

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR COLLIER COUNTY, FLORIDA

21ST MORTGAGE CORPORATION,

Plaintiff,

vs.

CASE NO.: 2015-CA-001170

MARY JEAN ZISKA, et al.,

DIVISION: C

Defendants.

NOTICE OF FILING

Plaintiff, 21ST MORTGAGE CORPORATION by and through the undersigned attorney,
hereby files this Transcript of Proceedings on August 5, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing has been served by U.S. Mail and/or e-mail on this 24th day of October, 2016 on the following:

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IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

CASE NO. 15-CA-1170

21ST MORTGAGE CORP.,

Plaintiff,

v.

MARY JEAN ZISKA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: August 5, 2016

TIME: 10:29 a.m. - 12:18 p.m.

PLACE: Collier County Courthouse
3315 East Tamiami Trail
Naples, Florida 34112

BEFORE: Honorable Hugh D. Hayes

Stenographically Reported by:

Rose Marie Witt

Von Ahn Associates, Inc.

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2nd Floor

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1 APPEARANCES

2
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15 * * * * *

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1 P R O C E E D I N G S

2 THE COURT: Okay. Let's go ahead and get
3 started on this case then.

4 This is on the Mortgage Corporation and Ziska.
5 And, so, you're -- briefly tell me where you're
6 going on this.

7 MS. PLANELL: Good morning, Your Honor.
8 Nicole Planell on behalf of the plaintiff, 21st
9 Mortgage Corporation.

10 MS. YERGER: Linda Yerger on behalf of Mary
11 Jean Ziska.

12 THE COURT: Okay.

13 MS. PLANELL: Your Honor, by brief
14 introduction on this, this is a mortgage
15 foreclosure action filed on June 29th of 2015, 21st
16 Mortgage Corporation against Mary Jean Ziska. And
17 there were several associations.

18 The attorney for the association was here
19 earlier. We did provide her with a proposed copy
20 of the Final Judgment. She reviewed it and said
21 that everything looked appropriate. She did leave,
22 so --

23 THE COURT: Okay.

24 MS. PLANELL: This is regarding a mortgage
25 foreclosure action for property located in Collier

1 County.

2 I have my witness here from 21st Mortgage
3 Corporation. He is ready and able to testify
4 today.

5 THE COURT: Okay.

6 MS. YERGER: Your Honor, obviously this is a
7 mortgage foreclosure action and we believe that on
8 the face of the complaint and the filing that the
9 plaintiff lacks standing at the inception of the
10 case and it's based on the Statute of Limitations
11 95.11(2)(c).

12 And it's just on the actual -- and not even
13 getting into the rehearing of Beauvais and the
14 Singleton and distinction of Stadler, on the face
15 of their complaint, that which was filed on
16 June 25th, 2015 in Paragraph 7, they identified the
17 default as March 1st, 2010.

18 Their exhibit under Exhibit D is the default
19 letter breached to the borrower. It should
20 identify the default as April 1st, 2010.

21 There's an attempt to correct that error and
22 an amendment to the complaint in Paragraph 7 and
23 additional exhibits to D, and to try and again
24 identify a default later in time as August 1st,
25 2010 but, you know, based on the McLean versus

1 JPMorgan, if it's not right at the inception, it's
2 not something that can be corrected after the
3 complaint is filed.

4 That's our focus in defending this foreclosure
5 action.

6 THE COURT: Are you talking about the -- in
7 essence, the Paragraph 22 letter?

8 MS. YERGER: That's the Exhibit D that's
9 attached that gives the notice and it's just
10 identification of default. There it's identified
11 as April 1st of 2010 in Paragraph 7 in the
12 complaint.

13 So, just by my math, they're beyond the time
14 period then when they file in June 25th of 2015.

15 We all know that the current is looking at
16 rehearing of Beauvais or you're talking about
17 Singleton but, I mean, our district is different
18 when you have an acceleration.

19 But at this point they elected an initial
20 filing and that's when you have to look at whether
21 there's standing. They're beyond the five-year
22 Statute of Limitations for filing.

23 THE COURT: Okay. But Singleton says they can
24 do that though. Right.

25 MS. YERGER: Singleton says you can pick up --

1 MS. PLANELL: Any date.

2 MS. YERGER: -- any date.

3 Well, they picked the wrong date and then they
4 tried to correct it and they tried to correct it to
5 August 1st of 2010. That would have made the
6 complaint correct. And they did that in the
7 amended complaint.

8 But in the initial complaint and initial
9 filing, and that's what you have to look at. They
10 didn't have standing and they can't correct it
11 later. It's like I don't have a corrective
12 assignment and say, oh, we need to amend the
13 pleadings. And they knew that.

14 That's what the -- but they weren't
15 supposed -- they amended the complaint and this was
16 back in February. They took a Motion to Amend the
17 Complaint only, only, copy the original note and
18 mortgage, front and back, because it wasn't done
19 correctly.

20 And what they did do, they filed an amendment
21 to change the default date and that was not
22 allowed. And they knew that that was a problem
23 because they changed it to August 1st, 2010, which
24 makes it fine, and that makes it okay for the
25 Statute of Limitations in compliance.

1 And at the inception though, it was not
2 correct and by their own exhibit and their own
3 admission in Paragraph 7.

4 THE COURT: And do you have a case that
5 actually says that they can't do that?

6 MS. YERGER: Well, I have the McLean case,
7 McLean versus JPMorgan, which is a Fourth DCA,
8 2012, that says, the plaintiff lacks good standing
9 at the inception of the case is not a defect. That
10 may be cured by the opposition of standing after
11 the case is filed.

12 THE COURT: Okay. Yeah. No. I -- I agree
13 with the standing --

14 MS. YERGER: Right.

15 THE COURT: -- argument, but a Notice of
16 Default may not be the same as standing, I guess.

17 MS. YERGER: Well, this starts totally at the
18 Statute of Limitations, once a cause of action
19 accrues.

20 THE COURT: Well, and there is, even under
21 Singleton, you know, argument, that if you let the
22 statute -- five years go before you -- in other
23 words, if you filed your lawsuit in year '07
24 instead of year, whatever, '01 or '02, you may
25 theoretically waive those first five years under

1 the Statute of Limitations, but it doesn't prohibit
2 you from filing your lawsuit and you can still file
3 a lawsuit.

4 MS. YERGER: But you still have to be within
5 your five years and that's why they knew it. If
6 they would have picked a date 2011, 2012. But they
7 picked the wrong default date.

8 I agree with the Court. They could have
9 picked any date they want because the -- you know,
10 the original default was 2007, so they did
11 obviously pick a different default date.

12 But then when they go back and they realized
13 when they did the math, when you say in April and
14 March of 2010, but you don't file until June, you
15 could have picked '11, '12, '13, you could have
16 picked any date you wanted in there. I agree.

17 All the courts seemed to be that rehearing of
18 Beauvais and Singleton says pick whatever month you
19 want to start the five-year clock.

20 THE COURT: Yeah. Because they're complying
21 with Singleton.

22 MS. YERGER: Yep. But they still also --
23 Singleton or Beauvais also says the Statute of
24 Limitations is still there. And once you elect to
25 do it, 95.112(c) still stands that once the cause

1 of action accrues, and they selected the date, and
2 they selected the wrong date when they filed the
3 initiate complaint and then they tried to amend it.

4 And then they tried to add an exhibit in
5 compliance with that amendment, but that wasn't the
6 way it was at the initial complaint.

