In the District Court of Appeal
Second District of Florida

CASE NO. 2D15-520
(Lower Tribunal Case No. 11-2010-CA-001751-0001-XX)

LUCHY SECAIRA,
Appellant,

VS.

OCWEN LOAN SERVICING LLC,
Appellee.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

Respectfully Submitted,

/s/ Evan M. Rosen
Law Offices of Evan M. Rosen, P.A.
12 SE 7th Street, Suite 805
Fort Lauderdale, FL 33301
754-400-5150 (phone)
Fla. Bar 120103
Attorney for Appellant
Designated E-mail for Service: eservice@evanmrosen.com

TABLE OF CONTENT

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Secondary Sources

PRELIMINARY STATEMENT

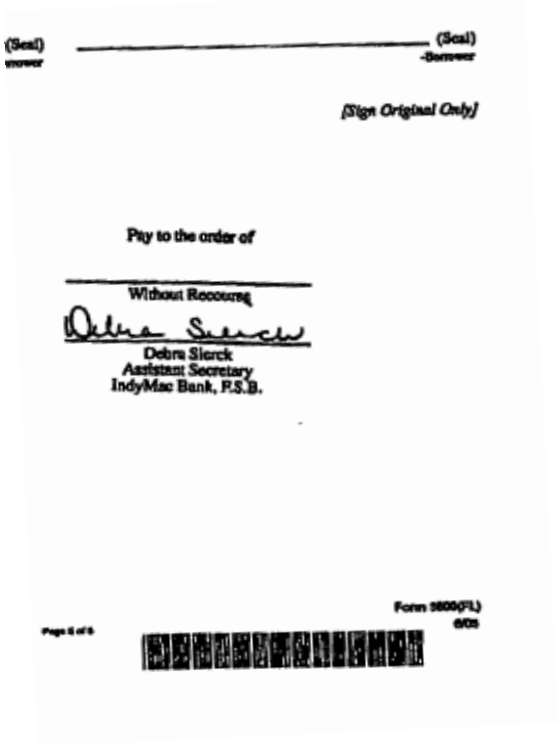
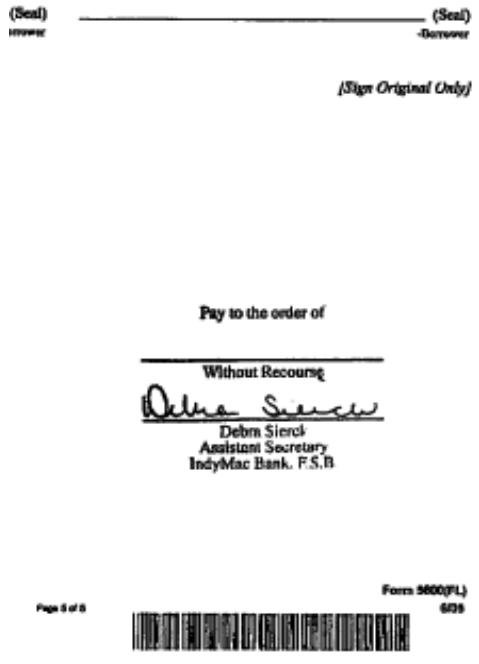
All references in this Brief to the Record on Appeal are designated by the symbol "R" followed by the page numbers [R. __].

All references to the Trial Transcript are designated as "Trial" followed by the page(s) and line numbers [Trial P. __ Ln.__]. The Trial Transcript can be found at [R. 376-511].

All reference to the deposition of the verified of the Amended Complaint are designated as "Depo." followed by the page(s) and line numbers [Depo P. __ Ln.__]. The Deposition can be found at [R. 288-345].

SUMMARY OF THE CASE AND FACTS

On March 10, 2010, the original Plaintiff, ONEWEST BANK, F.S.B., (OneWest) filed its Complaint against Defendant/Appellant, LUCHY SECAIRA to foreclose a mortgage on real property. [R. 1-30]. The Complaint alleged that Federal National Mortgage Association was the owner of the Note and that OneWest was the servicer of the loan and the holder of the Note. [R. 1]. The "copy" of the Note attached to the Complaint was originally made payable to IndyMac Bank, F.S.B. and contained, what appeared to be, an indorsement in blank. [R. 26-30]. On October 14, 2010, OneWest filed the Original Note and Mortgage. [R. 40-66.]. The position of the indorsements reveals a discrepancy:

Indorsement on the "copy" of the Note filed with 3/10/10 Complaint, [R. 30]:	Indorsement on Original Note Filed on 10/14/10, [R. 46]:
	

In relation to the signature line shown at the top of each image, the page number at the bottom left of each image and the barcode below each indorsement, the indorsement on what is a purported "copy" of the note is in a different position than the one on the original.

On June 23, 2014, the original Plaintiff was substituted for the current Plaintiff/Appellee, OCWEN LOAN SERVICING, LLC, (Ocwen). [R. 158-159]. Two days later, the Complaint was dismissed, with leave to amend, due to Appellee's failure to verify in accordance with the Florida Rule of Civil Procedure 1.110(b). [R. 163]. On October 8, 2014, Appellee filed its Verified Amended Complaint for Foreclosure of Mortgage (Amended Complaint) alleging it was the holder of the Note. [R. 173-202]. Appellant filed her Answer and Affirmative Defenses on October 16, 2014, which contested standing. [R. 203-206].

Deposition of the Verifier

On December 3, 2014, the deposition of the verifier of the Amended Complaint, Christopher Kelley, was taken. Although Mr. Kelley signed the verification in the Amended Complaint under penalty of perjury and swore that all of the facts alleged therein were true and correct to the best of his knowledge and belief, he admitted numerous times in his deposition that he did not know the facts he was verifying, did not understand the words used in the Amended Complaint, and could not describe from where the information for those facts came. The

Amended Complaint and several excerpts from Mr. Kelley's deposition make this clear.

