INTRODUCTION

This is an appeal from a Final Judgment of Foreclosure in a case filed by the now defunct, INDYMAC FEDERAL BANK, FSB, against the homeowner, ENRIQUE FABRE. Over a period spanning more than three years of litigation, FABRE was denied nearly every avenue of discovery to test the veracity of the claims asserted by INDYMAC, and its eleventh-hour substitute, DEUTSCHE BANK NATIONAL TRUST COMPANY. Among the disputed claims was the BANK's allegation that it had mailed a notice of default, as well as whether it even had standing to foreclose—a claim that was continually altered throughout the litigation.

At trial, the handicap of the disallowed discovery became apparent, allowing the BANK to present a single person to testify over objection regarding every aspect of the case, including recordkeeping practices about which he admitted to having no personal knowledge. This case presents the trial equivalent of the systematic execution of summary judgment affidavits by bank employees without personal knowledge of the facts—a practice resoundingly rejected by the courts and known to the public as "robo-signing." It presents the similar question as to whether the systematic testifying at trial by professional testifiers who lack personal knowledge should also be condemned.

STATEMENT OF THE CASE AND FACTS

A. At Trial, the Court Admitted a Wide Range of Documents, and Testimony about Documents, from a Single, Designated Bank Testifier, Despite Objections to Hearsay and Authenticity.

1. FABRE's Motion *in Limine* to exclude unauthenticated hearsay.

At trial, the BANK called only one person to the stand, an "assistant vice president" of the non-party OneWest Bank, FSB ("OneWest"), Marco Flores.[1] According to documents provided to Flores, OneWest is the current servicing agent for the loan, having inherited the rights from two predecessors, the original lender, IndyMac Bank, FSB, and the original plaintiff, INDYMAC.[2] In his role as OneWest's assistant vice president, Flores had testified in approximately 200 trials and hearings in the preceding eleven months,[3] an average of over four times a week.

FABRE had already deposed Flores and had moved *in limine* to exclude hearsay testimony which amounted to nothing more than the reading of bank-provided documents to the court—documents which themselves were hearsay and

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[1] Transcript of Non-Jury Trial before the Honorable Spencer Eig, December 19, 2011 (Volume XI of the Index to the Record on Appeal, hereinafter "T.") 28.

[2] T. 32, 40. Although Flores had worked at all three incarnations of IndyMac/OneWest, according to his review of documents he was provided, the servicing of FABRE's loan began over a year before he was employed there. *Id*.

[3] Deposition of Marcos Flores, taken November 28, 2011 ("Flores Depo."), p. 7 (Supp. R. 563).

which he had never seen until a few weeks before trial.[4] In the motion, FABRE pointed out that Flores could not be deemed a records custodian (or otherwise qualified witness) for many, if not all the documents that the BANK hoped to use at trial. FABRE highlighted the following testimony from the Flores deposition to prove his point:

Notice of Default Letter: Flores admitted that he had no custodial or supervisor duties regarding the breach letter required by the mortgage and that he did not know who prepared the letter. He appeared to be uncertain as to which department was responsible for preparing it:

> Q. Were you responsible for preparing the breach letter?
>
> A. No, sir.
>
> Q. Who is?
>
> A. To be honest with you, I don't know. I think it's somebody in our foreclosure department I believe.
>
> Q. Now, you said you don't know who was responsible for preparing the letter. Do you know who was responsible for sending the letter?
>
> A. No. Typically the sending of the letter I believe it occurs in our Kalamazoo office.
>
> Q. Are you in charge of that office?
>
> A. No, sir.

[4] Defendant, Enrique Fabre's Motion *in Limine*, dated December 13, 2011 (R. 1602-1618); Flores Depo., p. 8 (Supp. R. 564).

Q. Do you supervise anybody in that office?

A. No, sir, I do not.

[…]

Q. You said the person preparing the breach letter would be someone in the foreclosure department, right?

A. I believe so.

Q. Do you supervise anybody in that department?

A. No, sir.[5]

Notably, FABRE had denied the BANK's allegation that it had met all conditions precedent.[6] More specifically, FABRE raised an affirmative defense alleging with particularity that the BANK had failed to comply with Paragraph 22 of the mortgage which required it to send him a Notice of Default.[7]

Payment Records: Flores admitted that he was not in charge of maintaining the payment records and did not supervise anyone who did.[8]

Promissory Note: Flores admitted that the custodian of the promissory note was the freshly substituted plaintiff,[9] DEUTSCHE.[10] Yet, Mr. Flores was not an

[5] Transcript of Deposition of Marcos Flores, taken November 28, 2011 ("Flores Depo."), p. 45-6 (Supp. R. 601-02).

