IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D15-2822

L.T. CASE NO.: 13-CA-50824

BONNIE PEALER
Appellant,

vs.

WILLMINGTON TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2014-2, et.al.,

Appellees.

ANSWER BRIEF OF APPELLEE, WILLMINGTON TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2014-2

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PREFACE

(R.__) will be used to cite the page of documents in the record. (L.__) will be used to cite the lines of documents in the record.

"Appellee" shall refer to Wilmington Trust National Association, not in its Individual Capacity but Solely as Trustee for MFRA Trust 2014-2.

"Appellant" shall refer to Bonnie Pealer and William W. Pealer, inclusive.

"Fay Servicing" shall denote "Fay Servicing LLC".

STATEMENT OF THE FACTS AND CASE

Appellee supplements Appellant's recitation of the facts as follows.

This action was filed on February 20, 2013, by JP Morgan Chase Bank, National Association, which attached a copy of the original Note and its accompanying Allonge as an Exhibit (R. 1-30); the lender on the Note was Liberty Home Lending, Inc. and the Allonge contained a special endorsement in favor of JPMorgan Chase Bank, N. A. On March 28, 2013 Appellant filed her Answer, Request for Jury Trial, and Affirmative Defenses(R. 68-72); neither the Answer nor the Affirmative Defenses denied the authenticity of the Note or Allonge, nor any of the signatures contained therein. The original Note and its attached Allonge were filed with the Clerk of the Court on January 26, 2015(R. 147-171). On February 25, 2015 Appellee filed its Verified Amended Complaint for Foreclosure on February 25, 2015 (R. 172-204). The Plaintiff in the amended action was U.S. Bank National Association, as Trustee for Prof-2012-S1 Holding Trust I. The copy of a second Allonge was attached to the note, from JP Morgan Chase, N.A., endorsed in blank. On March 2, 2015 Appellant filed her Answer, Request for Jury Trial, and Affirmative Defenses (R. 215-221); again, neither the Answer nor the Affirmative Defenses denied the authenticity of the Note or Allonge, nor any of the signatures contained therein. On May 7, 2015 Appellant filed its Ex Parte Motion to Substitute Party Plaintiff to substitute Appellant as the Plaintiff (R. 240-247),

which was granted by Agreed Order on May 26, 2015 (R. 260-261). The second Allonge was filed at trial on May 28, 2015(R. 275-318).

In preparation for trial, Appellee, through counsel, filed an Affidavit of Plaintiff's Counsel as to Attorney's Fees (R. 267-268), Affidavit of Costs (R. 269-270), Affidavit as to reasonable Attorney's Fees (R. 271-272), and Affidavit of Plaintiff's Counsel as to Attorney's Fees (R. 273-274).

The trial proper commenced at 3:09 PM on May 28, 2015. (R. 5 L.12) Eric Hughes testified as the witness for Appellant. After lengthy direct examination of Mr. Hughes by Appellee's trial Counsel, Arlette Molina, and vigorous cross examination of him and numerous objections by Appellant's Counsel, Roy Foxall, the trial court ultimately admitted the loan history as part of Appellee's business record. Mr. Hughes testified that he was employed by Fay Servicing as a default specialist, and in which capacity he was familiar with Fay Servicing's books and records. (R. 426 L. 22- R.427 L.8) He testified that these books and records were made at or near the time of occurrence by people employed for this purpose. (R. 426 L. 8-10, R. 427 L. 201-21) Ms. Molina provided Mr. Hughes with her Exhibit B, which he identified as the loan's payment history. (R. 431 L. 25 R. - R. 432 L. 1-6) He testified that these records were put together under standard business practices. (R. 433 L. 5-7) Mr. Hughes further testified that the duty of a servicer was to service the mortgage on behalf of their client, that when the client---the