Paragraph 5 of the Amended Complaint states: "Plaintiff is the holder of the note and is entitled to enforce the terms of the note and mortgage pursuant to Florida Statute 673.3011(1)." Mr. Kelley could not give the definition of holder.

> Q. …What is a holder?
> A. The holder of the note is basically who is in possession of the note.
> …
> Q. …as far as being in possession, that's what a holder means?
> A. Yes
> Q. And what is Florida Statute 673.3011 subsection one? What does that say?
> A. I don't know.

[Depo. P. 45 Ln. 25 – P. 46 Ln. 11]. Furthermore, as it turns out, Appellee was not the holder nor did it prove it was entitled to enforce.

When asked, from paragraph 10 of the Amended Complaint, what it means to be vested in title, Mr. Kelley answered: "[t]hat they are currently the -- who's in possession of the house." [Depo. P. 48 Ln. 4-5].

Paragraph 11 of the Amended Complaint states: "All conditions precedent to the acceleration of this mortgage note and to foreclosure of the mortgage have been fulfilled and have occurred." However, Mr. Kelley did not know what any of this meant.

> Q. What is a condition precedent? What does that mean?
> **A. I don't know.**
> Q. How about acceleration? What does that term mean to you for purpose of the foreclosure lawsuit?
> **A. I don't know.**

Similarly, Mr. Kelley admitted that he did not know the truth or accuracy of Paragraph 12 of the Complaint which simply alleges that Appellee retained counsel and was obligated to pay them.

> Q. How did you know that Plaintiff retained an attorney and was obligated to pay an attorney in this case?
> **A. I don't know.**

[Depo. P. 48 Ln. 7-12].

Paragraph 14 of the Amended Complaint alleges that an unknown spouse may have homestead or other rights to the property which are inferior to Appellee's.

> Q. Okay. What are homestead rights?
> **A. In case there's a homeowner's association.**

[Depo. P. 49 Ln. 12-13].

Additionally, Mr. Kelley did not understand any of the terms found in Appellee's wherefore clause.

> Q. Okay. It says here in the wherefore – in this wherefore area here in the second line, abstracting. What is abstracting?
> A. That's something – that's more standard verbiage that's put in. **I don't know.**
> ***Q. What does it mean to foreclose the mortgage?***
> ***A. That's verbiage that the law firm puts in.***

Q. And you're not sure what that means?
A. No.
Q. How about securing the indebtedness? What does that mean?
A. I'm not really sure.
Q. Okay. What does it mean to satisfy the Plaintiff's mortgage lien?
A. I'm not really sure of the terminology.
Q. How about Florida Statutes 45031, do you know what that says?
A. No.
Q. What does it mean that Defendant's claim be forever barred?
A. I don't know.
Q. How about what does it mean to appoint a receiver?
A. I'm not sure.
Q. Okay. How about sequestration of rents, issues, income, and profits? Do you know what that means?
A. No.
Q. How about Florida Statute 697.07? Do you know what that says?
A. No.
Q. What's a writ of possession?
A. I don't know.
Q. How about a deficiency judgment? What does that mean?
A. I'm not sure.

[Depo. P. 50 Ln. 3 – Pg. 51 Ln. 13].

As result of Mr. Kelley's testimony demonstrating his lack of knowledge and belief as to the truth and accuracy of almost every fact alleged in the Amended Complaint, on January 2, 2015, Appellant filed a Motion to Strike the verification. [R. 210-221].

Trial Proceedings

Trial took place on January 13, 2015. Appellant's Motion to Strike the verification was heard but the trial court reserved ruling and requested an additional brief on the issue, which was filed by Appellant on January 16, 2015. [R. 346-367]. At trial, Appellee called one witness, Kevin Flannigan. Mr. Flannigan, was employed by Ocwen, not the original Plaintiff, OneWest. Mr. Flannigan testified that Ocwen was not involved with the loan at issue until 2013, three years after the lawsuit was filed. [Trial P. 67 Ln. 12-17]. Mr. Flannigan admitted that he did not know where OneWest kept their documents, [Trial P. 92 Ln. 20 – P. 93 Ln. 1], he did not know where the records were at the time the lawsuit was filed nor did he see them, [Trial P. 93 Ln. 7 – Ln. 13], he did not know when the blank indorsement was placed on the Note, [Trial P. 93 Ln. 14 – Ln. 21], he did not place the indorsement on the Note, [Trial P. 93 Ln. 22 – Ln. 23], and he did not see the Note prior to the filing of the action. [Trial P. 94 Ln. 1 – Ln. 3].

At trial, Appellee argued that standing at inception was established solely by comparing the indorsement on the "copy" of the Note filed with the initial Complaint with the indorsement on the Original Note, which was later filed with the Court. Specifically, Appellee argued that:

> . . . to establish standing in this case is a simple matter. The Plaintiff in this case -- the original Plaintiff was OneWest Bank. And OneWest Bank, upon filing the complaint, had a copy of the note

> attached to the complaint.
>
> This was promptly followed, Your Honor, with filing that same -- the original note for that complaint. **The endorsements that were in the copy that was filed with the [Complaint] are the same endorsements that were in the original that was filed with [t]he Court**. (*emphasis added*).

[Trial P. 107, Ln 15-25].

> However, with respect to showing whether OneWest had standing, the filing of a copy of the complaint is the standing that's shown here. There was a copy filed with the complaint. And [then] when the original [note] was then filed promptly after that, **there isn't any change to the endorsements.** (*emphasis added*).

[Trial P. 108 Ln 8-13]. The trial court took judicial notice of the initial Complaint that was filed in this action, along with the attachments, and of the Original Note and Mortgage filed seven months later. [Trial P. 45 Ln. 10 – P. 46 Ln. 11].