7 It's a technicality possibility, but it's a
8 violation of the Statute of Limitations.

9 THE COURT: Okay. We'll go ahead and --

10 MS. PLANELL: Your Honor, may I briefly
11 respond to that now?

12 THE COURT: Sure.

13 MS. PLANELL: The defendant is referencing two
14 different paragraphs in plaintiff's initial
15 complaint.

16 First of all, Paragraph 6, which states the
17 default on note and mortgage states that the loan
18 is due to make the payment on August 1st, 2010.
19 Then it says in the seventh paragraph of the
20 initial complaint and it states that the
21 approximate amount due in acceleration that goes
22 down -- it goes back to March 1st, 2010.

23 That is the paragraph that was corrected in
24 the amended complaint.

25 As to that being a relief that was requested

1 additional to the Motion to Amend, the plaintiff's
2 wherefore clause states when the motion -- for the
3 Motion to Amend it and for any other relief this
4 Court deems just and proper.

5 At that time and place it was seeking leave to
6 amend its complaint, it can change the allegations
7 in its complaint to comport with the attachments,
8 the -- the exhibits that have been attaching to the
9 complaint.

10 Furthermore, with respect to the issues, if I
11 may provide the Court with the case that just
12 recently came out on July 27th from the -- from the
13 Third DCA, Dhanasar versus JPMorgan Chase. This is
14 the Westlaw citation, 2016 Westlaw 4035727.

15 As I said, Dhanasar versus JPMorgan Chase came
16 out of the Third DCA on July 27.

17 The last paragraph specifically states that
18 the question is whether the bank could proceed with
19 the action for foreclosure whether Dhanasar failed
20 to make her April 2000 payment and any subsequent
21 payment where the notice letter was sent to her in
22 July of 2008 and where the foreclosure complaint
23 was not filed until August of 2013.

24 The Court goes on a little bit further and
25 says, because the bank's complaint specifically

1 alleged that Dhanasar had failed to pay the April
2 2008 payment and all subsequent payments. The
3 action was filed within the five years of a
4 default. The action survived the asserted Statute
5 of Limitations bar.

6 This case even goes further in stating that
7 because there have been defaults every month
8 thereafter, it basically works as a sliding scale
9 in that the -- because there has been no proof and
10 there's a continuous monthly default. So long as
11 the plaintiff alleges that all subsequent payments
12 have been -- that have not been made, the action
13 falls within the Statute of Limitations.

14 Therefore, plaintiff's position is that we are
15 able to proceed under the allegations in our
16 complaint and amended complaint.

17 THE COURT: Okay. Well, it does appear to
18 support your position. We'll, you know, get a
19 chance to look at it more carefully as we go.

20 Okay. We'll ask that your witness be sworn in
21 then.

22 THE CLERK: Do you swear or affirm that the
23 testimony you are about to give is the truth, the
24 whole truth and nothing but the truth?

25 THE WITNESS: I do.

1 Whereupon,

2 JEFFREY WARKINS,

3 a Witness, called and duly sworn for and in behalf
4 of the plaintiff, was examined and testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MS. PLANELL:

8 Q Will you please state your name for the
9 record?

10 A Jeffrey Warkins.

11 Q And, Mr. Warkins, can you please state the
12 name of your employer?

13 A 21st Mortgage Corporation.

14 Q And what is your position within 21 Mortgage
15 Corporation.

16 A Staff attorney.

17 Q And as part of your job responsibilities, what
18 are your job responsibilities as staff attorney?

19 A I coordinate with outside counsel on any
20 litigation. I answer all complaints to regulatory
21 bodies and answer all written requests for information
22 and notice of errors on loan.

23 In this capacity, I do have access to all
24 company records.

25 Q And as part of your job responsibilities and

1 duties, are you familiar with the type of records
2 maintained in connection with the loan that is the
3 subject of this foreclosure action?

4 A Yes, I am.

5 Q And what do the business records generally
6 entail?

7 A That will be the original loan file, which is
8 loaded to our AS 400 servicing platform. It would be
9 the collection history and any payment histories,
10 including escrow, insurance documents, origination
11 documents.

12 Q And anything else? Any type of
13 correspondence?

14 A Any borrower correspondence that is sent to or
15 from the borrowers, all the collection log that will log
16 all telephone calls and letters as well as as copies of
17 those letters will be in the imaging system.

18 Q And are you familiar with the loan associated
19 with the property, which is the subject of this action?

20 A I am.

21 Q And have you had an opportunity to review the
22 business records associated with this loan?

23 A Yes, I have.

24 Q And do you have personal knowledge of the
25 procedures for creating these types of records?

1 A Yes, I do.

2 Q And are these business records made at or near
3 the time of the occurrence?

4 A They are.

5 Q And are they provided by persons with personal
6 knowledge of the information in the business record or
7 from information transmitted by persons with personal
8 knowledge?

9 A Yes, they are.

10 Q And are they kept in the ordinary course of
11 your regularly conducted business activities?

12 A Yes.

13 Q And is it the regular practice of 21st to make
14 such record?

15 A It is the regular practice.

16 Q And, Mr. Warkins, was 21st Mortgage the
17 original servicer of this loan?

18 A We were not.

19 Q Who was the original servicer? Who was the
20 prior servicer of this loan?

21 A Oh, Ocwen Loan Servicing, LLC.

22 Q And does 21st Mortgage have a process for
23 checking the accuracy of the business records sent from
24 a prior servicer?

25 A We do.

1 Q And what is that process called?

2 A That is the called the loan boarding process.

3 Q Can you please provide the Court with a
4 description of the loan boarding process?

5 A Yes. A, what is called a flat file with all
6 customer information, loan terms, remaining balance,
7 property address, several other pieces of information is
8 sent over. The flat file is uploaded to our AS 400
9 servicing loan platform.

10 The original files are sent and checked in to
11 our storage facility. Documents are verified that they
12 are received such as original note, original mortgage,
13 other original documents.

14 All documents are imaged onto the AS 400
15 servicing platform. The loans are audited by 21st
16 Mortgage employees versus what is loaded on the AS 400
17 servicing platform versus the flat file that is sent
18 over to make sure that all terms, information, contact
19 information, loan terms such as a principal balance,
20 interest rate, remaining loan term, escrow balance
21 are -- are all audited both at the time of transfer and
22 then post audited by our customer service department.

23 Q And how are you familiar with this process?

24 A I have participated in the due diligence on
25 the acquisition of these loan files and I am familiar

1 with my training in the company of the boarding process.

2 Q Did this particular loan undergo the boarding
3 process of the business records from the prior servicer?

4 A Yes, it did.

5 Q And how do you know that, Mr. Warkins?

6 A I've verified the loan on the loan schedule,
7 I've reviewed the account and verified that all terms
8 were boarded properly.

9 Q And are all of the business records reviewed
10 for accuracy and trustworthiness?

11 A They are.

12 Q And did this particular loan undergo that
13 review?

14 A They did.

15 MS. PLANELL: Your Honor, plaintiff's position
16 is that it has established him to working as a
17 records custodian. We're going to be presenting
18 now the original documents.

19 THE COURT: Okay.

20 BY MS. PLANELL:

21 Q Mr. Warkins, will you please identify this
22 first document for the record?

23 A This is the original -- original Adjustable
24 Rate Note signed by Miss Ziska along with the Allonge
25 Payment Note Change Addendum and Balloon Note Addendum,

1 all signed in blue ink.

2 Q And, Mr. Warkins, how do you recognize this
3 document?

4 A I have seen copies. I have seen a copy of
5 this in our servicing platform associated with this loan
6 number.

7 MS. PLANELL: And I'm going to move the
8 original Note to the Amended into evidence as
9 Plaintiff's Exhibit 1?

10 THE COURT: Any objections to the --

11 MS. YERGER: No, Your Honor.

12 THE COURT: Okay. Show it's admitted.

13 MS. PLANELL: Thank you.

14 (Plaintiff's Exhibit 1 admitted into
15 evidence.)

