So when you are in here, I am going to assume
19 that you all are very skilled at what you do. But
20 the rules of evidence apply and the also the rules
21 of procedure and the rules of decor in the
22 courtroom. So if you start a discussion with the
23 judge, you finish the discussion with the judge.
24 If you want to divide up parts of the case, that's
25 fine. But you are with me, you and I are having

1 the discussion, so there's no double-teaming,
2 there's no triple-teaming, there's no bailing out
3 for somebody else to give you help.

4 MR. HOLTZ: Understood, your Honor.

5 THE COURT: Okay. I am with you. So I just
6 wanted everybody to be aware of how it works. So I
7 just want to know, my question to you is that is
8 there a reasonable basis for you to make the
9 assertion that this is not the original note, and
10 if so, please tell me the evidence that you're
11 going to put on at the time of trial to back that
12 up.

13 MR. HOLTZ: Your Honor, I believe the
14 reasonable belief or the reasonable basis for our
15 position in reserving that objection is that the
16 complaint in this case was originally plead with a
17 lost note count. Now, subsequent to the filing of
18 that lost note count, the plaintiff was able to
19 come up with a purported original note and filed
20 that with the court.

21 Your Honor, the very fact that after
22 conducting and swearing to in their complaint that
23 they've conducted an exhaustive and diligent search
24 of where this note should have been, looking for it
25 with all due diligence, they were not able to find

1 it, and then coming up with that original note, we
2 would maintain, casts suspicion on the originality
3 and the authenticity of the note that is now
4 purported to be the original note as filed.

5 THE COURT: Okay. I understand your position.
6 All right. So what we'll do at this point is that
7 I will reserve on the offering of the note into
8 evidence at this time. And so let's go ahead and
9 go forward. So for the plaintiff I don't think I
10 need to have opening statement. If you would call
11 your first witness, then.

12 Mr. Holtz?

13 MR. NEW: Your Honor, we would like to call --

14 THE COURT: Just a minute.

15 MR. HOLTZ: I'm sorry, Your Honor, we do have
16 some preliminary matters that we would ask the
17 Court to address before we begin the plaintiff's
18 case in chief. First of all, Your Honor, I believe
19 I need to bring to the Court's attention and for
20 the purposes of the record to preserve -- the fact
21 that we are here today on -- in this case is as a
22 result of the granting of plaintiff's motion for
23 rehearing; however, the granting of that motion was
24 done by Judge Harrison without any hearing, without
25 any notice, or notice to the defendant or giving

1 them any opportunity to respond in writing, which
2 the Fourth District Court of Appeals has held one
3 of the two, at least, must be afforded if the Court
4 is considering granting such a motion.

5 It was not done so. And so as a result we
6 believe we are here today in a severely prejudiced
7 position, and frankly we would ask this Court to
8 reexamine that decision at this time, and to at
9 least allow us to make argument on that motion for
10 rehearing as we have never had opportunity to
11 respond either via oral argument or in writing.

12 THE COURT: Okay. Response?

13 MR. NEW: They were permitted to respond, Your
14 Honor. What happened -- and they chose not to.
15 What happened in this case was we were set before
16 Judge Harrison on May 16th. Then the Court's
17 pretrial order required that the parties
18 immediately disclose the name, the specific name
19 and address of any witnesses intended to be called.
20 My firm identified a corporate representative --
21 the servicer to be the witness and didn't identify
22 the specific name, and that's on me.

23 What happened was after that witness list was
24 served, which generally is compliant with, you
25 know, the rules of procedure and trial preparation

1 when you've got a corporate entity as a party.

2 What happened was after disclosing the
3 witness, the defense Counsel, not Mr. Holtz, but
4 Ms. Lundergan and another colleague contacted my
5 office and asked for the names, the specific name
6 of the witness. So a week before trial we provided
7 the names, the specific name of the witness who
8 would be present. David Goldman.

9 A week later we show up for trial with
10 David Goldman sitting there flown in from Utah --
11 flown in from Jacksonville, ready to try the case.
12 With the knowledge of the witness the night before
13 the trial, there's a motion in limine filed arguing
14 that, Hold on, we're prejudice here, we didn't have
15 the name of the witness.

16 At the time that the motion in limine was
17 filed, Your Honor, they had the name of the
18 witness. Had never undertaken any effort
19 whatsoever in the last four years, no effort in the
20 week prior to the trail, no effort in the month or
21 so after the trial was set to take a deposition.

22 I argued to Judge Harrison that, Your Honor,
23 we disclosed the name. I didn't disclose the
24 specific name. We sent the e-mail in response the
25 same day giving this defense firm the name of the

1 witness. To the extent there's any prejudice,
2 let's do the deposition now. Let's go ahead and
3 continue the trial for a week and we will do the
4 deposition. Continue the trial a month and we can
5 accomplish this deposition. I will stay tonight,
6 I'll stay tomorrow, do it over this weekend,
7 whenever, to accommodate this claim that there's
8 prejudice.

9 Judge Harrison ended up under the basis that
10 there was prejudice on the part of the defendant
11 dismissed the case. I filed a motion for a hearing
12 more specifically laying out the arguments and
13 explaining to Judge Harrison that there is no
14 prejudice here. Here are the facts, here's the
15 discovery they been served. There's no deposition
16 and no prejudice.

17 Judge Harrison -- after a few weeks or so
18 Judge Harrison granted that motion, reset the
19 trial, they vacated the order dismissing the case.
20 Any time prior to that, these folks could have
21 served any kind of response or could have requested
22 a hearing. Nobody did that. Then once the order
23 was entered vacating the dismissal and resetting
24 the trial, then there was the complaint of, Well,
25 we didn't have an opportunity to be heard, but they

1 did.

2 I think Your Honor is in a difficult position
3 to have to rule on a motion for a hearing, an order
4 granting a motion for a hearing. I think Judge
5 Harrison could do that, but he didn't. He is the
6 person in the best position to look at the issue
7 and a classic example of when you need a rehearing,
8 when the Judge looks at it, and says, Yes, I should
9 not have dismissed the case that day, we had the
10 witness that they were aware of that they never
11 tried to depose before and they couldn't proceed
12 how they wanted to.

13 THE COURT: Okay. So, Mr. Holtz, let me ask
14 you, was there a request for an evidentiary
15 hearing? Was there a need for an evidentiary
16 hearing?

17 MR. HOLTZ: I think there would have -- Well,
18 Your Honor, the case was dismissed. And I believe
19 there would have -- I mean, there was a need --
20 there would have been a need for an evidentiary
21 hearing or some type of hearing had the Court --
22 well, if the Court was inclined to grant it.

23 THE COURT: Let me just ask you, though, so
24 did you get a copy of the motion to set aside the
25 dismissal for rehearing?

1 MR. HOLTZ: Yes, we did, Your Honor.

2 THE COURT: What did y'all all do as a result
3 of that?

4 MR. HOLTZ: We anticipated the plaintiffs
5 setting it for trial.

6 THE COURT: I appreciate that. I apologize,
7 let me be more specific. Did you file anything
8 with the Court?

9 MR. HOLTZ: No, we did not, Your Honor.

10 THE COURT: Okay. And then you got the ruling
11 from Judge Harrison?

12 MR. HOLTZ: Yes.

13 THE COURT: When did Judge Harrison ruling
14 come out?

15 MR. HOLTZ: That came out June 20th, I
16 believe.

17 THE COURT: June 20th?

18 MR. HOLTZ: Yes, on the motions for rehearing.

19 THE COURT: Okay. And you got Judge
20 Harrison's ruling.

21 MR. HOLTZ: Yes, and we moved for
22 reconsideration of that.

23 THE COURT: Did he rule on your motion for
24 reconsideration?

25 MR. HOLTZ: We don't have an order yet, Your

1 Honor.

2 THE COURT: You don't have an order yet?

3 MR. HOLTZ: No.

4 THE COURT: Have y'all received an order on
5 his motion --

6 MR. NEW: There's no order on that.

7 THE COURT: Okay.

8 MR. HOLTZ: Your Honor, I will say this, we
9 tried on numerous times to have our motion for
10 reconsideration of the motion for rehearing set
11 before Judge Harrison, but we were told by his
12 staff that he had taken a lengthy vacation, and so,
13 you know, we filed that motion, about a month ago
14 and have been trying to the calendar it since but
15 were not able to calendar it.

16 THE COURT: Again, when did you file your
17 motion for reconsideration?

18 MR. HOLTZ: It was June 17th -- July 17th,
19 excuse me.

20 THE COURT: July 17th, but the -- maybe I'm
21 having trouble with my dates here. You got his
22 order that set aside the dismissal on the 20th.
23 That's the date of the order, right?

24 MR. HOLTZ: Yes.

25 THE COURT: When would you have gotten it?

1 MR. HOLTZ: About a week later.

2 THE COURT: So probably about the 27th. So
3 and when did you file your motion for
4 reconsideration?

5 MR. HOLTZ: The 17th, I believe, of July.

6 THE COURT: 17th of July. What's the rule say
7 relative to filing a motion for reconsideration?

8 MR. HOLTZ: I don't believe there is a time
9 period on the motion for the reconsideration. The
10 motion for rehearing does have the ten-day rule.
11 The motion for reconsideration is a separate -- it
12 doesn't travel under the same rule of civil
13 procedure. I believe it's an entirely different
14 motion and so I don't believe it has the same --

15 THE COURT: What rule did you travel under?

16 MR. HOLTZ: Well, our motion for
17 reconsideration -- I'm sorry, I had put it in the
18 notes, here we go. Well, the reason -- okay. Our
19 motion for reconsideration was filed not pursuant
20 to this specific rule of civil procedure, but
21 rather it's cited, Fourth DCA case law, which I
22 have copies, courtesy copies for the Court and for
23 the plaintiff, Auburn V. Arozo 922 sd. 1106, which
24 says that if the Court contemplates granting the
25 motion for a new trial, the Court can satisfy due

1 process by holding a hearing or giving the opposing
2 party an opportunity to be heard through written
3 responses and also cited to local rule Number Six
4 promulgated by 15th Circuit which says with the
5 exception of motions for a new trial or rehearing
6 pursuant to Rule 1.530, which is their motion for
7 rehearing which is brought under Rule 1.530 or
8 similar procedural rule, no petition for rehearing,
9 motion for reconsideration or like pleading shall
10 be set for oral argument except upon court orders.

11 So, specifically, a petition under 1.530 is
12 excluded from the bar on oral argument without
13 leave of court which would indicate that it should
14 be set for an oral argument.

15 THE COURT: So which rule of civil procedure
16 were you traveling under?

17 MR. HOLTZ: One moment, Your Honor.

18 THE COURT: Sure. Is it 1.530 or 1.540, which
19 one?

20 MR. HOLTZ: Your Honor, we were traveling
21 under the Court's inherent authority to always
22 reconsider non-final orders. The motion for
23 rehearing was traveling under 1.530.

24 THE COURT: Okay, but I am talking about
25 yours. You said after you got the ruling from

1 Judge Harrison, that you filed a motion for
2 reconsideration.

3 MR. HOLTZ: Yes.

4 THE COURT: Okay. So you got rules of civil
5 procedure that talk about when you can ask a judge
6 to set aside an order. So I'm just curious which
7 one were you traveling under?

8 MR. HOLTZ: Again, Your Honor, we were relying
9 on the Court's inherent authority to reconsider any
10 non-final order that the Court enters.

11 THE COURT: Okay. So your position today is
12 that you still have a pending order or a pending
13 motion that has not been ruled upon requesting
14 reconsideration of the order by Judge Harrison to
15 vacate the default, correct?

16 MR. HOLTZ: It was an involuntary dismissal.

17 THE COURT: Okay. I'm sorry, vacate the
18 involuntary dismissal. Okay. Very good.

19 All right. Anything else on this?

20 MR. HOLTZ: No, Your Honor.

21 THE COURT: Well, I am going to deny your
22 motion. All right. So any other matters we need
23 to address before the plaintiff puts on their case?

24 MR. HOLTZ: Yes, Your Honor, we have a motion
25 in limine that we filed in this case. I have a

1 courtesy copy for Your Honor, if I may approach.

2 THE COURT: Okay. So when did you file that?

3 MR. HOLTZ: I believe it was filed yesterday,
4 Your Honor.

5 THE COURT: Yesterday. Okay. Is there a
6 pretrial order in this case?

7 MR. HOLTZ: I don't --

8 THE COURT: Is there a pretrial order?

9 MR. NEW: There is an order setting the trial
10 settings for --

11 THE COURT: Can you tell me where that is or
12 what the date of it is?

13 MR. NEW: It's June 20th, Your Honor.

14 THE COURT: June 20th?

15 MR. NEW: Of this year.

16 THE COURT: Hang on just a minute. Unless
17 somebody has a copy of it.

18 MR. WASSERSTEIN: Your Honor, I have a copy.

19 THE COURT: Okay. Thanks.

20 MR. NEW: It's subsection 4, which is at the
21 end of the order, Your Honor, for first motions
22 which require rescheduling or cancellation of
23 trial.

24 THE COURT: Let me just see what the order
25 says.

1 Mr. Holtz, go ahead with your motion.

2 MR. HOLTZ: Thank you, Your Honor. I think I
3 need to begin by informing the Court, as Your Honor
4 is new into the case, that essentially the issue in
5 this motion in limine is the second -- it's the
6 second time we've had to argue the same issues,
7 Your Honor. It's the same exact -- it's
8 essentially the same exact issues that lead the
9 case to be voluntarily dismissed at the last trial
10 setting, which is that in this case plaintiff has
11 failed to abide by the trial order and failed to
12 timely disclose its witness.

13 The trial order cannot be clearer, it says
14 that parties should immediately upon the issuance
15 of the trial order exchange lists with the names
16 and addresses of the witnesses that are potentially
17 going to be called at trial. Again, plaintiff's
18 Counsel failed to do so. They didn't reveal the
19 name of their witness until almost exactly -- until
20 three weeks -- after the trial order was issued.
21 And then, Your Honor, we were only given an
22 opportunity to depose the witness a week before
23 trial.

24 It completely -- we weren't really given an
25 opportunity. We were given a date. We were given

1 a time, one time with one opportunity to conduct a
2 telephonic deposition, which in our -- our position
3 is not -- is equivalent to not giving us any
4 opportunity at all. We were not available for that
5 day. We were not given multiple days in which to
6 choose. There was no coordination of any kind.

7 What we had was one opportunity to take a
8 telephonic deposition immediately by before trial,
9 which essentially affords us no opportunity at all
10 to depose that witness because at that point
11 there's no real benefit to us in terms of being
12 able to produce a useable transcript for
13 impeachment purposes, for gleaning additional
14 information about that witness.

15 And, Your Honor, the problem is this:
16 Plaintiff's counsel is going to argue that by
17 listing a corporate representative, that that is
18 sufficient, and that if they subsequently provide
19 us with the name, no matter how close before the
20 day of trial that is, they have complied with the
21 rules.

22 THE COURT: Let me just stop you for a second
23 so I can hear their side of this.

24 Go ahead. Response?

25 MR. NEW: Can I use the podium, Judge?

1 THE COURT: Sure. Absolutely. Anybody can
2 use the podium.

3 MR. NEW: Judge, I've practiced civil
4 litigation and commercial litigation for 13, 14
5 years. I've taken depositions all over the
6 country. I've taken depositions in Russia. I took
7 a deposition in Little Rock yesterday. If you want
8 a deposition, all you need to do is at any point in
9 the litigation, ask for a deposition. If you want
10 the deposition of a person certain, say I want to
11 take the deposition of this guy, get on the plane
12 and go take the deposition. If you want to take a
13 deposition of a corporate representative, you
14 notice it up, granting is required, and get it
15 done.

16 Case is pending for four years, they never did
17 that. With the prior trial which was set for
18 May 16th, I told you, I put the corporate
19 representative of the servicer, that's sufficient.
20 There's no prejudice there. They knew that the
21 servicer was going bring a witness to testify. It
22 doesn't matter to them who it is. They never
23 wanted to take a deposition before. I was there
24 offering, standing on my head offering the
25 deposition --

1 THE COURT: Let me ask you this, though. So
2 I've got a copy of the trial order and I'm looking
3 at subsection E of the trial order, and it's about
4 half way down it says that the party intending to
5 use an exhibit or witness discovered after
6 Counsel's been heard pursuant to paragraph E shall
7 immediately -- that's not the part I'm looking for.
8 Let me see if it's in here.

9 So the first part of it says -- hang on a
10 minute. Let me back up. I think I missed the
11 point. I guess it's A, it says -- this is on the
12 trial order: "The parties shall immediately
13 exchange lists of all trial exhibits, names and
14 addresses of all trial witnesses and names and
15 addresses of all experts." So at what point did
16 you comply with the trial order and name -- give
17 the name and the address of the trial witness?

18 MR. NEW: July 9th, Judge. This was issued
19 June 20, July 9th I provided the name of the
20 witness.

21 THE COURT: Who did you disclose?

22 MR. NEW: Ms. Kuerzi, who is sitting here.

23 THE COURT: Okay. So in your disclosure you
24 named her specifically?

25 MR. NEW: Named her specifically, provided her

1 address.

2 THE COURT: And when was that?

3 MR. NEW: July 9th, Your Honor.

4 THE COURT: July 9th. Okay.

5 MR. NEW: And I was referencing the corporate
6 representative because that's what I did last time
7 before the May trial. These attorneys objected and
8 Judge Harrison dismissed the case.

9 THE COURT: Let me stop you. I apologize.

10 Mr. Holtz, when did you get notice of the name
11 and the address of the witness for today? Would
12 that have been about that date that he just --

13 MR. HOLTZ: It would have been -- yes, one or
14 two days later.

15 THE COURT: So what did you do in the way of
16 asking for a deposition after you got the notice of
17 who the witness was going to be?

18 MR. HOLTZ: We asked for the deposition.

19 THE COURT: And when was that?

20 MR. HOLTZ: I believe it was July 31st.

21 THE COURT: July 31st. So, for what, 20-some
22 day you -- what were you doing?

23 MR. HOLTZ: Well, Your Honor, we -- first of
24 all, that's not the first time that we had asked
25 for the name of the trial witness and that we

1 had --

2 THE COURT: But you had it the first part of
3 July.

4 MR. HOLTZ: We did, Your Honor, but it had
5 been requested back in April.

6 THE COURT: I appreciate that, but first part
7 of July. So after you got the name of it, of the
8 witness --

9 MR. HOLTZ: We had to conduct -- we had
10 conducted or had to conduct an investigation of our
11 own records, of, you know, searches to determine
12 whether or not we needed to take the deposition of
13 that witness. And also, Your Honor, we needed to
14 obtain the exhibits from plaintiff of what they
15 were going to use at trial for the purposes of, you
16 know, potentially using it at deposition.

17 THE COURT: So let me ask you this: Did you
18 not have an opportunity to issue either a notice or
19 a subpoena, because it's a party with a duces tecum
20 to bring with you the things you are going to be
21 testifying from at the time of the trial, and set
22 that person for a deposition?

23 When was the first time you set them for a
24 deposition?

25 MR. HOLTZ: Well, Your Honor --

1 MR. NEW: This is extremely --

2 THE COURT: Stop, Stop. I am going just to
3 tell you all one more time. There is no double
4 teaming, and there's no whispering in the ear.
5 You're a member of the bar and you will answer the
6 questions if you are going to carry the case. If
7 you're not going to carry the case, you can have a
8 seat, but you can't come up and get help and you
9 can't give help.

10 MR. HOLTZ: I agree, Your Honor. I
11 understand.

12 THE COURT: That's not how it works.

13 MR. HOLTZ: Understood.

14 THE COURT: All right. Thanks very much. So
15 just y'all be aware of that. That's the second
16 time I've told y'all not to do that. The third
17 time somebody does that I will sanction you.

18 MR. HOLTZ: Understood.

19 THE COURT: Okay. Go ahead.

20 MR. HOLTZ: Your Honor, we -- the problem with
21 that is that this is a witness who is in Salt Lake
22 City, Utah. For us to have served a notice of a
23 deposition duces tecum on someone and then have to
24 fly out to Utah only to then have an opportunity to
25 see the exhibits.