Appellee also introduced an Assignment of Mortgage (AOM) from Mortgage Electronic Registration Systems (MERS) to OneWest, which assigns only the Mortgage and postdates the lawsuit by almost one year. [R. 235]. Similarly, Appellee introduced a Bailee Letter, which is also dated after the lawsuit was filed. [R. 240]. Neither of these documents establish standing, as admitted by Appellee when arguing its theory of standing based solely on the "copy" of the Note attached to the initial Complaint:

> . . . the only reason we have an AOM, assignment of mortgage, and the Bailee letter was to show the

> relationship of OneWest in all of this. However, with respect to showing whether OneWest had standing, the filing of a copy of the complaint is the standing that's shown here.

[Trial P.108 Ln. 4-7]. Additionally, none of Appellee's remaining evidence (IndyMac Default Letters [R. 228-233], Notice of Servicing Transfer [R. 236-239], and IndyMac Payment History [R. 241-258]) established standing to enforce the Note and Mortgage at inception, nor was that even argued. Despite the insufficiency of the evidence to prove standing, Final Judgment was erroneously rendered in Appellee's favor on January 28, 2015. [R. 368-371].

SUMMARY OF THE ARGUMENT

Failure to Prove Standing at Inception

At trial, Appellee made it very clear that it sought to prove standing at inception solely by asking the Court to take judicial notice of the "copy" of the Note attached to the initial Complaint and to compare it to the Original Note filed seven months after suit was filed. Appellee alleged that because there were no changes between the indorsement on the "copy" of the Note attached to the initial Complaint and the later filed Original Note, the original Plaintiff had standing at inception. However, this is incorrect for three reasons.

First, the indorsements are clearly in different positions. Since the "copy" of the Note attached to the initial Complaint is not actually a copy of the Original, Appellee did not prove standing at inception even by the terms of its own

argument. *Second*, the fact that the Original Note was filed seven months after the lawsuit was filed, does not establish standing at inception. *Third*, even if the indorsements were identical in all respects, at best, this only tends to prove that the original Plaintiff had a copy of the Note when suit was filed. It still does not prove that the original Plaintiff had the Original Note at inception.

Additionally, Appellee introduced no other evidence which supports standing at inception nor did it even seek to do so. Both the AOM and the Bailee Letter postdate the filing of the initial Complaint and, by Appellee's own admission at trial, were not offered to prove to standing at inception. Furthermore, Appellee's only witness was an employee of Ocwen, not of the original Plaintiff, OneWest. The witness testified in various ways that he did not have any personal knowledge of any information which could prove that the original Plaintiff had possession of the Note at the time suit was filed. As such, it was reversible error for the trial court to find that Appellee proved standing at inception.

Failure to Prove Appellee's Standing to Enforce the Note and Mortgage

Appellee's theory of recovery, as stated in its Amended Complaint, was that it was entitled to enforce the Note and Mortgage because it was the holder of the Note. However, as held in *Creadon v. U.S. Bank N.A.*, 2D13-5700, 2015 WL 3814853, (Fla. 2d DCA June 19, 2015), Appellee could not have been in

possession of the Note because the Original Note had been filed with the lower court for almost three years before Appellee was substituted as plaintiff.

Failure to Properly Verify the Amended Complaint

The initial Complaint was dismissed for lack of verification. The Amended Complaint contained a verification by Ocwen employee, Christopher Kelley, who was deposed on December 3, 2014. During the deposition, Appellant's counsel read from the Amended Complaint while questioning Mr. Kelley to find out how he knew that certain allegations were true and correct. However, Mr. Kelley could barely answer any of the questions and did not understand the words used to describe the factual allegations in the Amended Complaint.

For example, Mr. Kelley did not know what it meant to be a holder [Kelley Depo, P. 45 Ln. 24 – P.46 Ln. 8]. He did not know what a condition precedent was or what acceleration meant. [Kelley Depo, P. 48 Ln 7-12]. Further, he did not know what it meant to "foreclose the mortgage." [Kelley Depo, P. 50 Ln 8-11]. Without even a basic understanding of the terms used in the Amended Complaint, there is no way Mr. Kelley could have actually verified it, as he alleged to do under penalty of perjury. Indeed, one of the most important facts that must be verified according to the Supreme Court of Florida – that Appellee was the holder of the note and entitled to enforce – was untrue. As such, the trial court abused its

discretion by denying the Motion to Strike the verification and by not dismissing the Amended Complaint.

ARGUMENT

I. FAILURE TO PROVE STANDING AT INCEPTION

Standard of Review for Standing and Motion for Involuntary Dismissal

"Whether a party is the proper party with standing to bring an action is a question of law to be reviewed de novo." *LaFrance v. U.S. Bank Nat. Ass'n,* 141 So. 3d 754, 755 (Fla. 4th DCA 2014). Likewise, the standard of review for a motion for involuntary dismissal is de novo. *Allard v. Al-Nayem Intern., Inc.*, 59 So. 3d 198, 201 (Fla. 2d DCA 2011); *Bank Nat'l Trust Co. v. Huber*, 137 So. 3d 562, 563 (Fla 4th DCA 2014). In the current action, Appellant's Motion for Involuntary Dismissal was improperly denied as Appellee did not offer sufficient evidence to prove standing at inception or standing to enforce the Note and foreclose the Mortgage.

a. Appellee's only attempt at proving standing at inception failed because the Note attached to the initial Complaint was not a copy of the Original Note, which was filed seven months later.