16 BY MS. PLANELL:

17 Q Mr. Warkins, what is the date of the note?

18 A November 2nd, 2006.

19 Q And what is the principal balance on this
20 original note?

21 A \$331,500.

22 Q And what is the property address?

23 A 5632 Whisper Wood Boulevard, Unit 1601,
24 Naples, Florida, 34110-3308.

25 Q And, again, is this original Promissory Note

1 signed?

2 A It is.

3 Q And who is the signor again?

4 A Mary Jean Ziska.

5 Q And who was the original lender?

6 A The original lender is Option One
7 corporation -- excuse me -- Option One Mortgage
8 Corporation.

9 Q And does the original note include any
10 endorsements or allonges?

11 A It does. It has -- Page 4 it has an
12 endorsement in blank, allonge to note.

13 Q From the -- who --

14 A From Option One Mortgage Corporation signed by
15 Dana Shoemaker.

16 Q And, Mr. Warkins, did plaintiff require the
17 interest in this note prior to the filing of the
18 complaint?

19 A Yes, we did.

20 MS. PLANELL: Here's Plaintiff's Exhibit 1.

21 Thank you.

22 BY MS. PLANELL:

23 Q Mr. Warkins, can you please identify this
24 second document for the record?

25 A This is the original recorded mortgage.

1 Q And, Mr. Warkins, how do you recognize this
2 document?

3 A I have viewed the copy of this document in our
4 servicing platform associated with this loan file.

5 MS. PLANELL: Plaintiff moves for the original
6 copy of the recorded mortgage to be admitted as
7 Plaintiff's Exhibit 2?

8 THE COURT: Any objection?

9 MS. YERGER: No.

10 THE COURT: Admitted.

11 MS. PLANELL: Thank you.

12 (Plaintiff's Exhibit 2 admitted into
13 evidence.)

14 BY MS. PLANELL:

15 Q Mr. Warkins, can you please state the name of
16 the signor of this -- of the mortgage?

17 A Mary Jean Ziska.

18 Q And is there an address handwritten below the
19 signature of Mary Jean Ziska?

20 A There is. 5632 Whisper Wood Boulevard, Unit
21 1601, Naples, Florida 34110.

22 Q And what is the property address listed on the
23 mortgage?

24 A The same. 5632 Whisper Wood Boulevard, Unit
25 1601, Naples, Florida 34110.

1 Q And is this the property address that is the
2 subject of the foreclosure action?

3 A Yes, it is.

4 Q And based on your review of this mortgage, is
5 this mortgage in first mortgage position?

6 A Yes.

7 Q And based on your review, is the -- is this
8 mortgage superior to any and all other lienholders?

9 A Yes.

10 MS. PLANELL: Plaintiff moves for the original
11 certified copy -- certified recorded mortgage to be
12 admitted as Plaintiff's Exhibit 2.

13 THE COURT: Any objection?

14 MS. YERGER: No.

15 THE COURT: Okay. Show that it's admitted.

16 BY MS. PLANELL:

17 Q Can you please identify this third document
18 for the record?

19 A This is an Assignment of Mortgage recorded in
20 Collier County.

21 Q Is that a certified copy?

22 A It is a certified copy.

23 Q Can you please state the date of this
24 Assignment of Mortgage -- oh, I'm sorry.

25 MS. PLANELL: Plaintiff moves for the exhibit,

1 Plaintiff's Exhibit 3, Assignment of Mortgage, to
2 be admitted into evidence, for identification
3 purposes.

4 THE COURT: Any objection?

5 MS. YERGER: No.

6 THE COURT: Admitted.

7 MS. PLANELL: Thank you.

8 (Plaintiff's Exhibit 3 admitted into
9 evidence.)

10 BY MS. PLANELL:

11 Q Can you please state the date of this
12 Assignment of Mortgage?

13 A November 14th, 2006.

14 Q And who is the assignor?

15 A The assignor is Option One Mortgage.

16 Q And who is the assignee?

17 A Is Residential Funding Company, LLC.

18 Q And what is the date of this recorded
19 Assignment of Mortgage?

20 A It is recorded on April 7th, 2009.

21 MS. PLANELL: Plaintiff moves for the
22 Assignment of Mortgage to be admitted into evidence
23 as Plaintiff's Exhibit 3.

24 THE COURT: Okay. Show it's admitted.

25 MS. YERGER: No objection.

1 (Plaintiff's Exhibit 3 admitted into
2 evidence.)

3 BY MS. PLANELL:

4 Q Mr. Warkins, can you identify this fourth
5 document for the report?

6 A This is an Assignment of Mortgage recorded
7 in -- excuse me -- a certified copy of an Assignment of
8 Report recorded in Collier County.

9 Q And what is the date of this Assignment of
10 Mortgage?

11 A March 17th, 2014.

12 Q And who is the assignor and who is the
13 assignee?

14 A The assignor is Residential Funding Company,
15 LLC, the assignee is Ocwen Loan Servicing, LLC.

16 Q And what is the date that this Assignment of
17 Mortgage was recorded?

18 A April 7th, 2014.

19 MS. PLANELL: Plaintiff moves for the
20 certified copy of the Assignment of Mortgage to be
21 Plaintiff's Exhibit 4?

22 THE COURT: Any objection?

23 MS. YERGER: No.

24 THE COURT: Okay. Admitted.

25 (Plaintiff's Exhibit 4 admitted into

1 evidence.)

2 BY MS. PLANELL:

3 Q Mr. Warkins, this fifth document for the
4 record?

5 A This is a certified copy of a recorded
6 Assignment of Mortgage.

7 Q And who is -- what is the date on this
8 Assignment of Mortgage?

9 A March 26th, 2014.

10 Q And who is the assignor and the assignee.

11 A The assignor is Ocwen Loan Servicing, LLC, and
12 the assignee is Christiana Trust, a division of
13 Wilmington Savings Fund Society FSB as trustee for
14 Knoxville 2012 Trust.

15 Q And what is the date this Assignment of
16 Mortgage was recorded in Collier County?

17 A April 7th, 2014.

18 MS. PLANELL: Thank you.

19 Plaintiff moves for this Assignment of
20 Mortgage to be Plaintiff's Exhibit 5.

21 THE COURT: Any objection on that one?

22 MS. YERGER: No.

23 THE COURT: Show it's admitted.

24 (Plaintiff's Exhibit 5 admitted into
25 evidence.)

1 BY MS. PLANELL:

2 Q Could you please identify this sixth document
3 for the record?

4 A This is a certified copy of an Assignment of
5 Mortgage recorded in Collier County.

6 Q And what is the date of this Assignment of
7 Mortgage?

8 A September 5th, 2014.

9 Q And who is the assignor and the assignee?

10 A The assignor is Christiana Trust, a division
11 of Wilmington Savings Fund Society, FSB, as trustee for
12 Knoxville 2012 trust. The assignee is 21st Mortgage
13 Corporation.

14 Q And what is the date that this Assignment of
15 Mortgage was recorded?

16 A October of 21st of 2014.

17 Q Thank you.

18 MS. PLANELL: Plaintiff moves for the
19 Assignment of Mortgage to be Plaintiff's Exhibit 6.

20 THE COURT: Any objection on that one?

21 MS. YERGER: No.

22 THE COURT: All right. Show that it's
23 admitted.

24 (Plaintiff's Exhibit 6 admitted into
25 evidence.)

