IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D15-2960

LOWER TRIBUNAL CASE NO. CACE09042482 (11)

THE BANK OF NEW YORK MELLON, etc.,

Appellant,

vs.

PHYLLIS L. PRITCHER, etc.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This appeal arises from a full bench trial on Appellant's mortgage foreclosure action where the Seventeenth Judicial Circuit (hereinafter referred to as the "lower court") ruled in favor of the Appellee, the defendant/borrower[1].

STATEMENT OF THE CASE

On or about July 29, 2009, the Complaint for Mortgage Foreclosure in this matter was filed by the original Plaintiff in this matter. (R. 1-30). That Plaintiff was identified as BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH TRUST 2005-HYB7 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-HYB7 (hereinafter "original Plaintiff"). The Complaint attached an unendorsed Note and Mortgage in favor of Bankers Mortgage Trust, Inc. and alleged that the mortgage was "subsequently

[1] This is the Answer Brief of the Defendant below, PHYLLIS L. PRITCHER, hereinafter referred to as "Appellee." The Plaintiff at trial below, BANK OF NEW YORK MELLON, f/k/a BANK OF NEW YORK AS TRUSTEE (CWMBS 2005-HYB7) will be referred to as "Appellant." Citations to the Record shall be by the designation "R." followed by the page number, e.g. "(R. 3)". There is a Supplemental Record containing some of the trial exhibits. References to the Supplemental Record will be by use of the exhibit number followed by designation "SR", followed by the page number, e.g. "(SR. 3)". Where the trial transcript is being referenced, it will be by the designation "Tr" followed by the page number, e.g. "(Tr. 3)". Reference to the Appellant's Initial Brief shall be by the designation "IB" followed by the page number, e.g. "(IB. 3)".

assigned to the [Plaintiff] by virtue of **an assignment to be recorded.**" (Emphasis added). The Plaintiff claimed to "own and hold" the note and mortgage. (R.1) On November 13, 2009, Appellee filed her Motion to Dismiss Foreclosure. (R. 49-51) which was granted by the lower court on July 17, 2012. (R. 103).

On December 11, 2013, the original Plaintiff filed its Amended Verified Complaint for Mortgage Foreclosure. (R. 144-174). That Amended Verified Complaint alleged that the Plaintiff owned and held the note which was endorsed in blank. (R. 145). Attached as an exhibit to the Amended Verified Complaint was an Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") to the original Plaintiff dated December 1, 2009 with an "effective date" stated to be June 23, 2009 and a recorded date of July 6, 2010. (R.171). Also attached as an exhibit was an undated allonge between Bankers Mortgage Trust, Inc. and Countrywide Document Custody Services, a Division of Treasury Bank, N.A. with stamped endorsements from the former entity to Countrywide Home Loans and then from that entity in blank. Neither the special endorsements on the allonge nor the blank endorsement on the allonge was dated. (R. 154).

On December 17, 2013, the Appellee filed her Motion to Dismiss the Amended Complaint. (R. 175-176). On February 5, 2014, the original Plaintiff filed its Motion to Substitute Party Plaintiff and Amend Style of Case which Motion sought to add the Appellant as the new party plaintiff. (R. 177-181). On April 23,

2014, the lower court granted the Appellee's Motion to Dismiss the Verified Amended Complaint (R. 190) and also granted the Motion to Substitute Party Plaintiff and Amend Style of Case. (R. 191-192).

On May 22, 2014, Appellant filed its Second Amended Verified Complaint for Mortgage Foreclosure. (R. 193-224). Attached as a new exhibit to the Second Amended Verified Complaint was an Assignment of Mortgage from the original Plaintiff to Appellant dated December 30, 2013. (R. 220-21).

On June 2, 2014, Appellee filed her Motion for Judgment on the Pleadings and/or Motion to Dismiss Second Amended Verified Complaint for Mortgage Foreclosure. (R. 225-228). On October 8, 2014, the lower court entered its Order denying the Appellee's Motion to Dismiss. (R. 249). On November 7, 2014, Appellee filed her Answer and Affirmative Defenses to Appellant's Second Amended Verified Complaint for Mortgage Foreclosure. (R. 270-276). On November 13, 2014, Appellant filed its Reply to Appellee's Answer and Affirmative Defenses (R. 282-285). On April 27, 2015, Appellee filed her Motion in Limine. (R. 344-371). By Order dated April 30, 2015, the case was set for a non-jury trial before the lower court on June 30, 2015. (R. 377-378).

On June 30, 2015, the lower court conducted the non-jury trial of this matter. Neither of Appellant's two witnesses could provide actual dates for when the allonge containing the special endorsements were created, or for when

Countrywide Home Loans, Inc. placed the blank endorsement on the allonge, when the allonge became firmly attached to the note, or exactly what was transferred to the original Plaintiff and exactly when it was transferred[2]. At the trial after the Appellant rested, the lower court heard argument on Appellee's Motion for Involuntary Dismissal. (R. 406-455) and required the Appellee to put on her evidence. (Tr. 209). Appellee read a portion of a deposition into evidence and then rested her defense. (Tr. 210 – 211). It was only then, after both sides rested, that the lower court recited its findings deciding the case in favor of the Appellee. (Tr. 211-214). The lower court premised its comments by saying "I had a reason for doing that," presumptively indicating that the ruling was after and upon conclusion of the presentation of both sides' testimony and evidence. (Tr. 211).

The lower court had earlier expressed concerns about the probity of the Appellant's evidence stating:

> THE COURT:
>
> > It seems to me that what you're got here is a lot of assumptions and that's what's concerning me. You're assuming that the – that it's okay to post-date the allonge (sic) in this case because it's confirmed by other things. We're assuming that the note was transferred pursuant to the pooling and servicing agreement, we're assuming that the allonge was included with whatever was transferred to David Stern even though there's no evidence that the allonge was included with what was transferred to David Stern, we're assuming that whatever allonge was transmitted to David Stern was the fully endorsed allonge.

[2] For further details and record support see the Statement of Facts, *infra.*

That's an awful lot of assumptions.

(Tr. 192).

The lower court ultimately concluded that "the Plaintiff has failed to prove standing by a preponderance of the evidence." (Tr. 213). The lower court then directed that, instead of a final judgment, an order be entered dismissing the case without prejudice. (Tr. 214).