client gives Fay Servicing the books and records Fay Servicing incorporates that information in its books and records, and then this information becomes part of Fay Serving's books and records. (R. 433 L. 22-25 – R. 434 L. 1-6) Mr. Hughes again explained that the duty of Fay Servicing was to service the mortgage on behalf of the client and when the client gives Fay Servicing the books and records it incorporates that information in its books and records and the information becomes the books and records of the Fay Servicing. (R. 433 L. 22-25 – R. 434 L. 1-6) He further elucidated that the information that Fay Servicing obtains is information that the owner of the loan provides to you, including proof of the amounts that are due on the particular loan and that information is put into its system; this is how Fay Servicing knows what the amount is due under the Note and Mortgage. (R. 435 L. 12-25) Significantly, Mr. Hughes then testified that the Fay Servicing verifies the amounts due as reflected by the loan information from the prior servicer that are given to it by the owners of loan by loading it into their internal system, and then verify what is in their internal system against what was provided to us; in other words, Fay Servicing independently verifies the amount due on the Note and Mortgage as provided to it by its client against the payment history it received from the prior servicer. (R. 436 L. 9-25- R. 47 L. 1-12)

After Mr. Hughes' testimony, Ms. Pealer testified. (R. 48-R. 64). She offered no competent evidence that the amounts contained in Fay Servicing's payment history were incorrect.

The trial court then indicated that it would enter judgment of foreclosure in favor of Appellee. At this point the following exchange regarding the monetary amounts contained within the proposed judgment of foreclosure occurred between respective counsel and the trial court. Ms. Molina provided the trial court with her proposed Final Judgment, the trial court inquired if Mr. Foxall had seen it, Ms. Molina asked the same question, and Mr. Foxall responded "No, We're not personally liable for the $10 million. That's fine." (R. 490 L. 10-20)

At that point, the Final Judgment which is the subject matter of this appeal was entered, and the trial concluded at approximately 4:30 in the afternoon (R. 491 L8).

STANDARD OF REVIEW

It is respectfully submitted that the standard of review for the issue of whether the trial court erred when it admitted the payment history into evidence should be abuse of discretion, rather than the *de novo* standard urged by Appellant.

Appellant argues that this issue is one involving the trial court's application of a provision of the Florida Evidence Code, specifically whether the payment history admitted by the court fell within the statutory definition of hearsay. However, there never was a question of whether the business records were hearsay at trial; rather, the question was whether the business records were admissible under Florida Statute § 90.803(6) under the business records exception of the hearsay rule.

Lucas v State 67 So. 3 332 (Fla. 4th DCA 2011), a case cited by Appellee, describes this distinction at 333:

> " The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence." *Tengbergen v State* 9 So.3d 729, 736 (Fla. 4th DCA 2009). "[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review." *Burkey v State* 922 So. 2d 1033, 1035 Fla 4th DCA 2006).

Therefore, because the issue at bar concerns whether the trial court erred in admitting the business records rather than whether the trial court erred in characterizing the business records as hearsay, the standard of review should properly be abuse of discretion rather than *de novo*. See also *Hunter v Aurora Loan Services*, LLC 137 So. 3d 570 (Fla. 1st DCA 2014) and *Bank of New York v Calloway* 157 So. 3d 1064 (Fla. 4th DCA 2015) (cases cited by Appellant in other arguments of her brief) which both hold that the standard of review for evidentiary rulings regarding admissibility under Florida Statute § 90.803(6) is properly that of abuse of discretion.

Appellee does not dispute the remaining portion of Appellant's standard of review argument.

SUMMARY OF THE ARGUMENT

The trial court was within its discretion when it admitted the underlying loan's payment history. Appellee's witness' testimony satisfied the requisite requirements to qualify for admissibility under Florida Statute § 90.803(6), including but not limited to the requirement for trustworthiness.

The trial court was correct in determining that JP Morgan Chase Bank N.A. had standing to bring this action at the time that it was filed pursuant to a note with an allonge containing a special endorsement, and was correct in determining that Appellee had standing to bring this matter to trial pursuant to its possession an original allonge containing an endorsement in blank, as well as its status as a successor Plaintiff vested with the standing of its predecessor in interest.

