

# YOU CAN'T TRUST THE MORTGAGE PAPER TRAIL™

"You Must Secure The Collateral/Custodial Files & All Electronic Entries In The 'Lender's' Accounting, Financial, & General Ledger Systems & Document Custodian's Tracking System"

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# I. PREFACE

This may be one of the most important papers I have written regarding mortgage foreclosures and the mortgage foreclosure crisis we face in America. Since 2007, our nation has been in the midst of the Great Recession and a fiscal crisis we have not endured since the Great Depression. In order for our nation to prosper and move out of this Great Recession, we must fix our housing, mortgage, and securities markets.

We must clean house, no pun, and take a top to bottom approach in this effort. To do this, we must rid our courts of the backlogs of foreclosure cases and bring homes and properties to the marketplace in as smooth a transition process as possible. To do this, we must reform many industry practices and educate judges and lawyers on how to accomplish this goal in a constitutionally protected manner.



No one and I mean no one should unjustly benefit and be enriched from this morass and the crimes committed. With this paper I am sure to take some shots from many of my advocate and foreclosure defense lawyer colleagues and friends who will not like some of what I write here. However, this is an equal opportunity and critical paper. No one deserves a free house. Any lawyers claiming they will get you a free house need to be reported to the their state bar association.

Servicers and corrupt foreclosure law firms should not get a free house either. They must prove up their rights and claims in a constitutionally protected fashion. Short of the death penalty and incarceration, the taking of a human being's home or property should take be conducted with the utmost of care and caution in the judicial process. The automated and robotic foreclosure processes that have been engineered over the last two-decades must be reengineered to stop the frauds and abuses that have permeated our legal system.

Far too many major banks and servicers are getting a free pass to unjustly take away a borrower's property and getting a free house in the process. The Florida Supreme Court recently acknowledged this issue in its decision[1] in the Roman Pino v. the Bank of New York Mellon case. The Court, while ruling against the borrower, placed into context the issue when it stated "*the context of the issue as presented in this case arises out of a widespread problem associated with fraudulent documentation filed by various financial institutions seeking to foreclose on real property throughout the state…*"

Anyone blaming borrowers and homeowners for this crisis has not reviewed the facts and analyzed the situation correctly. The blame for this crisis lies squarely on the heels of the mortgage industry and its lawyers. These frauds were systemic and endemic, not isolated mistakes and errors. As you will see in this paper, the CEOs and boards of major banks and mortgage companies like Fannie Mae and Freddie Mac were fully aware of the frauds, but chose to turn a willful blind-eye to the abuse and its ultimate consequences.

[1] http://www.floridasupremecourt.org/decisions/2013/sc11-697.pdf

Yet, despite the fraud and the abuse, there should be no free rides or free homes for the victims. Government, advocates, courts, and the industry need to address real issues with real solutions. The formulaic modification and short sale models should not continue to push square pegs through round holes. Each situation is uniquely different.

The industry must stop its automated processes and create more human interaction with borrowers. Solutions and resolutions must be created. I will strive to work on those in the near future and each person reading this paper must strive to do so as well, for our nation and our collective psyches.

While we need to speed the foreclosure process up, it must be done in a constitutionally protected process. I propose such a process in this paper starting with the foreclosure affiant and witness process.

As such, to protect our nation, taxpayers, borrowers, and investors each alleged lender must be required to prove their note ownership with their accounting and financial books and records, not fabricated and forged paperwork and dubious servicing records that only allege accounting for a borrower's payments.

Due to the Sarbanes-Oxley Act that was created after the ENRON debacle, this should be a relatively simple process. Journal entries in the lender's financial, accounting, and general ledger systems showing a borrower's note as an asset and the asset being recognized and derecognized from the alleged lender's books should be able to be produced with the push of a few keys and clicks of a mouse.

These accounting books and records, not servicing records, should be readily available and made part of each affidavit in support of summary judgment or provided to any borrower and their attorney, if requested, in non-judicial foreclosure states. They should a standard part of a note owner or their authorized servicer's evidence in each foreclosure trial. If not, judgment cannot not be entered in that the servicing records may support the amount of payments missed, but it cannot support the actual "loss" and deficiency incurred, if any, to the foreclosing party or alleged note owner.

There are tens of billions of dollars in repurchases, substitutions, sales, servicing advances, lender paid mortgage insurance, guarantees, and other compensation and income streams in the pool of mortgage foreclosures that need to be identified and accounted for in each foreclosure action.

Issues such as who has really suffered a loss and what is the amount of that actual loss must be addressed in each proceeding? Is there really a holder in due course or can a borrower sue the current alleged lender for the torts of the originators and securitizers. By now, the questions for judges and lawyers should not be whether frauds, bad, and unlawful acts were committed for we all know they were. The questions that should be posed to each court is how was the borrower damaged; who was responsible for the damages; who are or were the ultimate lenders that actually suffered any loss; how much

is their actual loss; and how do we adjust the equities for the borrower and the true and rightful owner of the debt? Simply, who can a borrower sue and settle with?

In mortgage foreclosure reality, not legacy perception, there are a plethora of real parties in interest and indispensible parties that need to be before the Court in court contested non-judicial and judicial foreclosure cases. Many of the alleged claims in foreclosure brought forth in foreclosure court are in reality subrogation claims that need to be treated differently. Government Sponsored Enterprises ("GSEs") such as Fannie Mae and Freddie Mac, pool mortgage, and lender paid mortgage insurers may all have to be part of the process.

When judges begin ordering the accounting and financial books and records of the alleged owner of a borrower's note to be produced, not servicing records, at trail or attached to affidavits of indebtedness, you will begin to see a tidal wave of settlements, modifications, note sales, and new borrowing options presented to homeowners.

From options to buy the note at a discount or the value of the home; deeds in lieu with options to buy; and modifications to new notes, the mortgage market will begin to cleanse itself if judges mandate the simple production of the real lender's accounting and financial records and the collateral file and entries in the document custodian's tracking system. I promise that you will see a sudden abidance and adherence to rules of evidence and civil procedure.

The simple fact is this. If the industry once more ignores the warnings in this paper and does not fix their fatally flawed affiant and witness process, their next settlement may be far greater than their combined $35 billion settlement for robo-signing and foreclosure fraud. You see, robo-signing wasn't the cancer I identified over a decade ago, only a genetic marker for a much greater cancer.



## II. OVERVIEW

It is my hope that my affiant, affidavit, and witness process will be a game-changer for our nation and all Americans. Borrowers, advocates, lawyers, bankers, servicers, courts, regulators, and most importantly, our governments, communities, and its citizens can all benefit by adopting the affidavit, affiant, and witness recommendations and protocols I propose at the end of this paper.

No one, absolutely no one, benefits from costly foreclosure delays, expensive litigation, and an overwhelming caseload. Both borrowers and the owners of promissory notes, i.e. the "real" lenders, are each entitled to vigorous representation by their attorneys. However, no one can be allowed to proffer, support, and condone fabricated, false, and perjurious evidence and testimony to obtain a foreclosure, nor should borrower's or their lawyers advance the prospects of a free house or property.

Let me make this perfectly clear, fraud, not mistakes and errors, have permeated the foreclosure process in America for both residential and commercial mortgages over the past two decades. For a variety of motives that I detail herein and in subsequent reports and articles - - servicers, lenders, their lawyers and vendors have engaged in systemic frauds upon courts across the nation with virtual impunity for over two-decades. Recent regulatory action combined with state and federal court decisions mandates that business as usual must cease!

I have reviewed thousands upon thousands of foreclosure cases for almost twenty years. When I first started this process, I would spend days and weeks at Clerk of Court offices in Courtrooms across Florida reviewing each page of judicial foreclosure cases. Using my research background, I quickly saw the correlations of false and fraudulent pleadings, affidavits in support of summary judgment, and the assignments of mortgages and notes.

Today I see servicers' robo-witnesses testify in court before judges under oath to answer a fast talking foreclosure lawyer's questions with a nod and a pull of the string and programmed "yes." The lawyer's fast-talking is so fast, that it is reminiscent of the old FedEx commercials with John Moschitta.[2] Servicer witnesses and lawyers themselves, have admitted that they are simply going through the process. When challenged by a competent lawyer or expert, their false facade is visibly apparent.



If the mortgage industry does not learn from the past and fix its ways, then independent members of the judiciary will bring about the change that is necessary to bring justice to their courtrooms. I have spent countless sleepless nights trying to find a solution to our nation's mortgage morass since fairness to both borrowers and investors has been my life's mission for two-decades.

In trying to find the simplest and fastest solution to resolve the foreclosure crisis, I have settled on reforming the affidavit, affiant, evidence, and witness process first. If the servicing and mortgage industry follow my process, judges, including the honorable Judge Arthur Schack in New York, will be able to grant the lender's their foreclosure judgments with speed, ease, and a clear mind that they ordered a lawful foreclosure and not robo-stamped an unlawful foreclosure order.

If the industry refuses to go along with my simple affidavit, evidence, witness, and records process, then more and more judges, like judge Schack, will begin to order the production of key accounting and financial records or begin dismissing foreclosure actions en masse to clear their cluttered dockets.

With my process, borrowers must be ready to leave their homes and deed them back to the lenders, if the lenders abide by my proposed affidavit, evidence, and witness process. As the Fannie Mae independent counsel sadly, but correctly analyzed, borrowers cannot marshal up the resources and finances to battle the mortgage industry and players like Fannie Mae and Freddie Mac who are now controlled by our nation's government. In the

[2] http://www.youtube.com/watch?v=NeK5ZjtpO-M

end today, you are not fighting the mortgage industry or city hall. Today, you are most likely fighting your own nation.

The vast majority of mortgages today are owned or guaranteed by our government through its conservatorship of Fannie Mae and Freddie Mac; ownership of HUD/FHA, Ginnie Mae, and the VA; and support and guarantees to the Federal Reserve and Federal Home Loan Banks to whom trillions of notes, mortgages, and mortgage-backed securities have been pledged to. In addition, Fannie and Freddie bought a substantial amount of the MBS private label produced in the marketplace. And last, but certainly not least, the Federal Reserve has been pledged an untold plethora of original wet-ink promissory notes and MBS certificates for advances as well as part of the various bailout programs.

So, while you may think you are fighting the bank, it may be your own nation that is behind the stonewalling and inability to obtain final resolution. Or, it's an unidentified mortgage or pool insurer holding things up. It's easier to kick the can down the proverbial road than to take the immediate hit and do what is necessary to revitalize the market. Yet, it's the servicers who have been dragging their feet in the foreclosure process for a variety of ulterior motives.

With this paper, I propose a new affiant, affidavit, evidence, and witness process to the mortgage industry that will expedite the ultimate resolution of foreclosure actions by providing finality and constitutional protections for all involved. Dependent upon the industry's response to my proposed process, we will either prove an alleged lender's or servicer's ability and *authority* to foreclose in a matter of weeks, not years, or we will reveal more red-flags of servicing and foreclosure fraud that must be immediately addressed and remediated.

The primary issue facing Americans and American courts today is the authority and standing to foreclose and enforce the note. Many lawyers, even judges, have confused many issues related to standing and the authority to foreclose as well as enforce the note as evidence of that debt. Recent court decisions here in Florida support my propositions and prior testimony that servicers and their lawyers must produce more authenticated and admissible evidence at the start of a foreclosure action, not at its conclusion or years later. Hopefully, the recommendations in this paper get through to the boards of each servicer as well as their regulators.

If the industry or any lender/servicer agrees to comply with my new affidavit, record, evidence, and witness process, we can prove ownership of the debt (i.e. promissory note) within days or weeks, rather than months and years. If ownership is proven, borrower's lawyers and their clients must settle their claims and offer deeds in lieu to the actual and real lenders if viable workout, refinance, and note or property purchase options are unavailable. All that will be necessary then is for borrowers and their lenders to workout the details of the terms, conditions, and dates of their move-out.

It may be beneficial for some borrowers to stay in their homes and pay the upkeep or some modest rent until the home is purchased. An empty home is not beneficial to anyone.

If the industry does not adjust it process, you will see new borrower defenses, attacks, and lawsuits with new strategies and tactics that lawyers are creating based on new case law, knowledge, evidence, and facts. One increasing legal trend will be in denying default on the loan since the vast majority of notes and loan transactions have other third-party co-obligations such as lender paid mortgage insurance, guarantees, servicing advance agreements, and even the securitization for those servicing advances.

Many loans have been charged additional basis points on the backend to pay for the ability of the servicers to lay claim to insurance and guarantee payments to pass on to the ultimate lenders. This is akin to having your car parked outside on the street with a parking meter ready to expire. A cunning businessman or Good Samaritan could come and place another quarter or dollar in your meter to prevent you from getting a ticket. If someone makes your mortgage payment to your real lender, are you actually in default? What agreement do you have to pay them back?

If this party is a servicer that sues you for foreclosure where the ultimate lender has been paid by an insurer or other party, is there really a default and is that claim secured? Or, do you have a subrogated claim owed to an unknown party that is really calling the shots from behind the scenes? Many questions abound for the Courts wherein judges will have to make the ultimate decisions with support from experts like myself.

With new and better legal arguments, foreclosures will once more bog down as more and more skilled lawyers bring forth the right pleadings, answers, counterclaims, motions, discovery, briefs, and even their own motions for summary judgment supported by their own expert affidavits.

The process I propose at the end of this paper will efficiently move the backlog of state and federal court's docket of foreclosure cases and each lawyer's caseload, while protecting the constitutionally protected due process rights of both borrowers and the real lenders. Lenders and their shareholders; investors, homeowners, and borrowers; the courts, counties, states and even the Federal Government all stand to benefit from a speedy, efficient, simplified, and constitutionally protected foreclosure process.

The well-founded allegations and findings of robo-signing, foreclosure fraud, multi-pledging of notes, empty trusts, and failed securitizations that challenge the authority and standing to foreclose reveal that "paper" records and the "paper trail" cannot be relied upon by our courts and lawyers who defend borrowers.

A borrower's lawyer would be subjected to malpractice claims if they did not properly defend their clients. Thus, they simply cannot ratify the current process that the mortgage industry and their foreclosure firms have created. The current foreclosure process, especially as it relates to note ownership, affidavits, and assignments of mortgages is

broken, fatally flawed, prevents due process for all involved, and will subject the mortgage industry to greater delays, liability, and losses as more evidence comes to light each day.

I have taken the initiative to provide an easy solution to the mortgage industry and for the attorneys they work with that I detail at the end of this paper. It is a relatively simple process. My affidavit, evidence, and witness process requires servicers and lenders, at least for contested and "escalated" cases, to spend a few hours of research and preparation, rather than tens of thousands of dollars in legal fees.

If a servicer or lender cannot or refuses to comply with this simplified and streamlined affidavit process, it must be regarded as a red flag that the servicer or lender is lying and committing a fraud upon the Court and/or the borrowers.

However, before I provide this solution, I have taken the liberty to detail and brief this crisis, its motives, and the fatal flaws that commercial and residential mortgage servicers in America face with fatally flawed affidavit, witness, assignment, negotiation, transfer, and foreclosure processes. No borrower should get a free house, but neither should any servicer as well!



## III. BACKGROUND & HISTORICAL WARNINGS

**1996 – 2000**

I have been warning major banks, Wall Street firms, servicers, foreclosure attorneys, and state and federal regulators as well as reporting and writing on fraudulent and false affidavits to support residential foreclosures since the mid-nineties. Of specific reference on page two of my 2000 21st Century Loan Sharks report that may be downloaded at http://documents.jdsupra.com/197d1b59-e33e-47e0-92b0-d61992e9ed22.pdf, I wrote:

**"*well-known banks and mortgage companies in Florida are lying and providing perjured testimony, false affidavits and frivolous pleadings in cases involving mortgage foreclosure to courts in Florida.*"**

On pages 27–28 of this report, I described several robo-signing practices including the:

- *"filing of fraudulent and false affidavits by predatory lenders claiming that they own the note when in fact they are only the servicer;"*
- *"filing of fraudulent and false affidavits by predatory lenders claiming that they lost the note when in fact they never had control of the document;"*
- *"filing of fraudulent and false affidavits by predatory lenders claiming an indebtedness that is not owed;"*

- *"filing of fraudulent and false affidavits by predatory lenders claiming amounts owed that are non-recoverable from the borrower;"*

- *"filing of fraudulent and false affidavits by predatory lenders claiming control and custody of documents that are not in their control and custody;"*

- ***"filing of fraudulent and false affidavits that claim to support knowledge of facts not known by the affiant;"***

- *"supporting motions for summary judgment with fraudulent and false affidavits;"*

- *"using corporate dummies as corporate reps that are trained to avoid questioning and obstruct justice;" and "witness tampering."*

In a follow-up report[3] I released in 2008, titled "Sue First, Ask Questions Later" downloadable at http://www.scribd.com/doc/20955838/PMI-Ocwen-Anderson-Report-Sue-First-Ask-Questions-Later, I detailed the wide-scale mortgage industry practice of robo-signing. I provided this report to major banks, lenders, servicers, and their foreclosure firm lawyers.

On page 1 of this report I state ***"one of the many predatory servicing practices developed was the use of known false, fraudulent, and forged affidavits, assignments, and satisfactions of mortgages."***

On page 5 of this report, I stated that **I reviewed over 10,000 assignments of mortgages, powers of attorneys, affidavits, and satisfaction of liens in public records across the nation that resulted in the following findings:**

- *"That servicers, default servicing outsourcers and their lawyers are forging documents with 'squiggle marks' that are not the marks or signatures of the actual officer that is notarized to be the signatory;"*

- *"Squiggle marks with 'initials only' are designed so that anyone can sign an officer's or vice president's signature, instead of the signatory;"*

- *"Dozens of variations of a squiggle mark that are consistently different than several or a dozen other squiggle marks of the same signatory, notary, and/or witness to the document;"*

- *"Squiggle marks and full signatures that are diametrically opposed to the known signature of the signatory;"*

[3] http://4closurefraud.org/2009/10/21/pmi-ocwen-anderson-report-sue-first-ask-questions-later/

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- *"The same 'officer' or 'vice president' of a bank or lender being an officer and/or vice president for dozens of other banks and lenders;"*
- *"The same 'officer' or 'vice president' of a bank or lender signing and being located in various cities across the United States;"*
- *"The named 'officer' or 'vice president' of a bank or lender being a notary public or witness on other identical assignments, affidavits, and satisfactions;"*
- *"Pre-stamped assignments and notary signatures on assignments, affidavits and proof of claims;"*
- *"Second page notarizations that are attached to documents that do not conform in type and style to the first page of the document;"*
- *"Automated signatures on computer of 'both' the notary and the signatory; and*
- *"Backdating of dates on assignments and signatures of officers dating years after a company has been out of business or gone bankrupt."*



A Washington Post article about the robo-signing foreclosure crisis on October 7, 2010, concluded with my warning to the industry when the Post wrote:

> "*several years ago* (2003), *on a message board*[4] *still active on the MERS Web site, one participant* **(me)** *accused the company of participating in fraud and concealing the transfer of loans from public scrutiny*." "*The company's president and chief executive, R.K. Arnold, responded by insisting that MERS actually increased the transparency of the mortgage system and reduced the cost of homeownership by making the industry more efficient." "We're not perfect," Arnold wrote, "but there's nothing sinister about who we are and what we do."*

**2004**

In 2004, I authored a report as a concerned citizen and shareholder, that I sent to the board of directors and CEO of Fannie Mae, Freddie Mac and other mortgage industry leaders including BankOne, JPMorganChase, Bear Stearns, EMC Mortgage, WaMu, Ocwen, Litton Loan, Merrill Lynch, and others.

At the time, I resided in the state of Georgia and Georgia has specific tacit pro curation statutes that deal with the duty to respond to such writings under O.C.G.A. ¶¶ 24-4-23 and 24-3-36 that state as follows:

[4] http://www.mersinc.org/forum/viewreplies.aspx?id=13&tid=93

Title 24, Chapter 4, Section 23 (24-4-23)

"In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of his correspondent and to adopt them"

AND

Title 24, Chapter 3, Section 36 (24-3-36)

"Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission."

As discussed below, Fannie Mae's board answered me and then established an independent counsel investigation. JPMorgan Chase, WAMU, Ocwen, EMC Mortgage, and Bear Stearns established internal reviews with internal and outside counsel. Freddie Mac responded, but did not act. MERS did not respond at all.