On July 30, 2015, Appellant filed its Notice of Appeal herein (R. 499-502).

STATEMENT OF THE FACTS[3]

The note attached as an exhibit to the initial Complaint is made payable to BANKERS MORTGAGE TRUST, INC. and contains no allonge or endorsement (Tr. 37), either in blank or specifically to the then named plaintiff, which would confer onto the plaintiff filing the Complaint the status of "holder" of the note. Therefore, to establish its standing to sue based on the alleged endorsements on the note, Appellant was required to prove that the endorsements were effectuated prior to the action's date of filing - July 29, 2009[4].

After the Complaint herein was filed, on December 7, 2009, an assignment of mortgage from MERS to THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS THROUGH TRUST 2005-HYB7, MORTGAGE PASS THROUGH CERTIFICATE SERIES 2005-HYB7 was allegedly executed which indicated that

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[3] Appellee's recitation of the facts are derived from the testimony and exhibits introduced into evidence at the trial of this matter construed in the light most favorable to Appellee as the prevailing party. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995). (When evidence supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing party.).

[4] See *Matthews v. Fed. Nat'l Mortg. Ass'n*, 160 So. 3d 131, 133 (Fla. 4th DCA 2015) (holding that standing at inception of the suit was not established where the note attached to the complaint was not made payable to the plaintiff and contained no endorsement, even though the original note endorsed in blank was introduced at trial).

it was to be effective June 23, 2009. The assignment bears a recordation stamp dated on July 06, 2010. (Plaintiff's Exhibit 3 - SR. 170).

On October 01, 2012, Appellant was sent a notice that the servicing rights for the loan were being transferred from Bank of America to Bayview Loan Servicing. (Plaintiff's Exhibit 6 - SR. 207-212). Notwithstanding the transfer of its servicing rights to the loan four and one-half months (4 ½) before, on February 15, 2013 Bank of America executed a Lost Note Affidavit which attached an undated allonge which only had <u>one</u> <u>endorsement</u> – the typed endorsement from Bankers Mortgage Trust, Inc. to Countrywide Document Custody Services, a Division of Treasury Bank, N.A. **Significantly omitted from that allonge were the stamped endorsements that appeared on the note attached as an exhibit to the later filed Amended Verified Complaint (filed on December 11, 2013) and Second Amended Verified Complaint (filed on May 22, 2014).** (Plaintiff's Exhibit 12 - SR. 237-249).

It was not until June 19, 2013 that the original Plaintiff granted Bayview Loan Servicing, LLC (hereinafter "Bayview") its power of attorney with respect to the loan. (Plaintiff's Exhibit 1 – SR. 3-16). On December 30, 2013, the loan was assigned from the original Plaintiff to the Appellant by an Assignment of Mortgage. (Plaintiff's Exhibit 3 - SR. 171-172).

Appellant's first trial witness, Gerardo Trueba (hereinafter "Trueba"), was an employee of the loan servicer – Bayview responsible for review of the business

records and preparations for trials, depos, and any issues. (Tr. 6-7). Appellant sought to introduce its exhibits through Mr. Trueba ostensibly contending that he was a qualified witness under the business records exception to the hearsay rule. Fla. Stat. §90.803(6)(a)[5]. Although Mr. Trueba considered himself a document custodian (Tr. 22), he actually was merely a reviewer of documents kept by his employer in a computerized records database. (Tr. 22-24). Mr. Trueba had the same access to the document imaging system as anyone else in the company with access to that database. (Tr. 23). Mr. Trueba's knowledge of the records was limited to the fact that the records appeared in the database and that he reviewed it. (Tr. 24). As to documents transferred from the prior servicer and "boarded" into Bayview's system including payment records, Mr. Trueba's testimony that such documents were properly verified by the boarding department was based upon his conclusion that because it is in the production system it must have been to the boarding department's satisfaction. Mr. Trueba could neither explain the boarding process nor verify from some indication on the records themselves that the records were in fact boarded. (Tr. 28-31, 54-56).

[5] Pursuant to §90.803(6)(a), documentary evidence may be admitted into evidence as business records if the proponent of the evidence demonstrates the following through a records' custodian or other qualified witness: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

As to the original note, Mr. Trueba confirmed that the note attached to the Complaint did not have an attached allonge. (Tr. 37). The note offered into evidence had an allonge attached with a staple, however there were numerous staple holes, the reason for which he could not explain. (Tr. 38-39). Mr. Trueba could not testify to when the allonge was affixed to the note or to when any of the endorsements that appeared on the allonge were made, including particularly, the blank endorsement. (Tr. 39, 41). Neither was he at all certain as to whether any of the signatures on the endorsements were "wet-ink" signatures. (Tr. 39-40). Other than seeing the assignments, he had no knowledge regarding the transfers of the note. (Tr. 87). His testimony that the note was held by the prior servicer and then by his attorney was based upon a "privileged conversation" between himself and his legal counsel. (Tr. 40, 87). Moreover, although he testified that to his knowledge "the note's been in the possession of the Plaintiff the whole time…", he could not distinguish between the original Plaintiff and the substituted Plaintiff, the Appellant herein.

More importantly however, Mr. Trueba testified that on December 1st, 2009, five (5) months after the Complaint in this matter was filed, Mortgage Electronic Registration Systems had the note and assigned it. (Tr. 82). He also could not explain why on February 1st, 2013, four (4) months after servicing transferred from Bank of America to Bayview, Bank of America prepared a lost note affidavit with

an allonge that was different that the note and allonge in evidence. (Tr. 89, 93-96).

As to Bayview's own payment records, Mr. Trueba testified that those records were generated by Bayview's servicing platform – "MSP". He didn't know what the name "MSP" meant nor was he responsible for inputting the data or supervising the cashiering department that input the data nor had he seen any of the underlying invoices for the transactions, nor could he explain any categories of payments set forth on the payment history such as attorney advances, corporate advances, statutory expenses or miscellaneous F/C and B/R expenses. (Tr. 56-58).