The trial court was within its discretion to grant Appellee attorney's fees in this action, because it had provided the proper affidavits of proof, and counsel for Appellant specifically relinquished his opportunity to contest the fees, declaring in open court that he did not really care that they would be incorporated into the final judgment because Appellant would not be personally liable for them.

ARGUMENT

I. The Trial Court was correct and within its discretion in admitting Appellee's business records pursuant to Florida Statute § 90.803(6).

At trial, Appellee's witness properly laid the predicate to have the loan's payment history admitted as a business record under business records exception of the hearsay rule under Florida Statute § 90.803(6)(a).To qualify as a hearsay exception, the statute sets forth the predicate requirements for the evidence to be admitted:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness…

Mr. Hughes testified that as default specialist for Fay Servicing he was familiar with the books and records of his employer. (R. 427 L. 1- 7) He testified that the loan service records were created at or near the time of occurrence of transference of the data to Fay Servicing by people employed for that purpose, inputted as a standard business practice, and then incorporated into Fay's own books and records. (R. 427 L 10- L. 21, R. 433 L. 22-25- R. 434 L. 1-6) This transferred information included the amounts due on the loan and the payment history. (R. 431 L. 25 – R. 432 L. 1-6) After the information had been imputed into Fay Servicing's system, it was verified to confirm that the amount purported to be owed on the loan was correct and consistent with the payment history information which had been incorporated and made a part of Fay's business records. (R. 435 L. 12-25, R. 436 L. 9-25- R. 47 L. 1-12) The testimony of Mr. Hughes thus established the proffered loan payment history as business records admissible under the applicable statutory exception to the hearsay rule.

Appellant argues that Mr. Hughes was "spectacularly unqualified" to lay a proper predicate because he lacked personal knowledge of how, when, and why the records were created and kept. On the contrary, Mr. Hughes' testimony of Appellee's servicer's procedures was consistent with the predicate requirements this Court has deemed to be proper for the admissibility of business records in *WAMCO XXVIII v. Integrated Elec. Envts.*, 903 So.2d 230 (Fla. 2nd DCA 2005).

In *WAMCO*, the witness for the successor lender *WAMCO*, Grauer, was determined by the Court to have proffered an adequate predicate for introducing business records by testifying:

> That the loan payment histories reflected payments at the time they were made and the outstanding balances. He stated that WAMCO relied on the documentation and balance information that it received from [the prior lender] at the time WAMCO purchased the loans… He explained that at the time of a loan purchase "we put it on our system, the files that are delivered to us. We go through the files, check for the accuracy, anything that seems out of line, go through the file, reading it to get a good idea of the history of the loan, look at the payment histories, et cetera… *WAMCO* at 233.

Mr. Hughes' testimony was also consistent with the threshold requirement set forth in *Bank of New York v. Calloway* 157 So. 3d 1064 at 1073 (Fla. 4th DCA 2015), cited by Appellant, that the witness "demonstrate knowledge of each requirement for establishing the business record foundation." In the case at bar, as in *Calloway* , the witness testified to the transmittal of the Borrower's records from lender to then servicer, which included the Borrower's loan documents along with the lender's business records chronicling the complete payment history. In the case at bar, as in *Calloway* , the servicer's witness testified that the documents and

payment information were reviewed for accuracy contemporaneous to being scanned and inputted into the servicer's records system (in *Calloway* the information was reviewed for accuracy before being imputed, in this case after being inputted) In the case at bar, as in *Calloway* , the witness laid a foundation to the business record exception by testifying that the loan history represented a true accurate representation of the payment history for the loan, that it was kept during the regular course of regularly conducted activities by persons with knowledge of the activity that those making the record accurately compiled the information and that it was the regular practice of the servicer to make such a record. In the case at bar, as in *Calloway*, the witness satisfied the business records requirements under Florida Statute 90.806(6) and demonstrated his knowledge of the incorporation and verification of the business records from the lender to the servicer. As such, the it was within the trial court's discretion to admit the payment history, nor did the trial court err as a matter of law when it admitted these documents.

