Harrison).[11] After further argument, however, Judge Harrison sent the parties to argue the motion to Judge Lewis, who apparently stood by her denial of the continuance and the depositions.[12] As a result, the parties reconvened before Judge Harrison who now denied the motion *in limine*.[13]

C. The trial.

1. The Bank's document reader, George Kanuck.

The Bank called only one of its twelve listed witnesses at trial, George Kanuck—a meteorologist by education and vocation prior to starting his employment with OneWest Bank roughly three-and-a-half years ago.[14] He asserted that his employer, OneWest, was the servicer for the loan.[15] Kanuck answered a series of leading questions designed to establish a business records exception to hearsay—regarding all the OneWest records he had reviewed in the case even though the specific documents had not yet been identified:

> Q And are you familiar with the recordkeeping system of OneWest Bank?
>
> A Yes, I am.

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[11] Transcript of Proceedings Before Judge Howard Harrison, June 19, 2013, at T. 17.

[12] T. 20-22.

[13] T. 22.

[14] T. 61-62, 25, 29.

[15] T. 24.

Q Have you personally reviewed the records relating to the loan given to the borrower Christopher Tsonas?

A Yes, I am.

Q And are those records that you reviewed maintained under the direct, under the direction and control of OneWest Bank?

A Yes.

Q Are those records made at or near the time of the transactions reflected therein?

A Yes.

Q Are they made by somebody with personal knowledge of the information contained within those records?

A Yes.

Q And are they made within the regular and ordinary course of OneWest business?

A Yes.[16]

The Bank then sought to show a myriad of documents to the witness prompting a hearsay objection from the Homeowners.[17] The Homeowners also asked that Kanuck's testimony be stricken "because [he] has not indicated that he has ever worked with IndyMac."[18]

[16] T. 25-26.

[17] T. 27.

[18] T. 28.

2. *Voir Dire* demonstrates Kanuck's lack of personal knowledge.

On *voir dire*, Kanuck confirmed that he worked for OneWest Bank, not the lender, IndyMac Bank, F.S.B, or the plaintiff, Deutsche Bank.[19] He never maintained the books and records for IndyMac and could not give the name of anyone "who would have had something to do with the inputting of information into the IndyMac system.[20]

It was his view that Deutsche Bank had purchased the loan and that OneWest had inherited IndyMac's servicing rights after IndyMac was shut down by the Federal Deposit Insurance Corp. ("FDIC") in 2008.[21] He admitted, however, that this transfer of servicing rights and the "platform" (the servicing records computer system) happened six months before he began working for OneWest.[22] While it was his "understanding" that OneWest adopted the IndyMac servicing platform in its entirety,[23] he admitted that he did not work there and did not participate in any "mechanism" relating to the transfer of the servicing platform.[24] He "believed" that his description of Deutsche Bank's ownership

[19] T. 29, 32, 33.

[20] T. 33.

[21] T. 32, 34.

[22] T. 30.

[23] T. 32.

[24] T. 31, 34.

interest in the loan and OneWest's interest in the servicing rights was contained in a Pooling and Servicing Agreement ("PSA")[25]—a document which was never admitted (or even offered) as an exhibit.

In addition, he admitted that he did not know the regularly conducted business practices of Deutsche Bank.[26] His knowledge of IndyMac's business practices came from "training" provided by his employer, OneWest.[27]

3. The trial court admits the Bank's exhibits over objection.

After *voir dire*, the Homeowners again raised their hearsay objection to the documents brought by the Bank and specifically advised the court that the witness was not competent to lay the foundation for a business records exception.[28] The court ruled that Kanuck was competent to so testify.[29]

The court then allowed Kanuck to shuttle all the Bank's exhibits into evidence over repeated objections:

- Modification Agreement as of October 20, 2005 (Exhibit 1);[30]
- Power of Attorney (Exhibit 2);[31]

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[25] T. 32.

[26] T. 34.

[27] T. 34-35.

[28] T. 36-41.

[29] T. 41.

[30] T. 28, 41; (R. Exh. 2).

[31] T. 43.