Appellant's only other witness was Sandra Prestia (hereinafter "Prestia"), a Bank of America mortgage resolution associate. (Tr. 100). Appellant also sought to introduce certain of its exhibits through Ms. Prestia ostensibly contending that she was a document custodian under the business records exception to the hearsay rule. (Tr. 112). Ms. Prestia however worked from her home and merely had access to Bank of America's document management portal and she had the same access to review the imaged records as anyone else in the default litigation department. She neither maintained that portal nor did she upload any documents to it. (Tr. 108-110).

Besides the document management portal, Ms. Prestia attempted to lay the foundation to the admission of two printed screen-shots from Bank of America's AS400 servicing platform. (Tr. 114-116). Both documents were printed by Appellant's counsel for the purpose of being used as trial exhibits. (Tr. 117). The

documentation that the physical printouts purported to summarize allegedly represented entries in Bank of America's computer system. Ms. Prestia testified that those entries were made by people in the collateral department, a department she did not work for or supervise. (Tr. 119). Nevertheless, Ms. Prestia testified that she was trained to review "these "business records" and she was "very familiar with this screen". (Tr. 122). After Appellee's counsel's *voir dire,* the trial court admitted the routing history screen shots over Appellee's objections on the basis of trustworthiness, foundation, and hearsay. (Tr. 122-123; Plaintiff's Exhibit 11 – SR. ___).

Testifying from the screen-shots in evidence, Ms. Prestia concluded that because the initial entry indicated that the collateral file was transferred to Recon Trust, Bank of America's custodial vault, she could confirm "for that specific one that we are looking at" that the note would have had to have been fully endorsed before that transfer took place on September 9, 2005. (Tr. 125-126, 138). Nevertheless, although limiting her testimony to this specific situation, Ms. Prestia testified that she drew her conclusion that the allonge and the endorsements were placed on the note prior to it having been sent to the custodial vault based partially on her knowledge of certain undisclosed policies and procedures of Bank of America. Appellee's objections to this testimony were overruled. (Tr. 135-136).

Testifying about the next alleged transfer of the note allegedly depicted in the routing history screen-shots, a transfer on October 4, 2005 from the custodial vault to Bank of New York Mellon, Ms. Prestia contradicted her previous testimony by then stating that there would not have been any other time that Bank of America would have had the opportunity to place the allonge and endorsements on the note except when that document was sent to Bank of New York Mellon. Once again that testimony was a conclusion that she drew from the Pooling and Servicing Agreement (hereinafter "PSA")'s requirement that that the note has to be received by the Bank of New York Mellon with an endorsement in blank. (Plaintiff's Exhibit 2, p. 40 – SR. 62; Tr. 138-140; 166-167)[6].

On Appellee's cross-exam, Ms. Prestia acknowledged that the routing history screen-shots do not specifically mention an allonge or endorsements. (Tr. 142). Notwithstanding the fact that the routing history screen-shots make no mention of the lost note affidavit, Ms. Prestia claimed that entries in those screen-shot print-outs that she could not explain in her deposition taken the day before the trial now were

[6] In that regard however, Ms. Prestia ignored the fact that the PSA failed to contain the "Initial Certification" - Exhibit "F", by which the Trustee acknowledged receipt of the documents identified therein as the Mortgage Files or the "Final Certification" – Exhibit "H", by which documents not meeting the requirements of Section 2.01 are listed by the Trustee as exceptions, each of which exhibits being required by Section 2.02 of the PSA (Plaintiff's Exhibit 2, p. 44 – SR. 66).

entries that tracked the movement of the lost note affidavit. (Tr. 127-128, 142-146, 157-158).

Whereas the day before trial she testified that the entries on the routing history screen-shots only tracked the movement of the note and that the note was returned back to Bank of America in 2013, at trial she contradicted that testimony by claiming that the lost note affidavit was also being tracked by the routing history and by denying that the note was transferred back to Bank of America in 2013. (Tr. 156-158). Ms. Prestia further confirmed that her testimony interpreting the entries on the routing history screen-shots required her to review a collateral tracking screen that was not in evidence. (Tr. 155-156).

Ms. Prestia also confirmed that the lost note affidavit, admitted as a Plaintiff's exhibit through her testimony, was accurate, that it was part of the records of Bank of America, and that it was created by people with knowledge. (Tr. 149). Nevertheless, Ms. Prestia claimed to be unable to confirm that the whole purpose of creating a lost note affidavit would be so that Bayview could come to Court and say "this is the note that was lost" and that, to that end, the procedure would be for Bank of America to go into its imaging system and look at the most current image of the note. (Tr. 149-150). With respect to the lost note affidavit executed by Bank of America on February 13, 2013, Ms. Prestia agreed that the note that should have

been attached to that affidavit should have included an allonge fully endorsed in blank. (Tr. 152-153).

Like Mr. Trueba, Ms. Prestia was unaware that the Plaintiffs in the case had changed from the time that the Complaint was first filed. (Tr. 155). She did confirm however that the endorsements on the allonge were stamped endorsements with stamped signatures. (Tr. 158-159). Although Ms. Prestia testified that Countrywide purchased the loan from Bankers Trust (Tr. 144), there is no exhibit that documents such purchase. Likewise, she also testified that Bank of New York Mellon purchased the loan from Countrywide, yet such contention runs counter to the provisions of the PSA which does not characterize such a transfer as a "purchase". (Tr. 126-127).

On the Appellee's case, the Appellee introduced a portion of the deposition testimony of Mr. Trueba, the Appellant's corporate representative, where he was given the screen-shot of the routing history by his counsel and asked to clarify when the original collateral file for the original note and mortgage were transferred to the trust and he testified that such transfer occurred on July 13, 2009, contradicting the testimony of Ms. Prestia. (Tr. 210-211).

SUMMARY OF THE ARGUMENT

Appellant misstates this Court's standard of review of this matter by arguing that review is simply *de novo* and that it merely needs to show that substantial competent evidence exists in the record. Such contention flows from Appellant's failure to recognize that the lower court's finding for the Appellee was rendered after both the Plaintiff and the Defendant rested and thereby constituted the Court's ruling as finder-of-fact which comes to this Court with both the presumption of correctness and with all inferences from the evidence to be construed in favor of the Appellee.

