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.

INITIAL 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

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STATEMENT OF THE CASE AND FACTS

I. THE BORROWERS' DEFAULT ON THE NOTE AND MORTGAGE AND A FORECLOSURE ACTION IS FILED.

On May 18, 2006, Robert Gundersen ("Mr. Gundersen") and Joan Gundersen ("Mrs. Gundersen"), husband and wife (collectively, the "Gundersens"), executed and delivered an Adjustable Rate Note ("Note") to GreenPoint Mortgage Funding, Inc. ("GreenPoint"). (R:35-40). To secure their indebtedness under the Note, the Gundersens simultaneously executed and delivered a Mortgage to GreenPoint. (R:8-34). The Gundersens failed to make the installment payment due November 1, 2009, and all subsequent payments, and defaulted on the Note and Mortgage. (R:2).

As a result of the Gundersens' default, on March 19, 2010, GMAC Mortgage, LLC ("GMAC") filed a Complaint to foreclose the Mortgage ("Complaint"), alleging that it was entitled to enforce the Note and Mortgage.[1] (R:1-41). Attached to the Complaint was a certified copy of the original Note and a copy of the Mortgage. (R:8-41). On April 15, 2010, the Gundersens served a Motion to Dismiss the Complaint, alleging, among other things, that: (1) GMAC lacked standing because the Note and Mortgage attached to the Complaint were payable to GreenPoint; (2) GMAC failed to state a claim because no assignments were attached to the Complaint; and (3) GMAC did not identify its authority to file the lawsuit and, therefore, lacked capacity to maintain the suit. (R:47-56). The

[1] Tropic Isles Townhomes Homeowners Association, Inc. was also named as a defendant, but is not a party to this appeal.

trial court granted the Motion to Dismiss, providing GMAC with twenty days to amend its Complaint. (R:97).

In accordance with this order, on December 15, 2010, GMAC served an Amended Complaint alleging that it "is now the holder of the Mortgage Note and Mortgage and/or is entitled to enforce the Mortgage Note and Mortgage." (R:98-143, 100). GMAC attached copies of the Mortgage and Note, which was endorsed in blank. (R:106-43). Dismissal was again sought by the Gundersens based on the same grounds and the lack of verification required by statute. (R:149-76). Before the trial court ruled on the request for dismissal, Ocwen Loan Servicing, LLC ("Ocwen"), who had purchased various assets of GMAC, including the Gundersens' loan, was substituted as the plaintiff. (R:192-99, 205-06). The trial court subsequently dismissed the Amended Complaint, with leave to amend, which resulted in the filing of an amended verified complaint ("Second Amended Complaint"). (R:205-52). Ocwen alleged that it "is the holder of the original Note secured by the Mortgage which is the subject of this action and is entitled to enforce the terms of the Note and Mortgage . . . by virtue of its physical possession of the original Note" and attached copies of the Mortgage and Note, endorsed in blank. (R:209, 213-47). Ocwen later filed with the court the original Note, endorsed in blank, and Mortgage. (R:388-422).

The Gundersens filed an Answer and Affirmative Defenses on January 2, 2014, raising thirteen affirmative defenses. (R:255-61). Eleven of the thirteen affirmative defenses were subsequently stricken by the trial court, leaving lack of

standing and failure to serve a default and acceleration letter as the only remaining affirmative defenses. (R:262-74).

On November 25, 2014, Ocwen filed an amended motion for summary judgment, with supporting evidence including (1) the Gundersens' payment history; (2) the Default Letter dated January 4, 2010; (3) an Assignment of the Mortgage from Mortgage Electronic Registration Systems, Incorporated ("MERS"), as nominee for GreenPoint, to GMAC, dated March 4, 2010—fifteen days prior to the date GMAC filed the Complaint;[2] and (4) an Affidavit of Indebtedness, in which a senior default specialist employed by Ocwen attested that (a) GMAC was the holder of the Note before the Complaint was filed, or was otherwise authorized to enforce it, and Ocwen is now the designated holder of the Note, or otherwise authorized to enforce it; and (b) the amount due and owing on the Note, including principal, interest, and expenses, was $645,835.86. (R:281-381).

The Gundersens opposed, each filing an affidavit, asserting that they did not have knowledge that Ocwen owned the Note and Mortgage, were never provided with notice of the acceleration of the debt and opportunity to cure, and never received notice of default. (R:523-26). No ruling was issued by the trial court on the summary judgment motion.