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *Lloyd v. Bank of New York Mellon,* 160 So. 3d 513 (Fla. 4th DCA 2015); *Zimmerman v. JPMorgan Chase Bank*, N.A., 134 So. 3d 501 (Fla. 4th DCA). "A plaintiff alleging

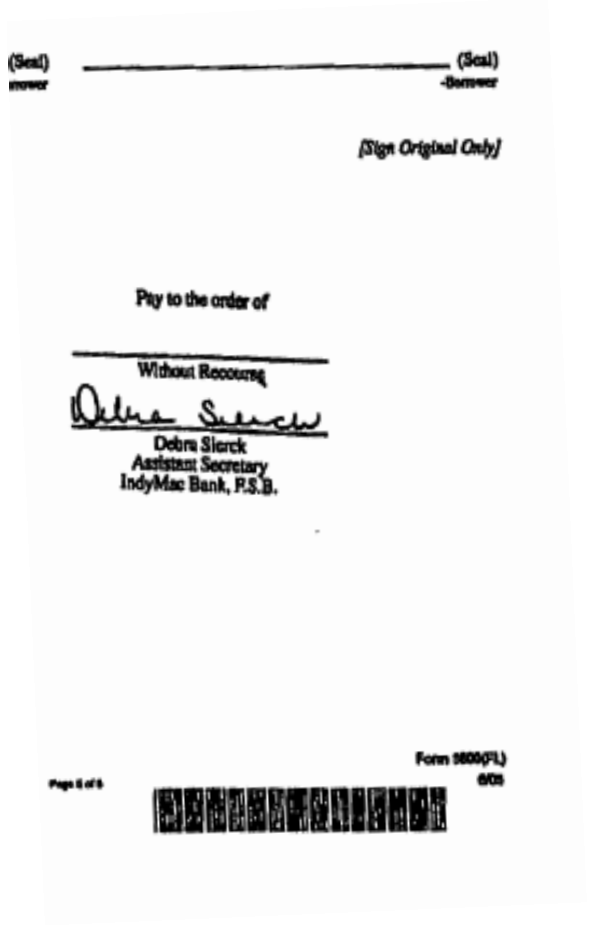
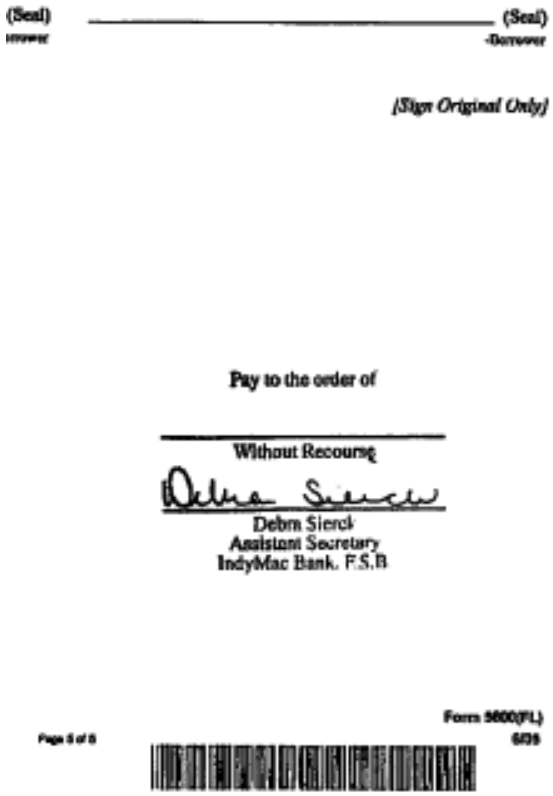
standing as a holder must prove it is a holder of the note and mortgage both as of the time of trial and also that the (original) plaintiff had standing as of the time the foreclosure complaint was filed." *Russell v. Aurora Loan Services, LLC*, 164 So. 3d 639, 642 (Fla. 2d DCA 2015)(*emphasis added*).

This principle is so well established that, just in the last year, there have been numerous cases which make clear that a plaintiff must prove standing. *Sosa v. U.S. Bank Nat. Ass'n*, 153 So. 3d 950 (Fla. 4th DCA 2014), *reh'g denied* (Jan. 23, 2015); *Ryan v. Wells Fargo Bank, N.A.*, 142 So. 3d 974 (Fla. 4th DCA 2014); *Seffar v. Residential Credit Solutions, Inc.*, 160 So. 3d 122 (Fla. 4th DCA 2015); *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015); *Wright v. Deutsche Bank Nat. Trust Co.*, 152 So. 3d 1289 (Fla. 4th DCA 2015); *Deutsche Bank Nat. Trust Co. v. Boglioli*, 154 So. 3d 494 (Fla. 4th DCA 2015); *Russell v. Aurora Loan Services, LLC*, 163 So. 3d 639 (Fla. 2d DCA 2015); *Pennington v. Ocwen Loan Servicing, LLC*, 151 So. 3d 52 (Fla. 1st DCA 2014); *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351 (Fla. 1st DCA 2014); *May v. PHH Mortg. Corp.*, 150 So. 3d 247 (Fla. 2d DCA 2014); *Lacombe v. Deutsche Bank Nat'l Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014).

In the current action, no testimony or other evidence was presented to prove that the original Plaintiff had standing at inception. At trial, Appellee incorrectly argued that standing at inception was established solely because there were no

changes to the indorsement as seen on the "copy" of the Note filed with the initial Complaint and the indorsement as seen on the later filed Original Note. [Trial P. 107, Ln 15-25; Trial P. 108, Ln 8-13]. This argument is incorrect for three reasons: 1) the indorsements were not the same, 2) standing at inception cannot be cured with a later filed original note, and 3) even if the "copy" of the Note attached to the initial Complaint and the Original Note were the same, by itself, a copy does not establish possession of the original at inception.

First, according to the Florida Supreme Court, a copy of an original document must be identical with the original. *In re Estate of Parker*, 382 So. 2d 652, 653 (Fla. 1980)("'Copy' implies that the instrument so labeled is identical with another instrument. The word "copy" is also defined as a true transcript of an original writing, and a reproduction of an original work.")(*internal citations omitted*). Furthermore, §90.954(4) defines duplicate as a document that "accurately reproduces the original." In the current action, the "copy" of the Note filed with the initial Complaint is clearly not an identical copy of the original, as the indorsements are in different positions on both documents, as seen in this larger snapshot on the following page:

Indorsement on the "copy" of the Note filed with 3/10/10 Complaint, [R. 30]:	Indorsement on Original Note Filed 10/14/10, [R. 46]:
	

