IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D15-2809

OCWEN LOAN SERVICING, LLC

Appellant,

v.

ROBERT GUNDERSEN and JOAN GUNDERSEN

Appellees.

REPLY BRIEF OF OCWEN LOAN SERVICING, LLC

ON APPEAL FROM A FINAL ORDER ENTERED IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

Patrick G. Broderick (FBN 88568)
broderickp@gtlaw.com
GREENBERG TRAURIG, P.A.
777 S. Flagler Dr., Ste. 300 E.
West Palm Beach, FL 33401
Telephone: 561.650.7900
Facsimile: 561.655.6222

Kimberly S. Mello (FBN 002968)
mellok@gtlaw.com
Laura J. Bassini (FBN 105060)
bassinil@gtlaw.com
GREENBERG TRAURIG, P.A.
101 E. Kennedy Blvd., Ste. 1900
Tampa, FL 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900

Counsel for Appellee, Ocwen Loan Servicing

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I. THE TRIAL COURT REVERSIBLY ERRED IN RULING THAT OCWEN DID NOT ESTABLISH THE FOUNDATION TO ADMIT ITS BUSINESS RECORDS INTO EVIDENCE.

There is no question that, under binding precedent from this Court, a trial court abuses its discretion in excluding prior servicer records because the witness did not work for the prior servicer or personally participate in the boarding process.[1] *Deutsche Bank Tr. Co. Ams. v. Frias*, 178 So. 3d 505, 508 (Fla. 4th DCA 2015) (holding that the trial court abused its discretion by excluding the borrower's loan payment history because the witness provided testimony that prior servicer records "complied with the business records exception requirements and were checked for accuracy when the loans were acquired by [the new servicer].").

Indeed, as this Court has explained, to admit records that contain information of a prior servicer, it is sufficient that the foreclosure plaintiff presents testimony that it "had procedures in place to check the accuracy of the information that it received from the previous note holder." *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015); *see also Sas v. Fed. Nat'l Mortg. Ass'n*, 165 So. 3d

[1] The Gundersens concede that the fact that Mr. Whittaker did not personally board the loan was not a basis to exclude Ocwen's records. (Answer Br. at 22) (stating that a witness "is not required to know the person who entered the information into [the current servicer's] computer system . . . ."). Indeed, numerous courts have explicitly held this is not required. *See, e.g.*, *Bank of N.Y. Mellon v. Johnson*, 41 Fla. L. Weekly D287, at *4 (Fla. 5th DCA Jan. 29, 2016) (holding that the trial court abused its discretion when it ruled that "only a boarding department employee could testify regarding the boarding process," and that it was sufficient that the witness testified as to the procedures used by the servicer to verify the accuracy of records).

849, 851 (Fla. 2d DCA 2015) (stating that "[t]here is no requirement that the records custodian have personal knowledge of the manner in which the prior servicer maintained and created its business records"); *Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213 (Fla. 5th DCA 2015) (stating that a note holder is not precluded from introducing records acquired from a prior holder despite the fact that "an employee of the current note holder may be unfamiliar with the previous owner's system for preparing its business records."). Thus, "a current servicer can establish a proper foundation for admission of a prior servicer's records 'so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy.'" *Bank of N.Y. Mellon*, 41 Fla. L. Weekly D287, at *4 (quoting *Berdecia*, 169 So. 3d at 216). That is exactly what occurred here.

The Gundersens, however, have wrongly misstated the record facts and ignored settled law in an effort to avoid reversal of the order granting a directed verdict in their favor. First, the Gundersens misleadingly state that Mr. Whittaker did not testify that the business records are "accurate or correct." (Answer Br. at 12). That is simply false. Mr. Whittaker plainly stated that Ocwen "has teams" to review prior servicer records before they are boarded onto Ocwen's system "for validity" and to ensure "they were accurate." In fact, throughout his testimony, Mr. Whittaker confirmed that each document went through an extensive boarding process and its accuracy was verified. (R:571, 580-81, 583, 585-86, 592, 595, 599, 602).