As referenced above, I specifically targeted one of my reports, as described below, to Fannie Mae since they controlled one of the largest portions of the mortgage market and taxpayers were on the hook for their actions. I directed my report to the board of directors and CEO of Fannie Mae, Franklin Raines, that described in detail many of the abuses of foreclosure law firms and servicers related to foreclosure fraud and how I believed Fannie Mae was cooking its books and helping others cook their books via the practices outlined in my report.

Fannie Mae's board of directors and Mr. Raines created a special review committee as well as retained Mark Cymrot of the law firm Baker Hostetler as an independent counsel to investigate my allegations.

During 2005, Mr. Cymrot, his associates, and I worked on an investigation into the practices of servicers and the foreclosure law firms. Mr. Cymrot agreed with many of my concerns about fraudulent pleadings, assignments of mortgage, and affidavits and told me such practices were unlawful and unacceptable.

Of primary concern to me then and today, as a shareholder and citizen, was and is that Fannie Mae and other "investors" in promissory notes, mortgages, and mortgage-backed securities were and are still intentionally concealing their "ownership" of such notes, when in fact servicers, MERS, and even sub-servicers claimed ownership of the notes. The resulting implications these events would have on the financial and accounting practices and reporting of Fannie Mae and other investors to which I or family trusts may have stock or ownership interests in, concerned me deeply.

At the time, these concerns were directly attributable to a decade of my personal research and investigation that reflected that mortgage "servicers" and a company called Mortgage Electronic Registration Systems ("MERS") and their law firms were claiming in both judicial and non-judicial foreclosure proceedings across America, the sole ownership of

promissory notes and mortgages. However, I knew for a fact that such notes were claimed to be owned or should have been owned by Fannie Mae and other investors.

My research and analysis of property records, pleadings, evidence, and assignments reflected that multiple parties were claiming ownership of the same asset on the same day thereby not only creating competing claims to the alleged secured collateralized property, but to the note and who could account for such note as an asset on its books.

While the research was conducted in many states, the majority of my inspection of court files and records came in the State of Florida at numerous courthouses in Palm Beach, Broward, Orange, and Pinellas counties. My concerns were also shared with Freddie Mac, but they failed and refused to act upon my concerns and report, although they acknowledged receipt and review of my report.

My primary concern stemmed from evidence I obtained that reflected that multiple parties were "booking and claiming ownership" of the same promissory note and that law firms for Fannie Mae and its servicers were routinely claiming in court pleadings and affidavits that hundreds of billions of dollars in promissory notes were either lost, stolen, or destroyed without any plausible explanation. I will explain this concern in more detail below.



My concerns also came at a critical time for both Fannie and Freddie in that they were being investigated for financial and accounting frauds and abuses, something I first made the industry aware of beginning in 1998.

I was informed that Fannie and its regulator, OFHEO, took my allegations so seriously, that not only was the board and Mr. Raines being apprised of the facts and report, but that Mr. Armando Falcon, head of OFHEO over Fannie Mae and Freddie Mac, was personally being briefed on the investigation. I was informed he was to receive progress reports and review of Mr. Cymrot's final report.

I specified and named many of the law firms that came under investigation by the Florida Attorney General as the primary abusers in Florida as well as other states. Firms and lawyers I informed Mr. Cymrot and Fannie Mae of being involved in the processing of fraudulent foreclosure actions in Florida included: David Stern, Marshall Watson, Shapiro and Fishman, Echeverria, Butler & Hosch, and Ben-Ezra.

On September 24, 2010, three members of Congress sent a letter to the current CEO of Fannie Mae asking that Fannie Mae stop using foreclosure law firms engaged in unlawful and fraudulent foreclosure practices, especially the practice commonly identified as "robo-signing" that I am credited with identifying and describing over a decade ago.

In October of 2010, more than seven years after my initial warnings to Fannie Mae and other investors and mortgage servicing companies, Fannie Mae and Freddie Mac stopped

using the law offices of David Stern for its foreclosures.[5] On March 7, 2011, DJSP Enterprises, Inc. filed an 8-K report with the SEC stating that its "primary customer, the Law Offices of David J. Stern, P.A., has announced that it will be ceasing the practice of law with respect to all pending foreclosure matters in the State of Florida as of March 31, 2011."

On or about February 10 of 2011, Fannie Mae also terminated its relationship with the law firm of Ben-Ezra & Katz.[6] On or about the last week of April 2011, the law firm of Ben-Ezra & Katz announced that it would be closing its foreclosure "operations."[7]

However, these foreclosure abuses and frauds were not an anomaly, but industry-wide practices across the nation. As such, I also named firms such as McCalla Raymer and McCurdy and Candler in Georgia as well as all members of Gerald Shapiro's LOGS group; all members of the Barrett Burke group; and all members of the United States Foreclosure Network ("USFN").

To immediately highlight for you my knowledge of Fannie Mae, Freddie Mac and the industry and its servicers, vendors and lawyers' practices and procedures in Florida courtrooms, I would draw your attention to a Wall Street Journal article[8] published on March 25, 2011, titled "Fannie Report Warned of Foreclosure Problems in 2006" that states and quotes the following:

> Fannie Mae was warned in a 2006 internal report of abuses in the way lenders and their law firms handled foreclosures, long before regulators launched investigations into the mortgage industry's practices.
>
> The report said foreclosure attorneys in Florida had 'routinely made' false statements in court in an effort to more quickly process foreclosures and raised questions about whether some mortgage servicers or another entity had the legal standing to foreclose.
>
> In recent months, federal and state officials have initiated probes into whether banks and foreclosure law firms improperly seized homes by using fraudulent or incomplete paperwork. Some U.S. banks temporarily froze foreclosures to review their processes and now face the prospect of a multibillion-dollar settlement with federal and state officials. Fannie Mae severed ties with two Florida law firms in the past six months due to concerns about how the firms pursued foreclosures in Florida courts.
>
> State and federal officials are seeking to establish new rules for the industry. The report could add ammunition to those calling for stronger regulation of mortgage servicers.
>
> Elizabeth Warren, the White House adviser in charge of establishing the new Bureau of Consumer Financial Protection, said in congressional testimony last week that with proper oversight, "the problems in mortgage servicing would have been exposed early and fixed while they were still small." Ms. Warren didn't name Fannie Mae and referred to the industry in general.
>
> Fannie Mae hired law firm Baker & Hostetler LLP to ***investigate potential mortgage-servicing abuses after a Fannie shareholder raised concerns to Fannie five years ago about the industry's***

[5] http://www.nytimes.com/2010/11/03/business/03mortgage.html
[6] https://www.fanniemae.com/content/announcement/ntce021011.pdf
[7] http://blogs.palmbeachpost.com/realtime/2011/04/28/ben-ezra-katz-to-close-second-south-florida-foreclosure-firm-to-shut-its-doors/
[8] http://online.wsj.com/article/SB10001424052748703784004576220582457540372.html

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> ***practices***. A person familiar with the report provided an account of its findings. A spokeswoman for Baker & Hostetler declined to comment.

As now known and widely reported, I was the Fannie Mae shareholder that provided the CEO and board of directors of Fannie Mae with the reports described above. I worked with the appointed independent counsel, Mark Cymrot of Baker Hostetler, in an attempt to create new policies and procedures to prevent our massive mortgage crisis.

As shown below, the foreclosure, servicing, and securitization frauds that I had first identified from 1993 to 2004 and continue to identify and report on today, were the focus of the report.

The report I provided in 2004 to Fannie Mae, its CEO, and its board of directors was the impetus for the Independent Counsel report. In addition to the 2004 report, I provided the additional reports described immediately below to Fannie's board, CEO, General Counsel, and the independent counsel Fannie Mae retained to investigate the findings and allegations contained in my reports.



As known by fellow advocates, experts, and many lawyers and regulators, this was not my first report. At the 2000 National Consumer Law Conference in Broomfield, Colorado, I released two white papers and reports I authored that were titled Predatory Grizzly "Bear" Attacks Innocent, Elderly, Poor, Minorities, Disabled & Disadvantaged and 21st Century Loan Sharks."

Each of these reports were provided to Fannie Mae's board, its audit committee, CEO, General Counsel, and the appointed Independent Counsel, Mark Cymrot of Baker Hostetler. I gathered the research that went into writing these reports and the findings, opinions, and predictions contained therein from 1990 to 2000 and each of these reports were provided to Fannie Mae in 2004; to Bear Stearns, EMC Mortgage, Washington Mutual, BankOne, JPMorgan Chase, Freddie Mac, Deloitte & Touche, KPMG, Fitch, Standard & Poors, Moodys, and others from 2000 to 2004.

Of particular importance to this report is who I warned. In relationship to JPMorgan Chase entities, I personally delivered and/or communicated warnings and my report to Jaime Dimon, the CEO of BankOne/JPMorgan Chase; William Harrison, the CEO/Chairman of JPMorgan Chase; James Cayne the CEO of Bear Stearns, Ace Greenberg, the Chairman of Bear Stearns; Mark Lehman, the General Counsel of Bear Stearns; Ralene Ruyle and Ed Raice, CEOs of EMC Mortgage; Kerry Killinger, CEO/Chairman of WAMU; William Lynch, Corp. Secretary of WAMU; and Faye Chapman, General Counsel of WAMU.

I also provided Merrill Lynch, Ocwen, Fairbanks Capital, Citigroup, and Litton Loan Servicing with my reports. As for Ocwen, I attended an annual meeting where I was the only outside shareholder in attendance in a conference room with the entire board and CEO and chairman present where I presented questions and noticed the board of my findings. Years later, the general counsel for Ocwen would write me to inform me that

there was nothing wrong with Ocwen's practice of "surrogate signing" in front of notaries attesting to the signature of Scott Anderson.

My reports were also provided to lawyers and law firms as well as accounting firms for virtually every major mortgage lending, bank, servicer, and GSE in the nation. Law firms that were specifically warned included: Butzel Long, Miller Canfield, and Clark Hill in Detroit, Michigan; Stroock, Stroock, and Levan in New York; Gibson Dunn in California; Looper, Reed & McGraw and Fulbright & Jaworski, in Dallas, Texas. This was in addition to the heads of major foreclosure mill firms from Gerald Shapiro and David Stern to Marshall Watson and Tommy Bastian of Barrett Burke.

In the third paragraph of page one of my 2004 Report, I wrote:

- "Below, you will find a set of facts, supporting evidence and documentation that will clearly demonstrate that each of the above named firms and/or subsidiaries of these firms are involved in direct or complicit support of predatory lending and servicing practices that are in direct violation of each company's stated code of conduct and ethics. Many of the violations and practices put each company at systemic, operational, legal, reputational, and financial risk."

- In paragraph #10 of page three I stated that I had "found wide-scale national and even international patterns of practices and abuses in the mortgage industry" whereby I isolated over seventy-five individual financial engineering schemes that directly affect borrowers, shareholders, financial markets and the current and future beneficiaries of pension, trust and mutual funds.

- In paragraph #55 of page six I warned of liability to investors and shareholders of Fannie Mae and the other companies where "since each and every loan that may go to foreclosure could raise affirmative defenses to the amount of the payoff and a wrongful foreclosure action."

- In paragraph #63 and #64 of page seven I wrote: "Via conferences, attorney summits and vendor outings, members of the mortgage banking and servicing industries get together and conspire on how to keep information away from borrowers and their lawyers as well as how to support one another and destroy valuable evidence." "The industry has created and put various industry players in business and adhere to a common set of underwriting guidelines, foreclosure practices, assignment and custody of mortgage loans."

- From paragraphs #70 to #85 on pages seven to nine of my 2004 Report (I wrote:

    - 70. All in all, one of the tactics used when the industry is caught in their frauds is to have their insurance carriers and investors pay the legal fees. In many cases, despite their public image position to the press and media, Fannie Mae, Freddie Mac and other investors as well as trustees such as

State Street Bank, Bankers Trust and BankOne work behind the scenes to support the frauds of the servicers.

- 71. In the majority of cases, notes when required to be produced in judicial foreclosure states such as Florida are claimed to be lost, stolen or destroyed and the servicer claims to be the only owner of the note and the only one with a beneficial interest in the note or mortgage.

- 72. In reality, as evidenced via the document located at the industry's MER's web site under foreclosure at http://www.mersinc.org/Foreclosures/index.aspx [click on state of Fla.] the servicer acts as an agent for the investor in foreclosure and in bankruptcy proceedings and conceals the investor's ownership.

- 73. Furthermore, the chain of assignments to the mortgage are often missing or are handled via the industry only electronic system call Mortgage Electronic Registration Systems located at http://www.mersinc.org/. MERS, which was created by Fannie, Freddie and the MBAA as well as is owned by the industry.

- 74. MERS refuses to give the public access to their records telling them who only services the note, but not who may have any beneficial interest in the note itself and other parties in interest to a potential lawsuit.

- 75. In fact, Fannie Mae and MERs go to great lengths to hide and conceal the true holders in due course and the entity, trusts or owners of beneficial interests to the notes.

- 76. A review of the following Georgia Supreme Court ruling whereby Fannie Mae was the actual owner of the note that was not disclosed to the borrower will help explain the role of MERs. http://www2.state.ga.us/Courts/Supreme/pdf/s03a0137.pdf.

- 77. In addition to these frauds, Mr. Lavalle had detailed conversations with leading analysts at Moodys, Fitch and S&P who rate not only the credit ratings on the various issuance of mortgage backed securities, but also rate the actual mortgage services in their performance of their duties.

- 78. While each ratings agency states that compliance is a factor in rating the performance of each mortgage servicer, each of the ratings agencies have full and comprehensive knowledge of the various frauds, schemes and predatory practices as well as the dozens of predatory lending and origination frauds.

- 79. Their knowledge is well known and dozens of reports and presentations on the subjects have been issued. Copies of these reports and presentations are available upon request.

- 80. The ratings agencies have failed in their reviews and ratings methodologies for servicers to take into account the risks inherent in the frauds and the potential for assignee liability to investors and trustees.

- 81. They have failed to take into account the billions of dollars in missing, lost and destroyed mortgages and notes across the nation.

- **82. The threat is that in a case of a major collapse or bankruptcy of a Wall Street firm like Bear Stearns ala LTCM derivative crisis, systemic risk among counter parties to these transactions could make the market fall like a stack of cards.**

- **83. Upon such a failure, the underlying collateral that is the mortgage and/or promissory note becomes key as to that will be entitled to future payments from the borrower.**

- 84. The failure to properly record assignments and perfect lien positions, only to have the underlying instrument declared lost or stolen or appear with missing assignments poses a threat to virtually every pension, mutual and trust fund that invests in these high risk securities.

- 85. In fact, one ratings analyst informed Mr. Lavalle that the entire industry is a ***scam and that the true sale opinion letters being written by major law and accounting firms weren't worth the paper they were written on since everyone knew that the majority of transactions were really financing of receivables since there were many side recourse agreements that the ratings firm were aware of.***



In my 2004 report, I also provided solutions and a series of industry "best practices" to not only eliminate foreclosure and securitization fraud and abuse, but to comply with existing state and federal laws and regulations. Under the heading Mortgage Servicing Best Practices I provided almost fifteen pages of recommendations for the industry.

Many of these Mortgage Servicing Best Practices, that I proposed in 2004, are now being put forth by all fifty state Attorney Generals as part of the nationwide settlement into the default servicing and foreclosure practices of virtually every major lender, bank, and servicer in the nation.

On page 15 of my 2004 report, I wrote the following as a prelude to my recommendations of industry best practices:

- "Mortgage servicing problems not only affect borrowers, but also affect the mortgage banking and investment communities. A lack of proper disclosure and deception can fuel the potential for fraud, abuse and potential liability for investors and government."

- "Predatory lending and servicing practices can impact and impair the reputation of lenders, servicers and investors which could lead to systemic risk and injury to mortgage banking secondary markets."

- "As such, we believe that it is in the interests of consumers, investors, shareholders, bondholders and government to insure that mortgage transactions and servicing are fair, reasonable and transparent to everyone. Such transparency will quickly identify anyone abusing the system, consumers, lenders and investors so that such abuses can be immediately rectified to protect the company, borrowers and the market."

On page 15 of my 2004 report, I recommended the new practices in the numbered paragraphs below:

- "2. Proper due diligence and data integrity shall be performed to assure that data received from a prior servicer is accurate and complete including nth number random selection of accounts for loan level information verification against actual loan documents."

- "4. Any fraud, error, misapplication or problem found on any loan in due diligence shall be immediately corrected and the loan shall be properly adjusted, recalculated and amortized."

- "6. Data checkpoints shall include critical data fields relating to the accurate servicing of the loans. Data fields to be verified include items such as first payment date, maturity date, term, late charge, assessment controls, lien position, property address information, etc."

On page 16 of my 2004 report, I recommended the new practices in the numbered paragraphs below:

- "10. If the servicer owns the note and mortgage and is keeping it in their portfolio, then the borrower shall be notified of this fact in the Transfer of Servicing letter."

- "11. If the servicer is acting as a master servicer, servicer, special servicer or sub-servicer on behalf of any pool of securitized mortgages, the servicer shall notify the borrower of the actual trust name as well as the name of the trustee for the trust and their contact information."

- "12. The borrower shall be notified of any subsequent assignments of any beneficial rights to the borrower's mortgage obligation, whether publicly recorded or not, or tracked in any internal computerized or electronic system including, but not limited to, Mortgage Electronic Registration Systems."

- "14. All assignments of mortgages and notes that are endorsed shall first be endorsed on the front of the note until there is no visible room left and then on the back of such note until there is no place for an endorsement stamp to be placed."

- "15. All endorsements shall be signed and dated on the date of endorsement."

- "16. If an endorsement is left blank, as is the policy of Fannie Mae, Freddie Mac and others, an explanation for why such endorsement is left blank shall be provided to the borrower."

- "17. Only when there is no room left on the front and back of a mortgage, shall an allonge be allowed to be used and attached to the physical note or mortgage itself."

- "18. Borrowers shall have the right to request and be provided the names and contact number of all servicers, sub-servicers, special servicers, trusts, trustees, investors and document custodians that service or hold their mortgage in any manner."

On page 25 of my 2004 report, I recommended the new practices in the numbered paragraphs below:

- "3. Upon request and the payment of a reasonable fee, borrowers shall be provided with all information in their mortgage file."

- "4. Key and chief among such a request would be the master ledger and servicing records of their account with an appropriate key code for the current servicer's records and system and each prior servicer and their records and systems."

- "6. …The complete chain of title of assignment of any rights to the borrower's note or mortgage regardless of whether publicly recorded or not; … All current endorsements on the borrower's mortgage and/or promissory note."

## IV. DEFINING ROBO-SIGNING & ITS PRACTICES

As the person credited[9] for first identifying, documenting, defining, and reporting on such fraudulent foreclosure and default servicing practices including the infamous "robo-signing" scandal in the 90s, I am uniquely qualified to not only define what constitutes robo-signing, but to identify and opine as to what practices, policies, procedures, and documents constitute foreclosure fraud and robo-signing.

In the fall of 2011, my colleagues in Palm Beach, Florida who have been instrumental in highlighting and exposing fraudulent robo-signing practices, agreed with this definition of robo-signing that we created.

The term "*robo-signing*" describes a number of manufacturing line type processes utilized in the creation, execution, witnessing, and notarization of legally necessary property, foreclosure, and bankruptcy required paper documents; e.g. notices of default, foreclosure complaints, notices of sale, assignments of mortgages and deeds of trust; satisfaction of mortgages and deeds; promissory note endorsements and allonges; affidavits of lost notes; affidavits of the amount of the indebtedness; affidavits of the amount of the alleged default in mortgage payments; and other legally required property and mortgage-related paper documents.

Robo is short for the robotic steps and processes that are controlled, directed, and automated by computer programs that contain formulas, database fields, and algorithms, many of which have been patented by foreclosure law firms, banks, servicers, and their vendors.

Paper documents are executed by persons who lack the requisite authority, facts, personal knowledge, history, data and information that is otherwise required by legal regulations and evidentiary rules in both State and Federal Courts; or wherein signatures are placed on such paper documents using inanimate digital signature application software and autopens, laser printers, and photocopy machines; or wherein surrogate signers execute and place the marks or signatures on behalf of other designated authorities and have such signatures notarized as if that person was present.