[6] Defendant, Enrique Fabre's, Amended Answer to Complaint and Affirmative Defenses, ¶ 9 (R. 167).

[7] Sixth Affirmative Defense, Defendant, Enrique Fabre's, Amended Answer to Complaint and Affirmative Defenses, p. 5 (R. 170).

[8] *Id*. at 56-7 (Supp. R. 612-613).

employee of DEUTSCHE.[11] He had never seen the original note or mortgage[12] and he did not know where the loan file containing these documents was kept.[13]

2. The testimony of Flores on direct examination.

At trial, the court ruled that the motion *in limine* would remain pending during Flores' testimony and that the evidence would be accepted conditionally, subject to a later decision on admissibility.[14] Flores began his trial testimony by describing his experience in the loan servicing industry which consisted of fifteen years in which he worked at "about six" loan servicing companies.[15] During that time, he held the job of a customer service representative, a collections agent, a loss mitigation specialist, a loss mitigation supervisor manager, and an assistant vice president.[16] He described his current activities with OneWest as "[r]eviewing

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[9] Over objection and without holding an evidentiary hearing, the trial court substituted DEUTSCHE BANK NATIONAL TRUST COMPANY, in its capacity as Trustee for a 2005 trust, as the party plaintiff less than a week from calendar call. Transcript of Hearing Before the Honorable Spencer Eig on November 21, 2011 (R.1677); Order Granting Plaintiff's Motion to Substitute Party Plaintiff, dated November 21, 2011 (R. 1191).

[10] Flores Depo., p. 21 (Supp. R. 577).

[11] *Id*. at 12-13 (R. 568-69).

[12] *Id*. at 17-18 (R. 573-74).

[13] *Id*. at 88 (R. 644).

[14] T. 17, 30-31.

[15] T. 27.

[16] T. 27.

of business records, documentation that has been imaged in our system" as well as "[c]ontact with, you know, all parties involved, heavy communication."[17]

Over numerous objections, Flores then became the conduit for information allegedly contained in computer records kept by the three, non-party entities that had serviced the loan. Through Flores, a paper purporting to be a Notice of Default letter (Exhibit 5) was introduced into evidence on the foundation that he had reviewed it before trial.[18] Although he previously testified at deposition he thought it was prepared by the "foreclosure department," he now testified it was the "collection customer service department."[19] Also, he now claimed to know that the letter was actually sent to FABRE because some "customer activity log" that was not offered in evidence, but which he said he had reviewed, allegedly said so.[20]

Similarly, Flores served as the conduit for the payment information contained in a computer printout summarizing servicing data, apparently on the grounds that he had reviewed it before trial.[21]

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[17] T. 29.

[18] T. 68-72.

[19] T. 68-69.

[20] T. 70.

[21] T. 62.

With respect to the loan documents, Flores identified something (Exhibit 2) that "appears to be a copy of the note or the original note."[22] Even on direct, he admitted to never having seen the document before in person.[23] His claimed familiarity with the document was acquired before trial by looking at a digital image that was not in evidence.[24] Over objection and without foundation, Flores testified that the BANK's imaging system "reliably contain[ed] copies of loan-related document[s]."[25] Although the note attached to the complaint was not endorsed, the trial court then permitted Flores to read into the record an alleged endorsement on the version that was presented at trial, an endorsement about which he did not claim to have any personal knowledge.[26]

Flores was also allowed to testify, over multiple objections, about the contents of a Pooling and Servicing Agreement ("PSA," Exhibit 6), apparently on the basis that he had reviewed it.[27] From reading this document, Flores asserted that the original mortgage note was "supposed to be delivered" to the trustee by December 29, 2005.[28]

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[22] T. 48.

[23] *Id.*

[24] T. 48-49.

[25] T. 50.

[26] T. 56.

[27] T. 74, 80.

[28] T. 78.

In the sixty-one transcript pages of Flores' direct testimony, the trial court overruled 102 objections to hearsay, authenticity and lack of personal knowledge. The court partially sustained only one objection.[29]

3. The testimony of Flores on cross-examination.

On cross, Flores revealed for the first time to the trier of fact that, in addition to the job activities he had voluntarily listed on direct, he had the responsibility of testifying and, in fact, had testified over 200 times in the previous eleven months.[30]

The Notice of Default Letter (Exhibit 5): Flores admitted that he did not prepare the notice of default letter, or supervise the maintenance of the digital version.[31] The digital record of the letter was information that was allegedly "boarded" onto OneWest's computer system on some unknown date by way of some physical process with which Flores was not involved.[32] While contending that the letter was sent, he admitted that he had no personal knowledge of whether it was sent, and no knowledge (personal or otherwise) whether it was sent by first class mail or hand-delivery as required by the note.[33]

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[29] T. 36.