[2] The Mortgage states that MERS "is the mortgagee under this Security Agreement" and acted "solely as a nominee for [GreenPoint] and [GreenPoint's] successors and assigns . . . ." (R:396).

II. AT THE NON-JURY TRIAL, OCWEN ESTABLISHED THE FOUNDATION TO ADMIT ITS BUSINESS RECORDS THAT RELY ON PRIOR SERVICER RECORDS.

A non-jury trial was held on April 20, 2015. (R:539). Harrison Whittaker ("Mr. Whittaker"), who has been employed by Ocwen for five years and is familiar with its recordkeeping system and how loan data is maintained, testified on behalf of Ocwen. (R:568-69). Mr. Whittaker testified that Ocwen holds the records for the Gundersens' loan and that (1) the records are kept in the ordinary course of business, (2) it is the regular practice of Ocwen to keep such records, (3) the records are kept by a person authorized to keep them, and (4) the records are entered by a person with personal knowledge at the time the information is transmitted. (*Id.*). In addition, through Mr. Whittaker, a limited power of attorney was admitted into evidence that grants Ocwen the authority to "[d]emand, sue for, recover, collect and receive each and every sum of money, debt, account and interest . . . belonging to or claimed by [U.S. Bank National Association as Trustee[3]], and to use or take any lawful means for recovery." (R:600-01, 000071-79). The trial court also admitted into evidence the original Note, endorsed in blank, and the Mortgage.[4] (R:574-76, 00001-000036).

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[3] In response to an interrogatory, Ocwen explained that U.S. Bank National Association as Trustee for Lehman XS Trust, Series 2006-GP4 acquired the loan on or around July 1, 2006, and Ocwen is the servicer of the loan. (R:298). Lehman XS Trust, Series 2006-GP4 is among the loans listed in the schedule to the Power of Attorney, which was admitted as evidence. (R:000075).

[4] Because the original Note and Mortgage had already been filed with the court, they were removed from the court file before being presented as evidence. (R:574, 577).

Mr. Whittaker testified that GMAC was the prior servicer of the Gundersens' loan and Ocwen became the servicer in early 2012 when it purchased GMAC's assets. (R:569). While Mr. Whittaker was able to explain that Ocwen acquired GMAC's assets only after "making sure that [its] policies and procedures were in order," the trial court sustained the Gundersens' counsel's objection to further questioning on this issue on the basis of lack of personal knowledge. (R:570-71). Ocwen altered its questions, asking Mr. Whittaker to explain "what happened with GMAC's records" after the purchase. (R:571). Mr. Whittaker testified that Ocwen reviewed the records pursuant to its boarding process, "meaning that when we enter into an agreement, we sit down with the prior servicer to make sure that their recordkeeping goes through a strict verification process." (*Id.*). After the verification process is completed, Mr. Whitaker confirmed that "GMAC['s] records become a part of Ocwen's business records," and that Ocwen found GMAC's records were so well-maintained that it continues to use "the GMAC servicing platform up to this day." (*Id.*).

According to Mr. Whittaker, Ocwen's records contained a copy of the endorsed Note, which GMAC uploaded in March 2010. (R:577, 580). To further establish this fact, Ocwen sought to introduce into evidence the "looking-glass screenshot" of the uploaded Note, which Mr. Whittaker testified "is a part of Ocwen's current business records as [it has] taken over all of the servicing records from GMAC," (R:580), and further explained Ocwen's boarding process, stating:

> [P]rior to actually entering into the agreement [with GMAC], [Ocwen has] teams in [its] office that speak and sit with the prior servicer prior to boarding that make sure that [Ocwen] go[es] through all of the

> records that—prior to them being part of Ocwen's records, for validity, to make sure they were sent out at the correct time, that they were accurate.
>
> Again, [Ocwen's teams] go through the entire process with checks and balances, QC processes towards the end that make sure that the information that we are entering into our own systems has been backed up and has been verified prior to it going and entering it as a part of Ocwen's business records.
>
> If there is any type of information that we cannot verify or we can't specifically put the date on, it would not be entered into our system. It would get kicked back and also either find—speak to the prior servicer about the issue or it wouldn't be a part of our business records.