Appellant's Initial Brief improperly cites to alleged facts that do not appear in the record. Such alleged record "facts" include allegations that: "FFA received the original Note and Mortgage directly from the Law Offices of David Stern on or about September 17, 2011. No other party took possession of the original documents … [thus] the allonge together with the endorsements must have been made prior to the filing of the underlying action." [IB, p. 4] and that it is the "common understanding and practice within the banking and lending industry that MERS does not generally take physical possession of the original loan documents" [IB, p. 7]. Such allegations improperly ask this Court to draw conclusions outside of the record, which this Court has specifically declined to do. See *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So.3d 562, 564 (2014) (…this court does not make "logical and

equitable" leaps of faith, as it cannot (and should not) make any such determination unsupported by the record before it).

The evidence necessary to establish the standing of the original Plaintiff to bring the mortgage foreclosure action was neither "competent" nor "substantial" but was instead based upon inferences and assumptions and was disputed and subject to conflicting interpretations, ultimately being rejected by the lower court at the conclusion of the case. The lower court's exercise of its discretion in weighing and resolving evidentiary conflicts cannot be overturned on appeal.

Appellant's trial exhibits fail to establish standing by way of an "equitable transfer". Appellant failed to introduce any mortgage purchase agreement and this Court has stated that back-dated assignments, loan histories and powers of attorney fail to establish standing. See *Matthews v. Federal Nat. Mortg. Ass'n*, 160 So.3d 131 (Fla. 4th DCA 2015). Additionally, each of the cases of cited by the Appellant to support its position that standing sufficient to withstand *de novo* review was established are distinguishable and inapplicable to the instant matter.

Finally, notwithstanding the foregoing grounds for affirmance, pursuant to the tipsy coachman's doctrine, the judgment below should be affirmed because the lower court abused its discretion in admitting documentary and testimonial evidence from both of the Appellant's witnesses without a proper foundation and in violation of evidentiary rules prohibiting hearsay.

STANDARD OF REVIEW ON APPEAL

"Whether a party is the proper party with standing to bring an action is a question of law to be reviewed *de novo*." *Westport Recovery Corp. v. Midas*, 954 So. 2d 750, 752 (Fla. 4th DCA 2007).

The admissibility of evidence lies in the sound discretion of the trial court and trial court decisions on the matter will be affirmed absent a showing of abuse of discretion. *See, e.g., Mendoza v. State*, 700 So. 2d 670 (Fla. 1997), *cert. denied*, 67 U.S.L.W. 3231, 119 S.Ct. 101, 142 L.Ed.2d 81 (1998); *Jent v. State*, 408 So. 2d 1024 (Fla. 1982); *Beerman v. Rollar*, 710 So. 2d 93 (Fla. 4th DCA 1998); *Janke v. Corinthian Gardens, Inc.*, 405 So. 2d 740 (Fla. 4th DCA 1981), *cert. denied*, 413 So. 2d 876 (Fla. 1982). However, the trial court's discretion "is limited by the rules of evidence." *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 620 (Fla. 4th DCA 2013). Thus, rulings interpreting and applying the rules of evidence are reviewed *de novo*. *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011) ("[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review."); *Shands Teaching Hosp. and Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 2d DCA 2007); *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

Determinations as to the manifest weight of evidence are generally left to the trial court. That is, the appellate court will not interfere with a jury verdict or, in

the case of a nonjury trial, a judgment or trial court findings of fact unless the record shows the absence of competent substantial evidence to support the factual findings. See *Kimbrough v. State*, 700 So. 2d 634 (Fla. 1997); Terry v. State, 668 So. 2d 954 (Fla. 1996); *Stroud v. Crosby*, 712 So. 2d 434 (Fla. 2d DCA 1998) (undisputed evidence); *Smith v. Sears, Roebuck & Co.*, 681 So. 2d 871 (Fla. 1st DCA 1996) (disputed evidence); *Clegg v. Chipola Aviation Inc.*, 458 So. 2d 1186 (Fla. 1st DCA 1984).

ARGUMENT

I. APPELLANT'S ARGUMENT IS PREMISED UPON AN INCORRECT STANDARD OF REVIEW.

Because trial courts are generally in a better position to assess the characteristics of testimony or other evidence they admit, appellate courts defer to the trial court to resolve factual questions. *Shaw v. Shaw*, 334 So. 2d 1 (Fla. 1976). This is particularly the case when assessing witness credibility or assigning weight to the evidence. *See, e.g., Clegg v. Chipola Aviation, Inc.*, 458 So. 2d 1186 (Fla. 1st DCA 1984). Where the evidence is disputed, appellate courts use the less restrictive clearly erroneous standard of review. As the Supreme Court explained:

> A finding of fact by the trial court in a nonjury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A

> finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. 3 Am Jur. 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety.

Holland v. Gross, 89 So. 2d 255, 258–59 (Fla. 1956).

Here the evidence necessary establish the standing of the original Plaintiff to bring the mortgage foreclosure action was based upon inferences and assumptions and was disputed and subject to conflicting interpretations. The lower court, after weighing the evidence and the witnesses' credibility, ultimately found that the Appellant failed to prove its standing by a preponderance of the evidence. There was nothing about the lower court's exercise of its discretion that could be classified as "clearly erroneous".

II. THIS COURT SHOULD STRIKE OR DISREGARD THE NON-RECORD "FACTS" CITED IN THE APPELLANT'S INITIAL BRIEF.

The Appellant's Initial Brief improperly cites to alleged facts that do not appear in the record. Such alleged record "facts" include allegations that: "FFA received the original Note and Mortgage directly from the Law Offices of David Stern on or about September 17, 2011. No other party took

possession of the original documents … [thus] the allonge together with the endorsements must have been made prior to the filing of the underlying action." [IB, p. 4] and that it is the "common understanding and practice within the banking and lending industry that MERS does not generally take physical possession of the original loan documents" [IB, p. 7]. Such allegations improperly ask this Court to draw conclusions outside of the record rely or to rely on the representations of counsel alone, which this Court has specifically declined to do. *Deutsche Bank Nat. Trust Co. v. Huber*, 137 So.3d 562, 564 (2014) (…this court does not make "logical and equitable" leaps of faith, as it cannot (and should not) make any such determination unsupported by the record before it); *Wright v. Emory*, 41 So. 3d 290, 292 (Fla. 4th DCA 2010) ("[An] attorney's unsworn, unverified statements do not establish competent evidence.").

III. THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN WEIGHING AND RESOLVING EVIDENTIARY CONFLICTS CANNOT BE OVERTURNED ON APPEAL.

A. The evidence necessary to establish the standing of the original Plaintiff to bring the mortgage foreclosure action was neither "competent" nor "substantial" but was instead based upon disputed inferences and assumptions subject to conflicting interpretations ultimately rejected by the lower court at the conclusion of the case.

To foreclose, a plaintiff must establish that it had standing at the time it filed

the complaint. *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (per curiam). "[W]ith bearer notes, possession of the note is the significant core element to be analyzed." *Rodriguez v. Wells Fargo Bank, N.A.*, 178 So. 3d 62, 65 (Fla. 4th DCA 2015) (Conner, J., concurring).

The note attached as an exhibit to the initial Complaint is made payable to BANKERS MORTGAGE TRUST, INC. and contains no allonge or endorsement, either in blank or specifically to the then named plaintiff, which would confer onto the plaintiff filing the Complaint the status of "holder" of the note. Therefore, to establish its standing to sue based on the alleged endorsements on the note, Appellant was required to prove that the endorsements were effectuated prior to the action's date of filing - July 29, 2009. *Servedio v. US. Bank*, 46 So. 3d 1105 (Fla. 4th DCA 2010).

It was not until almost two and one/half (2 ½) years later when the Amended Verified Complaint was filed on December 11, 2013, that the allonge containing the endorsements suddenly appeared.[7] An allonge is a piece of paper annexed to a

[7] Suddenly appearing endorsements in foreclosures by bank-trustees have become so common that they have earned the moniker "ta-da endorsements". See http://thjf.org/2014/06/27/suddenly-appearing-endorsements-used-by-bank-trustees-in-foreclosures/. See e.g., *Feltus v. U.S. Bank*, 80 So. 3d 375 (Fla. 2d DCA 2012); *Gonzales v. Deutsche Bank National Trust Company*, 95 So. 3d 251 (Fla. 2d DCA 2012); *Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453 (Fla. 2d DCA 2012); *Cutler v. U.S. Bank*, 109 So. 3d 224 (Fla. 2d DCA 2012); *Vidal v. Liquidation Properties*, 104 So. 3d 1274 (Fla. 4th DCA 2013); *Wells Fargo Bank v. Bohatka*, 112 So. 3d 596 (Fla. 1st DCA 2013); *Focht v. Wells Fargo Bank*, 124 So. 3d 308

negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof. *Seffar v. Residential Credit Solutions, Inc.*, 160 So. 3d 122, 125 (Fla. 4th DCA 2015) (quoting Booker v. Sarasota, Inc., 707 So. 2d 886, 887 n.1 (Fla. 1st DCA 1998)).

"An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof." BLACK'S LAW DICTIONARY 76 (6th ed.1990). A previous version of Florida's Uniform Commercial Code does not specifically mention an allonge, but notes that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument." § 673.2041(1), Fla. Stat. (1995). The relevant version simply requires the paper to be affixed to the instrument. See § 673.2041(1), Fla. Stat. (2015). *See also Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So. 3d 495 (Fla. 4th DCA 2011)("An "allonge" is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself; such must be so firmly affixed thereto as to become a part thereof.").

(Fla. 2d DCA 2013); *Zimmerman v. JPMorgan Chase Bank, N.A.*,134 So. 3d 501 (Fla. 4th DCA 2014); *In Re Canellas,* Case No. 6:09-bk-12240-AB, (Bankr. M.D. Fla. 2009).

The allonge attached to the Amended Verified Complaint does not meet the legal definition of what an allonge is: a firmly attached document to the Note, when there is no space on the bottom of the Note for endorsements. Recently the First District Court of Appeal took notice of such in *Wells Fargo Bank, N.A. v. Bohatka*, 112 So.3d 596, 598 (Fla. 1st DCA 2013), stating that "A body of case law has developed, primarily in other states and under the UCC, regarding the validity of an allonge and how it must be "affixed" to a note.4"). In footnote four to that statement, the First District Court of Appeal wrote:

> "See, e.g., Douglas J. Whaley, Mortgage Foreclosures, Promissory Notes, the Uniform Commercial Code, 39 W. St. U.L.Rev. 313, 318–19 (2012) (noting the "many new cases" that deal with allonges and the meaning of "affixed"). Professor Whaley continues, "It is not enough that there is a separate piece of paper which documents the transfer unless that piece of paper is "affixed" to the note. What does "affixed" mean? The common law required gluing. Would a paper clip do the trick? A staple?" Id. at 319 (footnotes omitted). To our knowledge, no Florida court has explored what type of affixation or annexation of an allonge is legally sufficient, nor has any court addressed the possibility of electronic attachment of allonges. See Patricia Brumfield Fry, James A. Newell, & Michael R. Gordon, Coming To A Screen Near You—"Emortgages"—Starring Good Laws And Prudent Standards—Rated "XML", 62 Bus. Law. 295, 311 (Nov.2006) (noting that Freddie Mac addressed the possibility "that an electronic allonge be added to all eNotes that contains language addressing both the recourse and transfer warranty issues")."

112 So. 3d at 604.

Here, Appellant's witness Ms. Prestia, confirmed that the alleged allonge did not bear an original signature on the two later endorsements but instead those

endorsements are stamped with signature stamps. (Tr. 159). Additionally, the allonge does not appear to be "permanently affixed" to the Note, particularly because it did not "materialize" until almost 2 1/2 years after this action was filed and because of the numerous unexplained staple holes. Finally, there was no apparent reason why an allonge was even necessary because there was ample space on the last page of the note with which to stamp the endorsements.

The facts herein are in stark contrast to those considered by this Court in *Purificato v. Nationstar Mortgage, LLC,* --- So.3d ----, 2016 WL 64331 (Fla. 4th DCA 2016). In *Purificato* the allonge by its terms stated that it was "affixed and [became] a permanent part of said note." Nationstar also proved that the allonge was part of the loan file at the time the complaint was filed by proving that the Note and allonge were simultaneously imaged as a single document before the filing of the action.