Second, the Gundersens assert Mr. Whittaker was not competent to testify because he lacked knowledge regarding the process that the prior servicer, GMAC, had for entering, maintaining, and verifying its records. (Answer Br. at 16, 22-23) (arguing that Mr. Whittaker had "no knowledge of the process used by GMAC to enter or maintain their records," and "had no working knowledge of which department for GMAC entered the information, the procedures which GMAC used to verify the information being entered or what information was being entered into GMAC's records.").[2] The only record, however, that is specifically noted as being inadmissible based on the witness's purported "lack of knowledge" is the "looking glass screenshot" that Ocwen introduced as Exhibit 2. According to the Gundersens, Mr. Whittaker's testimony failed to have sufficient "clarity" or detail as to "how it was prepared, how the data was produced, or how the data was uploaded into the Appellant's system." (Answer Br. at 19). Their entire argument, however, simply ignores that the law imposes no such requirement. To the contrary, this Court has expressly held that records are admissible despite the witness's lack of knowledge as to a prior servicer's procedures if the subsequent servicer relied on the information and verified its accuracy. *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1072 (Fla. 4th DCA 2015). Here, Mr. Whittaker

[2] In their Answer Brief, the Gundersens state that "not once" did Ocwen argue "that the knowledge of the person who actually entered the information was unnecessary to lay a foundation." (Answer Br. at 22). That is false. Ocwen informed the trial court—and provided relevant law—that a witness is not required to have personal knowledge as to a prior servicer's record-keeping procedures, but instead is simply required to testify as to the records' accuracy. (R:587-88, 590).

affirmatively testified that the looking glass screenshot, and all the other records the trial court excluded from evidence, had been made part of its records after it went through the extensive boarding process. (R:580-83).

In fact, the Gundersens do not cite to single case involving prior servicer records to support their position. Instead, they rely on inapposite decisions, not involving the boarding process, which hold records are inadmissible if a witness does not have sufficient knowledge about the process in which its own business records created and maintained. For instance, the Gundersens rely on this Court's decision in *Sanchez v. Suntrust Bank*, 179 So. 3d 538, 541 (Fla. 4th DCA 2015), holding that the business records were inadmissible because the witness "did not know anything about the process by which" a business record was created, and admitted that the document "was not generated by any of the three servicing systems he was acquainted with." Here, however, the law is clear that Mr. Whittaker, testifying on behalf of the servicer acquiring the records, did not need to have personal knowledge of the manner in which the prior servicer maintained and created its business records.

Third, Ocwen's witness, contrary to the Gundersens' assertion, met the proper foundational requirements for the admissibility of the "looking glass screenshot," and all other records introduced as evidence. (Answer Brief at 20-21) (arguing that the witness "failed to ask foundational questions and failed to elicit foundational testimony about the exhibit marked as #2, for identification purposes" and "did not even try to lay the foundation for exhibits marked 3-5 or 7"). The law, which the Gundersens continue to blatantly ignore, makes clear that Mr.

Whittaker's testimony was sufficient to meet the foundational requirements necessary for their admissibility into evidence. Not a single decision they cite finds that the witness is required to repeat the foundational requirements *ad nauseum* as to each of the prior servicer records, particularly after he repeatedly made clear the ***all*** records went through Ocwen's extensive boarding process and were verified for accuracy.[3] In fact, and tellingly, the Gundersens cited only one decision involving the admissibility of prior servicer records—*Glarum v. LaSalle Bank Nat'l Ass'n*, 83 So. 3d 780, 782 (Fla. 4th DCA 2011). That case, however, is inapposite.[4] There, this Court explained that its conclusion that the prior servicer records were inadmissible was based on the fact that the witness "had a total lack of knowledge as to how his company's own data was produced," a defect clearly

[3] Indeed, repeatedly providing the same foundation here would be a fruitless exercise with no purpose other than unnecessarily expending judicial resources because, after it excluded the "looking glass screen shot," the trial court made clear that it would not admit any business records of Ocwen that contained information from GMAC—*i.e.*, those Exhibits that are the subject of this appeal. Recognizing this, Ocwen's counsel stated that with the remaining exhibits, he simply sought to establish a record with the understanding that the Gundersens' counsel would "have the same objections for each of these records and [the trial court will] have probably the same ruling." (R:596-97).