There are numerous cases which stand for the proposition that when the note attached to the complaint is different from the original note filed with the court, a plaintiff cannot establish standing at inception with that evidence alone. *See Olivera v. Bank of America, N.A.*, 141 So. 3d 770 (Fla. 2d DCA 2014); *May v. PHH Mortgage Corp.*, 150 So. 3d 247 (Fla. 2d DCA 2014); *Farkas v. U.S. Bank Nat'l Assoc.*, No. 4D13-3006, 2015 WL 3396644 (Fla. 4th DCA May 27, 2015); *Seffar v. residential Credit Solutions, Inc.*, 160 So. 3d 122 (Fla. 4th DCA 2015);

Matthews v. Federal Nat'l Mortgage Assoc., 160 So. 3d 131 (Fla. 4th DCA 2015). These cases all address the instance in which a copy of an unindorsed note is attached to the Complaint, but later, an indorsed version appears. While the facts in the current action appear to be a case of first impression in Florida, the logic of the above cases applies. That is, the Courts have held that when the endorsements on the copy and the original are not the same, a plaintiff has not proven standing at inception. Likewise, in the current action, the indorsements are not the same because they are in different places. Nothing about a "copy" of a Note, with an indorsement in a different place than as shown on the original, establishes proof that the Plaintiff was in possession of the original Note, at the inception of the litigation. Ultimately, there was absolutely no evidence which demonstrates standing at inception.

Second, the fact that the Original Note was filed seven months after the lawsuit does not prove standing at inception, as held by this Court in *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308 (Fla. 2d DCA 2013). In *Focht*, this Court held that even if plaintiff presents unrefuted evidence of standing acquired after filing, "appellate courts are nonetheless compelled to reverse based on the district courts' application of a long line of supreme court cases applying the general principle that "the plaintiff's lack of standing at inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." *Id*. at 311-312 (*quoting*

Progressive Express Ins. Co. v. McGrath Cmty Chiropractic, 913 So. 2d 1281, 1284-85 (Fla. 2d DCA 2005)).

Third, even if the "copy" of the Note attached to the initial Complaint and the Original Note were the same, by itself, a copy of a note indorsed in blank, attached to a complaint, does not prove that a plaintiff had possession of the original at the time suit was filed. *See Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, FN 3 (Fla. 5th DCA 2013); *Hall v. REO Asset Acquisitions, LLC*, 84 So. 3d 388 (Fla. 4th DCA 2012).

b. Appellee did not admit any other evidence that could establish standing at inception nor did it even seek to do so.

Additionally, no other evidence presented established the original Plaintiff's possession of the Original Note at inception. Appellee's witness, Mr. Flannigan, was not employed by the original Plaintiff, OneWest. He was an employee of Ocwen, who was not involved with the subject loan until three years after the lawsuit was filed. Mr. Flannigan had absolutely no personal knowledge as to what OneWest did or did not possess when the suit was filed. [Trial P. 92 Ln. 20 – P. 93 Ln. 1]; [Trial P. 93 Ln. 7 – Ln. 13]; [Trial P. 94 Ln. 1 – Ln. 3]. Similarly, he had no personal knowledge as to whether or not there was an indorsement on the Note when suit was filed. [Trial P. 93 Ln. 14 – Ln. 21]; [Trial P. 93 Ln. 22 – Ln. 23]

Moreover, there was no record or exhibit which established the Appellee's burden to prove standing at inception. The AOM introduced cannot establish standing as it postdates the lawsuit by almost a year. [R. 235]. *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308 (Fla. 2d DCA 2013); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (Bank failed to establish standing to foreclose based on assignment dated one day after the complaint was filed); *Matthews v. Federal Nat'l Mortgage Assoc*., 160 So. 3d 131 (Fla. 4th DCA 2015). Similarly, the Bailee Letter is dated after the lawsuit was filed. [R. 240]. Further, Appellee at trial made it clear that it did not seek to use any of those exhibits to establish standing. [Trial P. 108 Ln. 4-7]. None of Appellee's evidence established that the original Plaintiff had possession of the Original Note, indorsed in blank, at the time the lawsuit was filed. Therefore, the trial court committed harmful reversible error in entering a Final Judgment in Appellee's favor.

II. FAILURE TO PROVE APPELLEE'S STANDING TO ENFORCE THE NOTE AND MORTGAGE

Appellee failed to provide sufficient evidence to prove it had standing to foreclose because it was not the holder of the Original Note. In paragraph 5 of its Amended Complaint, Appellee pled: "Plaintiff is the holder of the note and is entitled enforce the terms of the note and mortgage pursuant to Florida Statute 673.0311(1)." [R. 174]. However, Florida Statute §671.201(21) defines holder, in relevant part, as:

> (a) [t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; . . .

In the current action, Appellee could not have been the "holder" of the Note as there is undisputable evidence that Appellee did not have possession of the Note because it was located in the Collier County Courthouse, in the possession of the clerk of court.

This Court recently ruled on this very issue in *Creadon v. U.S. Bank N.A.*, 2D13-5700, 2015 WL 3814853 (Fla. 2d DCA June 19, 2015). In *Creadon*, as in the current action, the original plaintiff filed the original note after the lawsuit was filed. *Id*. Two years later, the plaintiff was substituted for U.S. Bank, N.A. who alleged it was the holder of the note and proceeded solely on this theory. *Id*. In reversing the trial court and remanding for entrance of an involuntary dismissal, this Court held that since the "original note had been filed in the registry of the Court years before U.S. Bank appeared in the suit…U.S. Bank simply could not have been holding the note or been a nonholder in possession with standing to foreclose the mortgage." *Id*. Here, in an almost identical fact pattern, the Original Note had been filed with the court for over three years before Appellee was substituted as plaintiff. As held in *Creadon*, Appellee simply could not have been holding the note, with standing to foreclose the mortgage. As such, final judgment should be reversed and the case should be remanded for entrance of an involuntary

dismissal, since courts "do not generally give parties who fail to prove their case an opportunity to do so in a retrial." *Creadon v. U.S. Bank N.A.*, 2D13-5700, 2015 WL 3814853*2 (Fla. 2d DCA June 19, 2015).