1 BY MS. PLANELL:

2 Q Mr. Warkins, can you please identify this
3 seventh document for the record?

4 A This is a Bailee letter sent to Attorney Sonja
5 Daz from -- on 21st Mortgage letterhead.

6 Q And Miss Sonja Daz, who is her employer?

7 A At the time it was Quintairos Prieto Wood and
8 Boyer.

9 Q And is Quintairos Prieto Wood and Boyer --
10 what is the relationship with Quintairos Prieto Wood and
11 Boyer to the plaintiff?

12 A They are foreclosure counsel in Florida for
13 21st Mortgage.

14 Q And, Mr. Warkins, how do you recognize this
15 document?

16 A I have viewed a copy in our AS 400 servicing
17 platform associated with this loan.

18 Q And is this -- is this type of letter one that
19 is kept in the regular course of business?

20 A Yes.

21 Q And is it in the ordinary scope of 21st's
22 business to maintain this type of document?

23 A Yes.

24 Q And is the -- is the Bailee letter one that
25 will be kept under your custody and control?

1 A Yes.

2 Q Is the Bailee letter the type of business
3 record routinely made and kept in the ordinary course of
4 business?

5 A Yes, it is.

6 Q And is the Bailee letter made at or near the
7 time of the occurrence of the matter?

8 A Yes.

9 Q Is this Bailee letter made by a person with
10 knowledge or from information transmitted by a person
11 with knowledge?

12 A Made -- yes. Made by a person with knowledge.

13 MS. PLANELL: Plaintiff moves for the Bailee
14 letter to be admitted for identification purposes
15 as Plaintiff's Exhibit 7.

16 THE COURT: Any objection?

17 MS. YERGER: No.

18 THE COURT: Okay. Admitted.

19 (Plaintiff's Exhibit 7 admitted into
20 evidence.)

21 BY MS. PLANELL:

22 Q Mr. Warkins, can you please explain what's a
23 Bailee letter?

24 A A Bailee letter is a letter sent to our
25 counsel informing them that we're sending collateral

1 file documents to them and we'll list what documents are
2 being sent.

3 Q Can you please indicate in this letter -- what
4 is the date of this letter?

5 A June 23rd, 2015.

6 Q And when is the Bailee letter generally sent?

7 A Prior to a filing of a foreclosure complaint
8 to provide counsel with the original documents.

9 Q And what documents were sent according to the
10 Bailee letter?

11 A The original note, the original mortgage, a
12 rider addendum and allonge attached to the note.

13 MS. PLANELL: Plaintiff moves for the Bailee
14 letter to be admitted as Plaintiff's Exhibit 7?

15 THE COURT: We already did.

16 MS. PLANELL: Oh, I'm sorry.

17 THE COURT: Yeah. Okay.

18 MS. PLANELL: Your Honor, I have multiple
19 demand letters. Would Your Honor prefer if I do
20 them individually or as a composite exhibit? I'm
21 not sure what counsel would prefer either.

22 THE COURT: Just do it as composite as long as
23 you identify each one.

24 MS. PLANELL: Okay. That's okay with you?

25 Okay.

1 MS. YERGER: Do you have copies for me?

2 MS. PLANELL: I have copies for you if you'd
3 like.

4 MS. YERGER: Actually, aren't they the same?

5 MS. PLANELL: No. February, dates are --
6 yeah, different addresses. These are the same.

7 MS. YERGER: I can refer back with him.
8 That's fine.

9 MS. PLANELL: Oh, okay.

10 Sorry, Your Honor.

11 BY MS. PLANELL:

12 Q Mr. Warkins, can you please identify these --
13 this composite exhibit?

14 A These are notes to default and right to cure
15 sent by 21st Mortgage on the loan account.

16 Q How do you recognize these documents?

17 A I have seen copies of these documents in the
18 AS 400 servicing platform under this file and familiar
19 with these documents as a necessary step to begin a
20 foreclosure action.

21 Q And is it the regular part of 21st to keep and
22 maintain the breach letter?

23 A Yes.

24 Q And was this breach letter kept in the
25 ordinary scope of the business of 21st's business

1 process?

2 A Yes, it was.

3 Q And where are these documents normally stored?

4 A They would be stored on the AS 400 servicing
5 platform so image copies would be available.

6 Q And is the breach letter the type of document
7 that would be kept under your custody or control?

8 A Yes, it is.

9 Q And is the breach letter one that is routinely
10 made and kept in the course of your business' usual
11 practice?

12 A Yes.

13 Q And was the breach letter made at or near the
14 time of the occurrence of the events?

15 A Yes.

16 Q And was the breach letter made by a person
17 with knowledge or from information transmitted by a
18 person with knowledge?

19 A Yes, it was.

20 MS. PLANELL: Okay. Plaintiff moves for the
21 composite demand breach letters to be admitted into
22 evidence as Plaintiff's Composite Exhibit 8.

23 THE COURT: Any objection?

24 MS. YERGER: No.

25 THE COURT: Admitted.

1 (Plaintiff's Composite Exhibit 8 admitted into
2 evidence.)

3 BY MS. PLANELL:

4 Q Mr. Warkins, let's go one by one then. The
5 first one here, can you please identify to whom this
6 letter was sent?

7 A Mary Jean Ziska.

8 Q And what is the address to which this letter
9 was sent?

10 A 5632 Whisper Wood Boulevard, Apartment 1601,
11 Naples, Florida 34110.

12 Q And what is the date of this letter?

13 A April 28th, 2015.

14 Q Does this letter indicate that the loan is due
15 for a payment?

16 A It does.

17 Q And what payment does this letter indicate
18 it's due for?

19 A The August 1st, 2010 payment and all
20 subsequent payments.

21 Q And, Mr. Warkins, based upon your review of
22 the business records, was any -- were any payments
23 received after Notice of Default was sent?

24 A They were not.

25 Q Can you please identify the second letter?

1 A Is a Notice of Default and right to cure sent
2 to Mary Jean Ziska at 9202 Vanderbilt Drive in Naples,
3 Florida 34108, and the letter was sent on April 28th,
4 2015.

5 Q Does this letter indicate that this loan is
6 due for a payment?

7 A It does.

8 Q And what is the due date indicated on this
9 letter?

10 A August 1st, 2010.

11 Q And based upon your review of the business
12 records, was any payment received after this Notice of
13 Default was sent out?

14 A No, it was not.

15 Q The third document within Composite Exhibit 8,
16 can you please identify this document?

17 A This is a Notice of Default and right to
18 cure -- or Right to Cure Default sent to Mary Jean Ziska
19 at 5632 Whisper Wood Boulevard, Apartment 1601, Naples,
20 Florida 34110 on February 5th, 2015.

21 Q And does this letter again indicate that this
22 loan is due for payment?

23 A It does. Starting with the April 1st, 2010
24 payment and all subsequent installments.

25 Q And I'm not sure if you said, but what was the

1 date of this letter that was mailed out?

2 A February 5th, 2015.

3 Q Okay. And, again, based upon your business
4 records, were any payments received as a result of this
5 Notice of Default?

6 A They were not.

7 Q And the fourth letter contained within
8 Composite Exhibit 8, would you please identify the terms
9 of that?

10 A This is a Notice of Default and Right to Cure
11 Default sent to Mary Jean Ziska at 9202 Vanderbilt
12 Drive, Naples, Florida 34108, sent on February 5th,
13 2015, advising that the loan was due for the April 1st,
14 2010 payment and all subsequent payments and providing
15 the cure period.

16 Q And based upon your review of the business
17 records, were any payments received after this Notice of
18 Default was sent out?