Hunter v. Aurora Loan Servs., LLC 137 So. 3d 570 (Fla. App., 2014), is cited by Appellee for the proposition that a witness for a servicer or lender is unqualified were the witness " lacked particular knowledge of a prior servicer's record keeping". *Hunter* is distinguishable from the case at bar. In *Hunter*, the business records were sought to be introduced to prove standing in a lost note case, specifically a printout entitled "Account Balance Report" and a "consolidated

notes log" printout, neither one of which was apparently generated by the servicer or a prior holder of the note, and the witness' could not conclusively testify as to whom the documents belonged or who generated the documents. *Hunter* at 572. In the case at bar, Mr. Hughes not only testified as to where the information in the business records were contained, but also that the veracity of the information contained therein had been confirmed and verified.

Appellee goes on to cite *Burdeshaw v. Bank of N.Y. Mellon* 148 So.3d 819 (Fla. 1st DCA 2014) as authority for the position that when a bank fails to establish any foundation qualifying the exhibit as a business record or its witness as a person with knowledge of the required for elements to establish the business records exception. Again, the facts of this case are distinguishable from those of the case at bar. In *Burdeshaw,* the lender's witness' only knowledge about the amount due and owing came from her review of the computer printouts and she had no information about how and when those records had been prepared or where the data came from. Her testimony that "everyone" was using the Fidelity system and "they would input any transactions, any adjustments" is comparable to the witness' testimony in *Hunter* [*supra.*] about general mortgage industry practices. Ms. Johnson's assumption that the original loan amounts "would have been input by someone handling the origination of the loan" was merely supposition, based on her general knowledge of ordinary mortgage industry practices, not any specific

knowledge about this debt or the transaction of the information between the original lender and subsequent servicers, including SunTrust. She was thus unable to show any of the requirements for establishing a proper foundation for the amounts or the documents she relied on. *Burdeshaw* at 826.

Unlike the witness in *Burdeshaw*, Mr. Hughes testimony was requisitely specific as to the servicer's processes, procedures, departments, and safeguards, and thus met the four elements of the business records exception.

Appellant then cites *Holt v. Calchas*, LLC, 155 So. 3d 499 (Fla. 4th DCA 2015), contending that it stands for the proposition that Mr. Hughes was not able to lay the proper foundation for the business records exception. The *Holt* court held that the testimony of the servicer's witness was inadmissible because the witness failed to establish that the lender had a process in which to verify the loan histories received from the prior lender. The Appellate Court distinguished this factual scenario from that found in the *Wamco* decision:

> Although the instant case has some similarity to *WAMCO* in that a witness associated with a subsequent note holder testified about loan information kept by a previous note holder and loan data systems, the difference in *WAMCO* is that, there, the witness testified that the current note holder had procedures in place to check the accuracy of the information that it received from the previous note holder. The

> witness in the instant case did not testify that the bank had these types of mechanisms in place for checking the accuracy of the numbers from Wells Fargo or Consumer Solutions. With this type of testimony missing, it is unknown whether the asset manager had personal knowledge as to the accuracy of the numbers, unlike the testimony in *WAMCO*. *Holt* at 505.

Interestingly enough, Appellant failed to cite this Court's recent Decision *Sas v. Fed. Nat'l Mortg. Ass'n* (Fla. 2nd DCA 2015, June 10, 2015) in her Brief, which cites *WAMCO, Calloway, Hunter, Burdeshaw,* and *Holt*. In *Sas*, the borrower contended that the trial court's reliance upon *WAMCO* in admitting the business records testimony of a lender's witness constituted error and furthered this argument with the contention that that *WAMCO* conflicted with the Fourth District Court of Appeals' *Hunter, Burdeshaw,* and *Holt* decisions. This Court found otherwise, holding:

> The trial court correctly found that the WAMCO decision is directly on point. In WAMCO, this court held that the loan payment histories of a prior servicer are admissible under section 90.803(6) when they are relied on by a successor servicer who establishes that it independently verified the accuracy of the payment histories and its verification procedures demonstrate that the records are trustworthy.