Here, when asked about Bank of America's imaging system and why Appellee couldn't merely produce a dated image from that system to show what the note looked like, Ms. Prestia stated that "I don't work in that department so I don't know". (Tr. 149). Appellant's testimony that the original plaintiff was in possession of the note endorsed in blank was entirely based upon Ms. Prestia's testimony interpreting a computer screen shot "routing history" – Exhibit 11. (SR.). Ms. Prestia was deposed the day before the trial and at that time lacked sufficient

personal knowledge about interpreting the routing history to answer questions about whether the routing history screen-shots only tracked the movement of the note and whether the note was returned back to Bank of America in 2013. (Tr. 156-158).

In evaluating the testimony of Appellant's witnesses, the lower court articulated his belief that much of that testimony was conclusionary, predicated entirely upon assumptions. (Tr. 192). Guesses and assumptions are not competent, substantial evidence of anything. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) (testimony that borrower did not recall receiving the acceleration was neither evidence that she did receive, nor did not receive, the notice). Accordingly, the lower court correctly determined that such testimony failed to preponderate.

B. Appellant's trial exhibits fail to establish standing by way of an "equitable transfer".

Appellant argues that notwithstanding the backdated assignment, there was an equitable transfer of the mortgage that occurred prior to the assignment. Appellant claims that the exhibits it introduced into evidence prove, to a preponderance of the evidence, that the Note and Mortgage were delivered to the original Plaintiff prior to inception of the suit, with the intention to pass title and to vest the equitable interest of the Note and Mortgage in the original Plaintiff. In that regard, Appellant points to the PSA, payment history, power of attorney, default letter and the note itself. (IB. 19-21). Appellant however failed to introduce any

mortgage purchase agreement and this Court has stated that back-dated assignments, loan histories and powers of attorney fail to establish standing. See *Matthews v. Federal Nat. Mortg. Ass'n*, 160 So.3d 131 (Fla. 4th DCA 2015). Appellant also argues that the cases of *Citibank v. Dalessio*, 756 F. Supp. 2d 1361 (M.D. Fla. 2010), *Peguero v. Bank of America, N.A.*, 169 So.3d 1198, (Fla. 4th DCA 2015) and *Fiorito v. JP Morgan Chase Bank*, 174 So.3d 519, 521 (Fla. 4th DCA 2015) all support its position that standing sufficient to withstand *de novo* review was established. Each of these cases can be distinguished from the instant matter.

In *Citibank* the witness appeared to present testimony based upon personal knowledge that "established how Citibank acquired the documents and obtained Dalessio's mortgage." Nothing in the *Citibank* opinion reflected any issues with the witnesses' testimony or in any way indicated that the note endorsed in blank, coupled with a PSA were otherwise sufficient to prove standing. Of course, the *Citibank* court believed the testimony and evidence presented by the lender and ruled in the lender's favor, the opposite of the lower court's ruling herein.

In *Peguero*, the borrower contended that the lender's final judgment of foreclosure should be reversed due to a lack of substantial competent evidence supporting the lender's standing. In affirming the trial court's determination, this Court held that the lender "furnished sufficient admissible testimony and evidence from which the trier of fact could conclude that all endorsements on the allonge

were made before the filing of the complaint and that Countrywide was a holder with standing to foreclose at the time of filing the original complaint." Here the lower court made a contrary finding.

Such finding belied the differences between the facts in *Peguero* and the facts herein. In *Peguero* there was no evidence that contradicted the routine practice presumption this Court applied. Here, the lower court was faced with contradictory evidence of when the note was allegedly transferred, what the note looked like as far as an attached allonge and endorsements when it was transferred and whether the witness really understood the routing history screen-shot based upon her contradictory testimony.

Appellant cited *Fiorito* for the proposition that "[a] bank employee's trial testimony that the plaintiff bank owned the note before the inception of the lawsuit is sufficient to resolve the issue of standing." That statement was derived from *Stone v. BankUnited*, 115 So.3d 411, 413 (Fla. 2d DCA 2013) where the plaintiff bank provided competent, substantial evidence that it owned and held the note prior to the filing of the complaint based on its employee's testimony that the bank acquired ownership of the note and mortgage pursuant to a purchase assumption agreement. Accordingly, on the evidence presented the lower court was well within its discretion to reject the Appellant's contention that it proved its standing by way of an equitable transfer.

III. THIS COURT CAN CONSIDER WHETHER THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED ON ALTERNATIVE GROUNDS, UNDER THE "TIPSY COACHMAN" DOCTRINE.

A lower court's order can be affirmed when the result reached is correct, even though for the wrong reason, under the "tipsy coachman" doctrine enunciated by this Court in *Carraway v. Armour and Company*, 156 So.2d 494 (Fla. 1963). Here, the lower court erred by admitting each of the Appellant's exhibits to which the Appellee objected on foundational and hearsay grounds because neither witness was properly qualified or knowledgeable and was testifying based upon assumptions, conclusions or information supplied by Appellant's counsel.

Before a document may be admitted as a business record, a foundation for such admission must be laid. *Mazine v. M&I Bank*, 67 So. 3d 1129, 1129 (Fla. 1st DCA 2011). To lay a proper foundation for the admission of a business record, it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. Charles W. Ehrhardt, *Florida Evidence* Sec. 803.6, at 585 (2d ed. 1991). Although it is not necessary to call the person who actually prepared the document, the witness must have the necessary knowledge to testify as to how the record was made. If the offering party does not lay the necessary foundation, the evidence is not admissible under Section 90.803(6). *Id.* See also *Lowe's of Tallahassee v. Giaimo*, 552 So.2d 304, 305 (Fla. 1st DCA 1989) (affidavit failed to make requisite showing to provide proper predicate for

admission of doctor's records under Section 90.803(6)). *Forester v. Norman Roger Jewell & Brooks Intern., Inc.*, 610 So.2d 1369, 1373 (Fla. 1st DCA 1992) (being able to generally identify records as the type of forms that a business or entity utilizes or completes is insufficient to lay a proper foundation for the introduction of business records).