[4] The remaining decisions cited by the Gundersens, which do not address the admissibility of prior servicer records, merely reiterate the general principle that the witness must be familiar with its record-keeping systems. *See Cayea v. CitiMortgage, Inc.,* 138 So. 3d 1214, 1218 (Fla. 4th DCA 2014) (records were admissible because records custodian demonstrated his familiarity with the lender's record keeping system and the process for uploading payment information); *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015) (stating that where the testimony elicited did not establish that all records met the foundational requirement the trial court erred in admitting the records into evidence).

not present here. To the contrary, Mr. Whittaker testified that he is abundantly familiar with the record-keeping processes at Ocwen. Specifically, he stated that he has worked for multiple departments within Ocwen and witnessed data entry. As to the processes employed by Ocwen, he explained that Ocwen (1) uses online research tools to verify data obtained from prior servicers, (2) communicates with the prior servicer to verify its information, and (3) has in place quality control processes to ensure the information was verified prior to uploading. (R:571, 580-81, 583, 586). Clearly, this testimony meets the required knowledge of Ocwen's record-keeping systems to lay the necessary foundation for the admission of the prior servicer records.

The Gundersens' entire argument, thus, attempts to defend the trial court's ruling by inaccurately representing the record facts and ignoring or misstating the law. Both the law and facts, however—when accurately stated—unequivocally demonstrate that the trial court's exclusion of the business records based on a belief that Mr. Whittaker was required to have either (1) worked for GMAC, and be familiar with its record-keeping systems, or (2) personally participated in the boarding process, is flatly wrong. Binding precedent from this Court—universally followed by other intermediate Florida courts—demonstrates that where the testimony sufficiently demonstrates the prior servicer records undergo an extensive boarding process and are verified for accuracy, no more is required for admissibility.

CONCLUSION

Based on the foregoing, Ocwen Loan Servicing, LLC respectfully requests that the Court reverse the Final Judgment in favor of the Gundersens and remand for further proceedings.

Date: April 6, 2016

Respectfully submitted,

Patrick G. Broderick (FBN 88568)
broderickp@gtlaw.com
GREENBERG TRAURIG, P.A.
777 S. Flagler Dr., Ste. 300 E.
West Palm Beach, FL 33401
Telephone: 561.650.7900
Facsimile: 561.655.6222

Kimberly S. Mello (FBN 002968)
mellok@gtlaw.com
Laura Bassini (FBN 105060)
bassinil@gtlaw.com
GREENBERG TRAURIG, P.A.
101 E. Kennedy Blvd., Ste. 1900
Tampa, FL 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900
Secondary Email: dunnla@gtlaw.com;
FLService@gtlaw.com

By: /s/ Kimberly S. Mello
Kimberly S. Mello

Counsel for Appellant, Ocwen Loan Servicing, LLC

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to the following by email on April 6, 2016:

Lisa McCue, Esq.
1600 S. Federal Hwy, Ste 451
Pompano Beach, FL 33062
service@mccuelaw.com
flabar1@mccuelaw.com

Christopher J. Gertz, Esq.
888 S. Andrews Ave, Suite 204
For Lauderdale, FL 33316
chris@gertzlaw.net

Keith A. Fousek, Esq.
22 7409 Albany Road, Suite A
Fort Myers, FL. 33967
eservice.kfouseklaw@gmail.com
sharondevita123@yahoo.com

Kyle P. Peters
225 Water Street, Suite 1290
Jacksonville, FL 32202
Email: kpeters@bwnfirm.com

/s/ Kimberly S. Mello
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Kimberly S. Mello
Kimberly S. Mello

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