903 So. 2d at 233; see also Bank of N.Y. v. Calloway, 157 So. 3d 1064 (Fla. 4th DCA 2015).

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Sas also contends that this court's decision in WAMCO is in conflict with the First and Fourth Districts' decisions in Holt v. Calchas, LLC, 155 So. 3d 499 (Fla. 4thDCA 2015); Burdeshaw v. Bank of New York Mellon, 148 So. 3d 819 (Fla. 1st DCA 2014); and Hunter v. Aurora Loan Services, LLC, 137 So. 3d 570 (Fla. 1st DCA 2014), review denied, 157 So. 3d 1040 (Fla. 2014). However, these three cases are distinguishable. In each case, the servicer's records custodian failed to testify that the successor servicer of the loan independently verified the accuracy of the payment histories received from the prior servicer or to detail the procedures used for such verification. See Holt, 155 So. 3d at 504; Burdeshaw, 148 So. 3d at 826; Hunter, 137 So. 3d at 573. Here, Seterus's records custodian's testimony satisfied the requirements of section 90.803(6) and also established that Seterus independently verified the accuracy of the records it received from Chase using Seterus's verification procedures. As such, the loan payment history was admissible under the business records exception to the hearsay rule. *SAS* at 3-5. In the case at bar, as in *WAMCO*, *Calloway*, and *SAS*, the trial court was firmly within its discretion admit the business records because the Appellant's procedures to

independently verify of the accuracy of the transferred business records demonstrate the trustworthiness of the records.

Appellant goes on to argue 'myths' that "bank records are inherently untrustworthy" and "providing admissible evidence from qualified witnesses is 'impractical' ". These matters were not cogently raised at trial and no competent evidence was presented concerning such issues. The remaining cases and arguments presented by the Appellant are probably best refuted by *The Calloway Conundrum: Exporting the Business Records Exception and Florida's Evidence Code* by Manuel Farach, *The Florida Bar Journal* ,Volume 90, No. 2, February 2016, Page 48, which states at page 52:

> To put it simply, the proponent must show some familiarity with the foundational requirements, but need not have personal knowledge of the precise operation of the foundational requirements. Again, the trial court is the arbiter of what is sufficient. *WAMCO* and *Calloway* approach the admission of business records evidence from the perspective that so long as the evidence meets the preliminary requirement of trustworthiness, it should be admitted and the opposing party can then challenge the factual correctness of the evidence or introduce their own evidence.

This passage pithily sums up the how the loan history was admitted at trial here:

Mr. Hughes showed some familiarity with the foundational requirements, although he may not have had personal knowledge of their precise operation; the trial court as arbiter of what was sufficient determined that the evidence met the preliminary requirement of trustworthiness; and finally, Mr. Foxall and Ms. Pealer were unable to adequately challenge the factual correctness of the loan history or introduce their own evidence to refute it.

Under such circumstances, he trial court was well within its discretion to admit the borrower's payment history, and the Final Judgment in this action should be affirmed.

II. Under Florida Law Appellee had standing to bring this action and obtain a Judgment thereon.

The next issue the Appellant brings before the Court is that of standing; specifically the trial court erred when it failed to grant Appellant's Motion for Involuntary Dismissal premised upon what her argument that Appellee's predecessor in this action lacked standing to bring this action, and Appellee failed to present any evidence of standing during the trial. Appellant is incorrect on both points.

In the case at bar, the party originally bringing this action produced the original Note and Allonge containing the special endorsement entitling it to enforce the Note to the trial court. Appellant produced the original Allonge made

by the initiating Plaintiff endorsed in blank. Under Florida law, this factual scenario is amply sufficient to convey standing to bring and enforce this action to final judgment.