> [A]s Judge Altenbernd observed, "[i]n this case and numerous other cases, the financial institutions have brought these problems upon themselves by the complex methods of securitization and their own sloppy recordkeeping." Id., at 313 (Altenbernd, J., concurring). We further note that many foreclosure actions languish due to the plaintiffs' failure to prosecute cases in a timely manner and not from any wrongdoing by the borrower. Once a defendant contests the plaintiff's standing as the proper party to enforce a note via foreclosure, the plaintiff's right to bring suit on the note at the requisite time becomes a disputed issue the plaintiff must prove. *Gee v. U.S. Bank, N.A.*, 72 So. 3d 211, 213 (Fla. 5th DCA 2011). It is not inequitable to require a plaintiff to prove its case, beginning with its standing to bring the action at the outset when that status is challenged.

Ham v. Nationstar Mortgage, LLC, 1D14-4024, 2015 WL 2189768, FN1 (Fla. 1st DCA May 12, 2015).

III. AMENDED COMPLAINT'S VERIFICATION SHOULD HAVE BEEN STRICKEN

Standard of Review for Motion to Strike

The standard of review for a denial of a motion to strike is abuse of discretion. *Empire World Towers, LLC v. CDR Creances, S.A.S.*, 89 So. 3d 1034 (Fla. 3d DCA 2012). However, the trial court's discretion is not absolute and may be reversed if unreasonable. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla.

1980). In the current action, it was unreasonable to deny Appellant's Motion to Strike the verification of the Amended Complaint given the verifier's testimony, the fact that Appellee was given a "second chance" after failing to verify the original Complaint, and the differing indorsements in this case. These facts are consistent with the Supreme Court of Florida's understanding that "...many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of New York*, 121 So. 3d 23, 30 (Fla. 2013).

a. Rule 1.110(b) required accurate verification of mortgage foreclosure complaints.

The Florida Supreme Court has promulgated rules of procedure specifically for foreclosure complaints. As it pertains to the current issue, Florida Rule of Civil Procedure 1.110(b)[1] stated in part:

> When filing an action for foreclosure on a mortgage for residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein **are true and correct** to the best of my knowledge and belief." (*emphasis added*)

[1] At all times relevant, Rule 1.110(b) was in effect, as such Appellant will refer to it rather than the current version of the verification now found in Rule 1.115(e), which is almost identical to its older counterpart.

In order to properly verify a complaint, the verification must comply with Rule 1.110(b) and Florida Statute §92.525, which codifies the requirements. Section 92.525 states that:

> (1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:
>
> (a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or
>
> (b) By the signing of the written declaration prescribed in subsection (2).
>
> (2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

Section §92.525, and the case law that interprets it, gives us the framework for how plaintiffs can comply with Rule 1.110(b).[2] *See Trucap Grantor Trust v. Pelt*, 84 So. 3d 369 (Fla. 2d DCA 2012)(holding that a foreclosure complaint is a pleading under the meaning of §92.525 and can be verified in accordance with the exception

[2] The language used in Rule 1.110(b) merely tracks the language of §92.525 and allows for verification based on "knowledge and belief."

found in §92.525(2)); *See* FLA. R. CIV. P. 1.100(a)(classifying a complaint as a pleading).

When a verification is signed by a person, it means something specific under our legal system. Generally, verification means that the person signing a document has read the document and says that the facts therein are true.[3] Trawick, *Pleadings*, Fla. Prac. & Proc. § 6:14 (2014-2015 ed.); *Martinez v. Abraham Chevrolet-Tampa, Inc*., 891 So. 2d 579, 582 (Fla. 2d DCA 2004)("It is implicit that a person must have read a document or have its contents read to them, in order to swear to the truth of its contents."). How a verifier knows that facts are true is of great importance and carries serious legal consequence if it is discovered that the verifier did not or could not have verified the truth of the matters asserted. FLA. STAT. §92.525(3)("A person who knowingly makes a false declaration … is guilty of the crime of perjury by false written declaration, a felony of the third degree, punishable as provided in s.775.082, s. 775.083, or s. 775.084.").

In the current action, numerous critical factual allegations in the Amended Complaint are expressed using terms commonly used in the foreclosure industry. It is only reasonable that in order for a person to verify certain factual allegations,

[3] Compare this to an acknowledgment, where a person signing a document merely appears before a notary and says that he/she has executed the document. Trawick, *Pleadings*, Fla. Prac. & Proc. § 6:14 (2014-2015 ed.).

they need to understand some basic terminology. This principle is supported by the wording in §92.525, Rule 1.110(b), and Florida case law.

First, the mortgage complaint verification starts with the words "under penalty of perjury." These same criminal consequences are stated in §92.525(2) and (3). With the threat of criminality, it would seem both wise and obvious that a person signing a verification take good faith steps to educate themselves in order to have, at least some idea of the meaning of the words he/she is being asked to swear are true.

Second, the verification declares that the facts in the complaint are "true and correct, to the best of my knowledge and belief." The words "true and correct" are qualified by "to the best of my knowledge and belief." However, this does not mean that anyone can verify any information as long as they "believe" it to be true. The verifier must also have "knowledge" of the facts verified. The Fifth District Court addressed a similar issue in *Brumlik*, where the Court held that "knowledge and belief" meant something very specific and was distinguishable from "information and belief." *First Nat'l Enterp. Corp. v. Brumlik*, 531 So. 2d 403 (Fla. 5th DCA 1988). To verify a document based on "information and belief" suggests that a person believes the truth of information based on hearsay information provided by others. *Id*. Verifying based on "knowledge and belief" means that a person believes the facts are true "<u>because he personally saw, heard,</u>

or experienced those facts and thus has knowledge of them." *Id*. In the current action, as detailed in the following section, Mr. Kelley admitted in his deposition to not having knowledge of almost every basic foreclosure term used to describe important factual allegations. If he did not even understand the meaning of the words used to allege certain facts, how can he swear, under penalty of perjury, that he heard, saw, or experienced any of those facts? Under a standard which requires "knowledge," how can ignorance be acceptable? More importantly, the most critical fact "verified" – that Appellee was the holder of the Note – was not true.

b. The verifier did not have knowledge of the information verified.