1 And, Your Honor, these depositions are highly
2 document intensive because it goes to the -- I
3 mean, the gravamen of the case deals with the
4 authenticity of the note, the ability of the
5 mortgage, the ability of this witness to testify to
6 those things, as well as to adequately testify as
7 to the -- to qualify themselves as another
8 qualified witness for the purposes of laying the
9 business records exception.

10 As such, we need to determine their
11 familiarity during the course of the deposition
12 with the various exhibits that are intended to be
13 used at trial. And so to have to do that on the
14 fly at a deposition in Utah, we believe it is
15 prejudicial and unfair. And so that is why we
16 conducted our discovery in this manner because,
17 again, that's a great expense to our clients.

18 And so as a result we first want to
19 determine -- we simply wanted the name of the
20 individual so that we could determine if a
21 deposition was necessary. Once we did so, we then
22 attempted to coordinate dates as soon as possible,
23 and we tried to be flexible as possible. But the
24 witness was only -- the witness was apparently on
25 vacation and was only available for one particular

1 date at one particular time and only available for
2 a telephonic deposition.

3 THE COURT: Okay. Were you able to take
4 telephonic deposition?

5 MR. HOLTZ: No, Your Honor, because our
6 position is that a telephonic deposition would not
7 serve our client's interest in that at that point
8 we can't see -- we can't -- it's very difficult,
9 it's exceedingly difficult to refer to the number
10 of documents, to the specific places in these long
11 listings of payment histories, et cetera, and to do
12 so over the phone.

13 THE COURT: Okay. All right. Anything else
14 on this?

15 MR. NEW: May I be heard, Your Honor?

16 THE COURT: Sure.

17 MR. NEW: My interruption before, I apologize,
18 was directed at the commentary. But, Judge, if you
19 want to take a deposition, there's no hold up here.
20 We had the name on July 9th. They had the trial
21 exhibits from the prior trial date back in May.
22 They had all the trial exhibits. What are the
23 trial exhibits going to be in a foreclosure case?
24 A dozen things, the payment history, the note, the
25 mortgage, all of these things that they have. They

1 never bothered to take the deposition.

2 We've conferred at our insistence on July 25th
3 to try to get some stipulations. They stipulated
4 to the admissibility of the note and mortgage and
5 that did not turn out. Never asked for a
6 deposition. They e-mailed us at the end of the
7 night on July 31st, which is a Wednesday, saying,
8 please let us know when we can sit your witness
9 down for a deposition.

10 Discovery cut off with the trial order that
11 Your Honor has was August 5th. So with the trial
12 cut off meaning that discovery was to be completed
13 by that date, what they did was they jammed
14 themselves up on purpose asking to agree to five
15 days. I -- and then of course --

16 THE COURT: I need to have you wrap up.

17 MR. NEW: Okay. We provided -- there's no
18 flexibility. We provided them with an opportunity
19 to take the deposition. The response is not I
20 don't want a telephonic deposition. The response
21 was we're too busy to do it. My last response to
22 them was provide some other alternative reasonable
23 possibility. Nothing.

24 THE COURT: Okay. Thank you very much. What
25 I'm going to do is I'm going to deny your motion in

1 limine. Any other matters we need to address,
2 Mr. Holtz?

3 MR. HOLTZ: Yes, Your Honor.

4 THE COURT: Okay. What do you got?

5 MR. HOLTZ: At this time we are filing a
6 formal motion for continuance pursuant to the
7 Florida Rules of Civil Procedure 1.460. It has
8 been verified.

9 THE COURT: Basis?

10 MR. HOLTZ: It's based on due to the untimely
11 disclosure of plaintiff's trial witness, the
12 defendants are seeking a continuance so that the
13 deposition of that trial witness can be taken.

14 Additionally, plaintiff's case was already
15 once involuntarily dismissed due to late
16 disclosures and noncompliance with the trial order.
17 Plaintiff has been unable or unwilling to produce
18 this witness for deposition, and we will be
19 severely prejudice by not having the deposition
20 available to us for use at todays trial.

21 THE COURT: Okay. Response?

22 MR. NEW: Motions to continue are to be heard
23 at the end. Were not to be heard at trial.

24 Section 4 of the courts order -- section 4 of the
25 court's order setting this trial required that the

1 motions to continue to be set at a certain time,
2 which is 10:30 a.m. on Wednesdays and Thursdays.
3 And at the end in bold, underlined, "No such
4 motions will be heard at trial. Noncompliance with
5 any portion will subject the party to sanctions."

6 I just don't get it, Judge. It's the second
7 time I am down here to try this case. I think it
8 should be denied and even sanctions if the Court is
9 inclined.

10 THE COURT: Okay. Thanks very much. All
11 right. I'm going to deny your request for a
12 continuance. Any other matters we need to address?

13 MR. HOLTZ: No, Your Honor.

14 THE COURT: Okay. Thanks very much. All
15 right. Plaintiff, call your first witness.

16 MR. NEW: I'd like to call Linda Kuerzi.

17 MR. HOLTZ: Your Honor, are we not allowed to
18 make opening statements?

19 THE COURT: I don't think I need one. Can I
20 file that in the court file?

21 MR. HOLTZ: Yes.

22 THE COURT: Your motion.

23 MR. HOLTZ: Yes. And, Your Honor,
24 understanding, Your Honor's position, we would like
25 the opportunity to make --

1 THE COURT: Understood, and I've ruled on it.
2 The Court conducts and controls the method, means
3 and manner of the trial. Okay? Thanks.

4 LINDA KUERZI
5 was called as a witness and, having been duly sworn and
6 responding "I do," was examined and testified as
7 follows:

8 THE COURT: Very good. Have a seat. Watch
9 your step there. The steps are down.

10 MR. NEW: Thank you, Your Honor.
11 May it please the Court?

12 THE COURT: Go ahead.

13 DIRECT EXAMINATION

14 BY MR. NEW:

15 Q Are you settled?

16 A I think so.

17 Q Can you please tell us your name.

18 A It's Linda Kuerzi.

19 Q Ms. Kuerzi, where are you employed?

20 A Select Portfolio Servicing.

21 Q Is Select Portfolio Servicing known as SPS?

22 A Yes, they are.

23 Q Okay. What do you do at SPS?

24 A I'm a Florida case manager.

25 Q What does that mean?

1 A I review and research defaulted accounts, prep
2 the files and get them ready for trial.

3 Q What's your involvement in this case?

4 A I have reviewed and researched this file.

5 Q You were asked to appear here, fly out from
6 Salt Lake to be a witness?

7 A To come in from Jacksonville, yes.

8 Q What did you do prepare for the case today?

9 A I reviewed the note, the mortgage, the pay
10 history, compared it to the original documents that came
11 in and also reviewed the notes on the account.

12 Q Okay. Have you and I spoken?

13 A Yes, we have.

14 Q What's the role of SPS on this loan?

15 A They are the servicing agent.

16 Q What's the status of the loan?

17 A It is in default.

18 MR. PRESTIA: Objection, hearsay, lack of
19 foundation.

20 THE COURT: So, your position is hearsay that
21 a statement -- she's offering a statement made by a
22 third party for the truth of the statement that was
23 made, that's your objection?

24 MR. PRESTIA: Correct.

25 THE COURT: At what point has she said that

1 somebody told her something?

2 MR. PRESTIA: She obtained this information
3 from some source. I also said lack of foundation
4 because she failed to identify --

5 THE COURT: I'm not there yet.

6 MR. PRESTIA: Sure.

7 THE COURT: Ma'am, that's the third time. Do
8 not offer -- he's going to make an objection -- if
9 you want to make an objection you may stand up.
10 You will be the one for your side that will make
11 the objection with no help from anyone else --

12 MS. LUNDERGAN: Can I --

13 THE COURT: Stop for a second. If he's going
14 to stand up and make the objection, he is going to
15 make it without any help from anyone else. He's
16 not going ask for help, he's not going to be given
17 any help, and that's to be the same for the
18 plaintiff. Whoever is actually going to be trying
19 the case is the one who is going to be speaking,
20 and no one else is going to be speaking with him or
21 providing him with the information unless I tell
22 them to.

23 MS. LUNDERGAN: Can I clarify, Your Honor?
24 Are we not allowed --

25 THE COURT: Can you what?

1 MS. LUNDERGAN: Can I just clarify something.
2 I just want to make sure I am clear.

3 THE COURT: Sure.

4 MS. LUNDERGAN: We are a trial team. Are we
5 not allowed to confer about anything at all --

6 THE COURT: You are allowed to confer about
7 anything so long as it's not during my discussion
8 with one of the members of your team; is that
9 clear?

10 MS. LUNDERGAN: I'm sorry, when I was
11 whispering, Your Honor, I do need to be able to
12 speak to him as well, so I didn't mean to talk to
13 Ms. Prestia while --

14 THE COURT: Maybe you need to have somebody
15 who is going to be handling the case sit off to the
16 side so the two of you who aren't handling the case
17 can be talking back and forth if that's what y'all
18 want to do. But while I'm having a conversation
19 with a lawyer who is making an objection in the
20 middle of the proceeding, I don't want you talking
21 across me, and I don't want you suggesting answers
22 to my questions to the person who is actually the
23 one conducting the case at that point in time.
24 Okay?

25 MS. LUNDERGAN: Are we allowed to write

1 anything, Your Honor? We usually keep a running
2 note where we confer with notes back and forth.
3 Are we allowed to write to each other?

4 THE COURT: Ma'am, whoever is in charge of
5 that particular part of the case, in this event
6 it's the one who made the objection, I don't want
7 you writing them notes to say here's what to say or
8 here's a new idea for you. If they're going to
9 stand up and make an objection, then they're going
10 to make an objection.

11 MS. LUNDERGAN: I appreciate that.

12 THE COURT: And that's all. It's not the
13 three of you at one time. I don't mind if y'all
14 discuss things while nothing is going on. But if I
15 am asking someone a question and they are the one I
16 am asking, I don't want you to give them the
17 answer, I want them. If they are going to stand up
18 and make the objection, they are going to defend
19 it, and I am going to deal with them. I'm not
20 going to deal with three of you. Okay?

21 MS. LUNDERGAN: I appreciate it, Your Honor.
22 We're used to working as a team, so I appreciate
23 it.

24 THE COURT: Okay. Thanks a lot.

25 So your foundation, what's the basis?

1 MR. PRESTIA: Failed to specify where she
2 obtained this information from or how.

3 THE COURT: Okay. I'm going to give you an
4 opportunity on cross examination. Okay. Go ahead.

5 MR. PRESTIA: May I have an opportunity to
6 voir dire the witness?

7 THE COURT: Not at this time, on cross
8 examination.

9 MR. PRESTIA: Yes, Your Honor.

10 THE COURT: Okay. Go ahead.

11 Q Mr. Kuerzi, you testified that you prepared
12 for today's trial including reviewing your notes and the
13 payment history; is that right?

14 A Yes.

15 Q What's the status of this loan?

16 A After review of the account, it is in default.

17 MR. PRESTIA: I renew my objection, Your
18 Honor.

19 THE COURT: Okay. Let me just tell you, once
20 you've made an objection it's good for the rest of
21 the case. Okay? Thanks.

22 Go ahead.

23 Q When is the loan due for?

24 A April 2009.

25 MR. PRESTIA: Objection, hearsay.

1 THE COURT: Okay. Again, tell me what you
2 think the hearsay objection is.

3 MR. PRESTIA: Well, she's getting this date
4 from some type of document -- facts not in
5 evidence.

6 THE COURT: No, your objection was hearsay, so
7 tell me the basis upon which you think it's
8 hearsay.

9 MR. PRESTIA: Sure. It's a matter of court
10 statement offered to the truth of the matter
11 asserted, Your Honor. She's a --

12 THE COURT: At what point did she testify that
13 somebody told her something?

14 MR. PRESTIA: Well, she's -- she's obtaining
15 this information from some third party source or
16 third party document.

17 THE COURT: That's your assumption. That's
18 your assumption. Okay. So let me just make it
19 clear. If she testifies that somebody told her
20 something, that's a possibility of a hearsay
21 objection, but if she says that the answer to "Is
22 it in default," and that's her answer, that's not a
23 hearsay objection.

24 MR. PRESTIA: Well, specifically, Your
25 Honor --

1 THE COURT: It's overruled. Thank you.

2 Okay. Go ahead.

3 Q Loan is due for April 2009, correct?

4 A That is correct.

5 Q SPS is the current servicer, correct?

6 MR. PRESTIA: Objection, leading.

7 THE COURT: Sustained.

8 Go ahead. Don't lead her. Just ask her a
9 question. Don't suggest an answer to her.

10 Q What role in servicing does SPS have on this
11 loan, if any?

12 A They service the account for DLJ Mortgage.

13 Q What payments has SPS received, if any?

14 A They haven't received any.

15 MR. PRESTIA: Objection, hearsay, lack of
16 foundation.

17 THE COURT: Overruled.

18 Go ahead.

19 Q Have you looked at the note in this case?

20 A I have.

21 Q You looked at the mortgage?

22 A I have.

23 Q In your employment or your responsibilities,
24 tell me what involvement, if any, you have with using
25 any kind of computer system?

1 A We use a mortgage computer system where we can
2 track notes on the account, payments received, advances
3 on the account, and any communication with the customers
4 only.

5 Q Okay. And then can you give me some
6 explanation of the types of information that you
7 yourself have inputted?

8 A After a review, if I have been reviewing, say,
9 the escrow account, for example, and I see --

10 MR. PRESTIA: Object to relevance, Your Honor.

11 THE COURT: Okay. Overruled.

12 A -- and I see their -- the escrow amount, I
13 will document it getting it ready for court because we
14 need those figures.

15 Q Okay. What contact do you have with
16 customers, if any?

17 A I do have contact with customers sometimes in
18 regards to getting consent judgments, you know, giving
19 them like 120 days to resolve the default.

20 Q Okay. And then -- and with you inputting
21 notes into the computer system, what ability do you
22 have, if any, to review notes on loans inputted by
23 others?

24 MR. PRESTIA: Objection, leading.

25 THE COURT: Okay. Overruled.

1 A I can review all notes that anyone from SPS
2 puts on the account.

3 Q Do you know whether SPS maintains an escrow
4 account on this loan?

5 MR. PRESTIA: Objection, leading.

6 THE COURT: Overruled.

7 A Yes.

8 Q Tell me little a bit more about the business
9 of SPS. I know they serviced this loan, but can you
10 otherwise explain the business practice or the -- the
11 business of SPS?

12 MR. PRESTIA: Objection, vague.

13 THE COURT: Okay. Overruled.

14 A We service a variety of different loans. We
15 do not originate loans. We service for different
16 owners.

17 Q What servicing, if any, does SPS do of loans
18 that were originated by a prior servicer?

19 MR. PRESTIA: Objection, leading.

20 THE COURT: Overruled.

21 A We do thousands.

22 Q What amount of loans would you say SPS
23 originates, if you could?

24 MR. PRESTIA: Objection, leading, relevance,
25 hearsay.

1 THE COURT: Overruled.

2 A Hundreds of thousands.

3 Q That SPS originates or SPS services?

4 A Services.

5 Q How about the origination portion?

6 A We don't originate at all.

7 Q Have you ever seen a -- would it be accurate
8 that SPS services -- well, let me ask you this: Give me
9 some information about the types of loans or portfolios
10 that SPS services, if you can, if that makes sense to?

11 MR. PRESTIA: Object to relevance, vague.

12 THE COURT: Overruled.

13 A The majority of our loans are all delinquent
14 accounts.

15 Q How about loans that securitized? Are you
16 familiar if whether SPS services loans that are
17 securitized?

18 MR. PRESTIA: Same objection, relevance,
19 vague.

20 A They are.

21 THE COURT: Okay. Overruled.

22 Go ahead.

23 A They are.

24 Q How about do you know what a whole loan is?

25 MR. PRESTIA: Objection, relevance.

1 THE COURT: Overruled.

2 A Yes.

3 Q Are you familiar with whether SPS services any
4 whole loans?

5 A I believe they do, yes.

6 Q Have you seen, does -- what servicing, if any,
7 does SPS do for DLJ Mortgage?

8 A They do the majority of the servicing for
9 them.

10 MR. PRESTIA: Object to the relevance, Your
11 Honor, not a party to this action.

12 THE COURT: Okay. Thanks. Overruled.

13 Q What role does SPS have with this particular
14 loan -- what role does DLJ have in this particular loan?

15 A They are actually the owner of the note.

16 MR. PRESTIA: Object to hearsay and improper
17 foundation.

18 THE COURT: Okay.

19 MR. PRESTIA: May I voir dire the witness?

20 THE COURT: No, you may not. Overruled.

21 Thanks.

22 MR. NEW: Your Honor, I've got a notebook of
23 exhibits, and what I'd like to do is have a
24 notebook with the witness, if I may approach, and
25 I've got one for Your Honor and one for the

1 defendants?

2 THE COURT: You have one for the defendants?

3 Okay.

4 MR. PRESTIA: Your Honor, I object to any
5 notebook being given to the witness. We can --
6 once a document has been entered into evidence or
7 they anticipate that they are attempting to, I
8 would ask at that point the witness be shown
9 document by document so that we could maintain all
10 objections to any pieces of documents prior to the
11 witness seeing them. Additionally, Your Honor, it
12 looks as if the packet provided to the witness is
13 substantially thicker than the one I was provided,
14 and I would like to take a look at it.

15 THE COURT: Sure. Take a look at it. Go
16 ahead. You can approach.

17 MR. NEW: Your Honor, did you want a copy of
18 the notebook?

19 THE COURT: Sure. Thanks.

20 MR. NEW: I'll tell you what I've got is the
21 final judgment is included in the witness's
22 notebook, which I got copies for Counsel in the
23 court when I get to that point, and then I've got
24 two documents that have redacted schedules that
25 I've got a redacted version in the notebook for the

1 Court and for Counsel. I have the complete one in
2 my notebook in the event that the Court wants the
3 unredacted version.

4 MR. PRESTIA: First -- I thought we would take
5 a brief recess so I can look at this, but as it
6 pertains to the Final Judgment and the witness
7 viewing it, I believe that it is -- first off,
8 that's highly prejudicial. Second off, that
9 document was made by these attorneys in
10 anticipation for litigation. It is not a piece
11 of -- it is not a document that can be offered into
12 evidence, and as such the case law is pretty clear,
13 the witness is not allowed to view any documents
14 that are not going to be entered into evidence. As
15 such, I would strenuously object to a Final
16 Judgment being shown to the witness at this point.

17 THE COURT: Okay. Overruled.

18 At this point I want you to take a look at the
19 binder and tell me what things are in it that
20 aren't in yours.

21 MR. PRESTIA: Yes, Your Honor. I was doing
22 that, but there was argument being made without my
23 presence.

24 THE COURT: Okay. Go ahead.

25 MR. NEW: Those are my attorney notes --

1 Judge, I've got a tab -- if I get there, I will
2 pull the tab off --

3 MR. PRESTIA: Absolutely not.

4 MR. NEW: Let me do this, Judge. I'm not
5 interrupting Counsel, but what I'd like to do is
6 let me take the notebook back and I'll just spoon
7 feed the --

8 MR. PRESTIA: I need this marked for the
9 record, Your Honor. Specifically, I would like to
10 make a record of this, Your Honor. The tab that --
11 the binder that was handed to the witness,
12 specifically as it pertains to tab Number Eight has
13 attorney notes written on there with the amounts
14 due. For the record it says, "Due - \$13,083.41
15 underlined, four payments at \$3,152.63 =
16 \$12,610.52, 5% late fees for late payments, 3 =
17 \$472.89, for a total of \$13,038.41," which is
18 purportedly is the amount in the default letter as
19 that is what it is stuck to.

20 THE COURT: Okay. Thanks.

21 MR. PRESTIA: So at this point the attorney
22 has been clearly --

23 THE COURT: Thanks a lot. Okay. Let me see
24 the book.

25 MR. PRESTIA: May I have this marked for an

1 exhibit, please?

2 THE COURT: Put it right back in the notebook.

3 MR. NEW: It's my notebook, Judge, and I --

4 THE COURT: Everybody calm down. Put it back
5 in the notebook. Let me see the book. Thank you
6 very much.

7 MR. PRESTIA: I didn't get through the whole
8 thing, Your Honor. I just saw that one and I still
9 need to address other issues.