While we adopted the above definition, the U.S. Government via HUD's Office of the Inspector General (OIG) would later come to succinctly define robo-signing and its practices as detailed below.



[9] http://www.wisbar.org/AM/Template.cfm?Section=wisconsin_lawyer&Template=/CM/HTMLDisplay.cfm&ContentID=101562

## V. 2012 HUD-OIG MEMORANDUMS ON FALSE FORECLOSURE CLAIMS, ROBO-SIGNING & SERVICER AFFIDAVIT PRACTICES

As part of HUD's Office of the Inspector General's (OIG) nationwide effort to review the foreclosure practices of the five largest Federal Housing Administration (FHA) mortgage servicers (Bank of America, Wells Fargo Bank, CitiMortgage, JP Morgan Chase, and Ally Financial, Incorporated), the HUD-OIG reviewed the servicers' foreclosure and claims processes.

The HUD OIG issued reports about foreclosure-handling practices at five major U.S. banks, after the banks filed court documents on March 12, 2012 as part of a $25 billion settlement of allegations they violated state and federal foreclosure laws. The inspector general's reports were held back as they were being used by federal officials as evidence of violations and served as leverage for the government during the settlement process.

The HUD OIG conducted the reviews because banks are charged with managing loans guaranteed by the Federal Housing Administration, which is part of HUD. When FHA loans default, banks submit claims to be reimbursed for any losses, but they can be forced to pay damages if they don't follow federal rules in processing those loans.

The five banks agreed to pay $5 billion in fines as part of the settlement, of which officials said $900 million will go to the FHA. The remaining $20 billion will be used for a variety of loan assistance to homeowners that owe more than their homes are worth and are at risk of foreclosure. In releasing the reports, the inspector general, David Montoya, said:

> ***"The reports[10] we just released will leave the reader asking one question--how could so many people have participated in this misconduct?" "The answer: simple greed."[11]***



As part of the HUD Office of Inspector General's (OIG) nationwide effort to review the foreclosure practices of the five largest Federal Housing Administration (FHA) mortgage servicers (Bank of America, Wells Fargo Bank, CitiMortgage, JP Morgan Chase, and Ally Financial, Incorporated) the HUD-OIG reviewed the foreclosure and claims processes of the aforementioned servicers.

In March of 2012, the HUD-OIG released five (5) memorandums on their review and audit of the foreclosure and claims process for JP Morgan Chase,[12] Bank of America,[13] Wells Fargo Bank,[14] Ally Financial,[15] and CitiMortgage.[16]

[10] Five reports available at http://www.hudoig.gov/reports/featured_reports.php
[11] http://online.wsj.com/article/SB10001424052702304537904577279521920807522.html
[12] Chase report found at http://www.hudoig.gov/Audit_Reports/2012-CH-1801.pdf
[13] Bank of America report found at http://www.hudoig.gov/Audit_Reports/2012-FW-1802.pdf

The HUD-OIG performed these reviews due to reported allegations made in the fall of 2010 that national mortgage servicers were engaged in widespread questionable foreclosure practices involving the use of foreclosure "mills" and a practice known as "robo-signing" of sworn documents in thousands of foreclosures throughout the U.S.

The United States DOJ used the HUD-OIG reviews and analyses in negotiating a settlement agreement with the five major servicers. On February 9, 2012, the U.S. DOJ and 49 State Attorneys General (except Oklahoma) announced a proposed settlement of $25 billion with the five servicers for their reported violations of foreclosure requirements. This settlement later reached over $35 billion with regaulators.

As part of the their settlement agreement, each of the five servicers paid a portion of the settlement to the United States and also had to undertake certain consumer relief activities. The settlement agreement described tentative credits that each mortgage servicer will receive for modifying loans, including principal reduction and refinancing, and established a monitoring committee and a monitor to ensure compliance with agreed-upon servicing standards and the consumer relief provisions.



The HUD-OIG issued a definition for robo-signing that I adopt as a succinct explanation of my detailed definition as stated herein. The definition of robo-signing that the OIG used stated:

> *"We have defined the term 'robo-signing' as the practice of an employee or agent of the servicer **signing documents automatically without a due diligence review or verification of the facts**."*

I accept and will adopt this definition in addition to my own and the process succinctly defines the practices defined in my 2000 and subsequent reports and my servicer affiant affidavits. In the reports, the OIG reiterated the findings of the congressional committee in stating:

> On November 16, 2010, the Congressional Oversight Panel released an in-depth report analyzing the robo-signing allegations. Its report concluded that *"[t]he foreclosure documentation irregularities unquestionably show a system riddled with errors" and emphasized "that mortgage lenders and securitization servicers should not undertake to foreclose on any homeowner unless they are able to do so in full compliance with applicable laws and their contractual agreements."*

In the body of each report, the HUD-OIG detailed the sampling methodology and protocols used to identify the foreclosure abuses and frauds. At the conclusion of their five reports, the HUD-OIG issued findings and conclusions of their reviewed that corroborated my prior testimony, findings, and opinions that the servicers' affidavit process was fatally flawed and unreliable and not a sound business or commercially reasonable practice as described directly below:

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[14] Wells Fargo Report found at http://www.hudoig.gov/Audit_Reports/2012-AT-1801.pdf
[15] Ally Financial Report found at http://www.hudoig.gov/Audit_Reports/2012-PH-1801.pdf
[16] CitiMortgage Report found at http://www.hudoig.gov/Audit_Reports/2012-KC-1801.pdf

**CitiMortgage**

CitiMortgage did not establish an effective control environment to ensure the integrity of its foreclosure process. Because it failed to establish proper policies and procedures that fostered compliance with laws and regulations, its affiants robo-signed foreclosure documents, its notaries failed to authenticate signatures, and it used law firms that may have falsified signatures on legal foreclosure documents. As a result of its flawed control environment, CitiMortgage engaged in improper practices by not fully complying with applicable foreclosure procedures when processing foreclosures on FHA-insured loans. This flawed control environment resulted in CitiMortgage's filing improper legal documents, thereby misrepresenting its claims to HUD.

**Ally Financial**

Ally did not establish an effective control environment to ensure the integrity of its foreclosure process. Because it failed to establish proper policies and procedures that fostered compliance with laws and regulations, its affiants robo-signed foreclosure documents, and its notaries failed to authenticate signatures. As a result of its flawed control environment, Ally engaged in improper practices by not fully complying with applicable foreclosure procedures when processing foreclosures on FHA-insured loans. This flawed control environment resulted in Ally's filing improper legal documents, thereby misrepresenting its claims to HUD.

**JPMorgan Chase**

Chase did not establish an effective control environment to ensure the integrity of its foreclosure process. Because it failed to establish proper policies and procedures that fostered compliance with laws and regulations, its affiants signed foreclosure documents automatically without performing a due diligence review or verification of the facts, its notaries failed to authenticate signatures, and it used law firms that may have included inaccurate information on foreclosure documents. As a result, Chase engaged in improper practices by not fully complying with applicable foreclosure procedures when processing foreclosures on FHA-insured loans. This flawed control environment resulted in Chase's filing improper legal documents, thereby misrepresenting its claims to HUD.

**Bank of America**

Bank of America did not establish an effective control environment to ensure the integrity of its foreclosure process. Because it failed to establish proper policies and procedures that fostered compliance with laws and regulations, its affiants robo-signed foreclosure documents, its notaries failed to authenticate signatures, and it used law firms that may have falsified legal foreclosure documents. As a result of its flawed control environment, Bank of America engaged in improper practices by not fully complying with applicable foreclosure procedures when processing foreclosures on FHA-insured loans, thereby misrepresenting its claims to HUD.

**Wells Fargo**

Wells Fargo did not establish an effective control environment to ensure the integrity of its foreclosure process. Because it failed to establish proper policies and procedures to ensure compliance with laws and regulations, its affiants robo-signed foreclosure documents, and its notaries failed to authenticate signatures. As a result of its flawed control environment, Wells Fargo engaged in improper practices by not fully complying with applicable foreclosure procedures when processing foreclosures on FHA-insured loans. This flawed control environment resulted in Wells Fargo's filing improper legal documents, thereby misrepresenting its claims to HUD.

# VI. PROOF OF SERVICER DECEPTION & FORECLOSURE FRAUD

The question any court, lawyer, regulator, or investor must ask is why are there so many irregularities and false claims in foreclosure proceedings? Anyone believing that such so-called irregularities and short-comings were the byproduct of increased securitization from 2005 to 2007 only need to ask themselves how I discovered these identical issues as early as 1993?

Robo-signing, false, affidavits, lost notes, false pleadings, missing allonges, conflicting endorsements, missing endorsements, false assignments, and other wide-spread and so-called document deficiencies are not new, but tried and proven automated processes that have been employed since the early 90s. My research and investigation since 1993 has revealed evidence and allegations of:

a) double and multi-pledging of the same promissory note to different investors, including Fannie Mae and Freddie Mac;
b) fraudulent financial reporting, gift and other tax implications of servicers and their stealing or taking promissory notes not owned by them, but alleged to be owned by Fannie Mae, Freddie Mac, and other investors;
c) the destruction of evidence such as written assignments, allonges, and the actual wet-ink promissory notes;
d) duel ownership evidenced by foreclosing parties' own notes, assignments, and pleadings;
e) creation of fabricated "ghost notes" or multiple notes never signed or executed by the borrower; and
f) the creation of fraudulent lawsuit complaints, motions for summary judgment, affidavits to support summary judgment, affidavits of indebtedness and lost notes, and the creation of fraudulent assignments of notes and mortgages as well as allonges to notes and endorsements upon note to fraudulently create the "appearance" of legal standing or authority to foreclose.



While I first identified many of these fraudulent schemes in the mid-nineties and reported on them in my 2000 reports, I still see these practices in wide-scale use by both residential and commercial mortgage servicers today, even after the robo-signing scandal and consent orders reached.

## TAYLOR BEAN & WHITAKER

My warnings about double and multi-pledges of notes were publicly proven when Federal prosecutors alleged that a multi-billion dollar mortgage fraud took place and Taylor Bean Whitaker's CEO was sentenced to 30-years in prison[17] for his participation in the fraud. Bank of America, trustee for notes issued by Taylor Bean's Ocala Funding LLC unit, accused executives at Taylor Bean, Colonial and Platinum **of having**

[17] http://www.dsnews.com/articles/taylor-bean-whitaker-ceo-sentenced-to-30-years-in-prison-2011-06-30

**fraudulently schemed to "double- and triple-pledge mortgages and steal assets" to hide their faltering conditions as the housing market declined**.[18]

These document deficiencies (industry parlance) were widespread and rarely deviate with major banks, lenders, and servicers and the discoveries I made, many of which I first identified beginning in 1993. This led to me to create a legal and tactical strategy[19] in 1993 called the "Produce the Note" strategy that has spread throughout our nation's courts.[20]

In fact, in a rare "sua sponte" direct appellate review, the Massachusetts Supreme Judicial Court last year agreed to hear an appeal considering the controversial **"produce the note" defense in foreclosure cases** and whether a foreclosing lender must possess both the promissory note and the mortgage in order to foreclose.[21]Oral arguments on the case may be seen at http://stopforeclosurefraud.com/2011/10/04/eaton-v-fannie-mae-oral-arguments/.

At the end of June, 2012, the Massachusetts Supreme Judicial Court gave a mixed review in its decision[22] when it held that lenders must establish that they hold both the promissory note (indebtedness) and the mortgage. However, responding to pleas from the mortgage industry and real estate bar, the Court declined to apply the new rule retroactively, thereby averting an Apocalyptic-type scenario where thousands of foreclosure titles would have been called into question. The Court also outlined new procedures, including filing a statutory affidavit, to ensure that foreclosures are fair to borrowers going forward.[23]

The Ohio Supreme Court also recently ruled in Fed. Home Loan Mtge. Corp. v. Schwartzwald, Slip Opinion No. 2012-Ohio-5017[24] that the alleged lender must have standing at the start of a foreclosure case when it opined that "standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint. Thus, receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action."

The Nevada Supreme Court also chimed in on this issue in Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48 (Sept. 27, 2012) where they opined that to obtain a non-judicial foreclosure in Nevada, the foreclosing party must be both the beneficiary of a deed of trust and the holder of the note. It also determined that a note and deed of trust could be split by agreement of the parties, but be unified prior to the non-judicial foreclosure to allow the foreclosure to proceed.



[18] http://www.reuters.com/article/2010/10/20/bankofamerica-fdic-taylorbean-idUSN2021282320101020
[19] http://en.wikipedia.org/wiki/Mortgage_note
[20] http://www.google.com/search?q=mortgage+OR+promissory+%22produce+the+note%22+OR+%22produce+the+promissory+note%22&hl=en&num=10&lr=&ft=i&cr=&safe=images&tbs=
[21] http://www.massrealestatelawblog.com/2011/09/08/sjc-to-consider-produce-the-note-foreclosure-defense/
[22] http://www.scribd.com/doc/97932678/Eaton-v-Fannie-Mae-SJC-Ruling
[23] http://www.massrealestatelawblog.com/tag/eaton-v-fannie-mae/
[24] http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2012/2012-ohio-5017.pdf

The misconceptions and misunderstandings about note and mortgage ownership and holder status have existed for decades. It is best illustrated by this one example in 2007 where a corporate representative for Wells Fargo in a Nevada case told a judge and I that when Wells Fargo sells a note to Freddie Mac, Wells Fargo always owns and holds the mortgage and doesn't transfer the note. Yet, she claimed, Freddie Mac is the owner of the note and Wells Fargo the owner of the mortgage.

You should have seen the Clark County Judge's startled face when this was stated. She later told me, they simply don't get it, but tell the client and her lawyer to settle the foreclosure case and then come back and file a quiet title action several months after the settlement the judge and I hammered out.

The irony of the situation is that the foreclosure counsel for the largest foreclosure mill on the West Coast was involved in two related settlements and he came to agree with my version of the facts and analysis. He was fired immediately after the last settlement because he failed to protect his client by further concealing his firm and client's frauds.



Each of these challenges were based on the produce-the-note strategy I designed in the mid-nineties to simply:

a) flush out all real parties in interest in foreclosure actions;
b) identify the real and true Lender, as defined in the promissory note;
c) identify who had standing and lawful authority to accelerate, collect, foreclose, advertise, modify, and enforce a promissory note and mortgage and approve assumptions of mortgages and lawsuit settlements; and
d) determine who had the right to be noticed of grievances, rescission claims, lawsuits, mediation, and contract disputes.

In simple parlance, who is the real entity or person on the other side of the fine print of the lengthy promissory note and mortgage, deed of trust, or deed to secure debt that borrowers execute everyday. I was staggered then, as I am now, at the lengths that Fannie, Freddie, and virtually every bank, servicer (both commercial and residential), Wall Street firm, accounting firm, law firm, and ratings agency would go to intentionally conceal this simple fact. Who owns a borrower's note and stands on the other side of the mortgage contract and its fine print is a fact that should be readily and easily ascertainable and accessed without the need of judicial intervention.

I even offered to create and pay for a relatively simple database for MERS that would track each transfer, pledge, sale, assignment, endorsement, hypothecation, sale, release, and/or transmittal of a borrower's original wet-ink promissory note, or the alleged hand-to-hand shifting of a note endorsed in blank.

What many lawyers, courts, and borrowers don't realize is that loans in foreclosure and in default can be sold to hedge funds and private investors who are willing to take on a high risk investment for high returns and their knowledge of the so-called "issues" such as the

fraud and default. Such knowledge defeats the holder in due course status they may want which is one additional motive for concealing the identities of the true note holder and the attempt to create a false chain of title and ownership to create HDC status.

This is especially true of any insurers or guarantors who may take a promissory note endorsed in blank through any subrogation rights they may have for paying off part or all of the indebtedness. Thus, assignee liability for note owners for the known appraisal, loan origination, documentation, securitization, and servicing frauds is a major issue. This is especially true when the investors themselves are suing the servicers and originators for frauds committed against both the borrower and investor (i.e. appraisal and falsified loan documents).

As of the date of this report, and after numerous state and federal investigations, lawsuits, firings, court orders, regulatory, actions and even consent orders, the "alleged" owners of promissory note and their vendors and lawyers are still routinely falsifying and destroying evidence and creating robo-signed and fraudulent affidavits. They continue to put forth false claims of ownership of the debt obligation and promissory note in courts across the nation in order to give the appearance of standing and authority to foreclose.[252627]

In instances where they are caught, they delay and obfuscate the discovery process. They often refuse to produce witnesses at depositions, seeking unnecessary protective orders, file additional legal attacks and motions, not producing necessary evidence for experts and the courts, and falsifying, fabricating, and even removing evidence such as wet-ink notes, allonges, and assignments from the existing collateral/custodial files.

Thus, to insure that borrowers, shareholders, investors in alleged mortgage-backed securities, other lien holders, property owners, government, and tax payers are not further defrauded and damaged, I have developed a relatively simple set of known documents to inspect. My two-decades' old produce the note strategy has become outdated and obsolete in a modern-day banking world full of advanced computerization; readily available imaging and scanning software and hardware; autopens; robo-signing and surrogate-signing; and continual fabrication and spoliation of evidence.

Today's world of sophisticated and complex financial securitizations, financing, derivatives, swaps, computer systems, high resolution color laser printers, robo-signors, and frauds require additional transparency, not more opaque veils. It also requires not only a forensic examination and review of "paper, copied, and imaged" "toner and ink on paper" documents, but of the imaged and electronic financial, accounting, servicing, trust, securitization, custodial, and tax data, records, and entries located in each servicer, trustee, trust, securitizer, and vendor's systems.



[25] http://www.americanbanker.com/issues/176_170/robo-signing-foreclosure-mortgage-assignments-1041741-1.html?zkPrintable=true
[26] http://abcnews.go.com/US/wireStory?id=14100463
[27] http://www.reuters.com/article/2011/07/18/us-foreclosure-banks-idUSTRE76H5XX20110718

Yesterday's paper and ink world in a legacy banking system is as obsolete as teller stamped savings passbooks. Today's accounting and financial systems are extremely complex, but relatively simple and time-efficient in retrieving sub-level accounting entries and postings related to a borrower's promissory note and loan. It's an electronic data and e-discovery world, not a paper and ink copy world anymore.

Promissory notes can be traded, sold, assigned, and pledged with a few keystrokes "at any time," and are often, admittedly, sold and traded "multiple times" by lenders. Thus, a review and reconstruction of such records via the production of the financial and accounting records showing each entry related to the note and its movement on and off a lender's balance sheet and general ledger is required to determine legal issues such as:

a) authority to execute assignments of mortgages/notes and endorsements on original wet-ink promissory notes;
b) standing and authority to provide default notices, accelerate, foreclose, cancel the debt, return the note, release the lien, notice claims and rescission, mediate and settle disputes;
c) assignee liability, rescission claims, and damages;
d) lien priorities and validity; and
e) clear title to land and property.



It may also need to be determined if the original wet-ink note is actually a negotiable instrument and is traveling under the UCC's Article 3 or Article 9.

As illustrated in the Bernie Madoff scandal, all that's needed in today's digital financial world are confidence, trust, computers, toner, and paper to give an illusion of ownership of nonexistent assets to investors (or borrowers and courts) who lost tens of billions of dollars. Some of Madoff's victims were not only some of the wealthiest and well-known men and women in the world, but sophisticated banks and financial institutions such as Banco Santander, Fortis, HSBC, Royal Bank of Scotland, BNP Paribas, Nomura, Societe Generale, Banco Populare, Barclays, and Allianz.[28][29]

Since servicers and their lenders have adjusted their legal arguments and procedures to get around my produce the note strategy, I've altered my due diligence strategy to "produce the collateral/custodial" file and all reports and entries from the document custodian's tracking system. The collateral/custodial file should include the original wet-ink note, allonges, assignments, and other pertinent loan documents.

In addition, whoever is claiming to own the borrower's promissory note must also produce all of their physical and/or electronic accounting journal entries, related to the borrower's note, its balance, current value, payment, write-offs, losses etc. that are contained in the financial, accounting, and general ledger systems of the alleged owner of the note. Servicing histories of an alleged servicer or holder of the note cannot

[28] http://s.wsj.net/public/resources/documents/st_madoff_victims_20081215.html
[29] http://online.wsj.com/public/resources/documents/madoffclientlist020409.pdf

adequately and reliably determine note ownership or even the legal authority for the servicer to service the loan and act as agent for the alleged owner.