19 A They were not.

20 Q Do all these letters contain the amount needed
21 to cure the default?

22 A Yes, they do.

23 Q Did all these letters contain the date by
24 which the defendant needed to cure the default?

25 A Yes.

1 Q And was the defendant given sufficient time to
2 cure the default?

3 A Was given 31 days from the postmarked date of
4 the notice.

5 Q And have any payments been received as a
6 result of these Notices of Default?

7 A They have not.

8 MS. PLANELL: Plaintiff moves for Composite 8
9 to be admitted into evidence.

10 THE COURT: Any objection?

11 MS. YERGER: No. I would just request that
12 they stay at the table because I'm going to be
13 using them to question, if possible.

14 THE COURT: That's fine. We'll show they're
15 admitted into evidence then.

16 MS. PLANELL: Thank you.

17 BY MS. PLANELL:

18 Q Mr. Warkins, can you please identify this
19 ninth document for the report?

20 A This is a Notice of Assignment, Sale or
21 Transfer of Servicing Right sent by 21st Mortgage.

22 Q And how do you recognize this document?

23 A I have reviewed a copy in the servicing
24 platform for the associated loan.

25 Q And is it a regular part of 21st's business to

1 keep and maintain the Notice of Service Transfer?

2 A Yes, it is.

3 Q Are those commonly referred to as something
4 else?

5 A A Notice of Transfer or -- or servicing, a
6 Notice of Service, Transfer, anything like that is fine,
7 yeah.

8 Q Is the Notice of Service kept in the ordinary
9 scope of 21st's business?

10 A Yes, it is.

11 Q And are you familiar with these types of
12 documents?

13 A Yes, I am.

14 Q And would the Notice of Serves, Transfer,
15 would be a document kept in your custody and control?

16 A Yes.

17 Q Is this type of document routinely made and
18 kept in the course of your business as usual practice?

19 A Yes, it is.

20 Q And is this document made at or near the time
21 of the occurrence of the matter?

22 A Yes, it is.

23 Q And was this document made by a person with
24 knowledge or from information transmitted by a person
25 with knowledge?

1 A Yes, it was.

2 MS. PLANELL: Plaintiff moves for the Notice
3 of Service to be admitted as Plaintiff's Exhibit 9.

4 THE COURT: Any objection?

5 MS. YERGER: No.

6 THE COURT: Admitted.

7 MS. PLANELL: Thank you.

8 (Plaintiff's Exhibit 9 admitted into
9 evidence.)

10 BY MS. PLANELL:

11 Q Can you please state the date of this letter?

12 A February 10th, 2014.

13 Q And what did -- what does this letter purport
14 to convey? What information?

15 A It advises the customer that the servicing of
16 the loan has been transferred from Ocwen Loan Servicing
17 to 21st Mortgage Corporation effective February 1st.

18 It provides the customer with balances owed at
19 the time of the transfer and any information on where to
20 remit payments and along with required disclosures
21 explaining why this notice has been received.

22 MS. PLANELL: Plaintiff moves for the Notice
23 of Service to be admitted as Plaintiff's Exhibit 9.
24 It's been already admitted.

25 THE COURT: Show it's admitted.

1 MS. PLANELL: And last, but not least.

2 MS. YERGER: Okay.

3 BY MS. PLANELL:

4 Q Mr. Warkins, can you please identify this
5 Composite Exhibit 10?

6 A This is the payment history on the loan from
7 21st Mortgage and previous servicers.

8 Q And how do you recognize these documents?

9 A I have reviewed the payment history stored on
10 the AS 400 platform associated with this loan.

11 Q And is it the regular practice of business --
12 of 21st to record payments from the borrower?

13 A Yes, it is.

14 Q Would these records be kept -- would these
15 regards made at or near the time of the event?

16 A Yes, they would.

17 Q Would these records be prepared by an agent of
18 21st Mortgage with knowledge of the information?

19 A The 21st Mortgage payment history records
20 would, yes.

21 Q Yes.

22 Mr. Warkins, did you receive this payment
23 history, this business record, from a prior servicer?

24 A The Ocwen Loan Servicing, LLC, yes, was
25 received from a prior servicer.

1 Q Did this document go through the boarding
2 process?

3 A It went through the boarding process. It was
4 independently. Was verified as part of the audit
5 process to ensure accuracy of the balance transferred at
6 the time the transfer is correct. So, along with all
7 other balances owed in terms of the loan.

8 Q Did you rely on these records?

9 A Yes.

10 Q And is there any reason to believe that the
11 payment history has any inaccuracies.

12 A No reason.

13 Q Is the payment history a true and accurate
14 representation of the payment history for the loan?

15 A Yes.

16 Q And is the payment history kept during the
17 regular course of regularly conducted business
18 activities by a person with knowledge?

19 A Yes, it is.

20 Q And did the person making the record have a
21 duty to accurately complete the information for the
22 record?

23 A Yes.

24 Q Do these payment histories also include
25 information for payment of taxes and insurance?

1 A They do.

2 Q And did this business -- does this payment
3 history indicate that any payments have been received?

4 A No.

5 Q Does this payment history indicate when it was
6 last time -- strike that.

7 Does this business payment history demonstrate
8 the unpaid principal balance?

9 A Yes, it does.

10 Q And what is the current unpaid principal
11 balance of this loan?

12 A \$326,706.55.

13 Q Does this payment history also indicate the
14 date for which this loan is due for payment?

15 A Yes, it does. August 1st, 2010.

16 MS. PLANELL: Plaintiff moves for the
17 composite exhibit payment history to be admitted
18 into evidence as Plaintiff's Exhibit 10.

19 THE COURT: Okay. Any objection or wish to
20 see it?

21 MS. YERGER: I just -- I would hold off. I
22 would object to it until I have an opportunity to
23 further ask the witnesses questions on the
24 foundation.

25 THE COURT: Okay. Well, you can voir dire him

1 on the document at this time if you wish.

2 VOIR DIRE EXAMINATION

3 BY MS. YERGER:

4 Q You have indicated that you reviewed the Ocwen
5 information that was provided.

6 Is this -- when you're reviewing, is it just a
7 data entry that you're reviewing?

8 A So, you're going to have the loan flat file,
9 which is going to have all the terms, then you're going
10 to compare that to the payment history that was provided
11 by the previous servicer to make sure terms that just
12 have been pulled out in the outstanding escrow, loan
13 firm, interest rate, all match up, and then vet that
14 again that they match the terms actually listed on the
15 note and mortgage.

16 Q But isn't that again just doing accounting to
17 make sure what would -- should have been paid been paid?

18 A To make sure that -- that everything, all the
19 transactions have lined up. As part of the Notice of
20 Transfer, it does give the customer a right to dispute
21 the data. So, that's one of the main purposes of
22 sending this transfer letter.

23 We did not receive any type of dispute or
24 anything to point out any type of error. Part of my
25 duties are answering requests like that, validations of

1 debt notices and they are about balances, so we -- we
2 take the business records.

3 They are, as I said, independently audited by
4 21st Mortgage, but the customer does have avenues to --
5 if there is any potential problems, to alert the
6 servicer so we can look into payments that perhaps were
7 not posted correctly or things of that nature.

8 Q Okay. Getting back to the question though,
9 the question is, you cannot verify who uploaded this
10 information from Ocwen.

11 A I do not know who uploaded it from Ocwen. I
12 do not work for Ocwen.

13 Q Right. And you didn't -- you don't know when
14 it was uploaded from Ocwen.

15 A I know when we received the -- we received the
16 flat file before the servicing to answer as part of the
17 due diligence and then the loans were service
18 transferred on February 1st, 2015.