- The Notice of Filing of the original Note and Mortgage (Exhibit 3);[32]
- Residential Construction Loan Agreement (Exhibit 4);[33]
- Acceleration Letter (Exhibit 5);[34]
- Payment history (Exhibit 6).[35]

The Modification Agreement—never attached to the Complaint—was between IndyMac Bank, F.S.B. and the Homeowners (although, like the original Note, it was signed only by Christopher Tsonas). The modified agreement has a variable interest rate (including the default rate) of 2.750 percent over the "Current Index" (weekly average yield on one year U.S. Treasury securities).[36]

The Homeowners renewed their objections to all but the Notice of Filing (Exhibit 3) on the grounds that the exhibits predated Kanuck's "involvement and personal knowledge" and were, therefore, hearsay.[37]

4. Kanuck reads the amounts due and owing from a proposed final judgment not in evidence.

The Bank then handed the witness a document which counsel described as a "final judgment," but which was never marked for identification or offered as an

[32] T. 44.

[33] T. 45.

[34] T. 45.

[35] T. 46.

[36] Modification Agreement, ¶4.(C) (R. Exh. 4)

[37] T. 51-52.

exhibit. Kanuck testified that he had compared the figures in the final judgment to OneWest's business records—which "included" the payment history in evidence—and that "to the best of [his] knowledge" the figures accurately reflected those business records.[38] Over objection, the trial court permitted Kanuck to read the figures into evidence.[39]

5. Cross-examination further exposes Kanuck's lack of personal knowledge of the documents and the computation of the interest rate.

On cross-examination, when questioned about the Power of Attorney between Deutsche Bank and IndyMac (Exhibit 2), Kanuck admitted he had never been an officer of either of those entities[40] and did not know the officers who signed the document. He did not know whether the officer who signed for Deutsche Bank even worked for that entity or whether the officer who signed for IndyMac had the requisite capacity to do so.[41]

When questioned about the Note, Kanuck admitted that he did not know whether the person who signed the endorsement was authorized to do so.[42] He

[38] T. 58.

[39] T. 58-59.

[40] T. 64.

[41] T. 65.

[42] T. 71.

could not even identify the person who endorsed the Note.[43] He explained that, to make the assertion that Deutsche Bank owns the loan, he "goes off of" the PSA, which he did not bring to court.[44]

As for the amount due and owing, Kanuck admitted that he did not know if he knew anyone who contributed information to the loan history[45] Likewise, he did not know if he knew anyone who input the financial data compiled into the proposed judgment prepared by the Bank's lawyer.[46] Nor did he know anyone who actually advanced the payouts (for example, for flood insurance premiums) listed in the history.[47] As summarized in a dialogue between Kanuck and the court itself, Kanuck's testimony as to the amount owed was based solely on what appears in the IndyMac/OneWest payment records:

> THE WITNESS: I rely on the business records.
>
> THE COURT: Okay. You're solely on the basis of what these records say?
>
> THE WITNESS: Correct.[48]

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[43] T. 77.

[44] T. 80.

[45] T. 81.

[46] T. 63.

[47] T. 86.

[48] T. 87.

When asked about the interest rate, Kanuck first said that "the interest amount that was owed came from a daily rate of 2.75 percent off of the interest."[49] Then he testified that the 2.75 percent was "the rate that the loan could adjust on any given year."[50] Then he testified that the 2.75 percent was the annual interest rate from which the per diem was calculated.[51]

6. The Homeowners move for involuntary dismissal.

At the close of the Bank's case, the Homeowners moved for an involuntary dismissal.[52] Among other things, the Homeowners once again raised the point that Kanuck was not competent to testify about OneWest's business records, much less those of IndyMac or Deutsche Bank:

> MR. ANTHONY [Homeowner's counsel]: …we have a nice fellow today who's come to testify that he doesn't know anything and I don't mean that to trivialize his testimony, but we know what he said and we know what he relied upon and we know that there's people like him that come from Texas or whatever other state to testify about people that they don't know and loans that they haven't really known anything about …[53]

The Homeowners also argued that the Bank had failed to prove its standing at the inception of the case as the holder of the Note because the endorsement—

[49] T. 81.

[50] T. 82.

[51] T. 83.

[52] T. 89.

[53] T. 89-90.

having first appeared a year after the case was filed—was undated.[54] Because the Bank conceded in its initial pleading that the Note was not in its possession (having been lost), then it was not the holder when the case was filed, even if it was endorsed.[55] The Bank responded that it had proven its ownership by Kanuck's testimony that the Bank had come "into ownership" in November of 2005.[56]

The trial court granted judgment in favor of the Bank.[57]