Riggs v. Aurora Loan Servs. LLC, 36 So.3d 932 (Fla. 4th DCA 2010) at 933 explains how Florida Chapter 672's statutory framework bestows standing in situations such as that here:

> Aurora's possession of the original note, endorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms. The note was a negotiable instrument subject to the provisions of Chapter 673, Florida Statutes (2008). An endorsement requires a "signature." §673.2041(1), Fla.Stat. (2008). As an agent of First Magnus, Alday's hand printed signature was an effective signature under the Code. *See* § 673.4011(2)(b), 673.4021, Fla. Stat. (2008). The endorsement in this case was not a "special endorsement," because it did not "identif[y] a person to whom" it made the note payable. §673.2051(1), Fla. Stat. (2008). Because it was not a special endorsement, the endorsement was a "blank endorsement," which made the note "payable to bearer" and allowed the note to be "negotiated by transfer of possession alone." § 673.2051(2), Fla. Stat. (2008). The negotiation of the note

> by its transfer of possession with a blank endorsement made Aurora Loan the "holder" of the note entitled to enforce it. §§ 673.2011(1), 673.3011(1), Fla. Stat. (2008). There is no issue of authentication. The borrower did not contest that the note at issue was the one he executed in the underlying mortgage transaction. With respect to the authenticity of the endorsement, the note was self authenticating. Subsection 90.902(8), Florida Statutes (2008), provides that "[c]ommercial papers and signatures thereon and documents relating to them [are self authenticating], to the extent provided in the Uniform Commercial Code." Subsection 673.3081(1), Florida Statutes (2008), provides that "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." Nothing in the pleadings placed the authenticity of Alday's signature at issue.

Here, we have something even more than an endorsement in blank, the initiating Plaintiff was the holder of a note with an endorsement specially endorsed to it, copies of which were attached to the original Complaint, and the originals later submitted to the trial court. Appellant's Answer contained no specific denials of authenticity as required by Florida Statute § 673.3081 (1). Therefore the instrument

was self authenticating. This is true of the second allonge as well. See also *Paul v. Bank*, 68 So.3d 979 (Fla. 2nd DCA 2011) at 981:

> [The lender's] "possession of the original note, endorsed in blank, [is] sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms." *Riggs v. Aurora Loan Servs., LLC*, 36 So.3d 932, 933 (Fla. 4th DCA 2010); *see also Mortgage Elec. Registration Sys., Inc. v. Azize*, 965 So.2d 151, 153 (Fla. 2d DCA 2007); *Troupe v. Redner*, 652 So.2d 394, 395–96 (Fla. 2d DCA 1995) (citing § 671.201(20), Fla. Stat. (1993). We need say nothing further on this issue.

Additionally, when the initiating Plaintiff is holds and possesses the original note, standing to bring the action remains undisturbed and intact, even if the underlying note and mortgage are subsequently negotiated and assigned during the pendency of the action, and the new holder and assignee are substituted into the existing cause. This is because a party who has been transferred a Plaintiff's interest in the middle of litigation has the right to continue the action. Thus, although Appellant makes much of an issue of Appellee's standing (incorrectly, we contend) it is really an irrelevant point, a red herring issue. This point of law is cogently explained in *Lewis v. J.P. Morgan Chase Bank*, 138 So.3d 1212 (Fla. 4th DCA 2014) at 213:

The borrower argues that the bank did not have standing to pursue the foreclosure action because it acquired the note and mortgage and was substituted as the plaintiff during the pendency of the action. We disagree with the borrower's argument because the original lender possessed the note and mortgage when it filed suit against the borrower before assigning the note and mortgage to the bank during the pendency of the action. Thus, we affirm the foreclosure judgment. We recognize that on repeated occasions, we have held that "a party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *See, e.g.*, *Gascue v. HSBC Bank, U.S.A.*, 97 So.3d 263, 264 (Fla. 4th DCA 2012); *Rigby v. Wells Fargo Bank, N.A.*, 84 So.3d 1195, 1196 (Fla. 4th DCA 2012); *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So.3d 773, 776 (Fla. 4th DCA 2011). However, in each of those cases, the party which filed suit did not have standing to file suit because the party did not own, or had not been assigned, the note and mortgage at the time the party filed suit. *See Gascue*, 97 So.3d at 264–65; *Rigby*, 84 So.3d at 1196; *Venture Holdings*, 75 So.3d at 775 n. 1. Here, though, the party which filed suit—the original lender—had standing to file suit at its inception because it owned the note and

> mortgage at the time it filed suit. Thus, unlike the situations in *Gascue, Rigby,* and *Venture Holdings*, this is a situation where the party which filed suit had standing to file suit at its inception, and merely assigned the note and mortgage during the pendency of the suit to another party, which then was substituted properly as the plaintiff. *See* Fla. R. Civ. P. 1.260(c) (2006) ("In case of any transfer of interest, the action may be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action* or joined with the original party.") (emphasis added). As a result, no standing defect exists.