19 Q But you don't know. You're just reviewing the
20 data in terms of what payment should have been made on
21 the loan.

22 A Correct.

23 Q Okay. And when was the last time a payment
24 was made on the loan?

25 A I'm not sure.

1 Q Well, you have that information to review;
2 right?

3 A We have payment histories from 2011 going
4 forward.

5 Q And you took over the servicing in?

6 A In 2014.

7 Q So, you have no information, as you sit here
8 today, as to the --

9 A I have the information from 2011 going
10 forward.

11 Q So, you have no information, as you sit here,
12 from payments from the time the loan originated in 2006
13 up until 2011.

14 A I have the principal balance of \$331,074.27 as
15 of the first entry on the 2011 payment history.

16 Q So, I guess that's a no, that you have no
17 information concerning that time period?

18 A Prior to that, correct. That is right.

19 MS. YERGER: I would object to the payment
20 history being submitted. I don't think that meets
21 the business record exception to the hearsay rule
22 when the only thing that he's testifying to is an
23 accounting.

24 THE COURT: All right. I would overrule the
25 objection.

1 I believe based on the case law that he's
2 adequately established the basis for the review and
3 the boarding process that the appellate cases
4 require and, obviously -- and they clearly state
5 that he doesn't have personal knowledge of the
6 entries, but that's part of the boarding process.

7 So, I would have to overrule the objection and
8 show that your exhibit may be introduced into
9 evidence.

10 MS. PLANELL: Thank you, Your Honor.

11 (Plaintiff's Exhibit 10 admitted into
12 evidence.)

13 MS. YERGER: If you could keep it out, I would
14 appreciate it. Thank you.

15 BY MS. PLANELL:

16 Q And, Mr. Warkins, have you had the opportunity
17 to review the Proposed Final Judgment in this action?

18 A Yes, I have.

19 Q And, Mr. Warkin -- Warkins, did 21st Mortgage
20 provide the figures in this case for the law firm to
21 prepare the Final Judgment in anticipation in today's
22 trial?

23 A Yes, we did.

24 Q And what is the procedure you used to gain
25 access to those figures?

1 A The figures are drawn from the unpaid
2 principal balance, amount of escrow owed and attorney's
3 fees and other costs, and are gathered off the AS 400
4 system and sent to our foreclosure counsel.

5 Q And did you personally review those figures?

6 A Yes, I did.

7 Q And would you please state for the record here
8 was the -- did the -- the unpaid principal balance we
9 are seeking to collect today correspond with the unpaid
10 balance principal in the payment history?

11 A Yes, it does.

12 Q And were you -- did 21st Mortgage make the
13 calculations based on the interest on the original
14 unpaid principal balance and the amounts due today?

15 A Yes.

16 Q And are those escrow advances and late charges
17 pertain to the note and mortgage in question here?

18 A Yes, they do.

19 Q Does the Proposed Final Judgment also provide
20 for attorney's fees and costs?

21 A Yes, it does.

22 Q Have you agreed to pay your attorney those
23 fees and costs in accordance with the terms of the note
24 and mortgage?

25 A Yes, we have.

1 Q And what is total amount plaintiff is seeking
2 to obtain in its Proposed Final Judgment?

3 A \$564 -- \$564,000 -- excuse me. \$564,097.75.
4 I apologize.

5 Q And are all of these numbers accurate?

6 A Yes, they are.

7 MS. PLANELL: Your Honor, at this time
8 plaintiff requests judgment in its favor. We
9 tender the witness to the defendant.

10 THE COURT: Okay. We'll go to
11 cross-examination.

12 MS. YERGER: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. YERGER:

15 Q I just wanted -- Mr. Warkins, let me just go
16 back to this Composite 10 which was the -- the payment
17 record.

18 A Yes, ma'am.

19 Q I thought you indicate on direct that you had
20 knowledge from 2011 moving forward of that?

21 A Correct.

22 Q But you gave a balance during testimony that
23 was from August 1st of 2010. So, how did you calculate
24 that number?

25 And you gave -- if I heard you correctly, you

1 said there was balance of 326,000 --

2 A Yes.

3 Q -- and you were asked, and it was given as of
4 August 1st, 2010. But you've indicated later that the
5 payment history only starts at 2011 and upward. Do you
6 have that information?

7 A We gave the customer credit for all payments
8 that would have been anticipated of the default date of
9 August 1st, 2010, thus reducing the principal balance
10 from the three thirty-one seventy-four twenty-seven to
11 the three twenty-six seven oh six fifty-five.

12 Q So, it's not information that you have in your
13 payment history that you have in front of you from 2011
14 to the present?

15 A It's located in the -- as the new principal
16 balance and the default letter would be where the
17 information was. There's not going to be an entry in
18 the payment history. It was adjusted as a courtesy to
19 the borrowers to move forward given the chance to cure
20 the default with the proper notice based on that default
21 date of August 1st, 2010.

22 Q And do you know -- I -- I asked you earlier.
23 Do you know when the last payment was made on the loan?

24 A We have not received any payments from the
25 customer since 21st has serviced the loan. I do not

1 know if the customer made any payments.

2 It is not indicated any payments on 2-17-11
3 going forward. As I said, we did give customer credit
4 for up to August 1st, 2010 for all the anticipated
5 balance if all payments had been received on a timely
6 manner on that -- on that date.

7 Q But in your review of your data boarding
8 process, if I've got that terminology correctly, would
9 you not have reviewed the information from the prior
10 servicer from Ocwen as to the payments made on this
11 loan?

12 A Absolutely. But we can only review what
13 documents were provided.

14 Q Okay. What -- were you not provided the
15 payment history on this mortgage?

16 A We were provided with 2011 going forward.

17 Q So, did you -- so, you never reviewed the
18 payment history from 2000 --

19 A I could not review --

20 Q Wait, wait. Just wait a minute.

21 You've never reviewed the payment history from
22 2012 -- to 2006 to 2011?

23 A Correct.

24 Q Well, how -- how can you verify the accuracy
25 of how the principal is determined as of August 1st of

1 2010?

2 A I would say that -- I mean, I can just go off
3 with the business records are provided that I have and
4 that the -- the customer was given several options and
5 said there is statutory duties at the time of transfer
6 that the customer can request the validation of the
7 debt.

8 We did, as I said, give a credit for the
9 customer for all anticipated payments until the
10 August 1st, 2010 due date.

11 But I cannot speak to anything 2006 to 2010
12 payment history-wise. It was not provided by the
13 previous servicer.

14 Q Are you aware that Mary Jean Ziska was
15 adjudicated incompetent way back in 2006?

16 A Yes, I am.

17 Q Okay. And to the present time she is still
18 been adjudicated incompetent?

19 A I have seen documentation to that extent.

20 Q And as part of the review of the data boarding
21 process, you provided a Composite 8, which gives a few
22 default notices.

23 A Correct.

24 Q Are you aware of any notices that went to the
25 Court appointed guardian?

1 A No, I'm not.

2 Q Are you aware that Mary Jean Ziska even
3 received any of these notices?

4 A The -- the letters were sent certified mail,
5 so if they're signed for, then we would keep that. We
6 do have a rejection and then a subsequent acceptance of
7 the notices by Miss Ziska's mother that is in our
8 business records.

9 Q Let's talk about the first date in the
10 composite, the first notice.

11 A Uh-huh.

12 Q All right.

13 A February 5th, 2015?

14 Q Take a look at that. You have copies.

15 A Yeah.

16 Q Okay. Yes.

17 So, this was sent certified. How do you know
18 that it was received by Mary Jean Ziska?

19 A Based on these documents, I'm not -- I can't
20 speak that it was received. I don't have the return
21 receipts.

22 Q And do you know where Miss Ziska has resided
23 since this loan was originated in 2006?

24 A I do not know that.

25 Q Do you know where she lives at the present

1 time?