A servicer's authority and the authority of any agent, officer, or entity desiring to enforce, endorse, and/or assign the note is only as good and legally binding as the owner's right in the note. When a borrower's note is sold, the alleged note owner no longer owns the note. Hence, they no longer have any beneficial rights in the note to assign to anyone, including the servicing of the mortgage.

A servicer's representative cannot merely accept as true, the prior entries into their servicing system alleging ownership of a note and the note's balances. They cannot look at an unknown generation of an undated image of an undated and unknown generation of a copy of the alleged original wet-ink promissory note of a borrower and claim ownership or holder status.

All they can attest to on personal knowledge is that they looked at a computer screen and what they witnessed on that screen. Merely, an unknown generation of an undated image of an undated and unknown generation of a copy of the alleged original wet-ink promissory note presumed to be executed by the borrower. They cannot state or attest, with any degree of certainty, personal knowledge, or reliability that the image they are "viewing on a computer screen" and printing out is an authentic first generation copy of the actual wet-ink promissory note executed by the borrower.

The most reliable and valid method I know of for servicers and document custodians to provide admissible evidence as to copies of original wet-ink promissory notes would be to follow the following protocol.

First, a complete set of all the paper and electronic records related to a borrower's original wet-ink promissory note and the contents of the collateral/custodial file must be assembled. This includes not only the original wet-ink notes of borrowers, but any bailee letters, certification and exception reports, resubmissions, transfer and transmittal documents, and most importantly, all of the electronic entries in each document custodian's tracking system. In essence, a chain of custody of the collateral file and original wet-ink promissory note is being created.

An employee or officer of the document custodian for the servicer and/or lender, can then assemble such documents, both paper and printouts of the electronic entries, and make a first generation copy of all of the contents in the paper collateral file and electronic system file and then bates number or personally stamp each document. This creates a record wherein the document custodian's employee can execute a document custody "custodian of records affidavit" that can authenticate the records contained in the file, both paper and electronic.

Separate of the file record made, the employee of the document custodian should place a marker at the point in the physical file where the alleged original wet-ink promissory note is contained. The original wet-ink promissory note should be removed and physically

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inspected for the characteristics of a wet-ink original. This could be an examination by lighted magnifying glass to analyze the differences between toner and ink placement characteristics and a physical touch with fingers on the backside of the note to determine if there were any indentation characteristics that corresponded with the signature placed on the document.

Due to the industry's decade's old practices of forgeries and fabrications, some of my colleagues believe that the only way to validate the authenticity of a borrower's wet-ink original note, is to have handwriting and ink-dating analysis conducted by experts. While this may be necessary on occasion if a borrower disputes their signature on a note as not theirs, it is not necessary for the document custodian's employee to conduct more than a "face validity" examination of the alleged wet-ink note in the custodial/collateral file.

After the face validity test of the alleged original wet-ink note is completed, the document custodian's employee must make a first generation and high definition copy of the original AS IS! In other words, staples, paper clips and any other marks, labels, Post It notes, or other fastening devices should never be removed and should remain "as is!" This is especially true if there are any allonges attached to the back of the note.

As such, this first generation copy must be individually and "manually" copied "page-by-page" and never fed through an automatic document feeder of a copy machine or scanner. If it is necessary for scanning the first generation copy, then the fold marks should be visible. However, lack of fold marks and other distinctive markings may indicate that the allonge was never attached or was removed and replaced.

The wide spread use by servicer witnesses and affiants of copies of images of notes from imaging systems for promissory notes should be abolished for there is no safeguard or chain of custody process built in to know that the note that was copied was a wet-ink original note or a mere copy. Some have admitted that allonges and endorsements were placed on copies as well as originals.

The sealed custodial file should be shipped to the lawyer for an in-camera inspection of the collateral files contents. This would eliminate claims of spoliation as is known to exist such as removing the prior pre-notarized assignments of mortgages with newly created and often robo-signed assignments.

Under a video camera review with the lender/servicer or its custodian, an inspection of the complete document custodial/collateral file containing all original wet-ink promissory notes, allonges, assignments, certifications, transmittal docs, release requests, title policies, insurance policies, guaranties, and all original wet-ink and copied documents maintained in these files in a few hours or less. Collateral/custodial files can easily be retrieved, released, and shipped within 24 to 48 hours.

Review of the custodial/collateral files and promissory note will show more than the alleged possession of a physical and original "wet-ink" note and its alleged and presumed lawful endorsements. It will also show what is missing and if the trust or lender was ever

transferred the note and if the note was properly negotiated to the alleged owner. A comparison of the custodial/collateral file records to the electronic accounting and financial, not servicing records, is mandatory due diligence in any foreclosure or mortgage action.

In fact, even sophisticated public accounting firms who turned a blind-eye to the frauds and abuses I warned of over a decade ago have been implicated. I noticed Deloitte of the fraudulent foreclosure and robo-signing abuses with relationship to Bear Stearns, EMC Mortgage, and WAMU and warned that they may be cooking their books as others in the mortgage market I suspected.

According to lawsuits by the U.S. trustee in the TBW bankruptcy, Deloitte's certifications of Taylor Bean's books were critical to maintaining its appearance as a legitimate, profitable mortgage business when in fact, the lawsuits contend, Taylor Bean was selling fake or grossly overvalued mortgages and misstating its liabilities. *"Deloitte missed this fraud because it simply accepted management's conflicting, incomplete and often last-minute explanations of highly-questionable transactions, even though those explanations made no sense and were flatly contradicted by documents in Deloitte's possession,"* one of the lawsuits says.[30]



TBW chairman Lee Farkas and his officers engaged in a scheme to defraud various entities and individuals, including Colonial Bank, a federally-insured bank; Colonial BancGroup Inc.; shareholders of Colonial BancGroup; investors in Ocala Funding LLC, including Deutsche Bank and BNP Paribas; the Troubled Asset Relief Program (TARP); and the investing public. One of the goals of the scheme to defraud was to obtain funding for TBW to assist it in covering expenses related to operations and servicing payments owed to third-party purchasers of loans and/or mortgage-backed securities.

TBW executives and their co-conspirators referred to one aspect of the fraud scheme as "Plan B." "Plan B" generated money for TBW through the fictitious "sales" of mortgage loans to Colonial Bank. The conspirators accomplished this by sending mortgage data to Colonial Bank for loans that did not exist or that TBW had already committed or sold to other third-party investors. As a result, the Plan B loan data was recorded in Colonial Bank's books and records, and gave the false appearance that Colonial Bank had purchased legitimate interests in mortgage loans from TBW.

A TBW executive named Desiree Brown admitted that she and her co-conspirators caused Colonial Bank to pay TBW for assets that were worthless to Colonial Bank. Brown admitted that, as part of the fraud scheme, she and her co-conspirators also caused TBW to sell fictitious trades, which had no pools of loans collateralizing them, to Colonial Bank. Brown and her co-conspirators caused false information about the trades to be entered on Colonial Bank's books and records, giving the appearance that the bank owned interests in legitimate trades, when the trades had no value and could not be sold.

[30] http://www.huffingtonpost.com/2011/09/27/deloitte-sued-mortgage-fraud_n_982804.html

Court documents indicate that the conspirators caused Colonial Bank to pay TBW more than $400 million for assets that in fact had no value, and caused Colonial Bank and Colonial BancGroup to hold these assets on their books as if they had actual value. Additionally, the conspirators caused TBW to misappropriate more than $1 billion in collateral from Ocala Funding LLC, a mortgage lending facility owned by TBW.

According to court documents, the fraud scheme also included an effort by the conspirators in the fall of 2008 to obtain $570 million in taxpayer funding through the Capital Purchase Program (CPP), a sub-program of the U.S. Treasury Department's TARP program. In connection with the application, Colonial BancGroup submitted financial data and filings that included materially false information related to mortgage loan and securities assets held by Colonial Bank as a result of the fraudulent scheme admitted to by Brown. Colonial BancGroup never received the TARP funding.

In August 2009, the Alabama State Banking Department, Colonial Bank's regulator, seized the bank and appointed the FDIC as receiver. Colonial BancGroup also filed for bankruptcy in August 2009.



In order to understand more of my concerns and the lack of knowledge of the servicer affiants and the total lack of candor of mortgage servicers and their lawyers, one needs only to examine recent court cases. There are recent examples and evidence of fraud and potential multi-pledges of borrower's promissory notes here in the state of Florida and in New York.

## Gillis Florida Case

In the Circuit Court of the Twentieth Judicial Circuit in Charlotte County, Florida in Case No.: 08-000252 - CA, Deutsche Bank Trust Company Americas As Trustee sued Ronald P. Gillis. and in the complaint's first paragraph states " Plaintiff Deutsche Bank Trust Company Americas As Trustee, sues Defendants, Ronald P. Gillis…"

As many now know, when Deutsche Bank Trust Company Americas acts as a "Trustee" it is acting as trustee for a specific securitized trust entity. However, we've seen increases in concealment of securitized trusts in litigation due to the empty trust and failed securitization scenarios discussed herein.

Yet, follow this trail of evidence in the case. The complaint states that Deutsche Bank Trust Company Americas As Trustee of an unspecified trust is the trustee, but the caption on the affidavit in support of summary judgment states "Deutsche Bank Trust Company Americas As Trustee for GMAC-RFC Master Servicing.

Now, in the affidavit itself, the affiant states that she is the "Assistant Secretary of Residential Funding Company, LLC the servicer for the Plaintiff and Vice President of Loan Documentation of Wells Fargo Bank, N.A., the sub servicer for the Plaintiff (hereinafter "Wells Fargo") and as such am authorized to execute this affidavit and to make the representations contained herein."

So, let me illustrate the issues here, we have a sub-servicer for another servicer testifying as to the records and books for the alleged owner who is a trustee of an unknown trust that is alleged to own the borrower's note and mortgage. Now, as if this was not enough, lets explore a couple of emails that were discovered in the case.

> Sent: Tuesday, June 05, 2012 9:57 AM
> To: David Miller
> Cc: MELISSA.D.DIETRICH@wellsfargo.com
> Subject: FW: Message in desktop---RUSH ALE
>
> David here is the message that I need a reply on that was sent in desktop, thanks
> We are in the process of trying to complete the judgment affidavit on this file however the one that was received has the plaintiff as DEIJTSCHE BANK
> TRUST COMPANY AMERICAS AS TRUSTEE FOR GMAC-RFC MASTER SERVICING.
> We have the plaintiff as U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR RALI 2006-QS8. Once the change is acknowledged by your office we will execute the affidavit received. Your office can assign the bid at sale or the affidavit can be resubmitted to judgmentaffidavit@wellsfargo.com mailbox with an amended plaintiff name. Either option is acceptable to us - please advise on how your office will proceed within 48 hours or the file will be stopped, thanks

In reply, the following email was sent:

> From: David Miller [DMiller@albertellilaw.com]
> Sent: Tuesday, June 05, 2012 10:07 AM
> To: Dietrich, Melissa; Ryan Weeks
> Subject: RE: Message in desktop--RUSH FILE
> Attachments: ATT00003.txt; ATT00004.htm
> Importance: High
>
> Since there is no association in this action, please execute the affidavit "as is" and we will assign the bid at sale to the appropriate entity. Just to clarify, the bid should be assigned from Deutsche Bank, the current plaintiff, to U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RALI 2006-QS8, correct?

Yet, on the same day (June 5, 2012), we have the affidavit executed and notarized that in paragraph two states:

> "Affiant is authorized to make this Affidavit on behalf of the Plaintiff. In the regular performance of my job functions, I am familiar with business records maintained by Wells Fargo for the purpose of servicing mortgage loans. These records (which include data compilations, electronically imaged documents, and others) are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Wells Fargo."

Yet, the named plaintiff in the case is Deutsche Bank Trust Company Americas as Trustee NOT U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RALI 2006-QS8. So now, according to the evidence presented, we have a sub-servicer for another servicer testifying as to the records and books for the alleged owner who is NOT the trustee for the trust known as U.S. BANK NATIONAL ASSOCIATION, AS

TRUSTEE FOR RALI 2006-QS8. In the very next paragraph the affiant states "Plaintiff is entitled to enforce the note that is subject of this action" which is obviously false!

In the same timeframe, in another Florida case, filed in the circuit court of Palm Beach that has garnered the attention of the media, a foreclosure lawsuit was filed that named HSBC BANK USA, National Association as the Trustee for the Holders of Deutsche ALT-A Securities Mortgage Loan Trust Series 2007-BAR1 Mortgage Pass-Through Certificates in case no. 502009CA030403XXMBAW.

In the affidavit to support summary judgment, the affiant stated:

> "I am authorized to sign this affidavit on behalf of the plaintiff, as an officer of Bank of America, N.A., which is plaintiffs servicing agent for the subject loan. Bank of America, N.A. maintains records for the loan in its capacity as plaintiffs servicer. As part of my job responsibilities for Bank of America, N.A. I am familiar with the type of records maintained by Bank of America N.A. in connection with the Loan."

However, attached to the affidavit was another internal document that Bank of America uses for communications between employees and vendors. The set of communications went something like this…

> From: Nicholas Leonhard
> Subject: FITNO Issue
>
> The plaintiff on the complaint/AIO and our system of record do not match. Please advise us regarding a reliable procedure whereby the appropriate foreclosing party can be situated in the matter such that we can proceed to judgment of sale'
> Thank you very much.
>
> Sincerely,
> Nicolas S, Leonhard
> Investor#:7008811
>
> Plaintiff: Foreclosure In Name Of : BANK OF AMERICA, N-A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING' LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP
>
> ---
>
> From: BAC Affidavits
> Subject: Re: FITNO Issue
>
> After reviewing the documents uploaded to LPS, the plaintiff on the complaint and the AOI match the information given to us.
> Please let me know if I can further assist you.
> Have a great day.
>
> ---
>
> From: Nicholas Leonhard
> Subject: Re: Re: FITNO Issue

We did an Internal review and see that the investor has requested that we FC in our name, given the point in the FC we are in.

Is this possible? Please provide us with a reliable path to proceed.

---

From: BAC Affidavit
Subject: Re: Re: Re: FITNO Issue

Good afternoon Nicholas

This should be corrected by quit claim deed after the sale takes place. Changing the plaintiff at the time of sale may result in significant increase in fees due to the condominium or homeowner association involved in this case. correcting post sale may result in documentary stamp taxes being incurred, but the taxes should be less than the association dues unless the loan is very large. Please note your system and advise us to make this correction when you advise of your bidding instructions

---

Intercom Message ;: Client Ref # 7419g144 :; Vendor Ref #
FROM: Leonhard, Nicholas
TO: Affidavits, BAC;
CC:
DATE: 8/17/20t1 7:30:00 AM
SUBJECT: Re: Re: Re: Re: FITNO Issue
TYPE: General Update
MESSAGE:

We approve your recommendation to do a QCD. Thanks for your help.
Sincerely,

Nicolas S. Leonhard

---



After a leading foreclosure fraud blog (www.4closurefraud.org) discovered the document,[31] Bank of America filed a Motion to Purge the documents from the court record, and to prevent further use and disclosure of, an attorney-client privileged communication that was inadvertently attached to the affidavit of indebtedness filed with the court. In the motion, the servicer stated that:

> On or about October 10, 2011, Plaintiff filed the affidavit of Kimberly Sue Daley in support of its motion for summary judgment in a document entitled "Payment History and Amended Affidavit of Indebtedness Supporting Plaintiffs Motion for Summary Judgment and Notice withdrawing Previous Affidavit of Indebtedness" (the AOI). The AOI referenced and attached as an exhibit a BANA business record showing, among other things, the date of default under the subject loan and amounts due thereunder. The AOI inadvertently and unintentionally also included an electronic intercom communication by and between BANA employee Nicholas Leonhard and "BAC Affidavits" (the Intercom Exchange). The Intercom Exchange was not referenced or described in the AOI.

[31] http://4closurefraud.org/2012/04/24/lender-processing-services-lps-internal-email-accidentally-leaked-in-a-fraudclosure-case/

The hearing on the Motion to Purge was originally schedule for May 24, 2012. BOA claimed in its Motion to Purge that the attorney-client privilege governed the Intercom Exchange, including possibly the meaning and purpose of that privileged communication. They made a motion that the hearing be held in camera and closed from public view when the court advised that it would not conduct a confidential in camera hearing without a separate motion and hearing on the propriety of an in camera hearing. News media and first amendment organizations then proceeded to object to the confidential, in camera hearing.

In essence, Bank of America and its lawyers want to put a lid and seal on the known fraud committed upon the court claiming it was attorney-client privilege. A final decision has not occurred to date.

Most recently, while investigating a case in Miami Dade, a poor older woman asked me for my assistance and showed me a case in which judgment was issued against her by a unit of Fremont and then the bid assigned to securitized trust that was not the plaintiff. While this has historically occurred with Fannie Mae, Freddie Mac, and MERS' foreclosures, it has permeated the entire residential and commercial mortgage markets.



## New York Case

However, Florida is not the only state where false and fraudulent representations to courts in affidavits and verification are occurring. In a recent case reported out of the state of New York, one judge detailed in his order the misrepresentations made as well as the various alleged pledges and transfers of the borrower's note. In her opinion, Judge Marcy Friedman wrote:

> After service of its motion to confirm the referee's report, plaintiff submitted the affirmation of its attorney, Robert Holland, dated October 28, 2011, in which he stated that he had conferred with Milagros Rivera-Perez, plaintiffs Assistant Vice President and Foreclosure Administrator, regarding the accuracy of the allegations of the complaint and the supporting affirmations. He stated that she had confirmed the accuracy, with the exception that the complaint (paragraph 15) and the supporting affidavit of James Raborn both mistakenly stated that plaintiff-is the owner of the mortgage being foreclosed in this action.
>
> He further represented that review of plaintiff's records and files indicated that prior to commencement or the action, plaintiff had assigned the mortgage and note to its affiliate Emigrant Savings Bank- Manhattan (Emigrant Savings), and that simultaneous with the execution of the assignment, Emigrant Savings endorsed the note in blank back to EMC.
>
> He stated that he was advised that the assignment of the mortgage was never recorded, and that at all times since the note and mortgage were executed, EMC has "always had actual physical control and physical possession" of these documents. As this affidavit was based solely on hearsay, the court directed plaintiff to submit an affidavit on personal knowledge explaining these transfers, and their effect on plaintiffs standing to bring the action at the time it was commenced by fling of the summons and complaint on November 7, 2008. The matter was adjourned for further argument. (Dec. 14, 2011 Transcript of Oral Argument)
>
> In response, plaintiff submitted the affidavit of Filippo Ruggiero, a Vice President of EMC. Mr. Ruggiero stated that plaintiffs attorney was mistaken when he stated that the allonge was prepared

and executed simultaneously with plaintiffs execution of the assignment of mortgage. He stated that although the mortgage was assigned from EMC to Emigrant Savings in 2008, it was never recorded, and the original assignment "has at all times remained in the loan file for this particular loan, which is in the vault where Plaintiffs loan files are maintained."

He further stated that the Emigrant entities were involved in a borrowing agreement with the Federal Home Loan Bank of New York ("FHLB"), and that as part of this agreement, mortgage loans were pledged, but not assigned by the various Emigrant entities to FHLB as security for loans given by FHLB to them.

In a change in policy, FHLB advised that it would require the Emigrant entities to deliver the collateral to FHLB. As a result, between November 2009 and January 2010, the Emigrant entities prepared assignments and allonges for all collateral which they *intended to give* as security for loans from FHLB. Based on his review of his computer, Mr. Ruggiero attested that the allonge transferring the note was created on December 10, 2009, that it contains his signature, and that it was fully executed on behalf of Emigrant Savings within a day or days thereafter. He concluded that EMC was the holder of the note until December 10, 2009, and that prior to that time, it had only executed the assignment to Emigrant Savings of the mortgage on March 10, 2008.