It is undisputed that Mr. Kelley did not know whether or not the great majority of the allegations in the Amended Complaint were true. Almost every paragraph of the Amended Complaint includes basic legal terms and, at trial, Appellee itself stated that "[u]nfortunately for Mr. Kelley, his legal knowledge wasn't where it should have been for the other legal terms. . . ," besides jurisdiction. [Trial. P. 19 Ln. 21-23].

At the deposition of Mr. Kelley, Appellant's counsel went paragraph-by-paragraph through the Amended Complaint, asking almost entirely non-leading questions as to how Mr. Kelley knew each sentence and paragraph was true and correct. In response to almost every single specific question, Mr. Kelley answered,

"I don't know," despite the fact that many of the questions, dealt with factual allegations.

For example, Paragraph 5 of the Complaint alleged that "Plaintiff is the holder of the Note…" [R. 174]. This is a factual allegation that is untrue. When Mr. Kelley was asked what a holder was, he replied that a holder was the person in possession of the Note. [Kelley Depo., P. 45 Ln. 25 – P. 46 Ln. 8]. Florida Statute §671.201(21) defines holder, in relevant part, as: "(a) [t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; . . ." Clearly Mr. Kelley's understanding of the definition was insufficient on one of the most important facts which must be verified. And, as it turns out, Appellee was not the holder. The Florida Supreme Court specifically articulated that one of the primary purposes for adding the verification Rule was to provide incentive to plaintiffs to verify their "right to enforce the note." *In re Amendment to the Florida Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010). Yet, Mr. Kelley did not understand that possession is only half of the definition of "holder" and that Appellee was, indeed, not even in possession.

Paragraph 8 of the Amended Complaint alleges that Appellee is due money for "title search expenses" while Paragraph 9 alleges that ad valorem taxes may be due. [R. 174]. These are factual allegations. However, when Mr. Kelley was asked

how he knew that title search expenses were due, he said he could not remember. [Kelley Depo., P. 47 Ln. 17-23]. The same answer was given as to ad valorem taxes. [Kelley Depo., P. 48 Ln. 2-3].

Paragraph 10 of the Amended Complaint alleged that "[t]he record legal title to said mortgaged property is now vested in Defendant(s)." [R. 174]. This is a factual allegation. However, Mr. Kelley did not know what it meant for title to be vested in Defendant. Instead, he believed that this meant the person in possession of the property. [Kelley Depo., P. 48 Ln. 4-6].

Paragraph 11 of the Amended Complaint alleged that "[a]ll conditions precedent to the acceleration of this mortgage note and to foreclosure of the mortgage have been fulfilled and have occurred." [R. 174]. Ultimately, whether or not a condition precedent has been fulfilled is a factual allegation. Appellee either sent a default letter and accelerated or it did not. For a person tasked with verifying complaints for accuracy, under penalty of perjury, there should be nothing complicated about knowing whether or not a default letter was sent to Appellant and whether the debt was accelerated. However, Mr. Kelley did not know what a condition precedent was nor what it meant to accelerate. [Kelley Depo., P. 48 Ln. 7-12].

Paragraph 12 of the Amended Complaint alleged simply that Appellee retained an attorney and was obligated to pay said attorney. [R. 174]. This, again,

is a factual allegation, yet Mr. Kelley admitted to not knowing if this was true, even though he swore it was. [Kelley Depo., P. 48 Ln. 13-16].

Further evidence of Mr. Kelley's lack of qualification to verify the Amended Complaint is found in the deposition. Despite working for a mortgage servicer, Mr. Kelley did not understand the very basic terms of the field in which he is employed. For example, Mr. Kelley believed that encumbering the property meant "that the property resides in Collier County." [Kelley Depo, Pg. 45 Ln. 11-12]. **Mr. Kelley did not know what it meant to foreclose a mortgage**, despite the fact that his job duty is to verify mortgage foreclosure complaints on a daily basis. [Kelley Depo., P. 50 Ln. 8-11]. Mr. Kelley did not know what a homestead right was; he believed that the reference to homestead rights meant that there was a homeowner's association involved in the case. [Kelley Depo., P. 49 Ln. 12-13]. Additionally, Mr. Kelley did not know what a deficiency judgment was. [Kelley Depo., P. 51 Ln. 11-13].

At the deposition, Appellee had ample opportunity to object to the questions posed or to try to rehabilitate Mr. Kelley. However, Appellee did not pose any significant objections nor attempt to rehabilitate. As such, given Appellee's silence at the deposition, its admission at trial that Mr. Kelley's knowledge was lacking [Trial. P. 19 Ln. 21-23] and most importantly, the level of ignorance of basic foreclosure terms as evidenced by the testimony of Mr. Kelley, it is clear that Mr.

Kelley could not have possibly had the "knowledge" required to verify that the Amended Complaint allegations were true and correct to the best of his knowledge and belief.

c. The documented history of Rule 1.110(b) makes it clear that the intent of the rule was to prevent complaints from being filed without proper investigation and verification of the facts.

A read of the Florida Supreme Court Order, *In re Amendments to The Florida Rules of Civil Procedure,* 44 So.3d 555, 556 (Fla. 2010), which enacted this historic rule change, specific to one industry, indicates the Court's concern. The first primary purpose of the verification requirement was "to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note **and** ensure that the allegations in the complaint **are accurate.**" *Id. (emphasis added*). Another reason was to conserve judicial resources resulting from suits brought by plaintiff's not entitled to enforce the note. *Id*. Lastly, the Florida Supreme Court specifically went out of their way to state that another purpose for the verification requirement was "to give trial courts authority to sanction plaintiffs who make false allegations." *Id*. In light of the specific intent of the Supreme Court of Florida, it cannot be clearer that the verification Rule was intended so that the facts of a complaint would be accurately verified; any other interpretation would directly contradict the Florida Supreme Court and render the Rule invalid and meaningless.

d. When any part of a pleading is false, it is void and should be stricken pursuant to Rule 1.150(a).