2 A I do not know without speculating.

3 Q And as of this -- the default letter of
4 February 5th, 2015, what's the date of default?

5 A April 1st, 2010.

6 Q Now, and just so I'm clear, as part of your
7 accounting, you don't have any accounting that goes back
8 to April --

9 A Correct.

10 Q -- 20th, 2010. So, you don't know if there
11 was any payments ever made after that up until the time
12 of your 2011 accounting.

13 A Correct.

14 Q If I -- the next letter, the next default
15 letter.

16 A Uh-huh.

17 Q And that's once dated?

18 A April 28, 2015.

19 Q Okay. So -- and do you know if Miss Ziska
20 received a copy of that notice?

21 A I know that it was subsequently her mother
22 received -- one of the notices was rejected and we do
23 have documentation on that. I do know that the
24 customer's mother did accept service of the
25 subsequent -- this Notice of Default through

1 conversations with -- that have -- were confirmed with
2 21st Mortgage employee, Emily Richards.

3 Q Okay. So, the rejection, do you know if Mary
4 Jean Ziska rejected it or her mother, which is Marian
5 Gregory?

6 A I don't know that.

7 Q Do you have that information in the file?

8 A Not in anything that's been entered into.

9 Q Okay. You've provided testimony. I believe
10 it was Exhibit 9 was the transfer of the mortgage.

11 A Uh-huh.

12 Q And the notice was sent to Mary Jean Ziska.
13 Do you know if she ever received that notice?

14 A I do not know.

15 Q Do you know when Marian Gregory received the
16 notice that you're talking about, the one that's dated
17 February 28th of 2015?

18 A No, I don't know.

19 Q Are you aware that the -- there's a previous
20 mortgage foreclosure action in this case?

21 A No.

22 Q You weren't aware that Residential Mortgage
23 filed complaint of foreclosure --

24 A I don't.

25 Q -- February 21st, 2008 in your review of the

1 records?

2 A I don't work for Residential. I'm not aware
3 of that.

4 Q Okay. Let me show you -- oops, I'm sorry.

5 MS. YERGER: Your Honor, I would request that
6 the Court take judicial notice of the filing of the
7 previous foreclosure action. I have a docket
8 number, 08-CA-1272, Residential Funding Company
9 versus Mary Jean Ziska and many defendants.

10 THE COURT: Any objection?

11 MS. PLANELL: I would just like to confirm
12 that that is a complete copy. No objection.

13 THE COURT: All right. So, reflect.

14 BY MS. YERGER:

15 Q In the body of the mortgage is there -- the
16 Mortgage Complaint of Foreclosure, is the date of
17 default identified on there?

18 A August 1st, 2007.

19 Q I'm sorry. What's the date?

20 A I see August 1st, 2007.

21 Q Any further -- subsequent payments?

22 A I see -- I apologize.

23 In Count 7 -- point seven, there's a default
24 under the terms of the Note and Mortgage for the
25 September 1st, 2007 payment and all payments due

1 thereafter.

2 Q All right. Thank you.

3 I'd ask that you look at the initial complaint
4 that was filed in the present action.

5 MS. YERGER: Do you have a copy of it?

6 MS. PLANELL: No.

7 MS. YERGER: If I may just approach?

8 THE COURT: Okay.

9 MS. YERGER: I may have a copy of that.

10 MS. PLANELL: Okay.

11 BY MS. YERGER:

12 Q Is that verified by an officer from 21st
13 Mortgage?

14 A It's verified by a 21st Mortgage employee that
15 has personal knowledge of the account, yes.

16 Q Okay. So, I'm going to direct your attention
17 to Paragraph 7. And does that indicate a date of -- a
18 default date of March 1st, 2010?

19 A No. It's -- it does not. It declares a full
20 amount payable under the Note and Mortgage be due
21 together with interest for March 1st, 2010.

22 Q Okay. And it references at the end of that
23 paragraph the composite Exhibit D.

24 A Correct.

25 Q And in your review of Composite Exhibit D, are

1 those the two letters that you just testified to that
2 were dated February 5th --

3 A Yes.

4 Q -- of 2015?

5 A Yes.

6 Q And the subsequent default letters that you
7 testified to that went -- that were dated, I believe, in
8 April, they're not attached to this initial complaint,
9 are they?

10 A They are not.

11 Q And there's also a certificate. If I could
12 direct your attention --

13 A Uh-huh.

14 Q -- Certification of Possession of original
15 note, and it's signed by Sonja Daz.

16 A Uh-huh.

17 Q Is this the information that you're --
18 indicated that it came from the --

19 A This is regard to the Bailee letter --

20 Q Bailee.

21 A -- that we sent, yes.

22 Q Okay. So, this is the information that she
23 received from correspondence from 21st Mortgage as to
24 the original note and mortgage?

25 A Yes.

1 Q Is that correct?

2 A Correct.

3 Q Okay. Now, were you aware that the complaint
4 was subsequently amended?

5 A Yes, I was.

6 Q And were you you aware that it was amended so
7 that a complete copy of the original note and mortgage,
8 front and back, could be attached to the complaint?

9 A Yes.

10 Q Okay. Well, in that complaint, the initial
11 complaint --

12 A Uh-huh.

13 Q -- isn't the entire note and mortgage
14 attached, meaning front and back?

15 A The allonge is not attached.

16 Q The front and back portions of the mortgage
17 and a note are attached.

18 A Yes. To my -- yes.

19 Q So, what's missing is the allonge on the
20 initial complaint.

21 A Correct.

22 Q Is that correct?

23 A Yes.

24 Q And was that then subsequently corrected in
25 the Amended Verified Complaint and Foreclosure?

1 A Yes.

2 Q Now, in that the Amended Complaint --

3 A Uh-huh.

4 Q -- that's the allonge that you're talking
5 about that is now attached --

6 A Yes, ma'am.

7 Q -- and admitted into evidence?

8 A Yes, ma'am.

9 Q And are you aware that there's also now every
10 other page is missing and it's blank on that verified
11 complaint. Do you have your verified --

12 A This would be the front and back, why it would
13 be blank, so --

14 Q Throughout the pleadings every other page is
15 blank?

16 A I -- I'm not understanding what you're trying
17 to look it.

18 Q The note and mortgage that are attached as
19 exhibits are all -- is that a complete copy of the note
20 and mortgage that's attached to the verified complaint?

21 A Yes.

22 Q Okay. Was there a change made to Paragraph 7
23 in the amended complaint?

24 A Yes.

25 Q Okay. And why was that changed?

1 A I was not enrolled in drafting the complaint.
2 I can't speak on that.

3 Q Is it verified by 21st Mortgage?

4 A It is.

5 Q Is there a new composite exhibit that's
6 attached?

7 A There is.

8 Q And that's the one that was received by Marian
9 Gregory. Is that correct?

10 A Based on the assertion that she would accept,
11 correct.

12 Q The -- attached to this amended complaint is a
13 Certification of Possession of the original note.

14 A Do you know about where it is?

15 Q It's right after the complaint. Right after
16 the -- in the very beginning.

17 A Okay. And can you reask, please?

18 Q I'm just directing your attention to this.

19 A Yes. Okay. Okay.

20 Q So, this indicates that the -- that the
21 Certification of Possession of original note is changed.
22 It's now February 9th of 2016. Is that correct?