## OCC CHASE CONSENT ORDER

The Comptroller of the Currency of the United States of America ("Comptroller"), through his national bank examiners and other staff of the Office of the Comptroller of the Currency ("OCC"), as part of an interagency horizontal review of major residential mortgage servicers, has conducted an examination of the residential real estate mortgage foreclosure processes of JPMorgan Chase Bank, N.A., New York, New York ("Bank"). The OCC has identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings. The OCC has informed the Bank of the findings resulting from the examination.

The Bank, by and through its duly elected and acting Board of Directors ("Board"), has executed a "Stipulation and Consent to the Issuance of a Consent Order," dated April 13, 2011 ("Stipulation and Consent"), that is accepted by the Comptroller. By this Stipulation and Consent, which is incorporated by reference, the Bank has consented to the issuance of this Consent Cease and Desist Order ("Order") by the Comptroller. The Bank has committed to taking all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the OCC, and to enhance the Bank's residential mortgage servicing and foreclosure processes. The Bank has begun implementing procedures to remediate the practices addressed in this Order.

## ARTICLE I COMPTROLLER'S FINDINGS

The Comptroller finds, and the Bank neither admits nor denies, the following: (1) The Bank is among the largest servicers of residential mortgages in the United States, and services a portfolio of 6,300,000 residential mortgage loans. During the recent housing crisis, a substantially large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from 2008 through 2010. (2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time;

(d) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(f) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

As you can see, my decades old warnings and reports were validated by our nation's regulators.



## VII. WHY CURRENT SERVICER PRACTICES, PROTOCOLS, EVIDENCE, ASSIGNMENTS, & AFFIDAVITS CAN'T SUPPORT SUMMARY JUDGMENTS FOR FORECLOSURES OR FORECLOSURE RULINGS AT TRIAL

As you can see by the cases I highlighted in the previous section, today's highly complex, volatile, and light-speed secondary mortgage and securitization trading markets are vastly different in their evidence requirements than the old traditional legacy banking methods related to portfolio loans. Banks rarely hold promissory notes in their own portfolio anymore since notes were originated to sell rather than originated to hold in the last decade. As such, the necessary evidence requirements are vastly different to:

a) define and prove who is the actual note owner as defined in a borrower's promissory note;
b) ascertain the date they became owner;
c) determine any actual damages, payments owed, or claimed deficiency;
d) ascertain any holder in due course;

e) identify all real parties in interest;
f) determine any actual default or the date of default; and
f) determine the actual amount due from a borrower after all payments from third-party and co-obligors under the note and securitization agreements are accounted for.

Proper note owner and holder due diligence requires a review and examination of not only the original wet-ink promissory note and all allonges ever created, but of:

a) all intervening written assignments ever created for the note and mortgage;
b) all corporate resolutions and power of attorneys for the Assignor's signatory;
c) the check or wire for payment of the note;
d) the contract with corresponding schedules of loans sold that included the subject note;
e) copies of the alleged owner's general ledger and corresponding journal entries, schedules and sub-ledgers recognizing the note as an asset on the alleged owner's books for all times the note is claimed to be owned;
f) custodial, trust, and transmittal receipts, reports, and certifications for notes securitized;
g) MERS Milestones if a MERS mortgage;
h) the closing book and all certification and exception reports for any securitization;
i) corporate authorizations, powers of attorney, and corporate resolutions for all signatories appearing on assignments and note endorsements;
j) data and records related to when all assignments and endorsements were created; and
k) all electronic data and records in the system supporting and related to the previous requests.

Simply taking data off a servicing system screenshot is not a commercially reasonable practice and cannot prove the facts placed in most servicer affiant's affidavits or their witnesses' testimony at trial.

After production of the above records, the following timelines have to be constructed for comparison:

a) note endorsement timeline;
b) assignment of note and mortgage timeline;
c) note possession and custody timeline;
d) accounting and financial record timeline;
e) MERS Milestone timeline;
f) payment timeline; and
g) contractual timelines.

A report, based on the above timelines can then be developed for corporate representatives to validate or explain any variances in the timelines in depositions and for determination of the best admissible evidence to the court at trial.

## VIII. THE FORECLOSURE FRAUD, ROBO-SIGNING, & DOCUMENT GAME

My colleagues and I have often termed the game of hiding note ownership as the old "shell game" or 3-card Monte trick to explain the mortgage industry's slight of hand. Little the servicing industry does is unique to a particular servicer. Via national conferences, seminars, and even "attorney summits," the servicing industry coalesces into creating a system of common practices, policies, and protocols. Often, the industry takes its lead from Fannie Mae and Freddie Mac and their practices are incorporated into their own.



I often ask lawyers, judges, advocates, and regulators to explain to me non-nefarious reasons why over the past two-decades:

a) the majority of promissory notes were all endorsed in blank;
b) the majority of foreclosure pleadings in Florida and other judicial states claimed notes were lost and missing;
c) MERS was created;
d) MERS foreclosed in their name instead of the real owner;
e) MERS claimed to own and hold notes when they never owned a note;
f) MERS claimed to assign promissory notes;
g) Fannie and Freddie instructed servicers to foreclose in their names:
h) blank assignments were used;
i) blank allonges were used;
j) allonges were not attached to notes;
k) servicers claimed to own notes in their names, not the owners;
l) Fannie and Freddie were not named as owners in foreclosures;
m) owners of notes were concealed in foreclosure proceedings;
n) chains of title were concealed and never disclosed;
o) robo-signing was created;
p) general ledger and accounting journals were and are never produced;
q) servicing histories of prior servicers were concealed;
r) affidavits, assignments of mortgages, and other documents contained fraudulent signatures;
s) surrogate signing was condoned and practiced;
t) there were no assignments or endorsements from any depositor to securitized trusts;
u) there were no complete chains of intervening endorsements and assignments from note originators to securitized trusts;
v) there were contradictory assignments, allonges, and endorsements;

w) endorsements were undated;
x) blank assignments were pre-notarized; and
y) endorsements contradicted assignments of mortgages;

Instead, these accounting control frauds were instituted practically without exception, by all major banks, lenders, servicers, trustees, and Fannie Mae and Freddie Mac. Control fraud occurs when a trusted person in a high position of responsibility in a company, corporation, or state subverts the organization and engages in extensive fraud for personal gain. The concept of control fraud is based on the observation that the CEO of a company is uniquely placed to remove the checks and balances on fraud within a company such as through the use of selective hiring.[32]

These tactics can position the executive in a way that allows him or her to engage in accountancy fraud and embezzle money, hide shortfalls or otherwise defraud investors, shareholders, or the public at large.

Examples of control fraud include Enron, the savings and loan crisis, Fannie Mae/Freddie Mac, Lehman Brothers and subprime mortgage crisis and Ponzi schemes such as that of Bernard Madoff.



## IX. WHY FORECLOSURE FRAUD, ROBO-SIGNING, & DOCUMENT DEFICIENCIES EXIST

My investigation and research over the last 20-years into the servicing, securitization, document custody, and foreclosure practices of both commercial and residential mortgage servicers reveals a variety of motives designed to confuse borrowers, lawyers, courts, and regulators about note ownership. These motives include:

- Concealing that the current and/or prior bank/lender is/was cooking their books;
- Concealing accounting schemes, frauds, and abuses from borrowers, shareholders, and regulators;
- Concealing that the securitizations were shams and were in reality not true sales, but financing of receivables subjecting the notes to the reach of federal bankruptcy trustees;
- Concealing real owners of foreclosed properties in downtrodden neighborhoods to prevent payment of property taxes and fines to local and state municipalities;
- Avoiding local transfer and state intangibles taxes and recording fees on transfers and assignments of mortgages and notes;
- Concealing double and multiple pledges of the same promissory note;
- Concealing broken chains of title;
- Concealing pledges of the note to other banks, private lenders, and even Federal Home Loan Banks and the Federal Reserve for other borrowings and advances;

[32] http://en.wikipedia.org/wiki/Control_fraud

- Attempting to create holder in due course status to avoid known origination, servicing, and securitization fraud and claims;
- Masking the true lender to prevent receipt of notices of rescission;
- Masking the fact that notes were paid off by insurers and other co-obligors and the debt may now be subrogated;
- Attempting to avoid assignee liability; and
- Making it easier to remove assets from a bankrupt estate.

## X. THE "SYSTEMS OF RECORD" FOR MORTGAGE SERVICERS, ARE NOT NOTE OWNERS' SYSTEMS OF RECORD

The mortgage servicing industry's common term for "business records" is "system of record." In the mortgage servicing industry, third-party systems of record have evolved over the past few decades and new technology players are entering the servicing system marketplace with various system offerings to complement and compete with the established providers such as LPS' MSP,[33] FICS' Mortgage Servicer,[34] Fiserv's MortgageServ,[35] and Harland's Servicing Director[36] systems. Other servicers, like BOA and Ocwen have created proprietary systems.

One can view these so-called "systems of records" as basically the nervous system and brain of the ***mortgage servicing*** process, **not note ownership**, wherein each of these servicing "hub systems" of record touch virtually each step of the entire mortgage process in what are commonly marketed as a cradle-to-grave process.

In a Special Report titled "Focus: Servicing," of the February 2011, Vol. 18, No. 1 of Mortgage Technology magazine a number of articles address the robo-signing and foreclosure fraud controversies and their effect on the mortgage servicing industry and the computer and processing systems utilized by lenders, servicers, and their vendors.

In an article by Austin Kilgore titled "HUB Evolution" on pages 11 to 15, Kilgore explains that the servicers' *"the systems of record weren't ready for the onslaught of foreclosures servicers are still dealing with today."*

The report referenced a number of issues that are pertinent to this paper and the process in which a servicer uses the LPS MSP system in their self-acknowledged "partnership." According to Kilgore, by far the biggest system of record is the Mortgage Servicing Package ("MSP"), a product of Jacksonville, Fla.-based Lender Processing Services ("LPS"). LPS is what Lebowitz calls the "IBM of servicing," because of its dominant position among servicing vendors. MSP boasts some of the industry's largest servicers among its clients, including JPMorgan Chase and Wells Fargo.

[33] http://www.lpsvcs.com/Products/Mortgage/Servicing/ServicingPlatform/MSP/Pages/default.aspx
[34] http://www.ficsloanware.com/index.cfm/mortgage-loan-servicing-software/
[35] http://www.loanservicing.fiserv.com/fiserv-loan-servicing-platform.aspx
[36] http://www.harlandfinancialsolutions.com/solutions/loan-servicing/servicing-director/servicing-director

On page 12, Kilgore writes ***"traditionally, the business model for servicers is to automate as many processes as possible and remove the human element in every feasible way to keep costs at a minimum. The systems of record assist in that because they are essentially large accounting systems,"*** explained Duke Olrich, president and CEO of DRI Management Systems in Newport Beach, Calif.

This automation, much of which was created via patented processes and systems, is the epicenter of today's mortgage and foreclosure crisis. By creating mill and factory-like automated assembly line systems, the mortgage and default servicing industry not only took the human decision making element out of the process, but automated the fraud and abuse which allowed the "gaming of the system" (the entire mortgage system).

This perpetuated rampant fraud, first at the loan broker, origination, and appraisal stage of the mortgage lending process, then led to additional frauds in the securitization, servicing, and foreclosure stages of the market.

Fraud is like cancer. If left unchecked or ignored, it spreads amongst other cells and parts of the body or system until terminal. Radical surgery and treatment are then necessary to excise the cancer, lest it spreads throughout the body or system.

Robo-signing is a merely a "symptom" of a much larger cancer (fraud). Since the cancer (i.e. foreclosure, securitization and accounting fraud) is so widespread, mere "testing" via a "temperature" is not sufficient to diagnose the extent of the disease and determine the appropriate treatment. If you find cancer in one part of the body or system, you must conduct additional tests and scans to see if the cancer has spread and if successfully treated, conduct continual testing to insure it has not returned.

In order to detect the cancer widely known to exist in today's fraudulent mortgage marketplace, it is necessary to scan and test each part of the system, when questions arise and fraud, misrepresentation, or deception is found in any one part of the servicing, securitization, foreclosure, assignment, affidavit, or witness process.

You must not only follow the money trail, but the collateral trail (original wet-ink promissory note), IT trail, and accounting trail to insure that the entire system is healthy and working properly. The industry's systems of record are the starting point for this testing by examining the entire body of information, facts, and data that resides in the hundreds and thousands of database and information fields contained in each system.

Unfortunately, as evidenced by the processes put forth in the affidavits and exhibits provided by the nation's leading servicers in the New Jersey Supreme Court matter (THE MATTER OF RESIDENTIAL MORTGAGE FORECLOSURE PLEADING AND DOCUMENT IRREGULARITIES before the New Jersey Supreme Court and Superior Courts with Docket F-059553-10), virtually every servicer and their affiants simply follow a matrix of commonly accepted automated process steps.

They do this without any independent effort to test, validate, authenticate, and verify the information, data, figures, and facts the affiant is attesting to. As part of my investigation and research, since 1993, I have conservatively reviewed over 20,000 mortgages, mortgage assignments, and foreclosure files.

My research has led to the conclusion and my opinion that Bank of America ("BOA"), JPMorgan Chase, Wells Fargo, Ally, EMC Mortgage, LNR and other residential and commercial mortgage servicers are preparing false and potentially fraudulent affidavits in support of foreclosures and summary judgments. Plaintiffs may not own the promissory notes claimed to be owned; hold the notes claim to be held; and the amounts and deficiencies claimed due are not the rightful amounts of the borrower's obligation.

These servicing entities, their vendors, and lawyers have consistently and intentionally, despite warnings by me, deceived state and federal courts across the nation by preparing and putting forth known false and fraudulent lawsuit complaints and sham pleadings, motions, affidavits, assignments of mortgages, deeds, deeds to secure debt, and copies of promissory notes for a variety of motives as explained herein.

My analysis of BOA mortgage foreclosures and their related files in the states of Georgia, New Jersey, Florida, South Carolina, and other states shows a total breakdown with commercial and residential foreclosures. My research and investigation shows that servicers, trustees, Fannie Mae, Freddie Mac, LPS, Fidelity, other third-party sub-servicers, and their law firms in foreclosure and bankruptcy proceedings across America have engaged in forgeries, fabrication of evidence, destruction of documents and evidence; fraudulent notarization and putting forth false and fraudulent pleadings claiming that a servicer, MERS, trustee or other claimed creditor is the actual owner and holder of the note when in fact, they are merely a servicer or alleged servicer that may be without lawful authority to service the loan or enforce the note.

My allegations and opinions on the practices of the mortgage securitization and servicing markets first made in the 90s have been now documented, validated, and proven in discovery, affidavits, reports, and testimony since that time in numerous state and federal cases and recent court decisions as described herein as well as regulatory consent orders.

## XI. REVIEW & ANALYSIS OF THE "FATALLY FLAWED" FORECLOSURE, ASSIGNMENT, AFFIDAVIT, AND WITNESS PRACTICES, POLICIES, PROTOCOLS, & PROCEDURES OF MAJOR U.S. MORTGAGE SERVICERS

I have reviewed and analyzed virtually every major servicer's foreclosure policies, protocols, practices, training manuals, and foreclosure and affidavit job aids to form many of the conclusions, facts, opinions, and findings I make in this report and in affidavits I prepare.

In addition, I have attended court proceedings and personally witnessed the testimony of what have become known to me to be "robo-witnesses" who appear in dozens of cases in various markets answering carefully scripted and often unchallenged questions by servicer attorneys.

In every judicial foreclosure case, evidence of the debt and ownership of the debt is a prerequisite to prosecuting a foreclosure action. As the New Jersey Special Master stated in his reports, ***"an essential element of proof in a foreclosure case is the existence of a note and mortgage and a default on the part of the mortgagor.*** "*Most typically the claim of default is based on allegations of non-payment of amounts due on the note.*" **"To prove that fact, the servicer of the mortgage will usually offer proof in the form of a *statement of account produced from its records*."**

Such evidence is typically classified as "hearsay" under Florida's Rules of Evidence and in other state's rules of evidence. "Hearsay" evidence is considered inherently unreliable and is therefore generally inadmissible in court proceedings unless it meets one of the strict exceptions to the hearsay rule.

However, one such exception is the business records exception to the hearsay rule under Florida law that is codified under section 90.803(6)(a), Florida Statutes, and provides that evidence may be admitted as a business record if it meets the following elements: (a) the ***record was made at or near the time of the event***; (b) was made by or from *information transmitted* by a ***person with knowledge***; (c) was kept in the ordinary course of a regularly conducted business activity; and (d) that it was a regular practice of that business to make such a record.

In Florida, servicers routinely file affidavits of indebtedness ("AOI") and sometimes Lost Note Affidavits ("LNA") in support of a motion for final summary judgment of foreclosure using business records of the servicer, who is not typically the note owner. Thus, the servicer, let alone a servicer's low-level employee, may not have access to facts and information about the ownership, sale, possession, and transfer of the actual wet-ink note of an alleged investor.

The standard "template model affidavit" used to support a motion for summary judgment or lost note count are template word processing and document assembly database electronic documents. In these template model affidavits, information from a servicer's servicing system's computer "screen" is placed into the blank fields automatically or by manual input from information contained in "screen shots."

Most often, servicer affiants and trial witnesses do not have the personal or independent knowledge of the data, facts, or information's accuracy, validity, and truthfulness necessary to testify as to the records introduced into evidence or the facts necessary to prove each element necessary to foreclose.

On many occasions, the information contained in the system and/or placed upon the affidavit or entered into evidence at trial has come from other persons, entities, or third parties, sometimes including defunct prior lenders, who the affiant could never have any personal knowledge to how the facts, information, figures, data, balances, fees, and calculations were made or arrived at.

As such, in my opinion, it is not only necessary, but mandatory that an attorney representing a borrower depose each affiant as well as corporate representatives of the alleged lender and servicer to gather details and facts about the money and payment trail; custody and possession of note trail; IT, data, and information trail.

It is also vital that an attorney, in discovery, obtain all of the massive amounts of information, data, facts, and other evidence contained in the various systems used by all lenders and servicers to originate, securitize, service, and foreclose on the borrower's loan and property. This is mandatory in order to validate and authenticate each claim and allegation a servicer or lender may make in any document or testimony in a judicial or non-judicial foreclosure action.

Additionally, information contained in a servicer's system may also have been automatically scanned into a prior lender's system at origination with their LOS system without proper testing, validation, or audit to be able to attest to the accuracy of the ownership of the note and the principal balance due on the loan. If data or document deficiency errors or even fraud were identified in the origination data, information, documents, and records, a prior lender may instead of informing the borrower and remediating any fraud or error, may simply sell the promissory note, at an agreed upon discount, to a successor lender in what is called a "scratch and dent" note.

The successor lender, if aware of the error, fraud, or default, would have its ability to claim holder in due course ("HDC") status severely limited or even eliminated, dependent on a court's judgment.

In addition, "rubberstamped" or handwritten entries are often placed upon the final affidavit for a) the name of the affiant; b) his/her title; c) county and state of execution; and d) even the name of the Plaintiff or foreclosing entity. The remaining boilerplate legalese in the AOI is developed by attorneys for each servicer.

Often, servicer affiants have no personal knowledge of the facts alleged by the legal language in the affidavit, nor the meanings of key legal terms and words contained in the AOI. In my experience, many low level as well as executive level affiants can even define what the owner and holder or a promissory note is, even though they have attested to that fact.

In fact, a number of servicers and their lawyers are now stating that if an expert is not a lawyer, they cannot testify as to whether a lender owns and holds the note since those are legal opinions. If the industry wants to take that tack, then any affiant testifying as to note ownership and holder status will have to be a lawyer.

Generally, amongst the major servicers such as JPMorgan Chase, Bank of America, Wells Fargo and others, there are "checklists" and "scripts" that a servicer's affiant follows when executing an AOI as detailed herein. Servicer AOIs in support of summary judgment typically make three major claims related to a) ownership of the note, standing and authority to foreclose; b) an alleged "default" event; and c) amounts claimed owed and due for past due payments, principal balances and other assessed fees.

With regards to ownership of the note, standing and authority to foreclose, there are serious shortfalls in the servicer's methods that are conducive and a precursor to fraud and misrepresentations in creating fraudulent and robo-signed affidavits that I describe herein. In relationship to standing and authority to foreclose, a servicer's AOI will often claim that the servicer has lawful standing to foreclose upon a borrower's promissory note via an either/or proposition that states they own and/or hold the borrower's promissory note or are the servicer for a party that either owns and/or holds the note.