10 THE COURT: So what else is in here that is
11 not in the one that I have and the one that the
12 defense has? What else is in this particular one?

13 MR. PRESTIA: I didn't get through whole
14 thing, Your Honor .

15 THE COURT: Well, that's okay. I'm asking the
16 plaintiff.

17 MR. NEW: Your Honor, I recall it was the
18 redacted -- I have the redacted version of a
19 schedule within the unredacted version. I did not
20 notice that I have my post-it note that I have
21 never -- I didn't show it to the woman.

22 THE COURT: Okay.

23 MR. NEW: And I have taken out the exhibit
24 lists and the witness lists, but I can take the
25 thing back and just give it to her one at a time.

1 MR. PRESTIA: Let the record reflect that it
2 was on the witness stand and presented to the
3 witness.

4 MR. NEW: That's not right.

5 THE COURT: No, that's not quite correct. The
6 document wasn't presented to the witness. The book
7 was and it was in the book.

8 MR. PRESTIA: Your Honor, may I finish looking
9 through it?

10 THE COURT: No, that's the one -- stop
11 everybody. The one that I just handed to the
12 plaintiff is the one that he handed to me. That's
13 the one that you will give to the witness. That's
14 the one you will use. Now, take a look at that one
15 and compare it to the one that defense has and see
16 if they are the same.

17 MR. NEW: And then that larger notebook, may I
18 take back and then --

19 THE COURT: Yes, you can have this one back.

20 MR. PRESTIA: Your Honor, I'd like that marked
21 as an identification for the appellate record as --

22 THE COURT: You have already read it into the
23 record what it was.

24 MR. PRESTIA: I would like that to be --

25 THE COURT: Denied. Thank you.

1 MR. PRESTIA: Admitted into evidence for the
2 record.

3 THE COURT: Thank you. You have already read
4 it into record. You made a good record.

5 MR. PRESTIA: I would like to finish reviewing
6 what was presented to the witness already once in
7 this matter, Your Honor.

8 THE COURT: Denied, she didn't open it.

9 MR. PRESTIA: It was open on the stand, Your
10 Honor.

11 THE COURT: Let me tell you, I'm going to tell
12 you one time. When I --

13 MR. PRESTIA: I understand. Go ahead.

14 THE COURT: You make one more body movement at
15 me and some other facial expression that you don't
16 like something I've done in my courtroom, the next
17 thing that will happen in this courtroom will be a
18 direct criminal contempt hearing that I will stop
19 what I am doing, and I will start it. Now, I don't
20 know where you've been before, but we're all going
21 to behave in this room like we're professionals.

22 You're not going to like some of my rulings.
23 You're going to like some of them and that's how
24 it's going to go. But after I rule on something,
25 the first thing you'll do is you will stop arguing.

1 And the second thing you will do is, if you get a
2 ruling from me you don't like, you will not have
3 hand gestures and you will not have face gestures
4 towards me, or I will stop this and what we will
5 do, I will have a direct criminal contempt hearing.
6 So tell me you understand.

7 MR. PRESTIA: Your Honor, I apologize. I did
8 not mean any disrespect.

9 THE COURT: And I don't mean any disrespect
10 either.

11 MR. PRESTIA: I will not make any gestures.

12 THE COURT: I just want to be sure everybody
13 is going to go by the exact same rules. Okay? So
14 everybody calm down.

15 MR. PRESTIA: Your Honor, I apologize. I was
16 trying --

17 THE COURT: I appreciate that. So do I. Just
18 don't do it again.

19 MR. PRESTIA: May I have the opportunity to
20 review the binder?

21 THE COURT: Take a look at the binder. I will
22 give you a couple of extra minutes to take a look
23 at it.

24 (Counsel is reviewing the binder.)

25 Okay. Does it look pretty much the same?

1 MR. PRESTIA: It looks pretty much the same as
2 the one that I was provided. However, the one that
3 was previously presented to the witness did look
4 substantially different.

5 THE COURT: I know. And what we are going to
6 do is, we are going to use the one in your hand and
7 give that to the witness.

8 MR. PRESTIA: For the record, I would object
9 to this, as well.

10 THE COURT: Okay.

11 MR. NEW: Your Honor, may I approach and look
12 over the witness's shoulder.

13 THE COURT: Yes, you may. Go ahead.

14 MR. NEW: I've got marked as Tab One --

15 MR. PRESTIA: Your Honor, may I position
16 myself to see what they -- what he's going to be
17 pointing at?

18 THE COURT: If you're going to point to
19 various parts of it, I am going to let him stand up
20 there. Go ahead.

21 MR. NEW: I will come back.

22 Q I want you to identify the exhibits,
23 Ms. Kuerzi. Tab One, have you seen Tab One, the
24 document behind Tab One?

25 A I have.

1 Q What is that? I just want you to identify it.

2 A It's a Limited Power of Attorney.

3 Q From DLJ to SPS?

4 MR. PRESTIA: Objection, leading.

5 THE COURT: Okay. Yes. Sustained. Don't
6 suggest an answer.

7 MR. NEW: Just for foundational --

8 THE COURT: For any reason. Just ask her and
9 she will tell you.

10 MR. NEW: And for something -- okay.

11 Q Who are the parties to the Power of Attorney?

12 A It's DLJ Mortgage to Select Portfolio
13 Servicing.

14 MR. PRESTIA: Object, witness is -- she's
15 reading facts -- facts not in evidence. This
16 document has not yet been presented into evidence.

17 THE COURT: Okay. Overruled. I'm going to
18 give you a chance on cross examination.

19 MR. PRESTIA: Sure.

20 THE COURT: Go ahead.

21 Q If you turn to Tab Two, is there a document
22 behind Tab Two?

23 A Yes, there is.

24 Q What do you recognize that to be?

25 A It is a Limited Power of Attorney.

1 Q Behind Tab Three is there a document?

2 A It is a copy of the note.

3 Q Okay. You seen that before?

4 A Yes, I have.

5 Q The two Powers of Attorney and the note, are
6 those documents reviewed prior today?

7 A They are.

8 Q What is behind Tab Four?

9 A That is a copy of the mortgage.

10 Q Have you seen one that before?

11 A I have.

12 Q Is that something you've reviewed prior to
13 today's trial?

14 A Yes.

15 Q What is the document behind Tab Five?

16 A It is the Corporate Assignment of Mortgage.

17 Q Have you seen that before?

18 A Yes, I have.

19 Q Tab Six, have you seen document behind Tab Six
20 before?

21 A Yes, I have. It's the purchase price and
22 terms letter.

23 Q Between whom?

24 A Fifth Third Bank and DLJ.

25 MR. PRESTIA: Objection, hearsay, facts not in

1 evidence.

2 THE COURT: Okay. Overruled. Go ahead.

3 Q Tab Seven, what document is behind Tab Seven?

4 A That is the Hello Letter.

5 Q What is a Hello -- not talking about this
6 document, but what is a Hello Letter?

7 A It is a letter introducing the borrowers to
8 their servicing company.

9 Q Who is servicing company?

10 A Which would be SPS, Select Portfolio.

11 Q Explain to me the process whereby SPS would
12 send a borrower a Hello Letter?

13 A Once we have --

14 MR. PRESTIA: I object to the foundation and
15 hearsay.

16 THE COURT: Okay. Overruled.

17 A Once we board loans it's like a welcome letter
18 to advise the customer who we are, where to send
19 payments, telephone numbers to call customer service if
20 they have questions or concerns.

21 Q You mentioned boarding loans. What do you
22 mean by boarding loans?

23 A Well, because we service loans, we have to
24 board them into our system from other companies.

25 Q Can you give me little bit more detail?

1 A Sure. When we board -- excuse me, I'm sorry.
2 When we board accounts into the SPS system, we have to
3 take and verify, you know, the information that we're
4 being provided is accurate. You know, it's hard -- the
5 paper product versus an electronical product, we make
6 sure it matches, we add it to our pay system and it
7 becomes part of our business records.

8 Q Okay. Tab Eight, do you see a document behind
9 Tab Eight?

10 A Yes. It is a default letter from Fifth Third
11 Bank.

12 Q Tab Nine?

13 MR. PRESTIA: I would object -- I'm sorry. I
14 object to facts not in evidence and hearsay.

15 THE COURT: Overruled.

16 Q Tab Nine, do you see a document behind Tab
17 Nine?

18 A Yes, this is a pay history from Select
19 Portfolio.

20 Q If you look at the last two or -- the last
21 three pages of the document, if you -- this is a
22 composite, so if you exclude those three documents
23 explain to me what pay history it -- what is it that we
24 are looking at?

25 A This is payments received or advances that

1 have been done on the account. Any expenses that we've
2 had to pay in advance on the account to service the
3 account.

4 Q And how does this relate, if anything, to this
5 particular loan?

6 A We have advanced --

7 MR. PRESTIA: Your Honor, I would object at
8 this point as it's hearsay and facts not in
9 evidence.

10 THE COURT: Overruled. Go ahead.

11 A The payment history is showing escrow advances
12 on this account for homeowners insurance and taxes.

13 MR. PRESTIA: Your Honor, I would have to
14 object. She's now testifying from a document
15 that's not in evidence.

16 THE COURT: Sustained on that basis.

17 MR. PRESTIA: Your Honor, I move to strike her
18 testimony.

19 THE COURT: Okay. Well, at this point, I am
20 going to -- you can't testify from a document that
21 is not in evidence, so I sustained your objection.

22 Q My question was directed more at whether this
23 is an SPS payment history.

24 A Yes, it is.

25 Q The last three pages -- and this contains

1 information created -- what information created by SPS
2 is reflected in this document, if anything?

3 MR. PRESTIA: Again Your Honor, the same
4 objection. She's going to be testifying to
5 something -- the question calls for the witness to
6 testify to information that is within the document
7 and the document is not yet in evidence.

8 THE COURT: In this particular instance I am
9 going to overrule the objection because the
10 question has to do with what information from SPS
11 is it that's in that document. You don't have to
12 tell me what it is, just tell me the general nature
13 of what it does.

14 A It is showing us activity on the customer's
15 account.

16 THE COURT: Okay. Go ahead.

17 Q What I am driving at, Ms. Kuerzi, who created
18 this document or what -- what entity created this
19 document?

20 A It was -- it's part of our business records.

21 Q What involvement did SPS have, if any, in
22 creating this SPS payment history?

23 A It is -- the mortgage -- the SPS system where
24 we can review, we can physically view a computer screen
25 and see this actual on the system.

1 MR. PRESTIA: Your Honor, I would object as it
2 is now a summary as it pertains to -- and I believe
3 in our motion in limine, it wasn't addressed
4 verbally, however, it was a written motion
5 specifically, Your Honor, as it pertains to Section
6 V, plaintiff must be precluded from presenting any
7 summaries as evidence. Documents that are mere
8 summaries that plaintiff will likely attempt to
9 introduce are loan histories, default logs and
10 payment histories. All of these documents are
11 summaries of more complete and comprehensive
12 documents and computer data, and the plaintiff was
13 required to comply with Florida Statute 90.956,
14 which requires that the plaintiff must make the
15 summary and the original or duplicates of the data
16 from which the summary is compiled available for
17 examination or compliant or both.

18 As such, Your Honor, we would ask that this
19 particular computer data that she is talking about
20 as she has testified that there are notes, there
21 are -- hold on one second.

22 THE COURT: Okay.

23 MR. PRESTIA: One second, Your Honor.

24 -- notes, advances. There is all different
25 types of information that are inputted, and now we

1 have here three pages selected by the plaintiff for
2 introduction, I assume, into evidence. And Your
3 Honor this is a mere -- it looks like a screen shot
4 of a potential summary of the plaintiff's computer
5 system. So therefore pursuant to 90.956, we would
6 ask this be excluded.

7 THE COURT: Okay. Response?

8 MR. NEW: It's actually not a summary, Judge.
9 If you look at what I'm showing the witness is 15
10 or 20 pages, it's the entire account history. If
11 you look at it, it's a customer account activity
12 statement that has all of the entries for every
13 month while the loan has been serviced by SPS.
14 It's two years of history. It's not a summary.

15 THE COURT: Let me take a look at it.

16 MR. NEW: Sure. A copy?

17 THE COURT: Yes, I would like to have a copy
18 to look at.

19 MR. PRESTIA: Your Honor, I appreciate
20 opposing Counsel's argument, however, the witness
21 herself testified that it was a summary, so
22 therefore opposing's Counsel's argument is not
23 evidence. What is evidence is what the witness is
24 saying.

25 THE COURT: Okay. Well, let me get a look at

1 it. Thanks.

2 MR. PRESTIA: Your Honor --

3 MR. NEW: Can I show this to the Judge? I
4 showed it to you. I'm going to show it to the
5 Judge. May I approach, Your Honor?

6 THE COURT: Sure. Come on.

7 MR. PRESTIA: After your review, Your Honor, I
8 would like to make an argument.

9 THE COURT: Okay. Thanks a lot.

10 MR. NEW: Your Honor, may I conclude my
11 argument or did you need argument?

12 THE COURT: Yeah, go ahead.

13 MR. NEW: Judge, what you're looking at is
14 clearly not a summary, it's the entire account
15 history of the -- the account history of this loan.
16 So you got the two year time period or close to two
17 years of time period with all of the individual
18 entries. As Your Honor knows, the summary, what
19 really works with summary is if you got some type
20 of voluminous, thousands of thousands of pages of
21 either computer data or what have you that is
22 distilled down. That's not what you got here.
23 Now, the last three pages that they focused on are
24 the three pages that I excluded from her -- from
25 the question where I was eliciting testimony.

1 Those are three pages that are not the subject of
2 what I was attempting to elicit testimony from.

3 THE COURT: Okay. Anything else on this?

4 MR. PRESTIA: Yes, Your Honor. Pursuant to
5 90.956, the witness has to either be the one who
6 made these summaries or be intimately involved with
7 its creation. The rules specifically states that
8 it needs to be a qualified witness to testify how
9 it was made and/or prepared.

10 Your Honor, specifically as it pertains to
11 these documents, these are, as she stated in her
12 own testimony on the stand under oath, summaries of
13 what she views in the court -- I'm sorry, in the
14 computer system. That encompasses both the first
15 16 pages that are numbered consecutively, then if
16 Your Honor flips to the fifth -- fifth to last
17 page, Your Honor, if you look at the top right, it
18 says page 34,989, and you go to the next page it is
19 34,988. And then there is three pages that follow
20 that of it looks like screen shots of some other
21 payment summary that they have somewhere within
22 their computer system.

23 So as it pertains to this, Your Honor, we're
24 entitled to view the rest of the 35,000, presuming
25 that this document that they presented to us today,

1 page 34,989 is the last page of this summary or
2 whatever the documents that they're relying on,
3 we're entitled to not only see these two selected
4 pages but the rest of the 34,900 and some-odd
5 pages. So pursuant to 90.956, Your Honor, we would
6 ask that these be excluded.

7 THE COURT: Tell me again, what statutory
8 section are you under?

9 MR. PRESTIA: 90.956. Okay. I have a copy
10 for Your Honor, if you would like.

11 THE COURT: No, I think I have it right here.

12 MR. PRESTIA: Okay.

13 THE COURT: So on summaries?

14 MR. PRESTIA: Yes, Your Honor.

15 THE COURT: All right. Well, what I am going
16 to do is, is that I am going to deny your motion.
17 I am going to deny it under section of Florida
18 Statute 90.803(6). This is Professor Earnhardt on
19 evidence: Business record under Section 90.803(6)
20 may take many forms. The record maybe a
21 memorandum, a report or a record of any type which
22 is a regularly kept business record. Section
23 90.803(6) also provides that data compilation may
24 qualify under any exception. A printout of records
25 ordinarily kept in a computer would qualify under

1 this section, Southern Jackson versus State, 877,
2 72d. 816, Florida Fourth DCA, 2004, as well as U.S.
3 versus Fuji, 301 Federal 3d. 535. So I am denying
4 your motion. Go okay.

5 Q Ms. Kuerzi, behind Tab Ten, what do you see?

6 A It is a copy from a printout on our computer
7 system of our paid three screen.

8 MR. PRESTIA: Your Honor, I would make the
9 same objection as it pertains 90.956 as it is a
10 summary. Witness just testified that it was --

11 THE COURT: Understood. Same objection, same
12 ruling.

13 Q Behind the pay three screen is what?

14 A I have -- excuse me. A screen called the pay
15 four screen which outlines principal balances, interest,
16 any fees owing on the account.

17 Q And what I am interested in having you testify
18 to at this point, Ms. Kuerzi, is tell us what is the pay
19 three screen and what is the pay four screen?

20 A They kind of give us a breakdown. The pay
21 three screen kind of identifies who the investor is of
22 that particular loan.

23 Q Well, what do you mean by "investor"?

24 A That would be who actually owns the note at
25 the time.

1 MR. PRESTIA: I would object to hearsay,
2 improper foundation, and testifying to documents
3 that are not in evidence yet.

4 THE COURT: Okay. Overruled.

5 Q To reemphasize, Ms. Kuerzi, I don't need you
6 to talk about what's in the documents, I want you to
7 just tell us what they are. So the pay three screen you
8 advised -- pay four, without telling us anything with
9 regard to this particular loan, what is the document?
10 What kind of information is in there?

11 A Well, it shows us principal balance. It shows
12 us interest, if it's current, late or how much it is, if
13 they the account is delinquent. It shows the exact
14 amount of late fees that accrued on the account,
15 advances, any inspections. It shows us the total amount
16 due on the account?

17 MR. PRESTIA: I will renew my same objection,
18 Your Honor.

19 THE COURT: Okay. Same ruling.

20 Q What familiarity do you have, if anything,
21 with using or relying on or utilizing the pay three
22 screen and the pay four screens in your practice?

23 A We utilize it quite frequently.

24 Q How about you individually?

25 A Yes, I do.

1 Q The payment history we looked at behind Tab
2 Nine, what familiarity do you have in your job in
3 utilizing a payment history?

4 A We use it daily. It is probably used a
5 hundred percent to determine the status of all accounts
6 that have.

7 MR. PRESTIA: Objection, hearsay.

8 THE COURT: Okay. Overruled. Go ahead.

9 Q And you individually, you've got experience
10 doing that?

11 MR. PRESTIA: Objection, leading.

12 A Yes, I do.

13 THE COURT: Don't lead her, ask her.

14 Q Okay. The documents we looked at in this
15 notebook, the pay three screen, the pay four screen, the
16 payment history, what documents -- which of these
17 documents, if any, did you review in anticipation for
18 today?

19 A I reviewed all of them.

20 Q If you mentioned DLJ Mortgage -- DLJ Mortgage,
21 what is the relationship, if any, between DLJ Mortgage
22 and SPS?

23 MR. PRESTIA: Objection, improper foundation.

24 She is not a representative of DLJ, as such, and
25 DLJ is not a party to this action, as such,

1 relevance and improper foundation.

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

4 A We are the servicer for DLJ.

5 Q SPS is the servicer for DLJ -- what servicing,
6 if any, does SPS do for DLJ with regard to this loan?

7 MR. PRESTIA: Leading, relevance, improper
8 foundation.

9 THE COURT: Go ahead. All right. Overruled.
10 Go ahead.

11 A They service it a hundred percent.

12 Q And then other than this loan, what servicing,
13 if any, does SPS provide to DLJ on other loans?

14 MR. PRESTIA: Objection, relevance.

15 THE COURT: Overruled.

16 A They do the exact same thing on all of DLJ
17 loans.

18 Q What knowledge do you have, if any, of the
19 acquisition by DLJ of loans originated by Fifth Third
20 Mortgage?

21 MR. PRESTIA: Your Honor, I am going to
22 object. Objection at this time. First off,
23 improper foundation. She's not a party -- she's
24 not a representative of either of those companies,
25 she's a representative of SPS. At this time I

1 would --

2 THE COURT: Okay. Overruled. Go ahead, if
3 you know.

4 A I know that DLJ -- Fifth Third sold this
5 particular account to DLJ.

6 MR. PRESTIA: And I would object to hearsay,
7 best evidence rule, and again improper foundation.

8 THE COURT: Okay. Overruled. Go ahead.

9 Q You had answered, right?

10 A Yes.

11 THE COURT: I think the objection was to her
12 answer.

13 MR. NEW: Okay.

14 THE COURT: It was an opinion question, so ...
15 Go ahead.

16 Q The boarding process. You had mentioned the
17 boarding process. Explain to me in detail what
18 knowledge, if any, you have of the boarding process?