[30] T. 124.

[31] T. 117-18.

[32] T. 119-20.

[33] T. 120.

Payment Records (Exhibit 4): Flores also testified that he was not in charge of maintaining the payment records, nor did he supervise anyone who did.[34] Nor did he input payments or tax transactions into the records or supervise anyone who did.[35] He had no personal knowledge of the escrow transactions or who input them into the payment history.[36] Furthermore, Flores had not seen a single loan payment document until a little more than a month before trial when he looked at them only for purposes of the litigation.[37] He also admitted that the pay history from the prior servicers were never boarded on the OneWest computers, but is simply pulled from archives.[38]

One key aspect of Flores' direct testimony had been that payments are posted to the BANK's computer system within 24 hours (testimony presumably intended to meet the "made at or about the time" element of the business record hearsay exception). He admitted on cross-examination, however, that his testimony about his employer's payment posting policy was actually a parroting of

[34] T. 98.

[35] T. 98.

[36] T. 99.

[37] T. 101.

[38] T. 116.

statements allegedly told to him the night before trial by a vice president of cashiering.[39]

As for the computation of the amount due, Flores testified that the payoff amount he calculated accounts for the variation in the interest rate as required by the note, although "the interest rate never changed in the system."[40] He had not reviewed any notice that he said would have been sent 45 days before the date of the rate change and did nothing to confirm that the rate changes were correctly applied and computed in the amount due and owing.[41] The verification of the fluctuating rates would be done by someone in the special loans department.[42] Flores does not supervise the department and could not name anyone there.[43]

The Promissory Note (Exhibit 2): Flores admitted again that DEUTSCHE BANK was the custodian of the original note and that he had never seen the original note before trial, did not know where it was before the lawsuit commenced, and never even knew that the note presented at trial, in contrast to the unendorsed copy attached to the complaint, now purports to be endorsed…twice.[44]

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[39] T. 99.

[40] T. 114.

[41] T. 115.

[42] T. 115.

[43] T. 115.

[44] T. 89, 94.

Most importantly, he did not know when the alleged endorsements were placed on the note.[45]

The Pooling and Servicing Agreement (Exhibit 6): Flores confessed that he did not draft the PSA and did not know who did.[46] He was not involved in the transaction and had never even seen a signed copy.[47] And although the document itself describes a transaction involving "IndyMac MBS," Flores never worked for that entity and never spoke with anyone there.[48] Flores did not "know anything at all" about that entity apart from the fact that its name appears on the unsigned PSA as the transferee of loan documents from the original lender.[49] As with the other documents he ushered into evidence, his only contact with the PSA was that he read it in preparation for trial.[50]

Additionally, Flores admitted that his "knowledge" of whether this loan was actually pooled in the DEUTSCHE trust (as it had alleged to justify substitution as the plaintiff) came from reading a mortgage loan schedule. The schedule,

[45] T. 94.

[46] T. 102.

[47] T. 102.

[48] T. 106.

[49] T. 106-07.

[50] T. 103.

however, was not attached to the unsigned version of the PSA admitted into evidence.[51] Nor was it ever offered into evidence.

Ultimately, his knowledge as to whether the original note was ever transferred from the lender to the Plaintiff DEUTSCHE was but a "contention," something he "would assume" because he would have "no reason to believe otherwise."[52]

The Loan Transfer History (Exhibit 7): The loan transfer history was an alleged computer record that purports to record a transfer of the loan in 2005, before Flores even worked for IndyMac Bank FSB.[53] Flores admitted he did not know the policies and procedures regarding the creation of such loan transfer histories, and did not know when it was drafted or updated in the computer system.[54] Again, Flores' knowledge (or lack thereof) stemmed from an out-of-court discussion with another individual at the company, this time the vice president of the investor accounting department.[55]

On redirect, Flores reiterated that testimony concerning whether the note and mortgage were in the DEUTSCHE trust was entirely "based on business record

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[51] T. 107.

[52] T. 92.

[53] T. 103-04.

[54] T. 104-05.