If the affiant and servicer were certain of their facts, it would take a mere minute to attest to which fact is accurate - - is a plaintiff the actual owner of the note or an agent or the servicer authorized to enforce the note? If an agent, the affiant should be able to note and provide evidence of such authorization via an attached POA, PSA, corporate resolution or any agreement evidencing the authority to act as agent for the note owner.

However, such information is derived from what often is unreliable and unverifiable sources that are purely hearsay. In addition, such information is often intentionally deceiving and even fraudulent, forged, or fabricated by an existing or prior party to the loan transaction.

Servicer affiants and trial witnesses, often without question, simply accept and attest to the data, information, facts, and/or evidence taken from a servicing system, as described herein, wherein the affiant does not have the skills, knowledge, or ability to access the information, facts, and data necessary to reach the conclusions and testimony relating to note ownership and standing that they attest to in their affidavits and testimony.

As the HUD OIG validated, servicer affiants (often called affidavit signers by servicers) simply sign off and attest to the information in the system, without sampling and testing the data and information for error, fraud, or miscalculations.

According to the servicing and preparation of AOI manuals and guides I have reviewed, a servicer's affiant generally determines standing and authority to foreclose, via note ownership, by looking at images on computer screens to make their determination and check-off the delegated tasks or steps in a virtually automated process.

At trial, when they file the alleged original wet-ink note prior to the summary judgment hearing or trial, they do not introduce any authenticated or even unauthenticated evidence from the document custodian's document custody or tracking systems of records that would evidence:

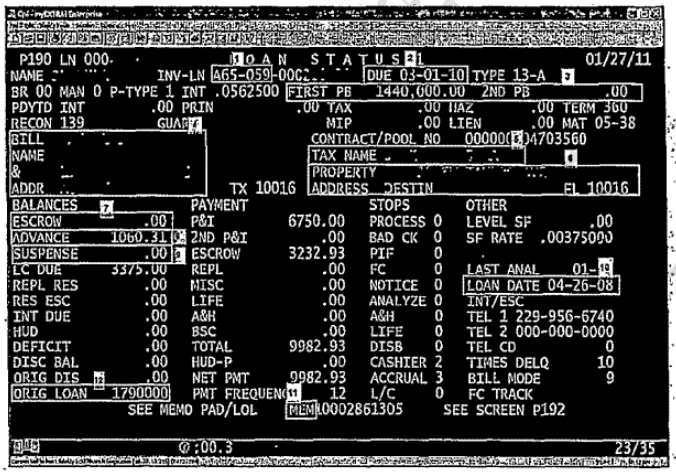
- The date the original wet-ink note came into possession of the owner, servicer, or document custodian;

- The date any endorsements in blank were executed or that an endorsed in blank note was received; and

- The physical possession of the borrower's original wet-ink note on the date the foreclosure action was filed.

Theses systems and their evidence and records are known to exist, so the question begs why don't servicers and their affiants and witnesses introduce authenticated versions of these records into the record at summary judgment or at trial? At summary judgment, servicer affiants generally look at two areas of the servicing systems and their related screens with one being an investor screen shot of data fields with information on a) the name to foreclose in; b) an investor code or number; c) contact information for an investor; d) pool numbers; e) remittance information; f) and other investor related data.

One typical screen of for servicing systems is the investor screen which generally lists the "name of the entity in which the servicer is to foreclose in" and often provides an "investor number or code." In the LPS MSP system, this is known as the P190 screen shot. In BOA's system its t*he Investor Information Maintenance Screen Print from iSeries, which"alleges" to provides the identity of the proper plaintiff*.




1. Investor Number and Category – each investor is assigned a specific number and category
2. Due Date – the date the first delinquent payment was due
3. Principle Balance – this is the current first and second (in the case of a second mortgage) principle balance on the property
4. Bill Name and Address – the name and address in which bills are mailed to
5. Tax Name – the name in which local taxes are paid in
6. Property Address – the physical location of the property the loan is on
7. Escrow – the current escrow balance
8. Advance – the current escrow advance (amount paid into escrow by Wells Fargo, where the mortgagor's escrow balance did not cover the costs; borrower owes)
9. Suspense – the suspense balance
10. Loan Date – the date in which the loan was originated.
11. Area in the P190 screen where you go to enter the name of the next screen you want to display.
12. Orig Loan – amount of the original loan

An affiant who is an employee of a servicer would have no independent or personal knowledge if that information was valid, correct, and truthful since the information was placed into the system by some unknown person or entity, other than the affiant.

The affiant would not have personal knowledge if the note was transferred again; never transferred; or if the note was double pledged to more than one lender such as in the Taylor Bean Whitaker fraud. In the investor screen, the investor name only contains the name of the last party the note was claimed to be sold to or a trustee or custodian for the loan which may not be the specific entity that has ownership for the actual note such as a trust.

At minimum, and truly not sufficient, any servicer using the LPS MSP system whose affiant accesses or reviews the MSP P190 screen should attach this screen and every other screen and all data in the MSP system tied to the figures on that screen, to their affidavit. However, again, this is a servicing, not note ownership system of record.

The other complementary system, typically an electronic imaging system, or another section of the servicing system has the affiant or person preparing the affidavit examine imaged copies of the alleged note "on screen."

When imaged copies of a document such as a note are viewed, an affiant has no personal or independent knowledge if he/she is reviewing: a) an imaged copy of the "original wet-ink note" as it was endorsed, executed, and existed on the specific date in time it was scanned ("image of original") or; b) if they are examining an imaged copy of a separate or 2nd generation "copy" of the note ("image of copy").

The reliance of images and copies of notes in an imaging system to determine note ownership is totally unreliable, unscientific, unverifiable, and subject to easy and intentional image manipulation, forgery, and fraud.

Affiants or those who prepare the affidavit or assignment examine on-screen computer images of promissory notes and allonges that are not attached to the note wherein the affiant simply accepts the imaged copy without questioning its validity or authenticity and assumes that it is an image of an original rather than an image of a copy.

It has been my experience to see endorsements placed upon copies and imaged copies and not the original wet-ink notes and to see different variations of a chain of endorsements on copies of the alleged note that did not match each other or did not match the physical wet-ink note when it was later produced.

At trial, servicers' witnesses and their attorneys do not introduce a) authenticated accounting and financial records of the note owner showing they own the note on the trial date; b) authenticated copies of servicing agreements and PSAs showing the servicer has the right and authority to service the loan and foreclose; c) authenticated document custody records showing when the note was endorsed and came into physical possession

of the note owner, servicer, or alleged holder; d) authenticated corporate resolutions and POAs of the signatories and endorsers; e) authenticated copies of the investor screens in the servicing systems; f) authenticated copies of life-to-date servicing histories from prior servicers; and/or g) any authenticated records or testimony on how a prior servicer or lender's servicing histories, information, figures, calculations, and data were entered, boarded, tested, and validated for their accuracy into the current servicer's system.

Also, since it is the industry's standard practice to endorse notes in blank in an attempt to make such notes negotiable instruments, any review of images and data on a computer screen placed by others is simply not sufficient to determine note ownership. The note may have or still could be pledged, transferred, traded, and hypothecated on one or more occasions since its origination.

A question of fact exists for courts as to whether certain notes are even negotiable instruments or not and travel under the requirements of each state's version of the UCC under Article 3 or 9. Servicer affiants and witnesses simply do not have access to this information or what the investor has or has not done with the note since the images on their screens were made. If a blank endorsement exists, a servicer affiant or witness cannot accurately attest to that note's ownership without a physical in-hand examination of the original wet-ink promissory note and its endorsements on the face of the note or a firmly attached allonge as of the date the affiant executes the AOI or the date the servicer took possession. Such an examination would be necessary to insure the alleged owner or its agent has possession and custody of the note on very specific legal dates such as notice of default, acceleration, and foreclosure filing.



Additionally, if the note is claimed lost, an affiant of an alleged owner of a note cannot attest to the circumstances surrounding that note's loss, theft, or destruction. As for the viewing of an allonge, an "imaged" allonge in a servicer's system creates more questions about note ownership in that if the allonge was detached or never attached to allow it to be scanned in an automated process, such a detachment or un-attachment may make the allonge invalid and a nullity.

In cases involving securitized trusts, governed by a PSA with strict trust provisions, the conveyance and transfer of a borrower's promissory note into a trust's corpus is mandated by closing and cutoff dates as well as intervening assignments and endorsement of the note and mortgage from the originator to the depositor to the trust.

In such cases, a careful review and analysis, by a skilled and knowledgeable affiant or witness of the servicer must be conducted that includes the review of the trust's PSA, records, agreements, certifications, exception reports, books, transmittal documents, original wet-ink notes, recorded and unrecorded assignments, and other evidence. Servicer affiants and witnesses simply reading computer screen shots would have no personal knowledge that a borrower's promissory note was actually transferred to the possession and control of the trust and became part of the trust's corpus.

Testimony about holder and/or owner status is complex. None of the affidavits I have witnessed to date have any detail or facts related to how holder status was obtained or even the type of holder status being claimed. In fact, recent generations of foreclosure complaints I see simply recite the Florida statue regarding holder status in a sentence like this one that states:

> Plaintiff is entitled to enforce the Note and Mortgage, pursuant to FS. § 673.3011, as the holder of an instrument, a non-holder in possession of an instrument who has the rights of a holder, and/or a person not in possession of the instrument who is entitled to enforce the instrument.

It doesn't even choose which one of the three options provided by the law. They leave it up to the borrower's counsel, experts, and the court to decide which option without providing any authenticated and admissible evidence, let alone facts and details on a) when it came to hold and/or own the original wet-ink promissory note; b) where the original wet-ink promissory note is located; and/or c) that it had physical possession of the original wet-ink promissory note on the date the foreclosure action was filed.

Due to securitized trusts and endorsements in blank, the dates of possession and custody of a borrower's promissory note is critical to determine ownership, authority to accelerate, modify, and foreclose as well as any assignee liability for those that participated in any fraud against the borrower. Yet, the servicers in their foreclosure, affidavit, and trial witness processes, completely ignores this mandatory step.

Servicers often refuse to provide the loan transfer history and document custody records that would clarify the chain of possession, transfer, and ownership of the note. My review and examination of the handful of custody and collateral files produced shows why commercial and residential mortgage servicers are reluctant to produce such files.

Collateral files we have viewed show that pre-notarized and blank assignments and allonges have been created; no original notes were in the file; the note was never properly endorsed; loose allonges were sitting in the file; and totally blank assignments were in the file. Thus, in securitized trusts, an affiant must review and analyze the following evidence in order to have personal knowledge to determine lawful ownership that they could attest to in an AOI.

a. The actual "original" wet-ink promissory note and all endorsements placed upon the physical note, not a copy or imaged copy;
b. Valid corporate resolutions and POAs for signatories;
c. All recorded and unrecorded intervening assignments of mortgage;
d. Research into the authorization for each person whose name was placed on any endorsement on the note;
e. All document custody records showing possession, control, transfer, custody, and transmittal of the borrower's promissory note;
f. All certifications and exception reports of the trust;
g. A review of the PSA, trust agreement, and all relevant agreements tied to the securitization;

h. Financial ledgers and books of the trust showing note as an asset on date of closing;
i. Cancelled check or wire transmittal; and
j. Schedule of loans sold.

In my opinion, each of the above records should be attached to the affiant's affidavit or introduced at trial. If a lender claims the loan is a portfolio loan, the affiant or witness could simply look at the lender's general ledger and subsidiary ledgers and schedules to ascertain that the note is an asset of the lender and attach such copies to the affiant's affidavit.

If the affiant or witness is not an officer of the actual lender, as defined in the borrower's promissory note, then the affiant or witness may not have personal knowledge of transactions related to a borrower's promissory note, but only information and data transferred or relayed to the their employer or a third party vendor by the lender or vendor. Servicer affiants and witnesses cannot with personal information and certainty attest to ownership of a note without specific pool, securitization, or other identifying information and what the investor may or may have not done with the note since notes can still be traded, pledged, sold, and transferred after their purchase and entry of that information into the system.



Under servicer's current affidavit procedures, they also would not have actual and constructive knowledge that an investor had actual physical possession, custody, and control of a borrower's original wet-ink promissory note on the date(s) of acceleration and/or foreclosure filing.

Also, many mortgages are assigned from the MERS' system. Yet, I have yet to see in a servicers' AOI system process steps, the requirement that for MERS' loans, the servicers access and view the information contained in the MERS' system and review the MERS' Milestone Report. This would be necessary to compare the data and information about beneficial rights to a borrower's note to information contained therein to make their determination and read and accept the images and information contained in the system.

All-in-all, using the processes currently employed, a servicer's affiant and wintess would not have the personal knowledge necessary to attest and testify to:

a) the date such data, images, and information were entered into the system;
b) the manner in which such data, images, and information were entered into the system;
c) the persons or entities who entered such data, images, and information into the system; and
d) the reliability, accuracy, and truthfulness of the data, images, and information entered into the system as further described herein.

The servicing information is really based on the information and belief of the affiant and not on their individual and personal knowledge in that the affiants generally review, in

five minutes or less, computer "imaged copies," not the original wet-ink version, of the alleged borrower's promissory note that are contained in the servicers' computer imaging and retrieval systems along with a database "field" entry in the so-called "investor screen" that tells the affiant "the name of the plaintiff in which to foreclose in."

For trial, a set of documents for dozens of hearings and trials are produced for each servicers' "trial witness." Many times, they only reviewed the file, note, or other docs for the first time less than a week before or days before the trial. They did not conduct a cursory audit or testing of the figures to insure the facts, allegations, amounts, and balances they are attesting to are accurate.

Most often, in the vast majority of cases, no certified and authenticated attachments for any such authority is attached to the affidavit nor is specifically referenced by footnote or paragraph (i.e. a specified PSA) to the AOI. In the vast majority of cases, ***no certified and authenticated attachments of the business records and books*** actually relied upon by the servicer's affiant in the AOI are actually attached either. I never see the actual general ledger provided in a servicer's AOI nor the contract, power of attorney, corporate resolution that grants the servicer with its alleged authority to not only enforce the note, but service the loan and execute assignments and affidavits. Many of these documents are not produced at trial either.



The systems of records used by servicers are for "mortgage servicing" and "mortgage servicing rights," not accounting of the note as an actual asset on the books of the alleged owner who would have another and distinct system of record allegedly accounting for the note's ownership as an asset.

Promissory notes are often endorsed in blank form the last endorser to allow for the free movement, sale, transfer, pledge, securitization, and/or hypothecation of a promissory note from one lender or security holder to another, if the note is actually negotiable and moving under Article 3 of the UCC. However, it can move under Article 9 of the UCC as well.

Such transfers are typically not tracked or referenced in the screen shots and image screens that a servicer's affiant utilizes in determining note ownership for an AOI. In my opinion, due to the reasons stated herein, lawyers and the Court must make a determination if:

> a) the affiant has any personal knowledge and understanding of the facts, allegations, data, and information they are attesting to;
> b) if the information, facts, data, and calculations are not only accurate and truthful, but came from reliable sources and systems that were the real business records of the company employed by the affiant; and
> c) if such information can be tampered with, altered, or programmed to mislead and deceive the court and borrowers.

## XII. THE RIGHT & WRONG WAY TO PREPARE FORECLOSURE AFFIDAVITS & TESTIMONY AT TRIAL

When I prepare an affidavit, I have anywhere from at minimum a dozen to twenty hours in my research, preparation, and writing. In one case, a judge asked me, "Mr. Lavalle, I have never seen a 280 page affidavit before… how long did it take you to write that?" "I replied, "judge, to be honest, almost 20-years!" 20-years of my research and investigation goes into the supportive side of my affidavit and my bona fides, but then I and assistants who assist me in securing data and information for me spend anywhere at minimum a dozen to twenty hours up to over 40 to 120 hours in some cases.

Here in Florida, the Fourth District Court of Appeals addressed my concerns and opinions and issue of the admissibility of servicer AOIs when on September 7, 2011, it issued an opinion in *Glarum v. LaSalle Bank National Association, as Trustee et al.*, 2011 WL 3903161 (Fla. 4th DCA September 7, 2011), narrowly construing the business records exception in a residential foreclosure case. The *Glarum* court held that an affidavit of indebtedness of an employee **of a loan servicer that relied on data from a computer system was inadmissible hearsay**.

Greenberg Traurig, a prominent mortgage industry law firm stated that *"this decision could have broad sweeping application in the lending and loan servicing industries and affect thousands of foreclosure cases, among other types of cases, currently pending in Florida courts."*[37]

The Florida Fourth District Court of Appeals echoed my concerns and findings about servicer affidavit processes in the Glarum decision when it opined:

> Orsini did not know who, how, or when the data entries were made in Home Loan Services' computer system. He could not state if the records were made in the regular course of business. He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. ***Orsini could state that the data in the affidavit was accurate insofar as it replicated the numbers derived from the company's computer system.*** Despite Orsini's intimate knowledge of how his company's computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

While the Fourth District Court of Appeals ruled that such computer entries of a servicer were unreliable, it did not address other issues I find problematic such as:

a) the servicer assuming the data and information into its computer records of one or more prior servicers, lenders, and originators;
b) how the servicers' records and GSE or securitized trust's records, books, and accounts may show an entirely different account and default record with some

[37] http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=152634&printver=true

loans being reflected as paid off by third party insurers, co-obligors, or guarantors per the provisions of a borrower's note;
c) different chains of titles or references to the ownership of a borrower's note; and
d) information regarding the actual possession and custody of a borrower's note at default, notice, and foreclosure filing.

In my opinion, if there is any information that was assumed into a servicer's system related to a borrower's account that came from a prior servicer or lender, then the servicer's affiant and witness cannot properly testify or lay the proper foundation for introduction of such evidence. If the data is not personally checked and tested by the servicer's affiant or witness for it validity and accuracy, it cannot be relied upon or entered into evidence by a servicer's affiant or witness since they do not know how such information and data was entered into the system, let alone its validity and accuracy.

If the data was boarded into their system, then the servicer's affiant and witness will need to know the procedures and protocols for how the data from the prior servicer was not only boarded into the system, but the due diligence and quality control methods employed to ascertain the validity of the data being boarded. What audits and checks were done in this process? What was the error rate? What was the testing and sampling procedure? Was each loan record individually tested? What systems and vendors conducted the testing? Was the borrower's loan one of the loans tested?

As you can see, there are many questions that the vast majority of servicer affiants and witnesses will not be able to testify to on personal knowledge. The information contained in many servicers' systems, such as the MSP system, related to calculations, formulas, ARM indexes, algorithms, and simulations that determine the principal balances owed, fees owed, interest owed, amounts due etc… were created and developed by third-party sources and vendors such as LPS and its contractors and not the servicer and its employees, whereby such information and knowledge is beyond a servicer's affiant or witness' knowledge and purview.



## XIII. PERSONAL KNOWLEDGE OF FACTS IN AFFIDAVITS & WITNESS TESTIMONY

In Florida, section 90.803(6)(a), Florida Statutes, states that documentary evidence may be admitted into evidence as business records if the proponent of the evidence demonstrates the following through a record's custodian:

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

Many of the affidavits I have reviewed as well as the affidavit training manuals of major servicers, shows that the "affidavit signer" for the servicer simply takes information from a computer screen and places it into fields on a template affidavit or merely signs a pre-prepared template from their staff or lawyers. The same applies to the

As shown above, in Florida and other states, affiants must have personal knowledge of the fact or information they are attesting to. I thought that some legal cites may be appropriate to define such personal knowledge. The same applies to the servicers' witnesses testifying at trial and attempting to introduce so-called "business records" as evidence.

An affidavit therefore must be based on an affiant's personal knowledge. The purpose of this requirement is to prevent the trial court from relying on hearsay as the basis for its decision and to ensure there is an admissible evidentiary basis for the claim or affiant's position rather than mere belief or conjecture. *Florida Dept. of Fin. Servs.* v. *Associated Indus. Ins. Co., Inc.,* 868 So. 2d 600 (Fla. 1st DCA 2004); 49 *Fla. Jur 2d,* Summary Judgment § 39 (2006). Accordingly, an affiant should state in detail the facts showing affiant has personal knowledge. *Id. See, e.g., Hoyt* v. *St. Lucie County, Bd. of County Comm'rs,* 705 So. 2d 119 (Fla. 4th DCA 1998)(affidavit legally insufficient where it fails to reflect facts demonstrating how affiant would possess personal knowledge of the matters at issue in case); *Carter* v. *Cessna Fin. Corp.,* 498 So. 2d 1319 (Fla. 4th DCA 1986)(affidavit legally insufficient where affiant failed to set out a factual basis to support claim of personal knowledge of matter at issue in case and failed to make assertions based on personal knowledge).