The bottom line is that this actions original Plaintiff, JP Morgan Chase Bank, National Association, possessed the original Note with an accompanying Allonge Containing specially endorsed to it, which not only conveyed standing, but was self authenticating. This should be dispositive to the issue of standing in this matter, and it is unnecessary to go any further.

Appellant's primary authority, *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351 (Fla. App., 2014), is distinguishable. In *Kiefert*, Aurora filed a foreclosure action, attaching to the original complaint an unendorsed copy of the note payable, not to Aurora, but to Lehman Brothers Bank, FSB. A year later, Aurora filed an

amended complaint to which it attached a different copy of the note, bearing a blank endorsement. A year later Nationwide was substituted in as Plaintiff. At trial, because the bank's witness could not fully resolve the ambiguous allonges, the trial court determined that Nationwide could not prove Aurora had standing at the inception of the action and found in the borrower's favor. Here, there are no such ambiguities.

Similarly Appellant's argument regarding standing vis a vis the allonges in this action are inapposite. As has been shown, the initial Complaint attached the Allonge which contained a special endorsement to the original Plaintiff to this action, the original of which was filed along with the original note. Appellant provided the original second Allonge with a blank endorsement at trial. Because the original Note and Allonges were filed, it is obvious that the party which initiated this action and the party that brought the action to trial were in possession and control of the instruments, and both therefore had standing to bring the action and conclude it, respectively.

Finally, Appellant seeks to impugn Appellee's standing by pointing out alleged deficiencies in the initial acceleration notice. However, in *Green Tree Servicing, LLC v. Milam* (Fla. 2nd DCA , 2015), July 29, 2015, this court held that substantial compliance and not strict compliance should be the standard when reviewing notice requirements in foreclosure cases. As such any alleged defects in

the acceleration notice should not be enough to divest Appellee of standing in this case.

The trial court was thus correct in determining that Plaintiff had standing to bring this action and proceed through judgment, and the Final judgment in this cause should therefore be affirmed.

III Appellee presented sufficient evidence to the trial court to merit the award of attorney's fees.

Appellant's final argument asserts that the trial courts award of attorney's fees in the Final Judgment was in error and therefore must be reversed, contending that Appellee failed to present testimony or evidence as to the number of hours spent on the case, and similarly failed to present expert testimony corroborating the reasonableness of the fees. This assertion is incorrect. A review of the record indicates that Appellee submitted filed two Affidavits of Plaintiff's Counsel as to Attorney's Fees, and an Affidavit as to Reasonable Attorney's Fees, and Affidavit of Plaintiff's Counsel. When the trial court was wrapping the trial up, at the end of the work day, counsel for Appellant was given the opportunity to review, question, and contest the monetary amounts contained in the proposed final judgment. His response was that he did not care, his clients were not personally liable on the judgment. Under such circumstances, it is respectfully submitted that the award of attorneys fees awarded in this action be upheld.

CONCLUSION AND RELIEF SOUGHT

For the reasons more specifically specified above, it is respectfully requested that this Honorable Court affirm the Trial Court's Final Judgment in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail on this 12th day of February, 2016, to Michael P. Fuino. Esq., WEIDNER LAW, P.A. 250, Mirror Lake Drive, N., St. Petersburg, Florida 33701, service@mattweidnerlaw.com, Counsel for Appellant, Butler & Hosch, P.A., 3185 South Conway Road, Suite E Orlando, Florida 32812, co- counsel for A

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned counsel has complied with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

BY: */s/ D. S. "Dar" Airan*

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