(R:580-81). Following this explanation, the trial judge asked Mr. Whittaker whether he had spoken with GMAC on these issues, which he personally had not. (R:581). The Gundersens' counsel subsequently objected to the admission of the "looking-glass screenshot" into evidence based on lack of foundation, arguing that Mr. Whittaker lacked personal knowledge because the copy of the Note was entered by a GMAC employee, not by an Ocwen employee. (*Id.*). A voir dire examination was subsequently conducted by the Gundersens' counsel, during which the following exchange occurred:

> COUNSEL: Sir, do you have any personal knowledge on what date this was put into the system?
>
> * * *
>
> MR. WHITTAKER: Yes. Again, this was entered into on March 11th, 2010.
>
> COUNSEL: Do you have any independent knowledge that that's the actual date it was done?

> MR. WHITTAKER: It has gone through our boarding process and has been verified through that process and is part of our business records currently. So yes.
>
> COUNSEL: Who verified it?
>
> MR. WHITTAKER: I do not know the exact individual.
>
> COUNSEL: Were you provided information on who actually put the information into the system?
>
> MR. WHITTAKER: I was not.
>
> COUNSEL: Do you have any information that was provided to you that when they put the information in that it was accurate at the time it was put in?
>
> MR. WHITTAKER: Again, I don't know the specific individual. I did not work for GMAC at the time. Again, however, when we had entered into the agreement with the prior servicer, those things had been—were cleared out and found acceptable by Ocwen in order for them to go ahead with the purchase and boarding process through our—for their records, and it's become a part of Ocwen's business records.

(R:582-83). Following voir dire, the trial judge asked Mr. Whittaker similar questions, including whether he was "personally familiar with the recordkeeping system that was used by GMAC, or are you relying on what other people have told you?" (R:583-84). When Mr. Whittaker responded that GMAC's system became part of Ocwen's business records, the trial judge re-phrased the question to, "do you know how the prior information was prepared, who prepared it, how it was prepared? Do you have any personal knowledge of that?" (R:584). In response, Mr. Whittaker stated that he "was not working for GMAC at the time." (R:584-

85). The trial judge subsequently sustained the Gundersens' counsel's objection until Ocwen could provide a further predicate. (*Id.*).

To establish the predicate, Mr. Whittaker further explained the boarding process as follows:

> I have not worked for GMAC Mortgage. However, Ocwen has found it through their verification and through their recordkeeping system that it was acceptable for them to take on from GMAC Mortgage, again . . . our boarding process team that went through and made sure their recordkeeping system was up to date and was acceptable from Ocwen. And we found it necessary that we could keep them—keep that—their information-keeping system on at Ocwen.
>
> * * *
>
> I had worked for multiple departments in Ocwen and have seen firsthand data entry and things of that nature, also verification of documents information using online research tools that—again, that the documents have been—the information entered into are accurate, that they are entered around the same time that they're entered, that the information that's contained has gone through the necessary steps for that to be a part of our business records.
>
> * * *
>
> [I]f there was any information that we weren't able to verify or to make sure that the dates were correct and things like that, if they weren't able to do that, we would not allow it to pass the boarding process and be a part of our business records.

(R:585-87). Despite this testimony, the Gundersens' counsel renewed the objection, which was again sustained. (R:587).

Regarding the payment history for the loan, Mr. Whittaker testified that it was also vetted through Ocwen's boarding process and became part of its records. (R:594-95). Notwithstanding this fact, the trial judge sustained the objection to its admission, stating that "[t]his is more of the same." (*Id.*). Ocwen's attempt to

introduce (1) the Default Letter (R:596-99); (2) a screenshot of Ocwen's computer system showing the date the Default Letter was sent (R:599-601); and (3) an MERS milestone report showing the transfer of servicing rights from GMAC to Ocwen (R:601-02) into evidence met the same fate—each was found to be inadmissible under the business records exception. (R:596-603).

After Mr. Whitaker's testimony concluded, Ocwen called Mr. Gundersen, who admitted that he defaulted on the Note and made his last payment in November 2009. (R:604-05).

III. THE TRIAL COURT GRANTS THE GUNDERSENS' MOTION FOR INVOLUNTARY DISMISSAL AT THE CLOSE OF OCWEN'S CASE-IN-CHIEF AND DENIES OCWEN'S MOTION FOR REHEARING.