[55] T. 104-05.

review."[56] At the end of the testimony, the trial court officially admitted all the BANK's exhibits by denying FABRE's motion *in limine* and motion to strike the exhibits.[57]

B. FABRE's Motions for Involuntary Dismissal Were Denied.

At the close of the BANK's evidence, FABRE moved for an involuntary dismissal on the grounds that the BANK had failed to adduce evidence of the essential elements of a *prima facie* foreclosure case.[58] One of the reasons argued by FABRE was that the BANK had failed to show that the required Notice of Default letter had been sent by first class mail (as required by ¶15 of the mortgage)—or for that matter, that it was sent at all.[59] FABRE also pointed out that there had been no evidence that the note was endorsed on the day that the complaint was filed.[60] The court denied FABRE's motion.[61] FABRE renewed the motion at the end of his own case, which the trial court also denied.[62]

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[56] T. 128-29.

[57] T. 144-45.

[58] T. 145.

[59] T. 146-47.

[60] T. 159.

[61] T. 159-60.

[62] T. 181.

C. Before Trial, the Court Had Hobbled FABRE's Discovery Efforts.

1. FABRE was denied a deposition of MERS.

The failed odyssey for a single deposition of a representative of the original mortgagee, Mortgage Electronic Registrations Systems, Inc. ("MERS") spanned over twenty months and eight hearings with four different judges.[63] The attorneys for INDYMAC had recorded a MERS assignment of mortgage in the public records approximately two weeks after the complaint was filed.[64] That assignment purported to transfer both the note and the mortgage from MERS to INDYMAC. Because the handwritten dates are unclear, the MERS assignment purports to have been executed either one day before the Complaint was filed, or two days after.[65]

After fruitlessly ordering MERS to produce a representative for deposition no less than three times, the trial court ultimately reversed itself on the basis of a recent Fourth District opinion,[66] which had declared that assignments of mortgage (even fraudulent ones) were completely irrelevant to foreclosure proceedings.[67]

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[63] The motions and hearings surrounding this single deposition request are summarized in "Table 1" at the end of this Brief.

[64] Assignment of Mortgage from MERS to INDYMAC, dated either September 24 or September 27, 2008, recorded in the public records at Bk 26597 Pg 4954 on October 6, 2008, FABRE's Trial Exhibit B, admitted at T. 172 (Supp. R. 1377).

[65] *Id*.

[66] *Harvey v. Deutsche Bank Nat. Trust Co*., 69 So. 3d 300 (Fla. 4th DCA 2011).

[67] Mortgage Electronic Registration Systems, Inc.'s Motion for Reconsideration of Order Denying Motion for Protective Order, dated August 25, 2011 (R. 644); Order Granting Mortgage Electronic Registration System, Inc.'s Motion for

Later, however, the Fourth District decided another case which found that an assignment would be relevant where, as here, undated endorsements suddenly appeared on the note after the case was filed.[68] The Fourth District found that, in that instance, the assignment is relevant to establishing whether the plaintiff acquired standing before the suit was initiated. FABRE's final attempt to force MERS to the deposition table based on the latter Fourth District decision was denied the morning of trial.[69]

2. FABRE was denied a meaningful deposition of Plaintiff.

a. Deposition of Plaintiff by way of corporate representatives identified by Plaintiff.

Aside from the MERS deposition, FABRE sought to depose a representative of Plaintiff under 1.310(b)(6) Fla. R. Civ. P.[70] The areas of inquiry included among other things: 1) the INDYMAC's standing to bring the suit; 2) conditions precedent; and 3) the payment history of the loan.[71] Plaintiff INDYMAC moved for a protective order principally on the grounds that discovery concerning its

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Reconsideration of Order Denying Motion for Protective Order, dated September 8, 2011 (R. 710-11).

[68] *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012).

[69] T. 12.

[70] Notice of Deposition of One or More Employees of IndyMac Federal Bank FSB, With The Most Knowledge of Each of The Areas on the Attached List, Exhibit A, dated November 10, 2011 (R. 1068).

[71] *Id*. at 4-6 (R. 1071-73).

standing was irrelevant.[72] The court denied INDYMAC's motion[73] and INDYMAC produced a single witness (the same Marcos Flores who would later testify at trial) as the person with the most knowledge of 27 different topics. Because Flores stated at the deposition he had no knowledge of many of these topics, FABRE moved to compel and for sanctions arguing that INDYMAC had, in effect, failed to appear for deposition on those topics.[74]

Specifically, FABRE pointed out that Flores had no knowledge about, among other identified subject matters, the conditions precedent (the Notice of Default letter), the payment history for the loan, where the lost note had been found (despite an earlier unsuccessful "due and diligent search"), where the note was kept before the foreclosure, the authority of the persons endorsing the note, and Plaintiff's standing (including the documents showing Plaintiff's purchase of the loan and the PSA).[75] In some cases, Flores identified others who would have more knowledge of the identified topic.[76]

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[72] IndyMac Federal Bank, FSB's Motion for Protective Order, dated November 15, 2011 (R. 1121-27).