19 MR. PRESTIA: Objection, asked and answered.
20 Went through this.

21 THE COURT: Overruled. Go ahead.

22 A I'm not in that department, but I know the
23 general concept of the boarding, you know, what we take,
24 the business records of whoever we're doing the
25 servicing for, and we board them into our system, we

1 verify them, we do audits, our due diligence to ensure
2 that what we're bringing on to our platform is accurate
3 information.

4 Q What knowledge do you have, if any, of the
5 used by SPS of records created by a prior servicer?

6 MR. PRESTIA: I would object, relevance,
7 improper foundation, the is outside this witness'
8 knowledge, she's not part of any other entity.

9 THE COURT: Okay. Overruled. Go ahead, if
10 you know.

11 A Well, we rely very heavily on the owners and
12 prior servicers' records to -- for accuracy to make sure
13 that we're boarding and we're -- that these accounts are
14 in the status that they should be based on the records
15 that we are provided and brought in to make them our
16 business records.

17 Q And you individually explained to me what
18 experience you have, if any, in utilizing or reviewing
19 records created by a prior servicer?

20 MR. PRESTIA: Objection, relevance and
21 improper foundation.

22 THE COURT: Okay. Overruled. Go ahead.

23 A I have to rely on those records. Like in this
24 particular case, I have to go back and review those
25 records. I have to rely on those records. I have to

1 know where this loan came from, who originated this
2 loan, you know, so I can make sure I am providing
3 accurate information to the Court on a foreclosure.

4 Q On payment history, what review, if any, would
5 you do of a payment history of a prior servicer?

6 MR. PRESTIA: I would again object to the
7 relevance and foundation.

8 THE COURT: Okay. Overruled. Go ahead.

9 A We would -- we would review it to look for the
10 actual default date, the last date a payment's made.

11 Q On UPB and the unpaid interest of charges on
12 the loans, what review, if any, would you make of a
13 record of a prior servicer with regard to those amounts?

14 MR. PRESTIA: Objection, leading.

15 THE COURT: Okay. Overruled.

16 MR. PRESTIA: And hearsay. I'm sorry.

17 THE COURT: Okay.

18 A We would rely on those records and just
19 confirm that all payments do match interest, the unpaid
20 principal balance, escrow that were paid out and that's
21 what we use, you know, to board into our system.

22 Q In this case, let me ask you what you did
23 individually to review any of the information of the
24 prior servicer?

25 A I review --

1 MR. PRESTIA: Objection, relevance,
2 foundation.

3 THE COURT: Okay. Overruled. Go ahead.

4 A I reviewed the prior servicer's pay histories.

5 Q Okay. How about any correspondence from the
6 prior servicer?

7 A All docs concerning the predecessor are
8 reviewed because, you know, I had to make sure that my
9 information that I was supplying was accurate.

10 Q What independent verification of the default
11 date did you make, if anything.

12 MR. PRESTIA: Objection, leading and hearsay.

13 THE COURT: Overruled.

14 A I made sure it compared, that it showed the
15 right due date which was shown in our system.

16 Q The amount demanded in the due date, what
17 evaluation, if any, did you do of that number?

18 MR. PRESTIA: Same objection.

19 THE COURT: Okay. Same ruling. Go ahead.

20 A The total amount due in the demand letter I
21 had to verify the months that were due and also add in
22 the late fees.

23 Q Okay. But what did you personally do to check
24 those numbers?

25 A I verified it on the prior servicer's pay

1 history.

2 Q What did SPS do, if anything, to incorporate
3 the records of Fifth Third Bank into SPS' records?

4 MR. PRESTIA: Objection to hearsay and
5 foundation.

6 THE COURT: Okay. Overruled. Go ahead.

7 A We do the same thing, it's all due diligence.

8 Q So what incorporation did you do -- did SPS do
9 to incorporate the records of this prior servicer in
10 this case into SPS' records?

11 MR. PRESTIA: Asked and answered, Your Honor.

12 THE COURT: Overruled. You can answer if you
13 can.

14 A We compared the records and we boarded the
15 amounts in escrow, principal balance that was showing on
16 the records of Fifth Third.

17 Q Did you look at the default notice in this
18 case?

19 A Yes, I did.

20 Q Did you -- what investigation did you do to
21 confirm the default date that was communicated in the
22 letter?

23 A I looked at the prior payment history.

24 MR. PRESTIA: Hearsay, foundation.

25 THE COURT: Overruled. Go ahead.

1 MR. NEW: Were you finished with your answer?

2 WITNESS: Yes.

3 Q Is SPS storing that record?

4 A Yes.

5 Q Is that the practice of SPS? What's the
6 practice of SPS, if any, to store records it receives
7 from a prior servicer?

8 A We keep them electronically.

9 Q When SPS boards a loan, if the default notice
10 is not provided to SPS, what would SPS do, if anything?

11 MR. PRESTIA: Objection, relevance.

12 THE COURT: Okay. Overruled. Go ahead.

13 A We would go back to the prior and try to
14 locate that letter.

15 Q What if in that event it couldn't be located?

16 A Then we would have to send to the demand
17 letter ourselves.

18 Q Was that done in this case, a default letter
19 sent by SPS?

20 A No.

21 MR. PRESTIA: Objection, hearsay.

22 THE COURT: Overruled.

23 Q Why not?

24 A Because one was a sent by the Fifth Third
25 Bank.

1 MR. PRESTIA: Objection, foundation. Now
2 she's -- foundation and hearsay, Your Honor.

3 THE COURT: Okay. Overruled.

4 Q Payment history. You talked about your review
5 or analysis of the payment history. Do you personally
6 input any entries on that payment history?

7 A Not on this particular account, no.

8 Q What knowledge do you have, if any, of any of
9 the individuals or departments that have any involvement
10 in creating entries for the payment history?

11 MR. PRESTIA: Objection, relevance,
12 foundation.

13 THE COURT: Overruled.

14 A Our escrow department when they advanced for
15 hazard insurance and for taxes, they had to advance that
16 were due.

17 Q And then -- but my question is a little bit
18 more general. Without regard to this particular loan,
19 what knowledge do you have of the escrow department that
20 SPS has in general. Do you know if they have one or
21 where the people sit?

22 MR. PRESTIA: Objection, relevance, foundation
23 and hearsay.

24 THE COURT: Okay. Overruled. Go ahead.

25 A In general, I know we have an escrow

1 department which has several other departments for taxes
2 and insurance, but that's about -- you know, I don't
3 know one individual per se in that department.

4 Q What personal role did you have, if any, in
5 advancing any escrows on this loan?

6 A I did not have any.

7 MR. PRESTIA: Objection, hearsay.

8 THE COURT: Okay. Overruled.

9 Q The payment history, escrow is just one
10 component. The cashiering department, does SPS have a
11 cashiering department?

12 MR. PRESTIA: Objection, leading.

13 THE COURT: Okay. Sustained. Go ahead and
14 ask her another way. Don't suggest the answer to
15 her.

16 Q What kind of cashiering department does SPS
17 have, if any?

18 MR. PRESTIA: Same objection, Your Honor,
19 leading.

20 THE COURT: When he says "if any," it doesn't
21 suggest whether they even have one.

22 A We have a cashiering department that takes in
23 payments from our customers.

24 Q What knowledge, if any, do you have of that
25 group?

1 A Just a general knowledge.

2 Q Do you personally create any of the entires on
3 that payment history?

4 A No, I do not.

5 Q How is the payment history maintained, if at
6 all?

7 A It is maintained by our cashiering department.

8 Q Can you tell me whether its the normal course
9 of business of SPS to maintain and store the payment
10 history?

11 MR. PRESTIA: Objection, leading.

12 THE COURT: Okay. Overruled.

13 A Yes, it is.

14 Q Can you tell me whether the people who input
15 the entries on the payment history have any personal
16 knowledge?

17 MR. PRESTIA: Objection, hearsay, improper
18 foundation, leading, relevance.

19 THE COURT: Okay. Just help me a little bit.
20 Tell me what you think the basis of the statement
21 is that is hearsay?

22 MR. PRESTIA: This knowledge is coming from
23 some source that he -- the question posed was what
24 do these individuals in this department or how do
25 they input that information. She testified that

1 she's not a person that is in charge of that
2 department or any part nor has any involvement with
3 that department at all. So any knowledge or
4 information that she's obtaining or attempting to
5 bring to this court would be obtained through
6 either verbal communication or some type of policy,
7 whether it be written or computerized, that we have
8 not been provided with. So, therefore, it would be
9 hearsay.

10 THE COURT: Okay. Overruled. Go ahead.

11 A I am sorry can --

12 Q The question was whether the people who input
13 entries on the payment history have any personal
14 knowledge of the events being entered?

15 MR. PRESTIA: That's an improper question,
16 outside her personal knowledge.

17 THE COURT: If you know. Go ahead.

18 A Yes, they would have to know.

19 Q Can you tell me when in proximity, when as far
20 as a period of time, when in proximity are entries for
21 the payment history created --

22 MR. PRESTIA: Objection.

23 Q -- with relation to the date of the time or
24 even reflected on the payment history.

25 MR. PRESTIA: Objection, hearsay, relevance,

1 and outside the scope of this witness' knowledge.

2 THE COURT: Okay. Overruled. Go ahead, you
3 can answer.

4 A Payments are automatically added onto the
5 accounts whether they are manually inputted or
6 electronically inputted.

7 Q Let's go back to the payment history. The
8 last three pages that I have carved out from my earlier
9 questions, let's look at those three pages. What
10 relationship, if any, do these last three pages of
11 Exhibit 9 have to the boarding process you describe?

12 MR. PRESTIA: I would object as he's
13 attempting to elicit evidence that from a document
14 that has not been entered into evidence. Hearsay,
15 foundation.

16 THE COURT: I'm going to overrule, but you
17 can't read from the document or tell me the content
18 of the document, so go ahead.

19 A This is what was provided to SPS as the prior
20 pay history.

21 Q What was done with that information once SPS
22 received it?

23 A We verified it with their paper records and we
24 loaded these amounts into our system.

25 Q Have you ever worked at Fifth Third Bank

1 before?

2 A I have not.

3 Q Are you suggesting you have -- well, what
4 personal knowledge do you have, if any, of the practices
5 of the Fifth Third Bank?

6 A I don't have any.

7 MR. PRESTIA: Your Honor, I would now renew my
8 objection to the last three pages. Specifically as
9 she testified that these are -- these were provided
10 to their company, SPS, by a prior company, Fifth
11 Third Mortgage. She just testified that she has no
12 knowledge as to the basis of any policies or
13 procedures that go on at Fifth Third Bank,
14 therefore, it's classic hearsay.

15 THE COURT: Okay. I'm going to overrule your
16 objection. Go ahead.

17 Q You had answered?

18 A Yes.

19 THE COURT: Yes.

20 Q Had you endorsed the note?

21 A No, I did not.

22 Q Did you watch the person who endorsed the
23 note?

24 A No, I didn't.

25 Q Are you in court suggesting that you have

1 personal knowledge of that endorsement?

2 A Yes.

3 Q That you have personal knowledge?

4 A No.

5 MR. PRESTIA: Objection, asked and answered.

6 A I'm sorry.

7 THE COURT: Overruled. Go ahead.

8 MR. PRESTIA: Just for my own clarification,
9 can I have the court reporter read back what the
10 answer was.

11 (The last question and answer was read back by the
12 reporter.)

13 THE COURT: Okay. Go ahead.

14 Q Can you explain your answers?

15 A I'm sorry, and I may have gotten confused. I
16 did not personally see the endorsement.

17 Q What knowledge, if any, do you have of the
18 purchase by DLJ of this underlying note?

19 MR. PRESTIA: Objection, asked and answered
20 and outside the scope of her knowledge, hearsay and
21 foundation.

22 THE COURT: Okay. Overruled. Go ahead.

23 A It is a based on the purchase agreement.

24 Q How about what impact, if any, does the
25 assignment that we looked at have on your understanding

1 of the purchase by DLJ of the underlying note from Fifth
2 Third Bank?

3 MR. PRESTIA: Objection, hearsay, foundation.
4 Your Honor, I would also like to address the fact
5 that we were never provided any purchase agreement
6 that this witness just testified to. As such, we
7 believe that it was a discovery violation, as we've
8 requested any and all documentation to show the
9 transferable ownership of this note and mortgage.
10 There is clearly more evidence out there that we
11 were not --

12 THE COURT: Thank you very much. So at this
13 point, you are not asking her, are you, about the
14 document itself?

15 MR. NEW: No, I'm just asking her --

16 THE COURT: Did it change any? Do me a favor,
17 read his question to me, please.

18 (The last question was read back by the
19 reporter.)

20 THE COURT: Okay. The question is what impact
21 does it have on your understanding. So I've got
22 your objection. Overruled. Go ahead.

23 What impact, if any?

24 A That Fifth Third sold to DLJ and SPS Services.

25 MR. PRESTIA: And I would object to hearsay

1 now and best evidence rule. Your Honor, there's
2 apparently this purchase agreement out there that
3 this witness is testifying about and we have never
4 seen it before.

5 THE COURT: Okay. Overruled. Go ahead.

6 Q I'd like to, before I move my exhibits in and
7 clarify, we had a stipulation that the note mortgage and
8 assignment were admissible, is that no longer --

9 MR. PRESTIA: There was no stipulation ever
10 entered that the note assignment and mortgage were
11 admitted into evidence, Your Honor. I believe
12 there was some type of e-mail that said that we are
13 going to -- between Mr. Holtz and Mr. New or
14 another counsel reflecting that in theory they
15 could be admissible if the proper foundation was
16 laid, if the authenticity was proven up --

17 THE COURT: There's not a written stipulation
18 of --

19 MR. PRESTIA: Absolutely not.

20 MR. NEW: Your Honor?

21 THE COURT: You have one?

22 MR. NEW: I do. It's the e-mail confirming
23 the document. There is no objection from --

24 THE COURT: Let me take a look.

25 MR. NEW: Sure. (Handing document.)

1 MR. PRESTIA: May we have a brief two-minute
2 recess?

3 THE COURT: Sure. No problem.
4 Let's take a break. You can step down during the course
5 of the recess. Don't talk to anybody about your
6 testimony. Okay. Very good. We will be in recess for
7 about three minutes. Okay. Thanks a lot.

8 (Short recess taken.)

9 MR. PRESTIA: Your Honor, we would like make
10 one motion. Ms. Lundergan -- with the Court's
11 permission we would like Ms. Lundergan to make one
12 motion.

13 THE COURT: Go ahead.

14 MS. LUNDERGAN: Sure, Your Honor. For the
15 record, I asked opposing counsel if they wanted to
16 see the motion. I had to hand write it, so I don't
17 have two copies; they didn't want to see it.

18 THE COURT: Is this your motion for refusal?
19 May I have it, please?

20 MS. LUNDERGAN: And a motion for continuance,
21 Your Honor, to allow us to have videotaped
22 testimony given your threats of criminal contempt.

23 THE COURT: Thank you very much. I will be
24 back. All rise.

25 THE BAILIFF: All rise. The Court will be in

1 recess.

2 (Short recess taken.)

3 THE COURT: Okay. I've heard your --
4 considered your motion. I've entered the order on
5 the motion.

6 MS. LUNDERGAN: Thank you, your Honor. I just
7 want to make --

8 THE COURT: And on the motion on the
9 continuance, I have denied the motion on the
10 continuance.

11 MS. LUNDERGAN: Thank you, Your Honor. I just
12 want to get one more appearance for the record. We
13 have brought into the court Mr. Rick Jarolem from
14 Wilson Elser as our Counsel for any contempt
15 issues.

16 THE COURT: Okay. Very good. Welcome. Have
17 a seat.

18 MR. JAROLEM: Thank you.

19 MR. NEW: May it please the Court?

20 THE COURT: Yes. Go ahead.

21 MR. NEW: Your Honor, I had sought to
22 introduce before we left off three exhibits that I
23 had understood were sent into a stipulation. There
24 was argument -- I provided the court the e-mail
25 which will confirm the stipulation. I'd like to

1 pick up there with moving in those three particular
2 exhibits.

3 THE COURT: Well, let me just tell you that I
4 took a look. What you gave to me is the e-mail of
5 Friday July 26th, and in the body of it it says
6 that after you -- let me read the whole thing. On
7 the paragraph three, the second -- third sentence:
8 "As to the plaintiff's exhibits, we agree that the
9 original note already filed with the court, a
10 certified copy of the mortgage already filed with
11 court, and a certified copy of the assignment of
12 mortgage in our possession are admissible.
13 Although, I understand you intend to raise an
14 argument as to some of these documents."

15 So in your -- it doesn't seem to me that you
16 got a stipulation. You acknowledge that they are
17 going to raise some argument relative to the
18 documents. Okay. So I don't find that you have a
19 stipulation relative to the admissibility of these
20 documents. Okay?

21 MR. NEW: Understood.

22 THE COURT: Okay. Thanks a lot. Okay. So go
23 ahead.

24 MR. NEW: Your Honor, I'd like move into
25 evidence as Plaintiff's Exhibit 1 the original note

1 in the court file.

2 THE COURT: I think you got to get the -- the
3 Limited Power of Attorney is Number 1.

4 MR. NEW: It is. Okay. Is the note 3 on your
5 list?

6 THE COURT: The note is 3 on my list.

7 MR. NEW: I'd like to move the note in, and
8 what I'd like to do, if Your Honor agrees, I think
9 you do with what you're saying, move them in in the
10 number identified in the note.

11 THE COURT: Yes. As we proceed on, and I hate
12 to interrupt you, but let me just agree on this.
13 See if everybody is going agree on this: There
14 continues to be this issue relative to hearsay, and
15 so I am looking at Statute 90.803 Hearsay
16 Exceptions, availability of clarity immaterial. It
17 says the provision is of Section 90.802, the
18 contrary, notwithstanding, the following are not
19 inadmissible evidence even though the declarant is
20 available as a witness. Subsection(6), records of
21 a regularly conducted business activity, (a) a
22 memorandum, report, record, or data compilation, in
23 any form, of acts, events, conditions, opinion, or
24 diagnosis, made at or near the time by, or from
25 knowledge transmitted to a person with knowledge,

1 if kept in the course of a regularly conducted
2 business activity, and if it was the regular
3 practice of that business activity to make such
4 memorandum, report, record, or data compilation,
5 all as shown by the testimony of the records
6 custodian or other qualified witness, or as shown
7 by a certification or declaration that complies
8 with paragraphs (c) and s. 90.902(11), unless the
9 sources of information or other circumstances show
10 lack of trustworthiness.

11 The term "business" as used in this paragraph
12 includes a business, institution, association,
13 profession, occupation, and calling of every kind,
14 whether or not conducted for profit.

15 So let me ask the plaintiff, is that the
16 section under which you are traveling relative to
17 the section of hearsay.

18 MR. NEW: As to the business record, yes.

19 THE COURT: So to the defense, is that the
20 business record exception?

21 MR. PRESTIA: As you've read it 803(6), Yes,
22 Your Honor, that is what's in the Florida Rules of
23 Evidence. However, at this point, plaintiff has
24 failed to meet all of the requirements pursuant to
25 that rule, and I would actually like to make this

1 argument outside the presence of the witness, if
2 possible.

3 THE COURT: Okay. Well, at this point I'm not
4 quite there yet. What I'm going to say to you is
5 to the extent you want to offer records that are
6 under the business record exception, I'm going to
7 require that as to every record that you wish to
8 offer, that you take it individually and either
9 make a showing under the records exception or don't
10 make a records exception. So go ahead.

11 MR. NEW: If I may begin with the note.

12 THE COURT: Okay. Go ahead.

13 MR. NEW: And the note --

14 THE COURT: Exhibit Number 3 --

15 MR. NEW: The note itself authenticating it
16 would not come in in the business record exception.

17 MR. PRESTIA: And I would disagree.

18 MR. NEW: The business record exception, Your
19 Honor, I would suggest applies clearly to the
20 documents, other than the note, other than the
21 mortgage, clearly the pay three/pay four screens,
22 payment history, Hello Letter, that's the exception
23 under which I am traveling. The note itself
24 authenticating, we would like to the move the note
25 into evidence as Plaintiff's Exhibit 3.