At the close of Ocwen's case-in-chief, the Gundersens moved for a directed verdict, which in non-jury trials such as this is properly referred to as an involuntary dismissal,[5] arguing that Ocwen did not (1) establish that it complied with paragraph 22 of the Mortgage, or (2) prove the amount of money owed. (R:607-08). Ocwen responded that Mr. Gundersen admitted that no payments had been made since he defaulted and that "by comparing that to our payment history and records, we do have the final figures that would explain what's due and owing at this time." (R:608). In addition, Ocwen reminded the trial judge that the affirmative defense of failure to comply with conditions precedent was (1) stricken

[5] *See Deutsche Bank Nat'l Tr. Col v. Clarke*, 87 So. 3d 58, 60 n.1 (Fla. 1st DCA 2012) (stating that in non-jury trials, a motion for directed verdict is a motion for involuntary dismissal).

and (2) waived because it lacked a specific denial. (R:608-09). Regardless, the Gundersens contended that Ocwen had the burden "to prove that [it has] done everything necessary to get a foreclosure," and failure to prove the amount owed is a sufficient reason, standing alone, to render a final judgment in favor of the Gundersens. (R:609-10). The trial court agreed and entered an order granting a directed verdict. (R:541, 610).[6]

Ocwen subsequently filed a motion for rehearing, arguing that Ocwen's records should have been admitted under the business records exception to the hearsay rule. (R:542-51). In denying Ocwen's request for rehearing, the trial court stated in its order that the "documents Plaintiff sought to admit at trial were inadmissible under the business records exception to the hearsay rule" because Mr. Whittaker "was unable to testify with sufficient detail to establish a proper foundation for the admission of business records," he "was unfamiliar with the verification procedures and the loan boarding process," and he "failed to verify with sufficient detail that [Ocwen] independently verified the accuracy of the payment history and loan information from the prior servicer or to detail the procedures used for such verification." (R:617-18). Accordingly, the trial court concluded that the "directed verdict was mandated." (*Id.*).

Ocwen appealed to this Court, and after the appeal was docketed, an Order was issued (1) finding that the order granting the directed verdict was not an appealable final order; and (2) staying the appeal until a final judgment was

[6] Notwithstanding the language of the order, because this was a non-jury trial, the trial court granted an involuntary dismissal. *Id.*

entered. (R:619-23). In accordance with the Court's Order, a Final Judgment was entered on August 18, 2015, and filed with this Court on August 20, 2015.

SUMMARY OF ARGUMENT

The Final Judgment, based on the trial court's exclusion of Ocwen's business records, was error and must be reversed. This Court and other district courts have expressly held that prior servicer records are admissible where an employee of the current servicer testifies as to his or her employer's verification process and the accuracy of the records. Mr. Whittaker provided extensive testimony as to Ocwen's boarding process, explaining numerous times that all of GMAC's records were verified by Ocwen before being boarded into its system and were found to be accurate. Accordingly, the trial court abused its discretion in excluding them. The Final Judgment should, therefore, be reversed and this matter remanded for further proceedings.

STANDARD OF REVIEW

This case was involuntarily dismissed based on the trial court's erroneous exclusion of business records that were necessary to establish Ocwen's entitlement to a foreclosure judgment. The trial court's exclusion of the business records is reviewed for an abuse of discretion, which discretion is limited by the rules of evidence. *See Peuguero v. Bank of Am., N.A.*, 169 So. 3d 1198, 1202 (Fla. 4th DCA 2015) (stating that "[a] trial court's ruling on the admissibility of evidence under the business records hearsay exception is reviewed for an abuse of discretion."); *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1069 (Fla. 4th DCA 2015). Accordingly, because the trial court abused its discretion, the involuntary

dismissal, which is reviewed *de novo*, must be reversed. *TD Bank, N.A. v. Graubard*, 172 So. 3d 550, 552-53 (Fla. 5th DCA 2015); *Deutsche Bank Nat'l Tr. Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012) ("When an appellate court reviews the grant of a motion for involuntary dismissal, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party.").

ARGUMENT

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

In Florida, a business record may be admitted under section 90.803(6), Florida Statutes, if the proponent of the evidence demonstrates that the business record was,

> (1) made at or near the time of the event; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

King v. Auto Supply of Jupiter, Inc., 917 So. 2d 1015, 1018 (Fla. 1st DCA 2006). To lay the foundation for admission of a business record, it is unnecessary to call the person who actually prepared the document, or even the records custodian. *See Twilegar v. State*, 42 So. 3d 177, 199 (Fla. 2010). It is only necessary that the witness have knowledge as to how the record was made. *Glarum v. LaSalle Bank Nat'l Ass'n*, 83 So. 3d 780, 782 (Fla. 4th DCA 2011). "The law does not require an affiant who relies on computerized bank records to be the records custodian

who entered or created the data, nor must the affiant identify who entered the data into the computer." *Id.* at 782 n.2. Instead, the witness is required to "demonstrate familiarity with the record-keeping system of [the] business that prepared the document and knowledge of how the data was uploaded into the system." *Burdeshaw v. Bank of N.Y. Mellon*, 148 So. 3d 819, 823 (Fla. 1st DCA 2014) (*citing Weisenberg v. Deutsche Bank Nat'l Tr. Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012)).