To illustrate, in *Mazine*, the bank had a regional security officer testify by looking at files in the bank's system and testifying as to the business records. The officer's duties were related to fraud and internal investigations. It was evident from the circumstances that the officer had not been involved with the documents personally. In that case, the witness admitted he had no knowledge as to the preparation or maintenance of the documents offered by the bank. He further indicated that he did not have any idea whether the information was input into the bank's system correctly nor could he vouch for the authenticity of any of the information. He could not testify that the amounts owed were actually kept in the regular course of business. He also did not know if the source of the information contained in the affidavit was correct or whether the purported amounts were accurate. Despite these unfavorable circumstances, the trial court admitted the testimony and the records to come as business records. Defendant appealed the trial court's decision on the grounds that the circumstances proved that the officer did not have the requisite knowledge to have been considered the records custodian. That,

coupled with the fact that there had been no attempt to admit the affidavit by certification and declaration pursuant to Section 90.803(6)(c) of the Florida Statutes, resulted in the First District reversing the case and entering judgment in favor of the defendant.

Furthermore, as stated in The Florida Bar, *Evidence in Florida* §9.67 (7th Ed. 2008):

> The attorney should be careful to select the proper witness to qualify a document under *F.S.* 90.803(6). The witness should know how the business generally operates and the usual procedure for preparing the type of document involved. Failure to select a properly qualified witness could result in the document being rejected as a business record. See *Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Commission*, 910 So.2d 948(Fla. 2d DCA 2005) (although sole witness for employer at unemployment compensation hearing claimed to be custodian of records, failure to produce any testimony satisfying three foundational requirements for admission under *F.S.* 90.803(6) meant that hearing referee properly rejected records as inadmissible hearsay); *A.J.D. v. State*, 842 So.2d 297 (Fla. 3d DCA 2003) (probation officer was not custodian or otherwise qualified person to testify about preparation of school attendance records); *Williams v. State*, 666 So.2d 187 (Fla. 2d DCA 1995) (accused's current probation officer, who had no personal knowledge of events alleged in violations report by former officer, did not know if report was kept in usual course of business; thus, admission of report was error); *McKenzie Tank Lines, Inc. v. Roman*, 645 So.2d 547 (Fla. 1st DCA 1994) (lab report showing that employee tested positive for cocaine properly excluded in unemployment compensation hearing, because employer did not make report in regular course of business and no one from outside testing lab had testified to lay proper foundation to qualify report under business record exception); *Phillips v. State*, 621 So.2d 734(Fla. 3d DCA 1993) (hospital nurse who admittedly was not custodian of proffered hospital records was not proper witness to lay foundation for them as business records); *Snelling & Snelling, Inc. v. Kaplan*, 614 So.2d 665 (Fla. 2d DCA

> 1993) (property manager of party wishing to withdraw funds from escrow account was not proper witness to lay foundation for party's ledger books, because manager was neither custodian of nor familiar with transactions recorded in ledgers); *King v. State*, 590 So.2d 1032 (Fla. 1st DCA 1991) (probation officer was not custodian of Department of Corrections computer printout showing defendant's release date for previous offense and did not know how record was prepared).

Out-of-court statements offered to prove the truth of the matter asserted are inadmissible unless the statements fall under a recognized exception to the rule against hearsay. *See* § 90.802, Fla. Stat. (2013). The Florida Supreme Court in dealing with the business records exception to the hearsay rule stated in *Yisrael v. State*, 993 So. 2d 952, 956-57 (Fla., 2008):

> To secure admissibility under this exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. *See, e.g., Jackson v. State,* 738 So.2d 382, 386 (Fla. 4th DCA 1999). Additionally, the proponent is required to present this information in one of three formats. First, the proponent may take the traditional route, which requires that a records custodian take the stand and testify under oath to the predicate requirements. *See* §90.803(6)(a), Fla. Stat. (2004). Second, the parties may stipulate to the admissibility of a document as a business record. *See, e.g., Kelly v. State Farm Mut. Auto. Ins.,* 720 So.2d 1145, 1146 (Fla. 5th DCA 1998). (holding that the parties stipulated to the admissibility of [993 So.2d 957] medical records under the business-records exception); but see *Gordon v. State*, 787 So.2d 892, 894 (Fla. 4th DCA 2001) (holding that the State and defense counsel's stipulation regarding the defendant's release date was not sufficient to relieve the State of its burden to prove the defendant's release date by a preponderance of the evidence). Third and finally, since July 1, 2003, the proponent has been able to establish the business-records predicate through a certification

> or declaration that complies with Sections 90.803(6)(c) and 90.902(11), Florida Statutes (2004). The certification—under penalty of perjury—must state that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
> (b) Was kept in the course of the regularly conducted activity; and
> (c) Was made as a regular practice in the course of the regularly conducted activity[.]

§ 90.902(11)(a)-(c), Fla. Stat. (2004).

"If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception." *Johnson v. Dep't of Health & Rehab. Servs.*, 546 So.2d 741, 743 (Fla. 1st DCA 1989).

Here, Mr. Trueba was merely a reviewer of documents kept by his employer in a computerized records database, with the same access to the document imaging system as anyone else in the company with access to that database. (Tr. 22-24). His knowledge of the records was limited to the fact that the records appeared in the database and that he reviewed it. (Tr. 24). As to documents transferred from the prior servicer and "boarded" into Bayview's system including payment records, Mr. Trueba's testimony that such documents were properly verified by the boarding department was based upon his conclusion that because it is in the production system it must have been to the boarding department's satisfaction. He could neither

explain the boarding process nor verify from some indication on the records themselves that the records were in fact boarded. (Tr. 28-31, 54-56).

Other than seeing the assignments, Mr. Trueba had no knowledge regarding the transfers of the note. (Tr. 87). His testimony that the note was held by the prior servicer and then by his attorney was based upon a "privileged conversation" between him and his legal counsel. (Tr. 40, 87). As to Bayview's own payment records, Mr. Trueba testified that those records were generated by Bayview's servicing platform – "MSP". He didn't know what the name "MSP" meant nor was he responsible for inputting the data or supervising the cashiering department that input the data nor had he seen any of the underlying invoices for the transactions, nor could he explain any categories of payments set forth on the payment history such as attorney advances, corporate advances, statutory expenses or miscellaneous F/C and B/R expenses. (Tr. 56-58).