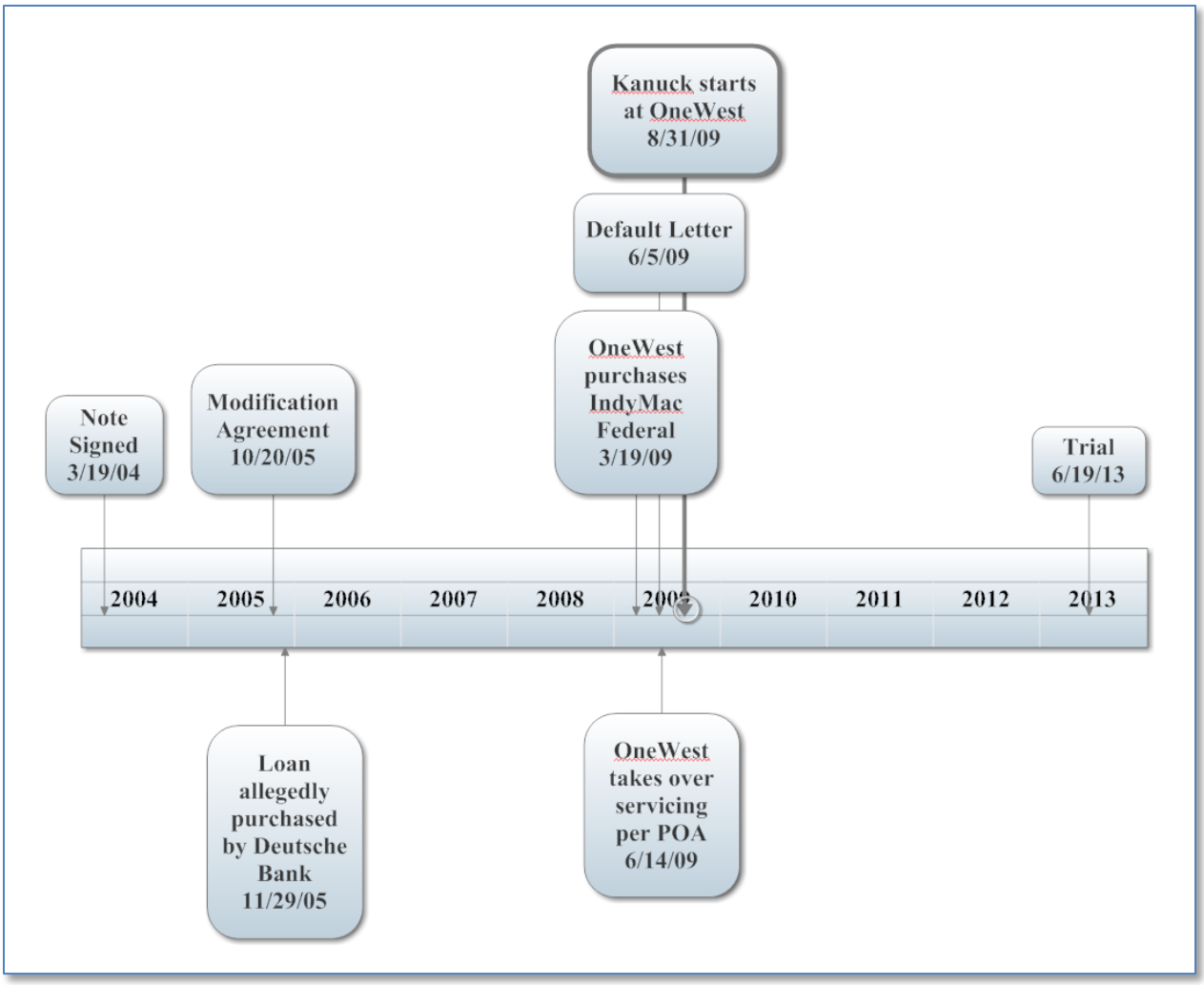
[54] T. 98.

[55] T. 89, 92

[56] T. 93, 94.

[57] T. 101.

TIME LINE OF KEY EVENTS



SUMMARY OF THE ARGUMENT

The Bank's sole witness, George Kanuck, was hired and trained by the loan servicer to shuttle documents into evidence. Previously a meteorologist, he was hired after every relevant event regarding the subject loan had occurred. His only connection to those documents was that he had read them when he was assigned to this trial. Kanuck was not a "qualified" witness with personal knowledge of the documents or how and when they were created. Indeed, the majority of the "payment records," as well as the Notice of Default letter, came from a previous servicer for which he had never worked.

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

As a result the Bank's exhibits and testimony related to them were inadmissible and should have been stricken. There was no competent evidence that the Bank had standing or had complied with an essential condition precedent. Nor was there competent evidence of the amount due on the loan. The trial court should have granted an involuntary dismissal because there was no competent evidence to support the elements of the Bank's claim.