Additionally, "a loan servicer . . . can lawfully rely on the records and loan transaction history of a prior loan servicer." *Deutsche Bank Tr. Co. Ams. v. Frias*, No. 4D13-4818, 2015 WL 6735332, at *2 (Fla. 4th DCA Nov. 4, 2015) (quoting *In re Sagamore Partners, Ltd.*, Bankr. No. 11-37867-BKC-AJC, 2012 WL 3564014 at *4 (Bankr. S.D. Fla. Aug. 17, 2012) (citing *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005))). It is not necessary to present a witness who was employed by the prior servicer. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213-14 (Fla. 5th DCA 2015) (stating that it is not necessary or practical for a foreclosure plaintiff to call an employee of the previous note owner), or who participated in the current servicer's boarding process, *see also Le v. U.S. Bank*, 165 So. 3d 776, 778 (Fla. 5th DCA 2015) (holding that records were admissible even though the witness did not participate in the boarding process). Instead, 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 Wamco XXVIII, 903 So. 2d at 233 (holding that business records that relied on information from a prior servicer were admissible where the witness testified that the prior servicer used bank-accepted accounting systems and the loan information was verified prior to boarding).

This Court has elucidated the requirements that loan servicers that have acquired records from prior servicers must meet in order for their business records to be admissible. *Frias*, 2015 WL 6735332, at *2; *Holt*, 155 So. 3d at 506; *Bank of New York v. Calloway*, 157 So. 3d 1064, 1070 (Fla. 4th DCA 2015). In *Calloway*, the bank introduced into evidence printouts of the payment history and transaction dates from the computer system of its current servicer, Resurgent. The records had previously been created and stored in the prior servicer's business records. To establish their admissibility, a Resurgent employee testified as to each requirement under the business records exception to the hearsay rule and explained that before uploading prior servicer records, it "reviewed the documents for accuracy . . . ." *Id.* at 1067. She also candidly admitted that she had never worked for the prior servicer and had no personal knowledge of its record-keeping systems. *Id.* at 1068.

Sustaining the defendant's objection to the admission of the records, the trial court ruled that although the prior servicer's records were "accurate insofar as they [we]re the records she got from the prior servicer," the bank failed to provide a witness with knowledge of the prior servicer's record-making processes. *Id.* Having no evidence to prove its case without the business records, the trial court entered an order of involuntary dismissal stating that the witness "was not familiar with the prior servicer's business practices or procedures," that she "was unable to

testify as to the accuracy of the prior servicer's business records," and that she "did not know who, how or when the data entries were made into the prior servicer's business records." *Id.*

On appeal, this Court made clear that a "successor business itself may establish trustworthiness [of a prior business's records that it has acquired] by independently confirming the accuracy of the third-party's business records upon receipt." *Id.* at 1072. The Court held that the testimony "that Resurgent 'reviewed' [the prior servicers'] supplied payment histories 'for accuracy' before integrating them into its own records" confirmed the trustworthiness of the records and rendered them admissible. *Id.* And even if such testimony had not been adduced, this Court noted that "the circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans." *Id.* Accordingly, the involuntary dismissal was reversed and the case remanded for a new trial. *Id.* at 1067.

This same result was again reached by this Court in *Frias*, which, like *Calloway*, involved testimony of an employee of the current servicer, Ocwen, who had never worked for the prior servicer but had knowledge regarding its own business records and the boarding process. The witness stated that the loans that originated with other servicers went through "a series of 'test regions . . . to verify the accuracy of the information from the prior servicer.'" *Frias*, 2015 WL 6735332, at *1 (alteration in original). Notwithstanding this testimony, the trial court "denied admission of any records that originated with a prior servicer" and

entered an involuntary dismissal against the bank. *Id.* at *1. This Court reversed, explaining that, "where the current note holder had procedures in place to check the accuracy of the information it received from the previous note holder," the records are admissible and the trial court, therefore, abused its discretion when it denied their admission. *Id.* at *2 (citing *Holt*, 155 So. 3d at 506).