An affiant's failure, however, to expressly state in the affidavit that it is "based on personal knowledge" does not necessarily render the affidavit deficient. A court may find the affidavit is legally sufficient if it is clear from the statements set forth therein that affiant has personal knowledge of the relevant matter at issue in the case. *See, e.g., Myrick* v. *St. Catherine Laboure Manor, Inc.,* 529 So. 2d 369 (Fla. 1st DCA 1988)(affidavit could be considered where it was clearly evident from face of affidavit that defendant merely recounting actions and conversations in which she was involved); *Wright* v. *Yurko,* 446 So. 2d 1162 (Fla. 5th DCA 1984)(affidavit sufficient where it was clear from statements made therein that they were based on affiant's own knowledge); *Alvarez* v. *Florida Ins. Guar. Ass 'n, Inc.,* 661 So. 2d 1230 (Fla. 3d DCA 1995)(affidavit sufficient where affiant stated her title as officer and manager, stated she was familiar with certain relevant procedures, described those procedures, and stated that copies of documents attached to affidavit were true and correct copies); 49 *Fla. Jur 2d,* Summary Judgment § 39 (2006).

Affidavits based on "information and belief" and to the "best of knowledge" are legally insufficient. *See Thompson* v. *Citizens Nat'l Bank of Leesburg,* 433 So. 2d 32 (Fla. 5th DCA 1983); *P & T Elec. Co.* v. *Spadea,* 227 So.2d 234 (Fla. 4th DCA 1969), *writ discharged,* 235 So. 2d 510 (Fla. 1970); *Tarkoff* v. *Schmunk,* 117 So. 2d 442 (Fla. 2d DCA 1960); *see also Hayn* v. *Frederick, 66*So. 2d 823 (Fla. 1953)

# XIV. CASES ON-POINT THAT VALIDATE MY FINDINGS

## OHIO

In Ohio, a recent Ohio Appeals Court opinion in HSBC Mtge. Servs., Inc. v. Edmon, 2012-Ohio-4990 backed up many of my findings, facts, and opinions in these matters, especially as to the affiant's personal knowledge of records and the use of scanned imaged copies of promissory notes. In its opinion, the Court stated:

> In Ohio… **{¶ 7}** "to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present ***evidentiary-quality materials*** showing: (1) The movant is the **holder of the note AND mortgage**, or is a party ***entitled*** **to enforce the instrument**; (2) if the mover *is not the original mortgagee*, **the chain of assignments AND transfers**; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. Wachovia Bank v. Jackson, 5th Dist. No. 2010-CA 00291, 2011-Ohio-3202, ¶ 40-45. {highlights are my emphasis}
>
> In determining the sufficiency of Vadney's affidavit, we turn to the requirements set forth by Civ.R. 56(E), which states that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit*." (Emphasis added.) The latter requirement is satisfied by a statement in the affidavit declaring that the copies of the documents submitted are true and accurate reproductions of the originals. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).
>
> The Ohio Appeals Court then went on to examine the affidavit, raising many of the issues I have put forth in this paper.
>
> *The Vadney Affidavit*
>
> **{¶ 11}** In determining the sufficiency of Vadney's affidavit, we turn to the requirements set forth by Civ.R. 56(E), which states that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit*." (Emphasis added.) The latter requirement is satisfied by a statement in the affidavit declaring that the copies of the documents submitted are true and accurate reproductions of the originals. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).
>
> **{¶ 12}** In his motion in opposition to HSBC's motion for summary judgment, Edmon argued that Vadney was not competent to testify to or verify the promissory note attached to her affidavit. Edmon does not argue that, on its face, the affidavit is insufficient to establish Vadney's personal knowledge of the note. Rather, Edmon argues that based upon Vadney's testimony at a later deposition, Vadney's affidavit was not based on personal knowledge. We agree.
>
> **{¶ 13}** In her affidavit, Vadney averred that she has personal knowledge over Edmon's account and that the promissory note attached to the complaint is a true and accurate copy of the original. Unless controverted by other evidence, a specific averment that an affidavit is made upon personal knowledge of the affiant satisfies the Civ.R. 56(E) requirement that the affiant must be competent to testify to the matters stated. *Seminatore* at paragraph two of the syllabus. Furthermore, verification of documents attached to an affidavit supporting or opposing a motion for summary judgment, as required by Civ.R. 56(E), is satisfied by an appropriate averment in the affidavit itself, for example, "such copies are true copies and reproductions." *Id.* at paragraph three of the

syllabus.

**{¶ 14}** We initially note that neither the promissory note nor the mortgage were attached to Vadney's affidavit. However, Vadney did attest that the copies of the note and mortgage attached to the complaint were true and accurate copies. The Ninth District has held that Civ.R. 56(E) is satisfied if the "affidavit[ ] state[s] that it was made upon personal knowledge of the affiant and reference[s] * * * documents filed with the complaint." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004- Ohio-4333, ¶ 14 (holding that an affidavit complied with Civ.R. 56(E) because it stated that "the affiant is a servicing agent for Charter One, that in such position [affiant] has custody of and is familiar with the account of [mortgager], and that the note and mortgage attached to the complaint are accurate copies of the original instruments"). *Huntington Natl. Bank v. Conservatory Assoc. LLC*, 9th Dist. No. 10CA0096-M, 2011 Ohio-3249, ¶ 4 (holding that affidavit satisfied Civ.R. 56(E) where affiant "asserted that he has personal knowledge of Huntington's books and records as they pertain to [mortgager] and that the loan documents attached to Huntington's complaint are true, accurate, and complete copies of the loan documents at issue"). Therefore, HSBC satisfied its initial burden in Vadney's affidavit when she averred, "[HSBC] is the owner in possession of the promissory note and mortgage, true and accurate copies of which were attached to the Plaintiff's Complaint as Exhibits thereto[.]"

**{¶ 15}** Nevertheless, in his memorandum in opposition to HSBC's motion for summary judgment, Edmon asserted that Vadney had never physically observed the original promissory note, and instead, when creating her affidavit, Vadney relied upon a scanned document in an online record, which was scanned from HSBC's New York office. As evidence in support of this assertion, Edmon filed a transcript pursuant to Civ.R. 30(E), from Vadney's deposition held on March 11, 2011.

**{¶ 16}** In the deposition Vadney averred, "All our original documents are kept in our Depew office." When explaining the process of how she requests "original" documents, Vadney explained, "All I know is when I need an original document for one of our attorneys, I will request it, and it gets scanned and over-nighted to me, but at any one time I could pull up a copy of every original document that's in that customer's folder off of my system." Furthermore, in response to a question regarding the handling of notes in HSBC's Depew office, Vadney replied, "They scan it. They upload them into our system to make sure we have copies of anything that's received in Depew, New York. All their originals are kept and bar coded under the customer's account." From the preceding testimony it would appear that Vadney's affidavit is corroborated by her depositional testimony. However, even though Vadney averred that as a loan servicing agent for HSBC, she has personal knowledge of Edmon's account, and that true and accurate copies of the promissory note and mortgage were attached to the complaint, Edmon met his reciprocal burden of demonstrating that a genuine issue of material fact exists by showing that Vadney did not review the original promissory note when swearing that the copy filed with the complaint is a true and accurate copy of the original.

In fact, Vadney relied on a copy of the note scanned into HSBC's database by the manager in the Depew, New York office:

> [Edmon's attorney]: Despite the fact that you signed an affidavit in this case in support of motion for summary judgment, by your own testimony you never laid eyes on the original note until just a month ago, is that right?
>
> [Vadney]: Sir, what I said, I don't need the original to do my job. Every document, every original, that we have on Mr. Edmon we have uploaded on our system. I have a copy of all the documents. *I did not have the original at the time*. I have all copies of all the originals that are in his file. (Emphasis added.)

**{¶ 17}** Furthermore, a review of the entire transcript indicates that Vadney is unfamiliar with the

processes of the Depew, New York office where the original promissory note was stored and retrieved. The following testimony reveals Vadney's lack of familiarity with the Depew office's processes:

> [Vadney]: I'm in foreclosure. I have a different set of processes [than those of the manager at the Depew, New York office]. Mine pertains all to the account. Anything with original documents and how they get it that has nothing to do with me. That – They have a process up in Depew, New York on how they handle - - store all their processes. I'm not there. I do not know what their process is.

**{¶ 18}** In further demonstration that Vadney is unfamiliar with the processes of the New York office, her testimony is as follows:

> [Vadney]: The manager at our Depew office is Phil LaGrossa
>
> [Edmon's attorney]: What is his name?
>
> [Vadney]: LaGrossa
>
> [Edmon's attorney]: Okay who gave [the original promissory note] to him: Who retrieved it from the vault?
>
> [Vadney]: Sir, my job is foreclosure. I don't know what his processes are. I'm not going to answer for what he does there.
>
> [Edmon's attorney]: Okay. When –
>
> [Vadney]: I can't answer what he does.

**{¶ 19}** Vadney was unable to compare her copy of the note to the original when she swore in her affidavit that she did so. Thus, Vadney, having not actually compared the copy to the original document, and being unfamiliar with the processes in HSBC's New York office, is unable to swear to the note as required by Civ.R. 56(E).

**{¶ 23}** Evid.R. 901(B)(1) provides that authentication can occur by "[t]estimony of [a] witness with knowledge." To authenticate the promissory note, HSBC presented the Vadney affidavit, in which Vadney testified that she has "personal knowledge" of Edmon's account and that the promissory note is a true and accurate copy of the original. However, Edmon has successfully raised an issue of fact regarding whether Vadney was "a witness with knowledge" and whether the documents are true and accurate copies. In her deposition, Vadney testified that she did not know who scanned the note into her computer system, nor did she know how such information was collected and compiled. In order to properly authenticate business records, a witness must "testify as to the regularity and reliability of the business activity involved in the creation of the record." *State v. Hirtzinger*, 124 Ohio App.3d 40, 49, 705 N.E.2d 395 (2d Dist.1997). Because Vadney was unfamiliar with the processes performed by the Depew office, we conclude that the court erred in admitting the promissory note as evidence for consideration in HSBC's motion for summary judgment.

**{¶ 24}** Accordingly, there remains a genuine issue of material fact as to the authenticity of the promissory note filed with HSBC's motion for summary judgment.

## WASHINGTON

In The United States District Court Western District Of Washington in Case No. C10-1952RSL James Mcdonald vs. Onewest Bank, fsb et al. judge Robert Lasnik issued a scathing opinion and sanctioned Onewest for their declaration and discovery abuses. In his opinion, Judge Lasnik stated:

> After reviewing the parties' written submissions regarding the pending motions for summary judgment, the Court determined that oral argument and further explication of the record were necessary to ensure the proper and just resolution of these motions. A half day evidentiary hearing was scheduled, the primary purpose of which was to inquire of Mr. Boyle how he came to make so many factual misstatements in his declarations and to ensure that plaintiff had access to all relevant and discoverable materials. The Court specifically mentioned that defendants had failed to produce electronic records regarding plaintiff's loan, promissory note, and/or deed of trust.
>
> In the meantime, defendants filed a motion to supplement the record, which was noted on the Court's calendar for December 14, 2012, almost two months after the cross-motions for summary judgment had been ready for consideration. Dkt. # 204. The evidence defendants sought to submit – a declaration from a representative of Deutsche Bank regarding the chain of custody of the original signed promissory note – was of obvious interest in this case. No explanation for the late disclosure was provided. The Court took the motion to supplement under advisement and requested that Mr. Corcoran be made available at the evidentiary hearing.
>
> The testimony of Mr. Boyle and Mr. Corcoran confirmed what this Court has long suspected: defendants have not taken their obligations as litigants in federal court seriously enough. Rather than obtain declarations from individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a "Rule 30(b)(6) declarant" who regurgitated information provided by other sources. Rule 30(b)(6) is a rule that applies to depositions in which an opposing party is given the opportunity to question a corporate entity and bind it for purposes of the litigation. A declaration, on the other hand, is not offered as the testimony of the corporation, but rather reflects – or is supposed to reflect – the personal knowledge of the declarant.
>
> Not surprisingly given the fact that his counsel apparently did not understand the difference between a declaration based on personal knowledge and a Rule 30(b)(6) deposition, Mr. Boyle's declarations consist of sweeping statements, a few of which may be within his ken and admissible, but most of which are assuredly hearsay.
>
> When he was asked to sign a declaration in this case, he thought he was responding on behalf of OneWest and therefore felt justified in questioning co-workers, running computer searches, and reviewing other sources before reporting their statements as his own. Nothing in his declarations would alert the reader to the fact that Mr. Boyle was simply repeating what he had heard or read from undisclosed and untested sources. When his statements turned out to be untrue, Mr. Boyle conveniently blames inaccuracies in the underlying documentation, computer input errors, or faulty reporting. Had defendants made the effort to produce admissible evidence in the first place, these errors may have been uncovered and avoided before they could taint the discovery process in this case.
>
> The Court is willing to assume that some of Mr. Boyle's untrue statements were innocent errors

arising from his reliance on out-of-court statements. Nevertheless, Mr. Boyle's repeated assertions that OneWest has been the holder of the note through Deutsche Bank since on or about March 19, 2009 (Dkt. # 49-3 at 3; Dkt. # 123 at 3; Dkt. # 173 at 3) is inexplicable.

Whether OneWest was the holder of the note, as that term is defined in the DTA, is one of the primary issues in this litigation. In January 2011, the Court advised defendants that their expansive definition of "holder" was inconsistent with the policy and practical considerations that underlie bearer paper and the DTA.

Rather than produce the original, signed note or provide admissible evidence regarding its location in response, Mr. Boyle simply repeats, over and over again, that OneWest is the holder based on a theory the Court had already called into question. This tactic of parroting argument and business records (whether in declarations or in legal memoranda) rather than providing actual evidence has been an issue since the inception of this case. When plaintiff challenged OneWest's claim to be the holder of the note at the time the notice of default was issued and otherwise disputed assignments and authorizations relied upon in this case, defendants declined to do anything more than refer to their business practices or confirm what their computerized records showed, without any attempt to investigate the alleged irregularities. Defendants specifically declined to produce the original note for inspection, sending this case into a holding pattern from which it has not yet recovered.

The Court is also disturbed by what appears to be a post hoc effort to imbue Mr. Burnett with the power to act on behalf of MERS as of January 2010. Mr. Burnett signed an Assignment of Deed of Trust on January 27, 2010, as an Assistant Vice President of MERS. Decl. of Charles Chong (Dkt. # 183-2), Ex. 5. In his original complaint, plaintiff alleged that Mr. Burnett was not, in fact, an employee of MERS and provided evidence that Mr. Burnett was actually an employee of OneWest. Dkt. # 1 at 4. In response, Mr. Boyle averred that Mr. Burnett was an employee of OneWest with signing authority from MERS. Dkt. # 49-3 at 4.13

Mr. Boyle offered a MERS corporate resolution in support of his statement, but, as plaintiff quickly pointed out, the document is dated August 19, 2010. Dkt. # 49 at 114. For a period of time, defendants avoided mention of Mr. Burnett, simply stating in their memoranda and Mr. Boyle's declaration that "MERS" executed the Assignment of Deed of Trust on January 27, 2010, without mentioning the individual who actually signed the document. Dkt. # 121 at 4; Dkt. # 123 at 4; Dkt. # 172 at 4; Dkt. # 173 at 4. At the evidentiary hearing, however, Mr. Boyle testified that Mr. Burnett had signing authority for MERS on January 27, 2010, because (a) he signed the assignment, (b) when Mr. Boyle had signing authority for MERS, it was pursuant to a written authorization, and (c) Mr. Boyle believes he saw a prior resolution that authorized Mr. Burnett to sign on behalf of MERS during the relevant time period.

The evidence submitted by the parties does not support this last assertion: a June 2009 corporate resolution identifies Mr. Boyle, but not Mr. Burnett, as signing agents for MERS. Decl. of Charles Chong (Dkt. # 183-2), Ex. 6. Mr. Boyle's testimony on this point, as on so many others, appears to be based on nothing more than what he has been told by others and an unstated assumption that defendants' business practices satisfy legal requirements. Neither ground provides a firm footing for the facts to which Mr. Boyle is all-too-willing to swear.

Finally, the disclosure of a computerized record that goes to a key issue in this litigation (i.e., was the original signed promissory note in the loan file Deutsche Bank delivered to OneWest in October 2010) for the first time at the evidentiary hearing held on January 31, 2013, is unacceptable. Plaintiff has spent years attempting to track down the original note – doubts regarding its location led to this lawsuit and feature prominently in the initial complaint, every substantive filing, and the Court's orders. The deficiencies in defendants' discovery efforts are readily apparent from the fact that defendants did not bother to produce a declaration or computer records from the document custodian until months after the motions for summary judgment were fully briefed. Even then, they failed to ascertain the meaning of the computer records, resulting in

> testimony at the evidentiary hearing to the effect that the documents produced thus far were insufficient to determine whether Deutsche Bank received the original note with the loan file in January 2007. In order to answer that question, Mr. Corcoran had to look at another screen on his computer screen, which was finally provided to both the Court and plaintiff via supplemental declaration on February 6, 2013.
>
> The Court understands that discovery is burdensome and expensive and that defendants did not ask to be dragged into this litigation. Nevertheless, the discovery obligations imposed by the Federal Rules of Civil Procedure are not optional: defendants were required to timely and fully respond to plaintiff's discovery requests. Instead, defendants did less than the bare minimum, presenting hearsay rather than admissible evidence, neglecting obvious sources of information, forcing plaintiff, acting pro se, to file two motions to compel and seek an extension of time to review late-disclosed information, presenting critical documents and declarations long after discovery had closed and dispositive motions were pending, and ultimately forcing another continuance of the trial date. The fact that the late disclosed documents and declarations are essential to defendants' defense makes their inability and/or unwillingness to conduct a meaningful investigation of plaintiff's claims even more striking.

## FLORIDA GREENE CASE

While placing final edits to this year-long paper, most recently, in Case No. 5D12-870 before the The District Court Of Appeal Of The State Of Florida Fifth District in Greene vs. JPMorgan Chase Bank, N.A., the Court validated many of my opinions in this paper and the need for servicers and their affiants, witnesses, and lawyers to follow my protocols. In this case, brought by a pro se litigant, the Court issued key opinions and rulings that should be fodder for borrower's attorneys to argue and for servicers to finally adopt protocols. The Court stated in part…

> "The only evidence submitted by the Bank was the affidavit of amounts due and owing. That affidavit did not show specific payments by Green or the dates on which they were made. As such, the trial court erred in denying his motion as to this count."