1 THE COURT: Okay.

2 MR. PRESTIA: Can I make an --

3 THE COURT: Interjection? Go ahead.

4 MR. PRESTIA: Yes, sir. I would object under
5 Florida Rule of Evidence 90.902, which provides as
6 follows: "Extrinsic evidence of authenticity as a
7 condition precedent to admissibility is not
8 required" --

9 THE COURT: Excuse me, just a minute. Excuse
10 me. What are you doing?

11 MS. LUNDERGAN: Charging my phone, Your Honor.

12 THE COURT: Okay. Please unplug your phone
13 and turn it off.

14 MS. LUNDERGAN: Sorry, Your Honor, I am trying
15 to call the court reporter to --

16 THE COURT: You can go downstairs and use the
17 phone or step out of the courtroom. I don't allow
18 the use of electronic devices in the courtroom.

19 MS. LUNDERGAN: I'll take them outside.

20 THE COURT: Okay. Thanks. Go ahead.

21 MR. PRESTIA: Yes, sir. Pursuant to
22 90.902(8), commercial papers and signatures
23 thereon and documents relating to them, to the
24 extent provided in the UCC. So it's admissible if
25 it is -- I'm sorry. If it's provided by the UCC.

1 Now, if you turn to the UCC, the only section of
2 the UCC that speaks of this is Article 3, which is
3 entitled Proof of Signatures and Status as Holder
4 in Due Course, which is Florida Statute
5 673.3081(1), and that rule states as follows: "In
6 an action with respect to an instrument, the
7 authenticity of an authority to make each signature
8 on the instrument is admitted unless specifically
9 denied in the pleadings." And the rule goes on.

10 Your Honor, we've made -- our affirmative
11 defenses clearly state that we are objecting to the
12 authenticity of those signatures, and as such, this
13 rule applies and it is not self-authenticating as
14 the burden now is on the plaintiff to prove that
15 those signatures are purported to be authenticated.

16 THE COURT: Okay. So based on final offer of
17 Number 3 and over the objection, I am going to
18 admit the note.

19 MR. PRESTIA: Okay. Let me just -- sure.
20 Your Honor, I was just speaking as it pertains to
21 that specific one. Let me, just for the record,
22 state the rest of my basis for the objection as it
23 pertains to the note.

24 We've already addressed hearsay. I would also
25 be relying on lack of personal knowledge, again,

1 authenticity of the document, and personal
2 knowledge as to the signatures as it relates to the
3 document and any potential endorsements, which may
4 or may not be on this document.

5 THE COURT: Okay. So over objection, Exhibit
6 3 into evidence. Okay. Go ahead.

7 (Exhibit Number 3 received into evidence.)

8 MR. NEW: I'd like to move into evidence as
9 Exhibit 4, the certified copy of the mortgage that
10 is in the court file.

11 THE COURT: Okay.

12 MR. PRESTIA: I would object, Your Honor, as
13 it's hearsay, authenticity, no personal knowledge,
14 and it is actually irrelevant since the mortgagor
15 in this case is -- the mortgagor in this case is
16 Fifth Third. However, the witness already
17 testified that the current owner and holder of the
18 note and mortgage is DLJ. So they are not a party
19 to this, and the proper owner and holder should be
20 the one that is here today before Your Honor.

21 THE COURT: Okay. Exhibit Number 4, the
22 mortgage is in evidence over objection. Okay.

23 (Exhibit Number 4 received into evidence.)

24 MR. NEW: As Exhibit 7, Plaintiff's Exhibit 7,
25 Your Honor, the recorded assignment of the

1 mortgage.

2 THE COURT: I have number 7 as the Hello
3 Letter. The assignment of mortgage I have as
4 Number 5. Are my numbers incorrect?

5 MR. NEW: My numbers are incorrect, Your
6 Honor. Number 5 is the assignment of mortgage.

7 THE COURT: Okay.

8 MR. PRESTIA: Same objections, Your Honor,
9 hearsay, authenticity, personal knowledge,
10 relevance.

11 THE COURT: Overruled. Into evidence over
12 objection.

13 (Exhibit Number 5 received into evidence.)

14 MR. NEW: Your Honor, I'd like to move into
15 evidence as Plaintiff's Exhibit 7 the Hello Letter.

16 THE COURT: Okay.

17 MR. PRESTIA: I would object as there has not
18 been a proper foundation laid under the business
19 records exception, and furthermore, this is
20 purported to be a document of a non-party to the
21 action.

22 THE COURT: All right. I am going to admit
23 number 7 over objection. Okay. Go ahead.

24 (Exhibit Number 7 received into evidence.)

25 MR. NEW: Plaintiff's Exhibit 8, Your Honor,

1 the -- I'm sorry.

2 THE COURT: Default is what I have --

3 MR. NEW: As Exhibit 9, Your Honor, the
4 payment history.

5 THE COURT: Exhibit Number 9?

6 MR. NEW: Yes, that is a composite exhibit, so
7 I'd like to introduce it -- the court would
8 consider it one, all pages that were created by SPS
9 were up until page -- up until the third page,
10 third from last of the exhibit, that's the SPS
11 portion which is what the witness testified to.
12 I'd move that portion into evidence.

13 THE COURT: But the last three pages are going
14 to be removed from the exhibit?

15 MR. NEW: Correct.

16 MR. PRESTIA: I would object, that's then
17 hearsay, personal knowledge, as it pertains to this
18 party plaintiff, relevance, authenticity, and the
19 actual best evidence rules and I'm renewing my
20 90.956 that it's a summary pursuant to the Florida
21 statutes.

22 THE COURT: I am going to overrule your
23 objection, so I am going to allow it into evidence
24 over the objection. Okay? Anything else you want
25 to offer?

1 (Exhibit Number 9 received into evidence.)

2 MR. NEW: As Plaintiff's Exhibit 10, Your
3 Honor, the pay three screen and pay four screens as
4 a composite exhibit.

5 THE COURT: Okay. Objection?

6 MR. PRESTIA: Objection to hearsay, relevance,
7 authenticity. Your Honor, there has been no
8 foundation laid as it pertains to --

9 THE COURT: Okay. Just tell me the basis.

10 MR. PRESTIA: Sure. I already stated my
11 basis.

12 THE COURT: Okay. So over objection. I'm
13 going to admit Exhibit 10. Okay. Anything else?

14 (Exhibit Number 10 received into evidence.)

15 MR. NEW: Your Honor, the Powers of Attorney
16 beginning with Plaintiff's 1, Power of Attorney
17 from DLJ Mortgage to SPS.

18 THE COURT: Okay. Objection?

19 MR. PRESTIA: Hearsay, personal knowledge,
20 authenticity, relevance, best evidence rule. Your
21 Honor, the -- this is not -- she's never testified
22 this is a document that they even keep in the
23 normal course of business activity, it was created
24 by another company.

25 THE COURT: Okay. Anything else?

1 MR. PRESTIA: I have stated my grounds, Your
2 Honor, if you'd like me to present argument, I
3 would be happy to.

4 THE COURT: Not necessarily, just your grounds
5 are sufficient. So in evidence over objection,
6 Number 1. Anything else?

7 (Exhibit Number 1 received into evidence.)

8 MR. NEW: Plaintiff's Exhibit 2, Your Honor,
9 Power of Attorney from Fifth Third Mortgages to DLJ
10 Mortgage.

11 MR. PRESTIA: Object to improper foundation,
12 hearsay, authenticity, best evidence rule, personal
13 knowledge, and that the specific hearsay exception
14 has not been met.

15 THE COURT: Okay. Number 2 is in evidence
16 over objection. Anything else.

17 (Exhibit Number 2 received into evidence.)

18 MR. NEW: Your Honor, the purchase agreement,
19 which is what I have as Exhibit 6.

20 THE COURT: Okay. Objection?

21 MR. PRESTIA: Yes, Your Honor, I would object
22 as the same grounds of -- for the record, I will
23 state them.

24 THE COURT: Okay.

25 MR. PRESTIA: Hearsay, lack of personal

1 knowledge, authenticity, relevance and best
2 evidence rule. And then specifically I would renew
3 my objection that this was never provided to us in
4 the course of discovery, despite having multiple
5 requests for request for production as it pertains
6 to ownership, as well as just trial exhibits in and
7 of themselves. So, your Honor, I have never even
8 seen this prior to today, and, it's prejudicial to
9 the defense.

10 THE COURT: Okay. Number 6 in evidence over
11 objection.

12 (Exhibit Number 6 received into evidence.)

13 MR. NEW: And then, Your Honor, the Exhibit 8,
14 breach letter.

15 THE COURT: Okay. Objection?

16 MR. PRESTIA: Object to hearsay, lack of
17 foundation, personal knowledge, authenticity,
18 relevance, this was made allegedly by a company
19 doesn't even have a witness here to testify, so it
20 would be impossible for them to satisfy any type of
21 exception for it.

22 THE COURT: Okay. So over objection it is
23 going to be in evidence. Anything else?

24 (Exhibit Number 8 received into evidence.)

25 MR. NEW: Your Honor, I have no further

1 exhibits and no other inquiry of the witness.

2 THE COURT: Okay. Cross examination.

3 MR. PRESTIA: Your Honor --

4 THE COURT: Let's do this, okay, we are going
5 to do this: We are going to take about a
6 ten-minute break and then we will reconvene. So at
7 that point we will do cross examination. So go
8 ahead and make whatever calls you need to make and
9 we are going to continue on until we resolve and
10 until we get to the end of the case. So folks make
11 whatever plans you need to make.

12 Step down during the recess. Do not talk to
13 anybody about your testimony. Okay?

14 MR. PRESTIA: Can I just bring one thing to
15 the Court's attention, Your Honor?

16 THE COURT: Sure.

17 MR. PRESTIA: In addition to this witness,
18 there's two additional potential witnesses that the
19 defense may call. I just want to make sure that
20 the Court is aware of that.

21 THE COURT: Sure. That's fine. Thanks.
22 Thanks very much.

23 Y'all go ahead and take a break.

24 (Short recess taken.)

25 THE COURT: Okay. Cross examination.

1 MR. PRESTIA: Before we get started I would
2 ask for a couple of minutes so that --

3 THE COURT: No, sir. You're request for a
4 delay to set up a video, he can set up if he
5 wishes, but we are going to go forward with. Go
6 ahead. Cross examination.

7 MR. PRESTIA: Your Honor, one other further
8 issue. This case was scheduled for a half day. It
9 was scheduled for 1:00, it is not almost 5:00. I
10 have another trial in the morning, and we also have
11 another trial in the morning at 9:00 a.m. Your
12 Honor, I would ask that before we start with the
13 cross examination we either declare a mistrial or
14 continue the matter so that then we can adequately
15 prepare for trial tomorrow, as well. Additionally,
16 so that we can conduct this full trial at the next
17 future setting.

18 THE COURT: Okay. All right. Denied. Go
19 ahead. Cross examination. Go ahead.

20 MR. PRESTIA: May I have permission to move
21 the podium?

22 THE COURT: Yes, absolutely. Go ahead.

23 MR. PRESTIA: May I have the pieces of the
24 documents that were entered into evidence?

25 THE COURT: Okay. Are they up there? They

1 should be up there, 1 through 10. You can
2 approach.

3 MR. PRESTIA: May I approach the clerk?

4 THE COURT: Yeah, go ahead.

5 Mr. New, which is the document that needs the
6 three pages taken off of it?

7 MR. NEW: It is the payment history.

8 THE COURT: Okay. So that's Number 10 -- I'm
9 sorry, that's Number 9. So if you will take the
10 last three pages off of it.

11 MR. PRESTIA: Your Honor, where are the ones
12 that are premarked and that were admitted? These
13 aren't premarked by any means.

14 MR. NEW: I got the premarked.

15 THE COURT: Okay. Great. You can take them
16 out of the binder if you want to. But as to that
17 one that was admitted without the last three pages,
18 Number 9, yes, take the last three pages off of it.

19 MR. NEW: Counselor, I've got the notebook if
20 you want to look at it and removed the three pages
21 and they are premarked.

22 THE COURT: Okay. Go ahead and give it to him
23 so that he has it.

24 MR. NEW: Okay.

25 MS. LUNDERGAN: Does the court reporter have

1 Defendant's Counselor's stickers or Defendant's
2 stickers.

3 THE COURT REPORTER: Yes.

4 MS. LUNDERGAN: May I have some, please?

5 THE COURT REPORTER: Sure.

6 MR. NEW: And there should be an expert
7 notebook floating around that I used that had
8 premarked --

9 MR. PRESTIA: Where is the notebook that had
10 the additional Post-it notes in there?

11 MR. NEW: Those were my attorney notes. He's
12 asking -- your question was, the notebook that had
13 my attorney note, that's not the trial notebook.

14 THE COURT: He wants to see the notebook that
15 had the note in it.

16 MR. PRESTIA: That was presented to the
17 witness.

18 MR. NEW: The note. Oh --

19 MR. PRESTIA: Yes.

20 MR. NEW: It wasn't presented to the witness.
21 The witness didn't open the book.

22 (Handing document.)

23 We need to mark this into evidence.

24 THE VIDEOGRAPHER: The time is 5:01 p.m. we
25 are now on video record.

1 MR. PRESTIA: May I approach, Your Honor?

2 THE COURT: Yes. Uh-huh.

3 Thanks. Go ahead. You may inquire.

4 MR. PRESTIA: Thank you.

5 CROSS EXAMINATION

6 BY MR. PRESTIA:

7 Q So that I don't have -- I don't want to say
8 your name wrong. Can you just pronounce it for me?

9 A It's Kuerzi.

10 Q Kuerzi.

11 A Yes.

12 Q Ms. Kuerzi, it's a pleasure to meet you. My
13 name is Tom Prestia. I represent the defendants in this
14 case. I just have a couple of -- I have a good amount
15 of questions for you as it pertains to the documents
16 that you discussed with plaintiff's counsel. Before we
17 get going with that, you would agree with me that you
18 have a financial stake in the outcome of this case?

19 A I'm not sure I understand what you mean.

20 Q Well, you're an employee of SPS, right?

21 A Yes.

22 Q And you're paid to be here, correct?

23 A It is my job to testify in trials, yes.

24 Q And as part of your job you're paid, correct?

25 A Yes.

1 Q And how much are you paid?

2 A An annual salary.

3 Q Which is?

4 A \$50,000.

5 Q And part of that \$50,000 is for you to come
6 here to testify in cases such as this one, correct?

7 A It is paid for my job duties to research,
8 review accounts, prep files and work with my counsel and
9 get accounts ready for trial, if -- if that's the case,
10 yes.

11 Q So the answer to my question is yes, as part
12 of your salary you're paid to come here to court and
13 testify in cases such as this one, correct?

14 MR. NEW: Objection, asked and answered.

15 THE COURT: Okay. Overruled. Go ahead.

16 A Yes.

17 Q And you make your living solely by testifying
18 in cases such as this, right?

19 A No.

20 Q No? You have another job?

21 A No.

22 Q So your -- your sole form of income is from
23 SPS, correct?

24 A Yes.

25 Q And your job at SPS is to, as you said, review

1 files and come in and testify in cases such as this,
2 correct?

3 A Yes.

4 Q Okay. And you've worked there how long?

5 A Seventeen years.

6 Q Now, you're not an employee of the plaintiff
7 in this case, are you?

8 A No.

9 Q Who is the plaintiff in this case?

10 A Fifth -- Fifth Third Bank.

11 Q And you at no point were ever employed by
12 Fifth Third Bank, correct?

13 A Right.

14 Q And you were never employed by DLG -- let
15 me -- I apologize, strike that.

16 You were never employed by DLJ Mortgage
17 Capital Incorporated, correct?

18 A Correct.

19 Q So you would agree with me then -- well, let
20 me kind of back up. I apologize. Since you are in the
21 business of testifying in these types of cases, you
22 would agree with me that your employer, if your employer
23 found out that you were a poor witness, you would no
24 longer be doing what you're doing, correct?

25 MR. NEW: Objection, speculation.

1 THE COURT: Okay. Overruled.

2 A I have not found that to be the case. I don't
3 know that personally.

4 Q All right. So if it's your testimony that you
5 don't do a full and thorough and good job testifying in
6 these cases, that you would still retain your job at
7 SPS, correct?

8 A I would assume that would be up to my
9 superiors.

10 Q Well, in general practicality, you would agree
11 with me that if someone isn't doing a good job at
12 their -- for their employer, they would not be there,
13 correct?

14 A I can't say yes or no to that. I would not
15 know.

16 Q Well, just -- I mean, on a common sensible
17 basis, you would agree that if an employee is not doing
18 their job thoroughly and accurately and to the standards
19 of their employer, they would not be an employee of that
20 company for very long, correct?

21 A Well, it depends if they want to give them
22 additional training and coaching.

23 Q Well, let's talk about that now that you've
24 mentioned that. You're actually given formal training
25 and coaching to testify, right?

1 A It's -- sometimes, yes.

2 Q No, in -- at your employment within the last
3 17 years, you're actually coached and trained on how to
4 testify in court just like this; isn't that true?

5 A I have had training, but I'm not trained on a
6 daily basis.

7 Q So the answer to my question then is yes?

8 A I have had training.

9 Q As it pertains to courtroom testimony,
10 correct?

11 A Yes.

12 Q Okay. And that training involves mock trials,
13 correct?

14 A No.

15 Q No? The training involves -- what does the
16 training involve?

17 A It's just a one-on-one session.

18 Q With who?

19 A With whoever the company sees -- it could be
20 one of the corporate attorneys.

21 Q Okay. So you actually receive training from a
22 attorney in preparation for you going to cases and
23 testifying; is that what your testimony is?

24 A They have been known to do that, yes.

25 Q And who was the person that trained you in

1 regards to this case?

2 A I -- I did not have any training regarding
3 this case.

4 Q Okay. When was your training?

5 A I had some training regarding court in general
6 about a year ago.

7 Q So about a year ago you met with an attorney
8 who trained you as it pertains to court procedures and
9 testifying, correct?

10 A I cannot say that he was an attorney, no.

11 Q Well, I thought you just told me that you had
12 met with a attorney and he was the person that gave you
13 training?

14 A We do in general at times.

15 Q Okay. And you particularly, you said you got
16 one-on-one training, right?

17 A Yes.

18 Q And you advised that the individual that
19 trained you was an attorney, did you not?

20 A No, I did not say that.

21 Q Okay. Well, who was the person that trained
22 you then?

23 A It was someone that the company had hired.

24 Q Who was that person?

25 A I do not recollect his name.

1 Q Do you recall what type of -- what did he do
2 for a living?

3 A He was a trainer.

4 Q Employed by SPS?

5 A Not a hundred -- not full time, no.

6 Q So he -- but he does have some legal
7 background, correct?

8 A As far as I know, yes.

9 Q And he trained you on how to testify, correct?

10 A He trained us on, you know, what to expect in
11 the courtroom.

12 Q Okay. So you -- you were made well aware of
13 the types of questions and issues that could arise in
14 these types of cases, correct?

15 A Yes.

16 Q And, specifically how to formulate a response
17 favorable to your employer, right?

18 A I wasn't told that, but I could say I was
19 trained to answer the question properly and accurately.

20 Q Okay. And properly and accurately as an
21 employee of SPS would be favorable to them; isn't that
22 right?

23 MR. NEW: Objection, argumentative.

24 THE COURT: Okay. Overruled.

25 Q Correct? It's a yes or no, ma'am.

1 A I would say so long as I give the correct
2 answer and it's the truth, that would be yes.

3 Q Okay. So then the answer to my question is
4 yes?

5 A (No response).

6 Q Correct?

7 A Yes.

8 Q Okay. You've testified in hundreds of cases,
9 correct?

10 A I would say yes.

11 Q Approximate -- approximately how many?

12 A That's kind of hard to say. I --

13 Q Over 500?

14 A No, I would not say that. I'd say maybe
15 between 100 and 300.

16 Q Between 100 and 300. So 100 -- between 100
17 and 300 times you've come into court and testified
18 before in the -- in this same fashion, before attorneys
19 and judges and court reporters and things of that
20 nature, correct?