No different result should be reached here. Mr. Whittaker provided extensive testimony as to Ocwen's boarding process, stating that a prior servicer's records "go through the entire process with checks and balances," and Ocwen ensures "that the information that [it is] entering into [its] systems has been backed up and has been verified . . . ." (R:580-81). Mr. Whittaker stated that if the accuracy of any records cannot be verified, they are not entered into Ocwen's system. (R:581). He also testified that he has "worked for multiple departments in Ocwen and ha[s] seen firsthand data entry . . . [and] verification of document[] information using online research tools . . . ." (R:586). Mr. Whittaker, thus, not only provided ample testimony as to Ocwen's boarding process, but he also further testified that Ocwen continues to use GMAC's system. (R:580-83, 85-86, 89-90).

Nonetheless, the trial court sustained the Gundersens' counsel's objections to the admission of the business records[7] because Mr. Whittaker did not work for GMAC or personally participate in the boarding process. (R:583-84). But there is

[7] As previously indicated, the business records that were excluded included: (1) the "looking-glass screenshot" showing the date the Note was entered into GMAC's system, (2) the Gundersens' loan history, (3) the Default Letter, (4) the screenshot of Ocwen's computer system showing information related to the Default Letter, and (5) the MERS milestone report showing the transfer of servicing rights from GMAC to Ocwen. (R:583-84).

no such requirement in the law. *See Le*, 165 So. 3d at 778 (holding that the trial court did not abuse its discretion when it admitted prior servicer records despite the fact that the witness did not work for the prior servicer or participate in the boarding process because the witness testified she was familiar with industry standards and the prior servicer's records were tested for accuracy and compliance with industry standards); *see also Berdecia*, 169 So. 3d at 216 ("Although [the witness] did not personally participate in the 'boarding' process to ensure the accuracy of the records acquired from CitiMortgage when Nationstar took over servicing the subject loan, she demonstrated a sufficient familiarity with the 'boarding' process to testify about it.").

Instead, the trial court erroneously believed that this Court's decision in *Holt* required that the business records be excluded from evidence. The trial court stated that—based on *Holt*—Mr. Whittaker is required "to have personal knowledge of . . . the systems that were in place at the time," and Mr. Whittaker "indicated that he essentially wasn't involved in the [boarding] process. So he doesn't even have any kind of knowledge helpful to this Court as to the prior servicing system." (R:588-91). Nothing in *Holt*, however, requires the witness to have worked for the prior servicer or have participated in the boarding process. Rather, *Holt* reiterated this Court's binding precedent explaining that prior servicer records are admissible if the current servicer provides testimony that a verification procedure is in place to ensure the accuracy of the prior servicer's information. 155 So. 3d at 505 (*citing WAMCO*, 903 So. 2d at 233). The records in *Holt* were not admitted because the witness "did not testify that the bank had these types of

mechanisms in place for checking the accuracy of the numbers from [the prior servicers]," and without this testimony, it was "unknown whether the asset manager had personal knowledge as to the accuracy of the numbers . . . ." *Id.* at 504.[8] Those clearly are not the facts in this case, making *Holt* entirely inapposite.

Here, the undisputed evidence demonstrated that GMAC's records went through an extensive boarding process and were verified for accuracy prior to being uploaded to Ocwen's system. *See, e.g.*, *Berdecia*, 169 So. 3d at 216 (stating that the trial court abused its discretion in excluding prior servicer records because the witness's testimony "demonstrated knowledge of the accuracy of the records."). Accordingly, the trial court's refusal to admit the business records into evidence was a clear abuse of discretion and the involuntary dismissal must be reversed. *Frias*, 2015 WL 6735332, at *3 (reversing involuntary dismissal and remanding after concluding the trial court abused its discretion in excluding prior servicer records).

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.

(Attorney's Signature Appears on the Following Page)

[8] The trial court also relied on *Glarum*, 83 So. 3d at 782, which is inapplicable here. In *Glarum*, the witness "had no knowledge of how *his own company's* data was produced, and he was not competent to authenticate that data." *Id.* at 783 (emphasis added). *Glarum* contains no discussion or analysis of under what circumstances a prior servicer's records are admissible.

Date: December 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on December 23, 2015, I electronically filed the foregoing with the Clerk of Court via the Florida E-Filing Portal, which shall cause a copy to be served via email to the following:

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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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