As a result of the verifier's lack of knowledge of the allegations in the Amended Complaint, the verification is false and should have been stricken. Florida Rules of Civil Procedure 1.150(a) states that:

> If a party deems any pleading or part thereof filed by another party to be a sham, that party may move to strike the pleading or part thereof before the cause is set for trial and the court shall hear the motion, taking evidence of the respective parties, and if the motion is sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment on the merits may be entered in the discretion of the court or the court may permit additional pleadings to be filed for good cause shown.

Florida case law states that in order for a pleading to be stricken, there must be evidence that the pleading is inherently false and based on plain or conceded facts. *See Miller v. Nelms*, 966 So. 2d 437, 440 (Fla. 2d DCA 2007); *Yunger v. Oliver*, 803 So. 2d 884, 886 (Fla. 5th DCA 2002). Here, the part of the pleading Appellant was seeking to strike is inherently false, based on the plain facts from Mr. Kelley's deposition. Mr. Kelley admitted numerous times that he plainly did not know and – because of his complete lack of knowledge of basic terms used in a foreclosure – could not know if the majority of the factual allegations in the Amended Complaint were true and correct, to the best of his knowledge and belief.

Appellee may argue that Appellant needed to prove that the allegations in the Amended Complaint were false, but this argument is incorrect, misleading, and ignores the fact that Appellant was not seeking to strike the Amended Complaint. Instead, Appellant was merely seeking to strike the false verification, a remedy that is well supported by the Rules of Civil Procedure and the facts of the current action. However, according to this Court in *Creadon* and the evidence presented at trial, the Amended Complaint does include a false allegation as Appellee is not the holder of the Note. *Creadon v. U.S. Bank N.A.*, 2D13-5700, 2015 WL 3814853, (Fla. 2d DCA June 19, 2015). As such, the trial court committed harmful reversible error in allowing Appellee to proceed with a falsely verified complaint as "expediency never trumps truth," and the "the sanctity of a sworn oath cannot take a back seat in the hierarchy of professional obligations." *Zuleta v. Prof'l Team Paint, Inc.*, No. 608-CV-1950-ORL31DAB, 2009 WL 1543823, at *3 (M.D. Fla. June 3, 2009). Further, considering Appellee was granted leave to amend after numerous transgressions[4], and for the reasons pertaining to Appellee's failure to

[4] To fully understand the significance of the issues presented in Appellee's false verification, it is important to review Appellee's pattern of disregard for Court orders and the rule of law throughout the litigation. After Appellee was substituted into the case, trial was set for June 25, 2014. However, trial did not go forward because the Court granted Appellant's Motion to Dismiss, with leave to amend, as the initial Complaint was not verified. [R. 163]. The Court also sanctioned the Appellee for its "repeated failure" to timely respond to Appellant's numerous, good faith requests for exhibits, as well as its failure to provide the name and address of Appellee's trial witness. [R. 160]. As a result of the above, Appellee

establish standing, Appellee's verification should be stricken and the Amended Complaint dismissed for failure to state a cause of action.

---

was ordered to file a verified complaint within 90 days and pay monetary sanctions within 30 days. [R. 160 & 163]. Appellee did not comply with either order, nor did it move to extend its time to respond before the expiration of the deadline. Appellee eventually did move for an extension of time, but only as it pertained to filing its amended complaint; however, it did so after the 90 day deadline and did not state any grounds for excusable neglect as required by Florida Rule of Civil Procedure 1.090. [R. 170-171]. It is also noteworthy that Appellee's Motion for Extension came only after Appellant moved, on August 8, 2014, for further sanctions as a result of Appellee's failure to timely comply with the Order for sanctions. [R. 164-168].

In advance of the January 13, 2015 trial, on December 1, 2014, Appellant propounded its second request for production on Appellee requesting simply: "[a]ny and all documents that Plaintiff intends to use at trial." On or about January 2, 2015, a little more than one week before trial, Appellee produced 3,784 pages of documents, containing untolled duplicates. Appellant's counsel immediately contacted Appellee's counsel, questioning its need for so many documents in a non-jury foreclosure trial. Appellee's counsel replied that it filed this for "strategic reasons." This statement tended to confirm Appellant's concerns that this filing – like other behavior throughout the litigation – was in bad faith. Two days after Appellant's demand for the actual exhibits intended for use at trial, on January 7, 2015, Appellee sent a new set of "exhibits" consisting of 459 pages. However, at trial, Appellee's exhibits totaled approximately 51 pages.

CONCLUSION

For the reasons and legal authorities set forth above, Appellant respectfully requests that this Honorable Court reverse the Final Judgment of Foreclosure entered in favor of Appellee and remand the action to the lower court for entrance of an order granting Appellant's Motion for Involuntary Dismissal.

Dated July 13, 2015.

Respectfully Submitted,

/s/ Evan M. Rosen
Law Offices of Evan M. Rosen, P.A.
12 SE 7th Street, Suite 805
Fort Lauderdale, FL 33301
754-400-5150 (phone)
Fla. Bar 120103
Attorney for Appellant
Designated E-mail for Service:eservice@evanmrosen.com

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jeremy W. Harris, Esquire, Morris, Laing, Evans, Brock & Kennedy, CHTD., 505 S. Flagler Drive, Suite 400, West Palm Beach, FL 33401 via email at fl-litigation@morrislaing.com, jharris@morrislaing.com, channon@morrislang.com, on this 13th day of July, 2015.

/s/ Evan M. Rosen
Evan M. Rosen, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements set for in Rule 9.210(a)(2), Fla. R. App. P.

/s/ Evan M. Rosen
Evan M. Rosen, Esq.