21 A Yes.

22 Q Okay. So in essence you're a professional
23 witness, right?

24 A No.

25 Q You wouldn't agree with that assessment?

1 A No, I wouldn't.

2 Q And why not?

3 A Because I actually work on accounts. I review
4 accounts. I -- you know, I don't do this
5 professionally, no.

6 Q Well, this is your profession, right?

7 A No, I -- I do testify in cases, yes.

8 Q But approximately 100 to 300, right?

9 A Yes.

10 Q Okay. Let's go ahead and start with -- what
11 did I do with that? Here we go.

12 Now, you mentioned before that Fifth Third
13 Bank is the plaintiff in this case, right?

14 A Yes.

15 Q DLG is not -- DLJ Mortgage Company is not a
16 party to this action, to your knowledge?

17 A They are -- they are the owner.

18 Q So DLJ is the owner of what?

19 A The note.

20 Q Okay. And who is the holder of the note?

21 A That would be DLJ.

22 Q What is a holder of a note, what does that
23 mean?

24 A They actually own the note.

25 Q Okay. But you said that they were the owner

1 and then you said that they were the holder. Can you
2 clarify what the difference is between those two?

3 A Well, they actually own it and hold it, and
4 it's -- the physical note is kept in a secure location,
5 you know, even though they own it, and it was only
6 brought out when it's needed.

7 Q Okay. Where is that secure location?

8 A I do not know.

9 Q Okay. So you don't maintain where the -- the
10 note is kept, correct?

11 A I personally do not, no.

12 Q SPS doesn't maintain where it's kept, correct?

13 A Yes, I'm sure we do.

14 Q Okay. And what is that knowledge based upon?

15 A By keeping it in a secure location you mean?

16 Q Yeah. How do you know that SPS maintains the
17 location of the note?

18 A Because it's part of the business records.

19 Q No, that's my question. My question is what
20 basis do you have to come here and testify under oath
21 that SPS maintains this note?

22 A Normal business practices.

23 Q You don't know -- you have never seen where
24 this location is, correct?

25 A No, I haven't.

1 Q You don't even know where this location is,
2 correct?

3 A Correct.

4 Q So you have no personal knowledge as to where
5 or how this note is maintained, correct?

6 A I know it's kept in a file in a secure
7 location.

8 MR. NEW: Relevance with regard to --
9 objection, relevance with regard to the note, which
10 is in the court file, which has been in the court
11 file since 2009. So to the extent the question
12 relates to how the note was maintained by SPS if it
13 was prior to 2009, that there might be some
14 relevance there, but he's been asking questions
15 about how -- how was the note was maintained any
16 time after the note was filed with the court, I
17 think it's misleading. So I'd say --

18 THE COURT: Well, the note itself has been in
19 the court file since January 5, 2010.

20 MR. NEW: That's correct.

21 THE COURT: So it's not 2009. So, all right.
22 Overruled, but go ahead, but I don't think there's
23 any question that it's been in the court file since
24 then.

25 MR. PRESTIA: Your Honor, that wasn't the

1 basis of my question whatsoever.

2 THE COURT: Go ahead.

3 Q So you would agree with me that prior to --
4 hold on, let me back up real quick. The note that's in
5 the court file, have you ever seen that?

6 A I have seen a copy of it, yes.

7 Q You haven't seen the actual one that's in the
8 court file, correct?

9 A No, I haven't.

10 Q You have not looked at the signatures that are
11 on that actual note, correct?

12 A The copy of them, yes.

13 Q No, I'm not talking about the copy. The
14 actual note that was in the court file, you have never
15 seen that before, right?

16 A No, I have not.

17 Q And you have never seen any potential
18 endorsements, if they do exist, on that note, correct?

19 A Correct.

20 Q And you have never -- and you had said on
21 direct examination that you, in fact, do not have any
22 personal knowledge as to when, if at any point, an
23 endorsement was placed on the original note, correct?

24 A Right.

25 Q Now, let's get back to how the note was

1 maintained prior to admitting it into or admitting what
2 is purported to be the original note into the court
3 file. And I'm only talking about prior to that date.
4 Like you said, you were never an employee of Fifth Third
5 Mortgage Company, correct?

6 A Correct.

7 Q And you were never an employee of DLG -- DLJ
8 Mortgage Company, correct?

9 MR. NEW: This is cumulative, Judge.

10 MR. PRESTIA: Your Honor, if you give me a
11 little latitude --

12 THE COURT: Go ahead. I said go ahead.

13 MR. PRESTIA: Thank you.

14 Q As a -- so since you have never been an
15 employee of Fifth Third Mortgage company or DLJ Mortgage
16 Capital Incorporated, prior to the alleged note
17 appearing in the court file, you have no personal
18 knowledge as to where the -- the -- where this note was
19 located, right?

20 A Correct.

21 Q And you have no knowledge as to how it was
22 maintained prior to allegedly being introduced into the
23 court file, correct?

24 A Yes.

25 Q And you have no knowledge as to when, if at

1 any point, the defendants in this case allegedly
2 executed this note, correct?

3 A Because I reviewed the note, it is dated as of
4 the date it was executed.

5 Q Okay, well you just told me you've never seen
6 the note before, right?

7 A The original, no.

8 Q Okay. So my question is: As it pertains to
9 the original, you have no personal knowledge, as to
10 when, if at any point, the defendants actually executed
11 this note, right?

12 A Based on the documents I have in our records
13 the copy of the note --

14 Q Let me make myself a little bit clearer. I'm
15 not talking about any copies or anything else that was
16 provided. I'm talking about the original note in this
17 case. So let me bring you back to my question again:
18 You have no idea as to when, if at any point, the
19 defendants actually executed this note; isn't that
20 correct?

21 A The copy of the original note that I have
22 seen --

23 Q I'm sorry. Did you say you have seen the
24 copy -- the original note?

25 A No, the -- the copy of the original --

1 Q Sure. Go ahead.

2 A -- was what I seen was dated the date of
3 execution.

4 Q Okay. But my question doesn't -- is not
5 related to the copy. Okay. So let's just forget about
6 the copy and let's focus on the -- purported to
7 original. As it pertains to the original note in this
8 case, you have no idea as to when or if at any point the
9 defendants actually executed that note, correct?

10 A I was not there when they executed it, no.

11 Q And you have no personal knowledge as you have
12 never seen the note, correct? I'm sorry. Let me strike
13 that.

14 You have no personal knowledge as to when, if
15 at any point, the defendants actually executed the
16 original note, as you have never seen it, correct?
17 Maybe that was a little easier.

18 A Because I never seen the original note, I
19 wasn't there at that time. All I have seen is a copy.
20 So no, I can't say that, you know, I -- I saw a copy of
21 that note.

22 Q But -- I understand in your -- I think I'm
23 phrasing it pretty -- pretty simply, but I will try to
24 do a better job. Let's not have any conversation as it
25 pertains to the copies. Okay?

1 THE COURT: Let me stop you for a second, and
2 you can go on. She has not seen the original note.
3 She didn't see them sign the original note. So I
4 am understanding your point. I get it.

5 MR. PRESTIA: Okay. Thank you, Your Honor.

6 THE COURT: She has not seen it. She can't
7 testify if that's the original note that was signed
8 at the time of closing by your client.

9 MR. PRESTIA: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. PRESTIA: And then one additional follow
12 up.

13 THE COURT: Sure.

14 Q The maintenance or how this note was
15 maintained allegedly from the time of closing until the
16 time it entered into that court file, you have no
17 personal knowledge as to the chain of custody or what
18 hands it went through to get into the court file; isn't
19 that correct?

20 A Only -- only information I have is based on my
21 business records.

22 Q Okay. But your business records don't tell
23 you a -- you don't have a list in your business records
24 that shows on X date the note went from, let's just say,
25 John Smith to Joe Smith, right? You don't have a chain

1 of custody that reflects that or that could link up how
2 or where the note was transferred to, correct?

3 A I would have the assignment.

4 Q Okay. But the assignment is solely from the
5 mortgage isn't that true?

6 A Yes, but the note follows.

7 Q So -- well, let's not talk about legal issues.
8 I'll move to strike that as it's a -- as it's a legal
9 opinion.

10 THE COURT: Okay. Overruled. You asked her
11 the question, so when she starts answering, you
12 can't object.

13 MR. PRESTIA: Yes, Your Honor.

14 Q As it pertains to solely the note, right?

15 A Uh-huh.

16 Q The physical document that is allegedly in the
17 court file, you have no idea what happened to that note
18 after it was -- it left that closing table until it was
19 put allegedly into this court file; isn't that true?

20 A I -- Fifth Third -- Fifth Third Bank had the
21 note.

22 Q But you're not an employee of the Fifth Third
23 Bank, right?

24 A Correct.

25 Q So you -- you're not familiar with their

1 business records; isn't that true?

2 A That's true.

3 Q Okay. So the only thing that you could
4 testify to is possibly something that is maintained
5 within SPS; isn't that true?

6 A Yes, and any --

7 Q Okay. So as it pertains to when that note
8 left the closing table, again, you have no idea what
9 happened to that note as you were not an employee of
10 Fifth Third Bank, right?

11 A Right.

12 Q Okay. And you don't -- you don't hold
13 yourself out to be a handwriting expert, right?

14 A No.

15 Q And you have never seen Mr. or Mrs. [REDACTED]
16 signature before, right?

17 A No.

18 Q Okay. So you would have no knowledge as to
19 what those signatures look like, correct?

20 A Correct.

21 Q Okay. (Coughing.) Excuse me.

22 MR. PRESTIA: May I have a moment, Your Honor?

23 THE COURT: Sure.

24 THE VIDEOGRAPHER: Video going off the record.

25 (Short recess taken.)

1 (Video back on the record.)

2 THE COURT: Okay. Go ahead.

3 MR. PRESTIA: Yes, Your Honor. I'm just
4 trying to get organized here.

5 Q Okay. Let's talk about -- let's talk about
6 the mortgage. Specifically I'm talking about defense --
7 or I'm sorry. Strike that.

8 Plaintiff's Exhibit 4. Just like the note,
9 you have never seen the mortgage prior to -- or you have
10 never seen the mortgage, period, correct?

11 A Only the copy, correct.

12 Q So you have never seen the actual original
13 letter -- what is purported to be the original mortgage
14 in this matter, correct?

15 A Correct.

16 Q Okay. And you have never reviewed that
17 original mortgage since you've never seen it, correct?

18 A Correct.

19 Q And you have no personal knowledge as to how
20 this document was maintained prior to entering the court
21 file, correct?

22 A Correct.

23 Q And you have no idea as to its location prior
24 to entering the court file?

25 A Correct.

1 Q And you have no personal knowledge as to the
2 chain of custody that this document may or may not have
3 went through to allegedly be purported -- to enter the
4 court file, correct?

5 A Correct.

6 Q You would agree with me that Fifth Third Bank
7 is the -- Fifth Third Mortgage company is the lender in
8 this matter?

9 A They were the originator, yes.

10 Q Okay. And they are the entity that is listed
11 on the mortgage?

12 A I believe so, yes.

13 Q And you -- like we discussed earlier, you have
14 no -- as it pertains to the signatures that are
15 reflected on this mortgage, you have no personal
16 knowledge as to whether or not these signatures are in
17 fact the [REDACTED] signatures, correct?

18 A Based on the documents, I would trust
19 that's -- that's -- that would be their signatures, yes.

20 Q But based on your personal knowledge, since
21 you've never seen their signature prior to today --

22 A Uh-huh.

23 Q -- and were not at the closing table, you have
24 no idea if -- if the signatures that are purported to be
25 on this document are in fact the [REDACTED] signatures,

1 right?

2 A Correct.

3 Q And you would agree with me that the security
4 instrument or the entity that is -- I guess may or may
5 not have the authority to execute this security
6 instrument would be Fifth Third Mortgage Company, right?

7 A I'm sorry.

8 Q Sure. I apologize. Strike that.

9 You would agree with me that the entity that
10 would be entitled to foreclose on this property per
11 the -- you know what, strike that. We'll move on.

12 I would like to show you -- let's talk
13 about -- let's talk about the -- the assignment of
14 mortgage that is Plaintiff's Exhibit 5. You would agree
15 with me that you've never seen that -- the original
16 assignment of mortgage prior to -- well, actually you
17 have never seen the original assignment of mortgage
18 period, correct?

19 A Correct.

20 Q So therefore you wouldn't know its context,
21 correct?

22 A Just in general.

23 Q But if you've never seen it before then you
24 don't know what's in it, correct?

25 A Not in that particular one, no, but in general

1 I have looked at assignments.

2 Q Okay. But I'm -- let's not talk about any
3 other assignments in general. I want to talk
4 specifically about the alleged assignment of mortgage in
5 this matter. Okay? You have never seen it before so
6 therefore you have no knowledge as to its contents,
7 right?

8 A Prior -- not prior to reviewing it.

9 Q Okay. Well, when did you review it?

10 A Just -- I'd say within the week.

11 Q Okay. And that review was in anticipation of
12 this litigation, correct?

13 A Yes.

14 Q Okay. It's not your normal practice to review
15 these type of documents, right, if there is no case
16 pending?

17 A No.

18 Q So how many clients do you -- could you
19 estimate that SPS has -- or loans? I apologize.

20 A I -- that's kind of a -- in general, I
21 couldn't even give you an approximate --

22 Q Thousands?

23 A Yeah, I would say thousands.

24 Q We'll try to narrow it down, 20,000, 50,000?

25 A I'd say at least 100,000.

1 Q At least a 100,000 loans and services. So
2 you're not given a file until you have been given the
3 green light to go and testify in this these cases,
4 right?

5 A No, not necessarily.

6 Q Well, let's talk about this case. You said
7 that the first time you reviewed the assignment was
8 about a week ago, right?

9 A Correct.

10 Q And at that time you have already been listed
11 as a witness in this matter, right?

12 A Correct.

13 Q So that -- that review was done solely in
14 anticipation for this litigation, correct?

15 A Well, to prepare myself to -- you know, for
16 trial, yes.

17 Q Exactly. So for this litigation. It wasn't
18 to maintain the loan account at SPS, was it?

19 A No.

20 Q Okay. It had nothing to do with the normal
21 practice that SPS may or may not have in -- in effect,
22 right?

23 A You mean the day-to-day practices?

24 Q Sure.

25 A Well, that is part of the day-to-day

1 practices.

2 Q Well, this litigation is, right, as you've
3 testified that you -- you've testified in about 100 to
4 300 cases, right? That is part of your job, I
5 understand that.

6 A Yes.

7 Q Okay. But as it pertains to just maintaining
8 the accounts at SPS, you don't go and you -- and review
9 these documents; isn't that true?

10 A Correct.

11 Q Okay. And the original you said you've never
12 even seen, right?

13 A Right.

14 Q Okay. And so therefore since you've never
15 seen it, you do not know how it's maintained; isn't that
16 true?

17 A I would not know because it -- we did not --
18 SPS did not have it at that time.

19 Q At what point did you acquire it?

20 A October 2010.

21 Q Okay. And how -- under what circumstances?

22 A We -- DLJ had us service the account.

23 Q Okay. So correct me if I'm wrong, but the
24 owner and holder in this case is DLJ, correct?

25 A Yes.

1 Q Okay. It has nothing -- Fifth Third Mortgage
2 company is out of the picture now, right?

3 A Fifth Third sold it to DLJ.

4 Q Okay. Well, let's talk about that for a
5 second. You testified that they sold it to them,
6 correct?

7 A Correct.

8 Q Were you part of that business transaction?

9 A No, I wasn't.

10 Q Is there documentation that reflects that
11 business transaction?

12 A Yes.

13 Q What is that documentation?

14 A That is the purchase agreement.

15 Q And is that something that you maintained?

16 A No.

17 Q Is that something that you created?

18 A No.

19 Q Is that something that you have any personal
20 knowledge about?

21 A No.

22 Q So, you would agree with me that you really
23 have no knowledge as to the alleged purchase of this
24 loan by DLJ from Fifth Third, right?

25 A No, because they were part of DLJ business

1 records, and once we started servicing --

2 Q Hold on. Let me stop you --

3 THE COURT: Stop, stop, just hang on. Let her
4 just finish.

5 MR. PRESTIA: Sure. I apologize.

6 THE COURT: If you ask her a question, let her
7 answer and let me see what she says.

8 MR. PRESTIA: Sure.

9 THE COURT: Go ahead. Go ahead. You can
10 finish.

11 A Thank you, Your Honor. When they became
12 SPS -- when SPS started servicing, those documents
13 became part of our -- our documents.

14 Q Okay. Now, let me get back to something
15 because you -- you said something in your last response
16 and it was "they were DLJ's business records," right?

17 A Correct.

18 Q That's what you said?

19 A Yes.

20 Q You never worked for DLJ like we've stated,
21 right?

22 A Correct.

23 Q You have no idea as to what their -- or how
24 their documents are kept, correct?

25 A Correct.

1 Q You do not know how this document was created,
2 correct?

3 A Correct.

4 Q You do not know at what point this document
5 was created, correct?

6 A Yes.

7 Q You have no -- one second.

8 MR. JAROLEM: Excuse me, Your Honor.

9 THE COURT: Yes.

10 MR. JAROLEM: May I be excused? I was noticed
11 as an appearance as counsel for Ice, but I don't
12 think I'm needed here at all.

13 THE COURT: You're free to come and go as you
14 wish.

15 MR. JAROLEM: I understand that. Just once my
16 appearance was noted, I didn't want to disrespect
17 the Court in any way.

18 THE COURT: No, I appreciate that, but you're
19 free to go any time you want. And you can stay if
20 you want.

21 MR. JAROLEM: I'm gonna go. Thank you, Your
22 Honor.

23 THE COURT: Okay. Thanks.

24 Q Okay. So as it pertains a document that may
25 or may not be with DLJ, you have no idea if or how, if

1 at any point, the documents that they have are kept in
2 the normal course of regularly conducted business,
3 right?

4 THE COURT: Excuse me just a minute. Just so
5 I'm sure, you're talking about ordinary course of
6 DLJ's business?

7 MR. PRESTIA: Correct, Your Honor.

8 THE COURT: Understood. Go ahead.

9 A No, I do not -- I do not know how DLJ -- DLJ
10 worked in the normal course of business.

11 Q Okay. And so when you say that you obtained
12 DLJ's business records, you really don't know that its
13 their business record per se, correct?

14 A In general, I would say once they ask us to
15 service the loan, their records become our records.

16 Q Okay. But as it pertain -- all right. Well,
17 I understand that. You don't understand -- you don't
18 have any personal knowledge as to when this document was
19 allegedly made by DLJ, correct?

20 THE COURT: And I don't mean to interrupt, but
21 just for the record, the document you're talking
22 about, tell her which one it is.

23 MR. PRESTIA: I apologize. That's Plaintiff's
24 Exhibit 5.

25 THE COURT: Just so we have a better record.

1 Okay. Go ahead.

2 Q As it pertains to Plaintiff's Exhibit 5, you
3 stated that you obtained your -- SPS obtained this
4 document from DLJ and then you testified that it was a
5 business record of DLJ, correct?

6 A Which is now our business records.

7 Q Right. Well, we'll get into that in a minute,
8 but I would -- I'd just like to focus on DLJ's business
9 records, all right?

10 So you -- as it pertains to DLJ's business
11 records, and this particular document, Exhibit Number 5,
12 you do not know if it was made or near -- made at or
13 near the time of its creation, right?

14 A I only know by the date, the -- if -- if
15 you're referring to the purchase agreement, the date
16 that it was created.

17 Q Okay. Let me -- let me kind of simplify it.
18 You would agree with me that this purchase agreement --
19 excuse me, purchase agreement was not made by you or
20 anyone from your company, right?

21 A Correct.

22 Q Okay. So -- and you have no knowledge as to
23 the business practices and creation of documents of DLJ,
24 right?

25 A Yes.

1 Q You don't, right?

2 A No. Correct.

3 Q So therefore prior to SPS getting it, you do
4 not know whether or not this document was trustworthy,
5 right?

6 A Based on our business records that we got from
7 DLJ, in review of those, those were trustworthy.

8 Q As it pertains to when DLJ had it in their
9 possession and created it allegedly, you do not know
10 since it wasn't your company and you're not in any
11 department there, you do not know whether or not it was
12 trustworthy, right?