Like Mr. Trueba, Ms. Prestia had the same access to review the imaged Bank of America records as anyone else in the default litigation department. She neither maintained that portal nor did she upload any documents to it. (Tr. 108-110). Her testimony that that the note would have had to have been fully endorsed in blank before the September 9, 2005 transfer of the note to the custodial vault took place was based upon her conclusion that certain undisclosed policies and procedures of Bank of America and the provisions of the PSA required such endorsements to have

been made prior to transfer. (Tr. 125-126, 138-140).

On Appellee's cross-exam Ms. Prestia acknowledged that the routing history screen-shots do not specifically mention an allonge or endorsements. (Tr. 142). Notwithstanding the fact that the routing history screen-shots make no mention of the lost note affidavit, Ms. Prestia claimed that entries in those screen-shot print-outs that she could not explain in her deposition taken the day before the trial now were entries that tracked the movement of the lost note affidavit. (Tr. 127-128, 142-146, 157-158).

Whereas the day before trial Ms. Prestia testified that the entries on the routing history screen-shots only tracked the movement of the note and that the note was returned back to Bank of America in 2013, at trial she contradicted that testimony by claiming that the lost note affidavit was also being tracked by the routing history and by denying that the note was transferred back to Bank of America in 2013. (Tr. 156-158). She further confirmed that her testimony interpreting the entries on the routing history screen-shots required her to review a collateral tracking screen that was not in evidence. (Tr. 155-156).

As this Court recently stated in *Sanchez v. Suntrust Bank*, __ So. 3d __ 2015 WL 7566353 (Fla. 4th DCA 2015):

> In the context of a foreclosure action, a representative of a loan servicer testifying at trial is not required to have personal knowledge of the documents being authenticated, but must be familiar with and have knowledge of how the "company's data [is] produced." *Glarum*

> *v. LaSalle Nat'l Ass'n*, 83 So. 3d 780, 783 (Fla 4th DCA 2011); see also *Cayea*, 138 So. 3d at 1217 ("Printouts of data prepared for trial may be admitted under the business records exception even if the printouts themselves are not kept in the ordinary course of business so long as a qualified witness testifies as to the manner of preparation, reliability, and trustworthiness."). If a representative of a servicing agent testifying at trial knows "how the data was produced," and is "familiar with the bank's record-keeping system and ha[s] knowledge of how the data was uploaded into the system," the business records exception is satisfied. *Weisenberg v. Deutsche Bank Nat'l Trust Co.*, 89 So. 3d 1111, 1112-13 (Fla. 4th DCA 2012).
>
> Although the witness had seen screenshots like the one entered into evidence before, he did not know anything about the process by which they were created, and admitted that the screenshot was not generated by any of the three servicing systems he was acquainted with. Finally, he stated that he believed the screenshot accurately reflected the date the endorsement was placed on the note based entirely upon a conversation he had with another employee he could identify only by first name. On these facts it cannot be said that this witness had sufficient knowledge to lay the foundation for the admission of the screenshot into evidence under the business records exception. See *Ensler v. Aurora Loan Servs.*, No. 4D14-351, 2015 WL 6496304, at *2 (Fla. 4th DCA Oct. 28, 2015) (stating that a "'witness's general testimony that a prior note holder follows a standard record-keeping practice, without discussing details to show compliance with Section 90.803(6), is not enough to establish a foundation for the business records exception.'" (quoting *Holt v. Calchas, LLC*, 155 So. 3d 499, 505 (Fla. 4th DCA 2015))).

The testimony of a witness regarding business records that are not entered at trial is insufficient to prove standing in a foreclosure case. *Schmidt v. Deutsche Bank*, 170 So. 3d 938, 941 (Fla. 5th DCA 2015). Additionally, there was no evidence that CWMBS, INC., as depositor under the PSA, had the intent to transfer any interest in the note to the original Plaintiff. Accordingly, Ms. Prestia's reliance

on the PSA was insufficient to establish the original Plaintiff's standing to bring suit at the time the suit was filed. See *Jarvis v. Deutsche Bank Nat'l Trust Co.*, 169 So. 3d 194, 196 (Fla. 4th DCA 2015); *Balch v. Lasalle Bank N.A.*, 171 So. 3d 207, 209 (Fla. 4th DCA 2015); *Perez v. Deutsche Bank Nat'l Trust Co.*, 174 So. 3d 489, 491 (Fla. 4th DCA 2015).

Accordingly, there was no evidence that was properly admissible at trial that would demonstrate that Appellant had standing to foreclose at the time suit was filed. See *Klemencic v. U.S. Bank Nat'l Ass'n*, 142 So. 3d 983, 984 (Fla. 4th DCA 2014); *Bristol v. Wells Fargo Bank, Nat'l Ass'n*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014); *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274, 1276-78 (Fla. 4th DCA 2013); *Hall v. REO Asset Acquisitions, LLC*, 84 So. 3d 388 (Fla. 4th DCA 2012). Likewise, there was no payment history evidence that was properly admissible such as would support the entry of a final judgment of foreclosure. See *Beauchamp v. Bank of N.Y.*, 150 So. 3d 827, 828 (Fla. 4th DCA 2014) (noting the bank's "failure to provide admissible evidence that would establish the proper amount due on the note was not harmless error.").

As such, the final judgment should be affirmed by this Court under the "tipsy coachman" doctrine based on Appellant's failure to demonstrate it had standing to foreclose at the time the complaint was filed. *Deutsche Bank Nat'l Trust Co. v. Boglioli*, 154 So. 3d 494, 495 (Fla. 4th DCA 2015) (affirming dismissal at trial

under tipsy coachman analysis where "the evidence at trial failed to demonstrate that appellant had standing to foreclose at the time it filed suit").

CONCLUSION

Appellee respectfully requests that the Court affirm the lower court's Order of Dismissal.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared using Times New Roman, 14 point, as required by Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: **/s/ David H. Charlip**
David H. Charlip, B.C.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was served on April 5, 2016 by E-mail upon the parties listed on the service list below.

By: **/s/ David H. Charlip**
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