Footnote #2 to this opinion stated…

> "None of the other *documents were authenticated*. Unauthenticated documents cannot be used in support of a motion for summary judgment. Ciolli v. City of Palm Bay, 59 So. 3d 295, 297 (Fla. 5th DCA 2011)"

The Court then went on to further opine…

> Second, the trial court erred in granting the Bank's motion for summary judgment because the Bank failed to refute Green's affirmative defense of lack of standing. This court reviews de novo an order granting summary judgment. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001). To establish standing to foreclose for purposes of summary judgment, **the plaintiff must show that it acquired the right to enforce the note before it filed suit**. See Gonzalez v. Deutsche Bank Nat'l Trust Co., 95 So. 3d 251, 253-54 (Fla. 2d DCA 2012); Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC, 75 So. 3d 773, 776 (Fla. 4th DCA 2011).
>
> The Bank's motion for summary judgment **asserted that the Bank had standing as the holder of the note, as evidenced by its earlier filing of the original promissory note**. **The note contained an indorsement in blank by WaMu**. On appeal, the Bank adds that its standing was

> supported by the Purchase and Assumption Agreement, which showed that the Bank bought all of WaMu's assets before the Bank filed suit. **The Bank also asserts that it filed an affidavit stating that it was the holder of the note**.
>
> **Within the original note, the indorsement in blank did not establish that the Bank had the right to enforce the note when it filed suit, because the indorsement was undated**. See Gonzalez, 95 So. 3d 251. Moreover, **the Bank's standing also was not established by its act of filing of the original note. Although the filing of the original blank-indorsed note showed the Bank's possession of (and thus right to enforce) it at the time of filing the note, that filing occurred more than a year after the Bank filed suit. As for the Purchase and Assumption Agreement, that Agreement *was not authenticated* for purposes of summary judgment. Finally, the affidavit of amounts due and owing did state that the Bank "holds the Note." However, like the filing of the original note, *the affidavit did not establish that the Bank held the note at the time it filed suit because the affidavit was dated more than two years later*.**

This opinion supports and ratifies the opinions and protocols contained in this paper. A servicer and their affiants, witnesses, and lawyers must provide more facts and information in their pleadings, affidavits, and testimony. They must state and show, via authenticated and admissible records and evidence, when challenged:

- The fact that the alleged holder had physical possession and custody of any borrower's original wet-ink notes that are endorsed in blank, on the date a foreclosure action is filed;
- That any Purchase Agreements such as the FDIC/WaMu/Chase Purchase and Assumption Agreement must be an *authenticated copy* of the FDIC/WaMu/Chase Purchase and Assumption Agreement.

Having been part of many FDIC/WaMu/Chase cases and investigations, I would make the argument and state an opinion that any authenticated copy of the FDIC/WaMu/Chase Purchase and Assumption Agreement must be produced in its entirety with all corresponding schedules, exhibits, and all subsequent amendments to date supported by an affidavit of the records custodian authenticating the document. I have yet to see this done in any of the many dozens of Chase foreclosures involving WaMu I have reviewed.

In addition, facts pertaining to the document custody and possession of a borrower's original wet-ink note must be presented in pleadings, affidavits, and testimony with supporting authenticated evidence from each servicers' document custodian's tracking system showing: a) the dates the original wet-ink note came into the physical possession and custody of all owners, servicers, agents, custodians, trustees etc… b) the date(s) any endorsement(s), especially endorsements in blank, were placed on the note or any attached allonge; c) the dates any allonges were executed and attached to a note: and d) any certifications and exceptions reported by the custodian.

These records all exist and I will predict that more and more lawyers will be seeking this evidence and that more and more judges will be ordering their production prior to signing off on any foreclosure orders. Judges can streamline their dockets my creating local rules mandating that these documents be produced in each foreclosure action or by adopting my affidavit protocols at the end of this paper.

Providing only an image of a copy of a note of an unknown generation with a blank endorsement of an unknown date is insufficient to establish note ownership and holder status as well as the right to service a note at the start of a foreclosure action.

## XV. SIMPLIFYING THE SERVICER AFFIANT, AFFIDAVIT & WITNESS PROCESS

Above in this paper, I have described the abuses, frauds, and acknowledged document deficiencies of the mortgage servicing industry. However, in order to move our nation and the world's economy ahead, we need to find solutions. To that end in order to simply the note ownership, standing, and authority issues I have described above, I have simplified the process for the mortgage industry, courts, borrowers, and attorneys alike.

As I describe herein and in a number of separate reports and affidavits, the Affidavits of Indebtedness ("AOI") used by major servicers such as Bank of America, JPMorgan Chase, Wells Fargo, CitiMortgage, and others are fatally flawed. Using template affidavits against a checklist of steps that doesn't even include the review and analysis of the actual wet-ink note, general ledgers of the note owners, servicing histories, or even a reading of the note or relevant PSA makes each servicers' AOI process fatally flawed in my opinion. As the HUD OIG stated, there simply is no due diligence conducted, let alone the proper due diligence, for the alleged affiant, often called an affidavit signer by the servicer, to have personal knowledge of the facts contained in their affidavits.

Often, such alleged knowledge is assumed from prior servicers, lenders, and even originators that are out of business or have gone bankrupt. That being the case, records and data from such lenders and servicers should be scrutinized, even more. However, both servicers and borrowers can't afford the time, energy, or money to conduct the necessary due diligence required for each loan. I have personally witnessed

As such, I have simplified the process to prove up note ownership, albeit at a cost to chain of title issues; amount of debt, obligation, and default issues; and other defenses and claims against servicers and lenders. This process has been created ONLY to address the standing and authority to foreclose issues referenced in this paper. This process should speed up "uncontested" and contested foreclosures.

In doing so, I have created a model Affidavit of Indebtedness ("AOI") for summary judgment that should provide legal protections to shareholders, investors, lenders, borrowers, and lawyers, as well. The three models provided at the end of this paper are based on a simple affidavit I identified in a case that mimics what I have proposed to the industry for over a decade. However, as way of background for the introduction of this new model, I must provide you with the following facts and information as the basis for the adoption of my Note Owner Affidavit™ or "NOA" for short.

First, as you know, the mortgage servicing "systems of record" used by "servicers" are simply that, systems of record for the *servicing* of mortgages. The information, data, and calculations, often maintained by third-party vendors such as LPS, makes it difficult for a corporate deponent or witness to admit and prove up these business records.

Second, these are mere servicing records at best, often containing the assumed data and information from prior servicers that a lender/servicer's witnesses may not be able to attest to or have personal knowledge of. Servicing records can "only" allege a "payment and transaction history," related to a servicer's "mortgage servicing rights" tied to the mortgage. A servicing history cannot validate and substantiate the alleged note owner's debt and ownership. Only the promissory note and how that promissory note is accounted for on the financial and accounting records of the alleged note owner, not servicer, can prove ownership of the debt instrument, the "original wet-ink promissory note." Servicing records also do not disclose payments and/or payoffs from third-party co-obligors such as sureties, guarantors, and endorsers of the note. The records provided also do not disclose any current or future contributions of private or lender placed mortgage insurers.

Furthermore, servicers may only be sub-servicers or even private label servicers and not the accrual servicer. Federal regulators and Congress should create a form of "truth in labeling" law or a regulation whereby each statement that a borrower receives states the relationships of the party sending the statement and receiving the check and identify their relationship to the owner of the loan. In the case of Fannie and Freddie, if the note was sold to a trust, disclosure of the trust should be made as well.

As shown above, the HUD OIG corroborated and validated my decades-old research, analysis, and opinion that the industry's affidavit process is fatally flawed. However, their assignment process is fatally flawed as well. Mortgage industry lenders and servicers cannot continue to simply take information off a servicing system computer screen without the proper due diligence and then place it on a template affidavit testifying to information the low-level clerk has little knowledge of, let alone the personal knowledge required by law in affidavits.

The servicing industry's affiant process does not have them inspecting original wet-ink notes, looking at general ledgers, nor even reviewing the actual terms of the note and mortgage or the PSA of an alleged securitized loan. At minimum, note ownership must be determined by the physical inspection and review of:

a) the original wet-ink promissory note, allonges, and documents in the collateral/custodial file;
b) the contract/agreement for purchase of the note;
c) evidence of "payment for value" for the note; and
d) entries from the note owner's "general ledger" showing the date the note came onto the books of the alleged note owner all the way through the date of the foreclosure filing.

When a servicer alleges to service and be an agent for others, they rarely, if ever, even attempt to substantiate that agency relationship. Furthermore, notes and servicing rights can be sold and traded, even after the foreclosure is filed.

This was made all the more evident by the LOGS affiliated law firm of Shapiro & Fishman before a motion for reconsideration before the Florida Supreme Court found at http://www.floridasupremecourt.org/pub_info/summaries/briefs/09/09-1460/Filed_02-26-2010_Shapiro_Motion_Rehearing.pdf. In the motion, the Shapiro firm on behalf of its clients and the industry stated the following facts (with my highlights)…

> 4. Mortgage foreclosure cases are unique in that the ***holders of the notes are often unfamiliar with the status of the loans*** and rely upon loan servicers to manage the loans, payments on the loans, and the foreclosure proceedings.
>
> 5. Therefore, ***while the holder of the note may have some limited knowledge in order to verify portions of the complaint, it may not have the necessary knowledge to verify the remainder of the complaint.*** For example, ***while the holder of the note may verify that it is the holder of the note, it may not have personal knowledge when the last payment on the note was made or if a default notice was mailed to the client***. While the holder of the note may not have that requisite knowledge, ***the loan servicer would, presumably, have that knowledge and be in a position to verify factual allegations of that nature, but likely will not have personal or direct knowledge of other factual allegations***.
>
> 6. **Furthermore, mortgage notes are frequently assigned between lenders and other investors**. Thus, ***subsequent holders of a note will not have personal knowledge as to the mortgagor's execution of the original note or assignments that occurred prior to its acceptance of the current assignment and consequently will not be in a position to verify those alleged facts in a mortgage foreclosure complaint***.
>
> 7. It is also ***unclear whether an attorney or law firm representing a lender can verify a mortgage foreclosure complaint based upon information he/she/it obtained from the client or other parties***, including the holder of the note and the loan servicer. The question remains whether an attorney or law firm representing a lender can verify the complaint after diligent review and inquiry into the matter with the various parties holding the necessary knowledge.
>
> 8. As currently drafted, there remains uncertainty as to whether a mortgage foreclosure complaint must be verified by the current holder of the note, the loan servicer, the attorney, ***or some <u>combination</u> of them to be in compliance with the amended rule***.

I estimate that the total amount of time a servicer or lender will expend to gather the necessary information for my model affidavit should be a few hours. The questions in my model affidavits should be asked and answered in depositions of corporate

representatives, affiants, and witnesses at trial. If this process is implemented, Americans will be more amenable to settle and move on, if they can be convinced that the process is fair and they are not being taken advantage of for the benefit of private bankers and hedge funds that make up the Shadow Banking System.

As Shapiro stated above:

- ***holders of the notes are often unfamiliar with the status of the loans***;
- while *the holder of the note may have some limited knowledge* in order to verify portions of the complaint, it *may not have the necessary knowledge to verify the remainder of the complaint*;
- while the *holder of the note may verify that it is the holder of the note,* it *may not have personal knowledge when the last payment on the note was made* or *if a default notice was mailed to the client*;
- the loan *servicer would, presumably, have that knowledge and be in a position to verify factual allegations of that nature, but likely will not* ***have personal or direct knowledge of other factual allegations***;
- Furthermore, **mortgage notes are frequently assigned between lenders and other investors**;
- **subsequent holders of a note will not have personal knowledge as to the mortgagor's execution of the original note or assignments that occurred prior to its acceptance of the current assignment and consequently will not be in a position to verify those alleged facts in a mortgage foreclosure complaint**;
- unclear whether an attorney or law firm representing a lender can verify a mortgage foreclosure complaint based upon information he/she/it obtained from the client or other parties;.

As said, mortgage notes are frequently assigned between lenders and other investors. This is often done without notice to borrowers, public recording, notations on the MERS system, endorsements on notes, production of bailee or custodial records. In fact, concealment and spoliation of evidence often occurs. Notes also can be transferred and sold immediately before, during, and after foreclosure which shows that this is a continuing area of discovery and must be reviewed and validated at critical timeline points such as the acceleration date; date of filing the foreclosure action; date of affidavits to summary judgment motions; and date of judgment.

I have seen multiple alleged changes of ownership during a foreclosure and even a claim by one lender to have rescinded the actual note purchase, months after the foreclosure was advertised and a settlement agreement reached with the prior alleged note owner. In that case, seven months later, the alleged note owner who foreclosed and a settlement was

reached with claimed they were no longer the note owner and holder since their purchase agreement was rescinded months after the settlement agreement was reached. The bank then instructed their closing attorneys to destroy all closing documents as if the sale of the note never occurred!

You should see the looks and comments we get whenever we seek production of general ledger journal entries. You would think we asked for the Holy Grail! Looks of astonishment, feigns of lack of knowledge of any such records, and pure out and out statements that under no circumstance will the actual lender ever show us their books or general ledgers greet our very simple request. When a court orders its production, serious settlement talks begin.

However, in one recent case in South Carolina, both the judge and counsel for the lender claimed they didn't know what a general ledger was so we proceeded to provide them the following definition from Black's Law Dictionary:

> **LEDGER**
> ledger (lej-<<schwa>>r).1. A book or series of books used for recording financial transactions in the form of debits and credits. — Also termed general ledger. [Cases: Evidence 354(5). C.J.S. Evidence § 941.] 2.Archaic. A resident ambassador or agent. — Also termed (in sense 2) leger; lieger.

We also provided a few more definitions and explanations of the common accounting terms ledger and general ledger as follows:

> The general ledger is the main accounting record of a business which uses double-entry bookkeeping. It will usually include accounts for such items as current assets, fixed assets, liabilities, revenue and expense items, gains and losses. Each General Ledger is divided into debits and credits sections. The left hand side lists debit transactions and the right hand side lists credit transactions. This gives a 'T' shape to each individual general ledger account. A "T" account showing debits on the left and credits on the right.
>
> The general ledger is a collection of the group of accounts that supports the value items shown in the major financial statements. It is built up by posting transactions recorded in the sales daybook, purchases daybook, cash book and general journals daybook. The general ledger can be supported by one or more subsidiary ledgers that provide details for accounts in the general ledger. For instance, an accounts receivable subsidiary ledger would contain a separate account for each credit customer, tracking that customer's balance separately. This subsidiary ledger would then be totaled and compared with its controlling account (in this case, Accounts Receivable) to ensure accuracy as part of the process of preparing a trial balance.
>
> The balance sheet and the income statement are both derived from the general ledger. Each account in the general ledger consists of one or more pages. The general ledger is where posting to the accounts occurs. Posting is the process of recording amounts as credits, (right side), and amounts as debits, (left side), in the pages of the general ledger. Additional columns to the right hold a running activity total (similar to a checkbook).

A refusal to produce the journal entries in the general ledger system recognizing the note as an asset portends that opening one side of the Pandora's black box of financial alchemy would show that the Emperor may be naked.

We often request this information in discovery and the information is not provided even though we know that the documents, records, and information not only exist, but are easy and inexpensive to retrieve. It should take minutes to retrieve the data and information that note owners, servicers trustees, and custodians are known to possess.

Servicing rights are derived from ownership of the original wet-ink note and as such, the agency relationship of the servicer only derives from the note owner. Without evidence of that note ownership from the note owner to insure that note has not been sold or transferred to another entity, the servicer and the servicer's affiants simply cannot properly attest to note ownership.

A law firm's right to lawfully represent the alleged note owner or their agent is at stake here. A refusal to abide by my model affidavit raises serious issues to not only note ownership, but a foreclosure law firm's ability to represent their clients in a foreclosure matter. If a lender/servicer refuses to provide the execution of such an affidavit, it is a red flag for fraud that should be aggressively prosecuted!

If the note owner refuses to provide the general ledger journal entries, borrower's lawyers should notice opposing counsel of a motion for sanctions and seek dismissal of such cases with prejudice and to cancel the note and release the mortgage. If lenders and servicers comply, borrower's counsel should work with the lender's counsel to create an agreed quiet title amendment to their complaint that will clear title for the lender and subsequent property owners moving forward.

If the industry and courts can work with us on my model affidavit, we can bring these foreclosure matters to successful closure, once and for all, with everyone's due process rights protected. If not, the foreclosure process will continue to clog out court's dockets for the next several years.



## XV. CONCLUSION

As stated in this paper and the cases I highlight, the servicing industry's affiant, affidavit, evidence, and witness processes, protocols, and policies are fatally flawed and must be immediately revamped to provide constitutional due process protections for both borrowers and the investors in mortgage backed securities and shareholders of banks.

Testimony from servicer affiants and witnesses is unreliable without the proper foundation and support of authenticated and admissible evidence that is readily available to note owners, their agents, and servicers. Any hesitation or failure to produce such evidence is a red flag for servicing abuse and fraud since the electronic production of these documents do not pose a burden or large expense to servicers in comparison to the costs of extended litigation.

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Producing evidence, known to exist protects the constitutionally protected due process rights of all parties and the integrity of each court. Judges should demand strict compliance with discovery requests to insure that borrowers and investors are protected from a pattern of servicer abuse. Seeking unnecessary protective orders and the refusal to produce documents, evidence, witnesses, deponents, financial, and custodial records should be a major red flag for judges, lawyers, borrowers, investors, and shareholders.

The industry must retool its processes and protocols with guidance from the FHFA and CFPB. Following the protocols laid out in this paper and the adoption of my model affidavit will go along way towards speeding up the foreclosure process in a constitutionally protected manner as well as settlements of foreclosure claims. No one deserves a free house nor a house to be taken by unlawful means.

Nye Lavalle
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# EXHIBIT A - MODEL NOTE OWNER AFFIDAVIT™

1. My name is <Executive Name> and I am the < Title>of <Lender Name>, Inc., a <State of Inc.> Corporation. Per the corporate resolution attached as Exhibit A, I am authorized to make this Affidavit.

2. I am over eighteen (18) years of age, of sound mind, and capable of making this Affidavit. I have never been convicted of a felony of moral turpitude. The matters stated herein are of my personal knowledge and are true and correct.

3. Attached as Exhibit B, is my most current resume and curriculum vitae outlining my education, experience, skills, qualifications, and competency in provided this testimony.

4. On <Note Purchase Date>, <Lender Name> purchased the promissory note attached as Exhibit C from <Prior Lender Name> via a <Name of Purchase Agreement> of which a true and genuine copy of such agreement as it existed on <Date> is attached as Exhibit D.

5. A true and genuine copy of the promissory note and all endorsements and/or allonges attached as Exhibit C was made by <name of person copying> on <copy date> and the original wet-ink promissory note is currently held at <Law Office, Document Custodian, Other> and its physical inspection may be made during normal business hours with appropriate notice.

6. Attached as Exhibit E is an affidavit of <name of person copying> our document custodian's custodian of records who attests that Exhibit C is a first generation copy of the borrower's original wet-ink promissory note that was attached as Exhibit 1 to their affidavit.

7. Attached as Exhibit F is genuine copy of the Schedule of Loans that we purchased as part of the <Name of Purchase Agreement> on <Purchase Date>. The borrower's loan is listed on page <Page #>.

8. Attached as Exhibit G is genuine copy of the <Check/Wire> that evidences our payment for the borrower's note and/or the pool of mortgages we purchased along with the borrower's note listed on a ledger sheet.

9. The amount attributable for value of our purchase of the borrower's note was <Note Purchase Amount>.

10. To evidence our ownership of the borrower's note, I have attached Exhibit H which is a genuine copy of journal entries into our company's general ledger as of <Date Note Entered> which is the date the borrower's note was entered onto our financial and accounting books and records as an asset.

11. Attached as Exhibit I is a genuine copy of our document custodial records and tracking system that evidences that the note was placed into our vault on <Date of Custody> and has remained there in our custody and control until <Date of Release> when it was shipped to <Servicer/Law Firm>.

12. Attached as Exhibit J are genuine copies entries in journals of our company's general ledger system evidencing that the note has remained on our accounting books as an asset from <Date Note Entered>, the date we entered the note onto our books as an asset until <Date Last Entry>.

13. The note remains on our accounting books and records and shall remain there through the date of foreclosure when we shall confirm the existence of the note's entry on our books with a copy of our ledger forwarded to counsel for the borrower.

14. Attached as Exhibit K is our Servicing Agreement with <Servicer Name>.

15. Attached as Exhibit L is the Servicer Affidavit of <Servicer Affiant> and the life-to-date loan servicing history that reflects all applications of the borrower's payments; all fees and expenses charged to the loan; all loan transactions on the account; the dates of default; and the amounts claimed due and owed under the terms of the promissory note and mortgage.

16. Attached as Exhibits to Exhibit M are copies of all cancelled checks and invoices for all charges related to services provided under provisions of the borrower's note and mortgage as well as a detail of such charges, their reasonableness, and the right to assess such charges under <¶ #> of the borrower's note or mortgage.

17. Attached as Exhibit N is our notice of default and acceleration to the borrower per the conditions specified in paragraph 22 (most uniform residential mortgages) of the borrower's mortgage.

18. As of <Date of Letter>, the borrower owes us a principal balance of <Balance> for a default staring on <Default Date> for <# of Missed Payments> missed payments as shown in Exhibit L.

FURTHER AFFIANT SAYETH NAUGHT