13 MR. NEW: The same question. Objection, asked
14 and answered cumulatively.

15 THE COURT: Overruled. Go ahead. You can
16 answer.

17 A Based on my business records, I consider it
18 trustworthy.

19 Q As it pertains to what you guys have in your
20 file, sure.

21 A Correct.

22 Q As it pertains to what DLJ had in their file
23 and when they allegedly created it you cannot testify in
24 this court under oath as to its trustworthiness, right?

25 A I feel like I -- excuse me. Because it is

1 part of our records which were part of DLJ records, to
2 me that I am trusting that document as being
3 trustworthy.

4 Q Sure. As a courtesy --

5 THE COURT: Let me stop you for a second. For
6 the purposes of this trial, I am going to -- to
7 rule that prior to the time of the sale that she
8 can't testify to the trustworthiness of the records
9 that were prepared by DLJ or which were their
10 business records at that time.

11 Go ahead.

12 MR. PRESTIA: Are you -- is Your Honor going
13 to make the same ruling as it pertains to Fifth
14 Third Mortgage company?

15 THE COURT: To the ones where she was not the
16 person who was not working for the company at the
17 time and had no control or knowledge of the method
18 by which they kept it, which I think she's already
19 testified to, same ruling. Okay?

20 MR. PRESTIA: Okay.

21 THE COURT: Now, it doesn't mean she has --
22 she doesn't have an opinion that it's trustworthy.
23 I'm just saying she can't testify if its
24 trustworthy or not.

25 MR. PRESTIA: Thank you.

1 THE COURT: Okay. Go ahead.

2 Q All right. Let's talk about Plaintiff's
3 Exhibit 8, which is the alleged acceleration letter.
4 That was not sent out by SPS, right?

5 A Correct.

6 Q You -- hold on one second.

7 THE COURT: For planning purposes, I -- it
8 would be my intention to go to 6:00 at which at
9 that point I will be willing to recess the case.

10 MR. PRESTIA: Okay. Where were we?

11 Q The -- Plaintiff's Exhibit 8, the acceleration
12 letter. Again, this is a document -- or actually have
13 you ever seen the original document, the original, the
14 acceleration letter?

15 A No, I have not.

16 Q That's not a document that was created by SPS,
17 right?

18 A Correct.

19 Q That's not a document that's maintained in the
20 normal course of business activity by SPS, right?

21 A We do a keep a -- we do a keep a copy of that
22 letter, yes.

23 Q That wasn't -- okay. But the document was
24 not -- it was given to you at some point, right?

25 A Yes.

1 Q Okay. So I can give you a letter today, this
2 letter right here, which I can call whatever I would
3 like to call it, and give it to you, and if you put it
4 in your file, then to you it's your business record; is
5 that your testimony?

6 MR. NEW: Objection, argumentative.

7 THE COURT: Okay. Overruled.

8 A If it -- if it's from the prior servicer and
9 it's a document they sent out, it is part of our
10 business records.

11 Q Okay. But what I'm saying to you is I can
12 give you a letter from -- from my company --

13 A Uh-huh.

14 Q -- and once you put in your file, then
15 according to you it would be your business record,
16 right?

17 A Correct.

18 MR. NEW: Same objection.

19 THE COURT: Okay. Overruled.

20 Q That's a yes?

21 A Yes. Uh-huh.

22 Q So the trustworthiness of -- trustworthiness of
23 the document prior to SPS' receipt or your receipt of it
24 is unknown to you, correct?

25 MR. NEW: This -- this -- this addresses Your

1 Honor's ruling. Your Honor has a ruling of the
2 trustworthiness of records that were for her
3 indulgent.

4 THE COURT: Again, she can't testify to the
5 trustworthiness of the documents at the time and
6 how they were a part, she wasn't there. That
7 testimony we got. But if she has an opinion as to
8 whether or not she believes what she gets to be
9 trustworthy, she can testify to that point. But
10 your point is well taken. She can't testify to
11 what occurred in a place where she said she had no
12 first-hand knowledge and she didn't work. Okay?

13 MR. PRESTIA: Okay.

14 Q So now you mentioned before that as part of
15 your job duties are having some type of correspondence
16 with your clients; is that true?

17 A We do at some point, yes.

18 Q Have you ever spoken with the [REDACTED] in
19 this matter?

20 A No, I have not.

21 Q As part of your job duties you did not create
22 any correspondence that was sent to the [REDACTED]
23 correct?

24 A Correct.

25 Q As part of your job duties, you did not

1 supervise any maintenance of any documents that are sent
2 to the [REDACTED] correct?

3 A No.

4 Q You do?

5 A I don't.

6 Q Okay. And you already testified that you've
7 never seen the original document, right?

8 A Correct.

9 Q Okay. And that's because this document was
10 not created by you, right?

11 A Correct.

12 Q And you're not a supervisor for the department
13 that -- of the department that allegedly created this
14 document, correct?

15 A It was created prior to coming to SPS.

16 Q So then the answer to my question is yes,
17 you're not a supervisor of the department that may or
18 may not have created this document, correct?

19 A But I worked for SPS not the department or the
20 company that created the document.

21 Q So then the answer to my question is yes,
22 right? I mean, I think we're on the same page here,
23 right?

24 A I'm -- I am not a supervisor for SPS, no.

25 Q And you're not a supervisor for Fifth Third

1 either, right?

2 A Correct.

3 Q And you would agree with me that this letter
4 was sent by Fifth Third or allegedly sent by Fifth Third
5 Bank, correct?

6 A Yes.

7 Q Okay. And Fifth Third Bank is actually not
8 the plaintiff in this case, right?

9 A Correct.

10 Q So this document was sent by some random
11 company; isn't that true?

12 A I would not know that.

13 MR. NEW: Argumentative.

14 THE COURT: Okay. That one I will sustain.

15 MR. PRESTIA: Sure.

16 Q Well, it was not sent by the servicer in this
17 case, correct?

18 A It was not sent by SPS, no.

19 Q And it was not sent by the servicer on or
20 around June 1st, 2009 -- strike that.

21 It was not sent by the servicer of this
22 particular loan on or about June 1st of 2009, correct?

23 MR. NEW: Objection, foundation.

24 THE COURT: Overruled. If you know.

25 A My -- by the review of the document, Fifth

1 Third sent that -- sent the document out.

2 THE COURT: Let me stop you for a second. Do
3 you have any first-hand knowledge of the -- of the
4 preparation of the document?

5 WITNESS: No.

6 THE COURT: Do you have any first-hand
7 knowledge of the sending of the document?

8 WITNESS: No.

9 THE COURT: Okay. Go ahead.

10 Q So if that's the case, then you would have no
11 personal knowledge as to whether or not this document
12 was even sent, right?

13 A No, only by having it in my business records.

14 Q So you would agree with me that you have no
15 personal knowledge as to if this document even sent to
16 the [REDACTED] correct?

17 A Based on my business records the document was
18 sent.

19 Q Okay. Well, then let's talk about your
20 business records because I don't understand, and I
21 apologize. What in your business record shows that
22 this -- this document was sent to the [REDACTED]

23 A The document was addressed to the [REDACTED] to
24 the property address.

25 Q Okay. So it's your testimony that due to the

1 fact that there is a address block that says [REDACTED]
2 and an address, that is what you're basing your personal
3 knowledge on that this document was actually sent to
4 them, correct?

5 MR. NEW: Judge, I've got objection as to the
6 pleadings, the relevance with the pleadings. What
7 was put into issue by the defendant in this case,
8 was not that the letter wasn't sent, but that it
9 wasn't received. The point the defendants went and
10 attempted to -- they sought leave to amend the
11 answer to assert a more complete or more full
12 defense raising issues of service of the Notice of
13 Default. That was denied.

14 What we're traveling on is that defendants
15 denied having received the application, that has no
16 relevance to this case anyway, but the testimony
17 that's attempted to be -- to be elicited now as to
18 whether it was sent, that has no relevance in this
19 case.

20 THE COURT: Okay.

21 MR. PRESTIA: May I respond?

22 THE COURT: Sure. Go ahead.

23 MR. PRESTIA: Paragraph 22 of the mortgage has
24 some conditions precedent that the plaintiff must
25 meet in order to foreclose on the matter.

1 THE COURT: Okay.

2 MR. PRESTIA: One of which is this particular
3 issue. That's why I'm processing that.

4 THE COURT: Okay. Understood. Overruled.
5 I've been allowing you to ask about it.

6 Q Okay. So you would agree with me that based
7 on your testimony that the only reason, the basis of
8 your statement that this document was sent to the
9 [REDACTED] was because on the top of the letter
10 allegedly there is a address block made out to the
11 [REDACTED] with an address, correct?

12 A And it was part of the business records,
13 correct.

14 Q Okay. But tell me -- well, let me ask you
15 this: Tell me what your business records shows that it
16 was actually sent?

17 A I have nothing other than the letter.

18 Q Okay. So you have nothing other than the
19 letter, which just has a address to the [REDACTED]
20 right?

21 A Correct.

22 Q Okay. Now, you have no -- you have no
23 involvement with the operations of the whatever
24 department sent this -- hold on a second. Let me ask
25 you this: Do know who Michelle McCoy is?

1 A No, I do not.

2 Q Are you aware if she's the one who sent the
3 this letter?

4 A No, I am not.

5 Q Are you aware of where she works?

6 A No.

7 Q Have you met her before?

8 A No.

9 Q Has -- you would agree with me that if -- if
10 her name was at the bottom of this letter, she would be
11 the person with the most knowledge as to whether or not
12 it was sent, right?

13 MR. NEW: Objection, speculation.

14 THE COURT: Okay. Overruled.

15 A I would not know that.

16 Q Okay. So if -- let me follow your rationale.
17 If at the top of the letter, there's an address block
18 that says the [REDACTED] and an address --

19 A Uh-huh.

20 Q -- and based upon that you can formulate an
21 opinion under oath before this court that that -- based
22 on that it was sent, right?

23 Follow me?

24 A Okay.

25 Q But you can't testify that if the letter was

1 signed by Michelle McCoy, she would be the best person
2 to know the creation or whether or not this document was
3 sent?

4 MR. NEW: That's some type of improper
5 impeachment and the question was different.

6 THE COURT: Just set the basis of -- just tell
7 me the basis for --

8 MR. NEW: Argumentative. Argumentative.

9 THE COURT: Okay. Overruled. You can answer.

10 A If she's the one that sent it, yes.

11 Q So as it pertains to this letter, you do not
12 have any personal knowledge if it was sent via first --
13 first class mail, right?

14 A No, other than being part of my business
15 records, no.

16 Q I understand you keep on saying that but
17 there's no -- nothing in your business records that
18 would indicate to you that this letter was sent via
19 first class mail, right?

20 A Right.

21 Q All right. Let's talk about the actual
22 contents of the letter since it's already in evidence.
23 Let's --

24 MR. PRESTIA: May I have one second?

25 THE COURT: Sure.

1 MR. PRESTIA: May I approach the witness, Your
2 Honor?

3 THE COURT: Go ahead. Uh-huh. Go ahead.

4 Q I'm now showing you -- for the record, I am
5 now showing you what has already been entered into
6 evidence as Plaintiff's Exhibit -- well, for
7 identification it was marked as 8, is it coming in as 8
8 Madam --

9 THE COURT: It's the default letter?

10 MR. PRESTIA: Yes.

11 THE COURT: 8.

12 MR. PRESTIA: Thank you, Your Honor.

13 MR. NEW: Is that the one that's in evidence?
14 Do you want to use the one that's in evidence?

15 MR. PRESTIA: That is the one that's in
16 evidence.

17 THE COURT: Okay. Do you want to take a look
18 at it?

19 MR. PRESTIA: If I may.

20 THE COURT: Go ahead. It's all right.

21 MR. NEW: So where is the exhibit binder or
22 the --

23 MR. PRESTIA: Right there.

24 MR. NEW: Those are the exhibits in evidence?

25 MR. PRESTIA: Yes.

1 THE COURT: Okay.

2 MR. NEW: No, this -- this is the exhibit in
3 evidence.

4 THE COURT: That's the one.

5 MR. PRESTIA: May I approach?

6 THE COURT: All right. Go ahead.

7 Q So this is the first time you're seeing this
8 document, right?

9 A No.

10 Q No? When did you see it before?

11 A Earlier this week.

12 Q Okay. And that was in your review of this --
13 in anticipation for litigation, right?

14 A Correct.

15 Q It wasn't part of your normal maintenance of
16 the file, right?

17 A Right.

18 Q Okay. Let's talk about the -- if you look
19 down on -- in the first paragraph, you see where it
20 starts, the sentence starts "In order to cure this
21 default?" It's one, two, three four, five -- the
22 seventh line down, do you see that?

23 A Yes.

24 Q Can you please read that?

25 A "In order to cure this default, we must

1 receive the past due amount within 30 days from the date
2 of this letter."

3 Q Okay. And you would agree that that is a fair
4 and accurate reading of what is in evidence already as
5 Plaintiff's Exhibit 8, right?

6 A Yes.

7 Q Okay. Now what I would like to show you what
8 has already been admitted into evidence as Plaintiff's
9 Exhibit 4.

10 (Handing document.)

11 MR. NEW: Thanks.

12 MR. PRESTIA: May I approach the witness, Your
13 Honor?

14 THE COURT: Yes, you may. Thanks.

15 Q I'd like -- I'd like you to turn to -- do you
16 have the mortgage?

17 MS. LUNDERGAN: Where is it?

18 Q Paragraph 22 of that. Let me know when you
19 get there, please. It's on page 14 at the bottom there.

20 A Okay.

21 Q Do you see that?

22 A Uh-huh.

23 Q Now, do you see a paragraph 22 there,
24 acceleration?

25 A Yes.

1 Q Okay. It says, and correct me if I'm wrong,
2 that -- I'm just going to read it into the record:
3 "Acceleration remedies. Lender shall give notice to
4 borrower prior to acceleration following borrower's
5 breach of any covenant or agreement in this security
6 instrument (but not prior to acceleration under Section
7 18 unless applicable law provides otherwise). The
8 notice shall specify." And then it has A, B, C and D,
9 right?

10 A Yes.

11 Q And it says, "It shall specify, A, the
12 default," Right?

13 A (No response).

14 Q Yes?

15 A Yes.

16 Q "B, The action required to cure the default,"
17 right?

18 A Yes.

19 Q And then "C, A date not less than 30 days from
20 the date the notice is given to the borrower by which
21 the default must be cured." Did I read right?

22 A Yes.

23 Q Okay. Now, I'd like you to go back to the
24 breach letter and look at that line that we just
25 discussed, and correct me if I'm wrong but it reads as

1 follows: "In order to cure this default, we must
2 receive the past due amount within 30 days from the date
3 of this letter," right?

4 A Yes.

5 Q Now, you would agree with me that that
6 sentence does not comport to what's required under
7 paragraph 22 within the mortgage; isn't that correct?

8 MR. NEW: Objection, foundation, calls for a
9 legal conclusion and with the rule of completeness
10 the entire letter should be read or at least have
11 the witness have an opportunity to look at it.

12 THE COURT: I'm going to give you redirect.
13 Overruled. Go ahead. You can answer.

14 A I am sorry, can you repeat that?

15 MR. PRESTIA: Madam Court Reporter, may you
16 read back the question?

17 (The last question and answer was read back by the
18 reporter.)

19 A I would disagree.

20 Q You disagree with that? Well, tell me why.

21 A Because it's 30 days from the date of the
22 letter.

23 Q You -- you see in there under paragraph 22
24 where it says, "shall specify a date not less than 30
25 days from the date the notice is given to the borrower,"

1 right?

2 A Uh-huh.

3 Q And you agree with me that -- well, on your
4 direct examination, that this is the first time they
5 received notice of the default, right? That's the point
6 of an acceleration letter, right?

7 A Yes.

8 Q So then pursuant to this acceleration letter
9 it says that in order to cure this default we must
10 receive the past due amount within 30 days, right?

11 A Yes.

12 Q So do you -- now, do you agree with me that
13 that does not comport to what is stated under paragraph
14 22 of the mortgage?

15 MR. NEW: Objection, asked and answered, the
16 same exact question he just doesn't like the
17 answer.

18 THE COURT: Okay. Overruled. Go ahead, you
19 can answer.

20 A I disagree.

21 Q You -- you disagree with the words "within 30
22 days" and then what it says in here "not less than 30
23 days"?

24 MR. NEW: Objection, asked and --

25 A That is 30 days.

1 MR. NEW: Answered, cumulative.

2 THE COURT: Overruled.

3 A It is 30 days.

4 Q Okay. Maybe I'm -- maybe I'm not
5 understanding you correctly. It says "a date not less
6 than 30 days from the date the notice is given," so if
7 we go by this document here, which is in -- entered into
8 evidence as 9?

9 THE COURT: No, it's 8.

10 A 8.

11 Q Eight, I apologize.

12 THE COURT: No, that's okay.

13 Q If we go by that document, document date of
14 June 1, 2009, according to the acceleration letter, they
15 would -- excuse me -- have to receive the past due
16 amount within a 30-day window to avoid acceleration and
17 foreclosure; isn't that right?

18 MR. NEW: Same objection.

19 THE COURT: Overruled.

20 A They are notified that they have 30 days to
21 cure the default.

22 Q No, it says in there that they must receive
23 the payment within 30 days?

24 A 30 days.

25 Q Isn't that right?

1 A Right.

2 Q So within, so 30 and under, you agree that's
3 what within mean?

4 A Yes.

5 Q Okay. And then if we go to paragraph 22 it
6 says, "a date not less than 30 days", so that would be
7 30 and over, right?

8 MR. NEW: Same objection.

9 THE COURT: Okay. Overruled. Go ahead, you
10 can answer.

11 A It's still 30 days. I mean, that's the way --
12 this is reading. Within 30 days, but not --

13 Q Sure. So the acceleration letter says within
14 30 days?

15 A Within 30 days yes.

16 Q And then the mortgage says a date not less
17 than 30 days, right?

18 A Yes.

19 Q Okay. Continuing on with our discussion of
20 the -- let me grab that stuff from you real quick.

21 THE COURT: Sure, go ahead.

22 MR. PRESTIA: May I approach? Let me have
23 just the mortgage. I want you to hold onto the
24 acceleration letter. I have some more questions
25 for you.

1 Q Let's talk about further -- let's go back and
2 talk about the second line in that acceleration letter.
3 Do you see that?

4 A Uh-huh. Yes.

5 Q Okay. Please read it for the record --

6 A "The amount past due on the -- on the mortgage
7 loan is \$13,083.41.

8 Q Okay, now how is that number computed?

9 A It's based on payments due.

10 Q Okay. And you would agree with me that the
11 payment, monthly payment, in this matter was \$3,152.63,
12 right?

13 A Correct.

14 Q Okay. So how many -- all right. At what
15 point did the defendants allegedly default in this
16 matter?

17 A April 1, 2009.

18 Q Okay. So let's do the math together. If
19 they're getting -- if the monthly payment is 3152.63,
20 and how many months according to this acceleration
21 letter is it -- are you testifying that were in
22 arrearage?

23 A It was actually, they were three months, so it
24 would be April, May and June's payments that was
25 arrears.

1 Q I am sorry, June's payment was in arrears, as
2 well?

3 A They were due. At the time the escalation
4 letter -- this went out, April, May and June.

5 Q Well, this went out on June 1st, right?

6 A Yes.

7 Q So at that point June wasn't really due, was
8 it?

9 A It was a due on June 1st.

10 Q But at that point they didn't default,
11 correct?

12 A It had to be in -- it had to be in by
13 June 1st.

14 Q Okay. But if this letter was also sent on
15 June 1st, you would agree with me that they could have
16 paid up until midnight on that date?

17 A But it was -- it was due at that time.

18 Q Okay. But you would agree with me that they
19 could have paid up until midnight on June 1st, correct?

20 A But April and May were already due.

21 Q I understand that. Well, I'm just talking
22 about June now. As it pertains to June 1st, 2009, this
23 letter was created on June 1st, 2009, it was not over
24 due, correct?