[73] Order Denying Defendant's Motion for Failure to Attend Deposition and Plaintiff's Motion for Protective Order, dated November 21, 2011 (R. 1179).

[74] Defendant, Enrique Fabre's Motion to Compel Attendance at Deposition and Motion for Sanction of Dismissal, dated December 9, 2011 (R. 1509).

[75] *Id*.

[76] Id. at 4 (citing Flores Depo., p. 74), 5 (citing Flores Depo., p. 88), 8 (citing Flores Depo., p. 85)

Although the trial court had already denied the BANK's motion for protective order which had argued that the topics were irrelevant, the BANK resurrected the relevancy argument to excuse its failure to provide witnesses with knowledge of the identified topics.[77] Without explanation, the court denied FABRE's motions.[78]

b. Deposition of Plaintiff by way of corporate representatives identified by FABRE.

FABRE also asked for the deposition of INDYMAC's representative by specifically naming, Erica A. Johnson-Seck,[79] the bank's Vice President who executed the original summary judgment affidavit saying she had personal knowledge of the books and records of IndyMac.[80] INDYMAC objected on the grounds that "Johnson-Seck is a non-party" and, therefore, could not be compelled

[77] Transcript of Hearing before the Honorable Spencer Eig, December 12, 2011, pp. 17-19 (R. 1638-40).

[78] *Id*. at 21.

[79] Notice of Taking Deposition (Duces Tecum), dated October, 7, 2011 (R. 769).

[80] Affidavit as to Amounts Due and Owing dated November 17, 2008 (R. 87-90). Ms. Johnson-Seck has been the subject of several uncomplimentary judicial opinions. *In re Kang Jin Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) (expressing disbelief regarding her testimony that IndyMac was the duly authorized servicing agent for the note owner); *Deutsche Bank National Trust Company v. Maraj*, 18 Misc 3d 1123, at 2 (A) (Sup Ct, Kings County 2008) (expressing concern whether she was engaged in "self-dealing"); *Onewest Bank, F.S.B. v. Drayton*, 29 Misc. 3d 1021, 1022 (N.Y. Sup. Ct. 2010) (labeling her a "robo-signer").

to sit for deposition without a subpoena.[81] INDYMAC also argued that Johnson-Seck's testimony would be irrelevant, because INDYMAC had withdrawn the affidavit.[82] The trial court granted INDYMAC's motion for protective order.[83]

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At trial, FABRE proffered the testimony of the witnesses he was precluded from deposing.[84] At the close of all the evidence, the trial court ruled in favor of the BANK and entered judgment from which this appeal was timely taken.[85]

[81] Plaintiff's Motion for Protective Order and to Strike Deposition Notice, dated November 4, 2011, p. 1 (R. 994).

[82] *Id*.

[83] Order Granting Plaintiff's Motion for Protective Order and to Strike Deposition Notice, dated November 17, 2011 (R. 1179).

[84] T. 172-76.

[85] T. 200; Final Judgment of Foreclosure, dated December 19, 2011 (R. 1932).

SUMMARY OF ARGUMENT

A professional testifier who has no responsibility for the creation or preservation of company records and whose only contact with those records is to review them in preparation for funneling them (or sometimes merely reading them) to the fact finder at trial is singularly unqualified to overcome hearsay and authenticity objections to those records. The rules provide an easy alternative for admissibility—a sworn certification or declaration by an actual records custodian—which the BANK here eschewed.

Because the BANK's designated testifier, Flores, could not lay the necessary predicate for the business records exception to hearsay, admission of the BANK's documents into evidence was error and FABRE was entitled to an involuntary dismissal. Among other hearsay documents was the alleged Notice of Default necessary to accelerate the loan such that: 1) additional payments made would not count towards a cure; and 2) the BANK could file suit.

The erroneous admission of hearsay evidence was exacerbated by the pre-trial denial of depositions of BANK officers who had actual knowledge of the documents proffered at trial. This ruling denied FABRE the due process right to cross-examine the hearsay testimony offered against him. The trial court also misinterpreted case law to deny FABRE a deposition of a MERS representative needed to determine whether the BANK acquired standing before filing suit.