25 A No, but due.

1 Q So the answer to my question is yes?

2 A That it was due.

3 Q So realistically, they were -- the amount due
4 and owing was for April and May, correct?

5 A That was the past due amounts, yes.

6 Q Okay. And so the past due amounts -- let's
7 see if, we multiply 3152.63×2 , I'm not a
8 mathematician, I apologize, but let me just do the math
9 here --

10 MS. LUNDERGAN: Would you like the calculator
11 on your phone?

12 MR. PRESTIA: No, it's all right.

13 Q You would agree with me that 3152.63×2 would
14 be 6305.26.

15 A Yes.

16 Q So the amounts that were over due and owing at
17 the time of this letter were \$6,305.26, right?

18 A Actually, based on this letter it was the
19 April, May delinquent payments that were due, plus the
20 June payment that -- that is -- would be -- would have
21 been currently due and because they have 30 days to cure
22 the account, it also included the July payment to bring
23 the account totally current.

24 Q Okay. Now -- now, you're saying that it
25 includes not only June but July as well?

1 A Yes.

2 Q But how -- at this point June 1st, 2009, the
3 date this letter was created, July is still another 30
4 days away. They have plenty of time to pay that, don't
5 they?

6 A I mean, I don't have a calculator in front of
7 me, but I do believe that it was April, May and June
8 payment.

9 MR. PRESTIA: Your Honor, may I --

10 A And I do apologize.

11 MR. PRESTIA: -- produce my phone for a
12 calculator so that she can do calculations?

13 THE COURT: If she can do it on your phone,
14 sure.

15 MR. PRESTIA: May I approach, Your Honor?

16 THE COURT: Yes, you may.

17 MR. PRESTIA: Let the record reflect I'm
18 giving the witness a calculator.

19 A Thank you.

20 Q Okay. So you would agree with me --

21 THE COURT: Here's another one if you want to
22 try this one.

23 MR. PRESTIA: Oh, that one's is a little
24 better.

25 May I approach, Your Honor?

1 THE COURT: Yeah, absolutely.

2 A Thank you.

3 THE COURT: Go ahead.

4 Q Okay. So you -- you agree with me -- well,
5 first off let me ask you this question: As it pertains
6 to April and May --

7 A Correct.

8 Q -- you say that those amounts were due in
9 owing, right?

10 A Yes.

11 Q Okay. Show me in that letter where it says
12 that April and May are due and owing?

13 A It does not specify.

14 Q Okay. So as it pertains to the substance of
15 this letter, this figure of \$13,083.41 has no breakdown
16 as to how it was calculated. Do you agree with me on
17 that?

18 A The letter does not show a breakdown, no.

19 Q Okay. So your testimony that it includes a
20 balance due and owing of April is based -- is not based
21 on this letter, right?

22 MR. NEW: Objection, argumentative, foundation,
23 it's not the testimony.

24 THE COURT: Okay. Overruled.

25 A I am sorry, can you repeat that?

1 MR. PRESTIA: Madam Court Reporter, will you
2 please read that back for me.

3 (The last question and answer was read back by the
4 reporter.)

5 A No.

6 Q What is that based on?

7 A It is based on the past amounts of April and
8 May and -- and June and the upcoming June, which also
9 included late fees. I'm sorry.

10 Q What document is showing that April and May
11 and June were part of the \$13,083.41 that were
12 demanded -- allegedly demanded on June 1st, 2009?

13 A That would have been the pay history. That's
14 where they would have got the amounts.

15 Q But -- well, you don't know that, do you?

16 A Just from normal business practices.

17 Q Okay. But you can't testify as to the normal
18 business practices of Fifth Third Bank Corp, correct?

19 A Correct.

20 Q So you really don't know their calculations as
21 it pertains to this figure of 13,083.41, right?

22 A But by looking -- but by looking at the
23 account at my system and what was due at that time, I
24 can break that down, yes.

25 Q But I'm not talking about your system. I'm

1 talking about what was included in this document that
2 has been entered into evidence and that you're saying is
3 the acceleration letter as it pertains to this account.
4 Okay?

5 A Right.

6 Q So you have no idea how this, how Fifth Third
7 Bank computed this figure of \$13,083.41?

8 MR. NEW: Objection. She's been trying to say
9 for ten minutes.

10 THE COURT: Okay. Overruled. Do you have any
11 idea how it is calculated?

12 A Base on amounts past due, current and the late
13 fees that were due on the account.

14 Q Where did you obtain that information from?

15 A If you take the delinquency date and you look
16 at what was due at the time this letter went out.

17 Q But you -- as you said, you're not an employee
18 of the Fifth Third Bank Corp.?

19 A Correct.

20 Q So what you're telling me is really what your
21 thoughts are on how they may or may not have created
22 this figure of \$13,083.41, right?

23 A Based on my review of this and my notes, it
24 was the actual payment and the late fees, which totaled
25 the 13,000.

1 THE COURT: Let me stop you for a second. How
2 much additional time do you need with this witness?
3 Let me just, I need to get a feel of what time you
4 need.

5 MR. PRESTIA: I would anticipate --

6 THE COURT: I'm not going to try and cut you
7 short, I just want to know what the time is.

8 MR. PRESTIA: Your Honor, with all candor of
9 the court, I anticipate a good -- I've only gotten
10 through two documents so far. I would anticipate
11 another three hours, maybe.

12 THE COURT: Okay. Well, keep in mind that --
13 that the trial was set based upon an estimate, and
14 you already told me once it was for half of a day,
15 so ... I mean, we're -- we've already spent an hour
16 with this particular witness. It's now 6:00. So,
17 I'm just asking you so that I know what you need.
18 So you may need another three hours to do that.
19 And then how many other witnesses, do you have?
20 That's just your cross.

21 MR. PRESTIA: Yes, Your Honor.

22 THE COURT: How much --

23 MR. PRESTIA: And we have obviously motions
24 between -- if the plaintiff is not calling any
25 other witnesses, we have motions and then we

1 potentially have two other additional witnesses.

2 THE COURT: All right. How much time do you
3 anticipate for your other witnesses?

4 MR. PRESTIA: And -- I just want to raise one
5 thing for the record, Your Honor. We did file a
6 request for additional time.

7 THE COURT: Okay.

8 MR. PRESTIA: And that's within the court
9 file.

10 THE COURT: Okay.

11 MR. PRESTIA: We're requesting a full day on
12 this trial for this exact reason.

13 THE COURT: Well, I'm trying to figure out
14 from this point on what we need --

15 MR. PRESTIA: Sure. No, I anticipate --

16 THE COURT: -- start you all over again.

17 MR. PRESTIA: May I have one chance to confer
18 because I'm not the one that directed --

19 THE COURT: Go ahead.

20 (Short recess taken.)

21 MR. PRESTIA: Your Honor, based upon our, I
22 guess, colleagues and our trial team, we anticipate
23 that at least another three hours with this witness
24 and then additionally for our witnesses, a good
25 three hours, as well.

1 THE COURT: Okay.

2 MR. PRESTIA: However, Your Honor, the
3 reason -- I did -- I just wanted to put on the
4 record, that before I started my cross examination
5 that I made a point that I do have trial tomorrow,
6 and I asked for a continuance so that the cross
7 examination can be completed in one shot. At that
8 point, Your Honor, you indicated that we were gonna
9 go until this matter was completed; therefore, you
10 know, obviously we started at Your Honor's order.

11 At this point, if we -- if we continue the
12 matter now, it's highly prejudicial to continue in
13 the middle of my cross examination. You know,
14 obviously, before my -- my continuance was denied,
15 it allows the witness to potentially confer with
16 counsel and/or any other --

17 THE COURT: Quite frankly, she was under an
18 order of the Court not to contact anybody while she
19 was -- did you hear me instruct her not to do that?

20 MR. PRESTIA: I understand that, Your Honor.

21 THE COURT: Do you have reasonable basis for
22 me to consider that that may have occurred? Do you
23 have a reasonable basis to --

24 MR. PRESTIA: No, by no means. I'm not -- I'm
25 not --

1 THE COURT: Just want to be sure.

2 MR. PRESTIA: Absolutely not.

3 THE COURT: Because if you're going to suggest
4 it, you better have a reasonable basis.

5 MR. PRESTIA: No, sure. I'm -- I'm saying
6 that it allows her to potentially think of, you
7 know, fix her answers --

8 THE COURT: Okay.

9 MR. PRESTIA: And/or, you know, at that
10 point -- at this point already --

11 THE COURT: That's part of the trial, though,
12 isn't it? I mean, breaks are one of those things I
13 can't anticipate. So I would have to go with
14 whatever the time frame is. And I don't think
15 you'd want me to arbitrarily set time frames on
16 you, would you?

17 MR. PRESTIA: No, I understand, Your Honor. I
18 just -- I brought it to the Court's attention prior
19 to the start of my cross exam for that reason.

20 THE COURT: What's the nature of your case
21 tomorrow?

22 MR. PRESTIA: I'm sorry?

23 THE COURT: What's the nature of your case
24 tomorrow?

25 MR. PRESTIA: It's another foreclosure matter

1 with contested trial.

2 THE COURT: Here? In this courthouse?

3 MR. PRESTIA: No, it's in Broward County, Your
4 Honor.

5 THE COURT: Okay. All right. So that's what
6 you're looking at. You're advising me that you
7 need another six hours and that's just for your
8 part of it.

9 Redirect, what do you think? How much time do
10 you need?

11 MR. NEW: Extremely little, Your Honor. I
12 can't imagine a --

13 THE COURT: Give it to me -- parameters in
14 minutes, time or hours?

15 MR. NEW: Fifteen minutes. I think a redirect
16 is going to less than 15 minutes. I cross their
17 witnesses if they do appear.

18 THE COURT: Okay. So no other witnesses
19 besides this witness?

20 MR. NEW: At this point, I can't anticipate
21 that.

22 THE COURT: I'm just saying, do you have any
23 listed ones?

24 MR. NEW: I've got -- I've got their
25 witnesses. But no, sir. No, Your Honor.

1 THE COURT: Okay. So what are you thinking in
2 terms of are you planning on putting their
3 witnesses on the stand?

4 MR. NEW: No, not at this point. At this
5 point I do not.

6 THE COURT: Okay. So -- but you're going to
7 need to do cross examination, and they're saying
8 they're going to have probably three hours of
9 direct of their own witnesses. So what --

10 MR. NEW: My cross will be less than 15
11 minutes on each witness.

12 THE COURT: Okay. So we're looking at like
13 seven or eight hours, roughly, if you guys
14 estimate.

15 Okay. So in a regular trial day, we start at
16 9:30 a.m., we go to noon, that's two and a half
17 hours by my count. Then what we do is that we go
18 from 1:00 to 4:30 p.m, which is why you saw those
19 people come on the phone for a hearing. So
20 that's -- that's another three and a half hours.
21 So you need -- like all total, you need about two
22 or three days; is that about right?

23 MR. PRESTIA: I would anticipate, yes, Your
24 Honor.

25 THE COURT: Okay. And when you asked for

1 additional time, which is what you were telling me
2 a minute ago is that what you asked for?

3 MR. PRESTIA: We asked for a full day, I
4 believe.

5 THE COURT: So at this point, that's not
6 accurate. You need two or three days.

7 MR. PRESTIA: I put in -- I mean, that was a
8 good faith estimate, Your Honor, and in light of
9 the evidence that has been --

10 THE COURT: Okay.

11 MR. PRESTIA: -- admitted, I would -- I didn't
12 anticipate ten plus documents being entered into
13 evidence.

14 THE COURT: Okay. They weren't listed on the
15 pretrial order?

16 MR. PRESTIA: Sure, but, Your Honor, normally
17 it's --

18 THE COURT: I'm just asking.

19 MR. PRESTIA: Normally it's four documents.
20 It's normally a note and mortgage, payment history
21 and acceleration letter, so ...

22 THE COURT: All right. Anything else? Either
23 party?

24 MR. NEW: No, Your Honor.

25 THE COURT: Okay.

1 MR. PRESTIA: I would like to make a motion
2 outside of the presence of the witness, if
3 possible.

4 THE COURT: Okay. Let me just do -- let me
5 just take this issue while we're here. At least,
6 go ahead and get this out of the way.

7 So what I'm going to do is based upon the
8 motion made, I'm going receive from my original
9 order on the motion for mistrial. I'm going to
10 vacate that. I'm going to grant you a mistrial,
11 and I'm going to start y'all over again so there's
12 continuity in this case all the way through. We'll
13 put you on one of my non-jury trial dockets. We'll
14 send you out a new case order, and you will be
15 using my courtroom. It will be me, and I will be
16 setting you for trial. So what, what do you think,
17 three days enough?

18 MR. PRESTIA: That would be plenty, Your
19 Honor.

20 THE COURT: Okay. I am going to give you
21 three days worth of trial. And I don't know when
22 I'll set you at this point, but I am going to
23 require this: I've had two motions that were filed
24 under oath by the defendants who -- who signed
25 under oath under penalty of perjury things that

1 happened in the courtroom that they have no
2 first-hand knowledge of. So in order to make sure
3 that doesn't happen again, that they don't file
4 another affidavit or they have no first-hand
5 knowledge of things that happened in the courtroom,
6 your clients will be -- they'll necessarily be in
7 the courtroom with us the whole time so that
8 doesn't happen again.

9 So that having been said, I will be getting
10 you out an order and what we'll do is we'll hold
11 the exhibits. So if we could get all of the
12 exhibits.

13 MR. PRESTIA: May I approach the witness to --

14 THE COURT: Yes, absolutely.

15 MR. PRESTIA: Your Honor, I have one request
16 just so that and while we're still on the record
17 here.

18 THE COURT: If you want me to have the witness
19 step out of the room, that's fine.

20 MR. PRESTIA: Well, for purposes of this, I'd
21 actually like her present.

22 THE COURT: Okay.

23 MR. PRESTIA: For the next trial setting
24 before Your Honor, as now it's -- this was -- is in
25 effect null and void, there's been a mistrial

1 declared, we'd like affirmation from plaintiff's
2 counsel that this will be the witness testifying as
3 in the next trial setting and the opportunity to
4 depose that witness prior to that setting so that
5 we do not run into the same pretrial motions
6 again --

7 THE COURT: Let me just say, when I send out
8 my new pretrial, it will have discovery
9 opportunities there. It will also have other
10 disclosure requirements. So when I reset it, it
11 does open up the opportunity for discovery --

12 MR. NEW: Both sides?

13 THE COURT: Both sides, yeah.

14 MR. NEW: So they are -- they will produce
15 their clients for depositions?

16 THE COURT: If you ask for their clients for
17 deposition, you can have their clients for
18 deposition. Just, I am making them come to the
19 courtroom because of filing affidavits, swearing
20 under oath and things that occurred that they
21 didn't see, so they didn't have any first-hand
22 knowledge of the things that they said that had
23 occurred. So they obviously got that information
24 from somebody else.

25 So we don't have that again, if they want to

1 file affidavits and the motions later in the case,
2 they're certainly free to do so, but they're going
3 to need to be present and anything they swear to,
4 they need to have first-hand knowledge of.

5 So with that being said, I wish you all a
6 goodnight.

7 MR. WASSERSTEIN: Your Honor, before we
8 conclude here, if I may, the association, who is my
9 client in this action --

10 THE COURT: Right.

11 MR. WASSERSTEIN: -- I would say is most
12 significantly prejudiced by the outcome here today.

13 THE COURT: Right.

14 MR. WASSERSTEIN: The delay of this case
15 further, we had a trial and an outcome where, you
16 know, procedurally dismissed, we had a rehearing,
17 and granted, and then now here we are again today.
18 My client has paid for me to be here today for the
19 purposes of insuring that there will be no further
20 delays, because every day that passes there's a
21 lack of assessments being paid and a delinquency,
22 and as an association, there's a budget that can't
23 function properly and that has to be privy unpaid
24 assessments to other owners.

25 So in light of that information, my clients'

1 circumstances, I would just urge the court, I mean,
2 another trial order setting out -- I know we're
3 going to have a lot of procedure and it reopens --
4 it sounds like we're reopening discovery.

5 THE COURT: Correct.

6 MR. WASSERSTEIN: And this is just going to
7 further prejudice my client who has anticipated a
8 ending to this very long pending case and it has,
9 you know -- for sometime now with the trial
10 settings that have put forth.

11 THE COURT: Well, let me just ask you this:
12 So in this particular case, are you ready to put on
13 your case relative to your -- your claim?

14 MR. WASSERSTEIN: My client has no case to put
15 on, is putting on no argument in this case, Your
16 Honor.

17 THE COURT: Okay. You obviously don't have
18 another case, your claim is in this case, correct?

19 MR. WASSERSTEIN: No, Judge. Our claim and
20 our interest is outside of this case. We are named
21 as a defendant only because we have a security
22 interest in the property.

23 THE COURT: Let me just ask you this: Do you
24 have a lien on the property for your association?

25 MR. WASSERSTEIN: I believe there maybe a lien

1 of record that is very old or if not, there may not
2 be, but the documents give us a security interest
3 in the property.

4 THE COURT: Okay. So I guess what I'm saying
5 to you, you don't have a pending counterclaim or
6 cross claim against these defendants?

7 MR. WASSERSTEIN: No, Your Honor.

8 THE COURT: Okay. So if that were the case, I
9 would consider severing it and trying that case
10 separate because it would go fairly quickly--

11 MR. WASSERSTEIN: No, Your Honor, and there's
12 really no benefit for us.

13 THE COURT: Okay. Otherwise, I can say I'm
14 sympathetic with your position, but as I told
15 everybody when they came in this room, this room is
16 a circuit civil trial division and everybody gets a
17 free trial. And everybody gets a fair trial. So
18 it's not free, but regrettably, that's the way
19 these things work. So I've granted the motion for
20 a mistrial because I can't get all of the evidence
21 here, and we're going to start everybody all over
22 again. And when I do, the trial order will open up
23 discovery, but it's going to be very quick and then
24 I'm gonna be right back in here. So as soon as I
25 can get on enough time. So I'm going to give them

1 three days so it's uninterrupted and I'm going to
2 put them on my schedule.

3 MR. WASSERSTEIN: Just -- just doing my job.

4 THE COURT: I know you are, and I'm
5 sympathetic to everybody. Y'all be aware, though,
6 I'm going to set it, so you're going to have to
7 adjust your schedules accordingly, because I'm not
8 going to be able to accommodate everybody's
9 conflicts. So I'm going to get you right back in
10 here and we'll start over again, and we will get
11 this case resolved. Okay. Watch your step
12 stepping down.

13 Anything else we need to address before we --

14 MR. PRESTIA: Yes, Your Honor, I have one --
15 outside the presence of the witness, I'd like to
16 make a motion.

17 THE COURT: Okay. Go ahead. Why don't you
18 leave the room for just a second.

19 MR. PRESTIA: Your Honor, may I approach with
20 your calculator?

21 THE COURT: Sure.

22 MR. NEW: Your Honor, to confirm with the
23 mistrial, I want Ms. Kuerzi to understand that she
24 can communicate with us. She's not on the stand at
25 mistrial.

1 THE COURT: That's correct, you are free to
2 talk with the attorneys at any time at this point.
3 Okay.

4 Go ahead and step out, if you don't mind.
5 Thanks a lot.

6 MR. PRESTIA: Your Honor, at this time based
7 upon Ms. Kuerzi's testimony, I'd like to make an
8 ore tenus motion to dismiss this matter as she
9 testified that DLJ Mortgage company is the owner
10 and holder of this note, contrary to the
11 allegations that were set forth within the
12 complaint that Fifth Third -- I want to get it
13 right for the record. I'm sorry -- Fifth Third
14 Mortgage company as paragraph five of the complaint
15 states that they are the owner and holder of the
16 subject note and mortgage. Pursuant to case law
17 that is on this issue and I can present Your Honor
18 with --

19 THE COURT: Let me ask you this: At this
20 point I'm not going to accept any oral motions.
21 Anything you want to move, put it in writing and
22 we'll set it for a hearing and we will do that.
23 Okay?

24 MR. PRESTIA: Thank you, Your Honor. I
25 appreciate it.

1 THE COURT: Thank you. See y'all later.

2 (Time noted: 6:14 p.m.)

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HEARING CERTIFICATE

I, Lia Brocking, Court Reporter and Notary Public in and for the State of Florida at Large, certify that I was authorized and did stenographically report the foregoing proceedings and that this transcript, pages 1 through 177 is a true record of the proceedings before the Court.

I further certify that I am not a relative, employee, attorney or counsel for any of the parties nor am I a relative or employee of any of the parties's attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 20th day of August, 2013.

LIA BROCKING