23 A Correct.

24 Q Okay. After the filing of the complaint.

25 A Correct.

1 Q Okay.

2 MS. YERGER: That's all the questions I have,
3 Your Honor.

4 THE COURT: Okay. Any other witnesses for the
5 plaintiff?

6 MS. PLANELL: No, Your Honor. May I briefly
7 redirect the witness?

8 THE COURT: Oh, I'm sorry. Surely.

9 REDIRECT EXAMINATION

10 BY MS. PLANELL:

11 Q Mr. Warkins, based upon your review of the
12 business records, did the defendant or the guardian for
13 the defendant notify 21st of the defendant's legal
14 incompetence prior to the sending of the Notices of
15 Default?

16 A No, they did not.

17 Q Did the defendant or the guardian appointed to
18 the defendant notify 21st of the defendant's
19 incompetence after 21st sent its Notice of Service of
20 Transfer?

21 A No, they did not.

22 Q When did 21st, based upon your review of the
23 business records, receive notice of the defendant's
24 incompetence?

25 A Based on a letter provided by the -- the

1 customer's mother and a subsequent phonecall and court
2 documents that were sent in to 21st Mortgage.

3 Q Mr. Warkins, based upon your experience, do
4 you know if 21st has a -- has an obligation to confirm
5 receipt of demand letters that are mailed out?

6 A No.

7 Q And based upon your knowledge, your experience
8 in the -- in the business, are demand letters required
9 to be attached to the complaint?

10 A They -- they typically are, yes.

11 Q Is it a legal requirement though?

12 A I'm not sure on that in the State of Florida.

13 Q Okay.

14 A Yeah.

15 Q And just to -- may I have the two complaints?

16 Thank you.

17 Mr. Warkins, based on the initial complaint
18 dated June 26, 2015, and the Certificate of Possession
19 attached to that complaint as Exhibit A, does it say who
20 was in possession of the original note prior to the
21 filing of this complaint?

22 The entity that was in possession of this
23 original note.

24 A Sonja Daz at Quintairos.

25 Q And in the amended complaint that also has the

1 Certificate of Possession attached to the original -- of
2 the original note attached to the complaint, does it
3 also state what entity was in possession of the original
4 note at the time of the amended complaint?

5 A Michael -- Michael Hirsch -- Harsch.

6 Q And is Michael Hirsch an employee of the
7 plaintiff's -- plaintiff's firm?

8 A Yes.

9 Q And the copies of the note attached to the
10 initial complaint that were filed, Exhibit A, is there
11 any indication that there -- that the back of the
12 original documents was copied?

13 A Can you repeat that?

14 Q Does the copy of the note attached to the
15 initial complaint show that --

16 A Yes. It shows the blank backs of each page.

17 Q The initial complaint --

18 A Yes.

19 Q -- does it show the -- let me see how I can --
20 strike that, please. Let me start again.

21 If there were to be copies of the original
22 note, front and back, of a two-page document, front and
23 back, how many copied pages would there be?

24 A Two pages.

25 Q I think it's where the -- well, yeah. It's a

1 little confusing, but the copy of the note attached to
2 the amended complaint, how many -- how many pages are
3 actually included in the copy of Exhibit A?

4 A The front and back, there's --

5 Q How many pages?

6 A Oh.

7 Q One, two -- how many pages was that?

8 A That's 12.

9 Q Okay. And the initial complaint, how many
10 copies -- how many pages does the copy of the note
11 include?

12 A Six.

13 Q Thank you.

14 MS. PLANELL: No more questions for the
15 witness.

16 THE COURT: Okay.

17 MS. YERGER: No.

18 MS. PLANELL: No more questions.

19 THE COURT: Okay. Any other witnesses for
20 either side?

21 MS. YERGER: I have one witness to call.

22 THE COURT: Okay.

23 MS. YERGER: I'm going to have to speak very
24 loud to Mrs. Gregory. She's very hard of hearing.

25 THE COURT: Okay.

1 MS. YERGER: I don't want to say -- think I'm
2 yelling at her, but --

3 THE COURT: You need to swear her in then.

4 THE CLERK: Do you swear or affirm the
5 testimony you are about to give will be the truth,
6 the whole truth and nothing but the truth?

7 THE WITNESS: Yes, I do.

8 Whereupon,

9 MARIAN GREGORY,

10 a Witness, called and duly sworn and in behalf of
11 the defendant, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MS. YERGER:

15 Q Please state your name, Miss --

16 A Marian Gregory.

17 MS. PLANELL: I'm sorry. What did you say,
18 ma'am?

19 MS. YERGER: Marian Gregory.

20 BY MS. YERGER:

21 Q How are you related to Mary Jean Ziska?

22 A I'm her mother.

23 Q And were you appointed guardianship over
24 Miss Ziska?

25 A Yes.

1 Q And is this document, I have it marked as
2 Defendant's Exhibit 1, represent the letters of
3 guardianship signed by Judge Brodie?

4 A Yes.

5 Q Prior to your being appointed guardianship
6 over Miss Ziska, did she have a previous appointment of
7 a guardian?

8 A Patrick Weber.

9 Q Do you know when -- what year she was -- had
10 her first guardianship?

11 A Sometime after 2003. I don't remember the
12 exact date.

13 Q Okay. So, at that point, at least in 2006,
14 she was adjudicated incompetent.

15 A Yes.

16 Q And moving forward, she's been to the present
17 still adjudicated incompetent.

18 A Yes.

19 Q Do you know where she lives?

20 A 5632 Whisper Boulevard.

21 Q Is that the subject property we're talking
22 about --

23 A Yes.

24 Q -- on the foreclosure?

25 A Apartment 1601.

1 Q And do you know how long she's lived there?

2 A Probably since around 2003, 2004.

3 Q To the present continuously?

4 A Yes.

5 Q Okay. And where do you live?

6 A 9202 Vanderbilt Drive, Naples, Florida.

7 Q Does Miss Ziska live with you?

8 A No.

9 Q I'm going to show you a letter. Is that a
10 letter that you sent to 21st Century?

11 A Yes.

12 MS. YERGER: That's the one.

13 MS. PLANELL: This one.

14 MS. YERGER: Yeah. Here's the one. That one.

15 MS. PLANELL: Yeah.

16 BY MS. YERGER:

17 Q Why did you send that letter to 21st Century?

18 A There was a certified letter that was
19 addressed to Mary Jean at my address and because I'm her
20 legal guardian, I went and find out what it was, so I
21 wrote to 21st Century, told them -- advised them I was
22 her legal guardian.

23 Q And did you send that letter certified?

24 A Yes, I did.

25 Q And when did they receive it?

1 A I think June the 19th, 2015.

2 Q Okay. And --

3 MS. YERGER: Your Honor, I have marked as
4 Exhibit 2, it's a composite, four pages, of the
5 document that she's testifying to.

6 THE COURT: Okay. Does the -- you have a copy
7 or do you -- does she need to see a copy?

8 MS. PLANELL: Counsel did provide me with a
9 copy.

10 THE COURT: Very good.

11 BY MS. YERGER:

12 Q Did you get a response back from 21st Century?

13 A No.

14 Q Did you receive the certified letter back?

15 A No.

16 Q I'm going to show you what I've marked as
17 Defendant's Exhibit 3. Do you recognize that document?

18 A Not offhand. It came to me, my address.

19 Q Is that the certified letter you requested?

20 A This is -- no. This is Mary Jean's name and
21 address.

22 Q Right.

23 A It's not -- no, not what I was looking for.

24 Q I'm going to show you what's been marked as
25 Defendant's Exhibit 4.

1 When you sent the letter to 21st Mortgage, did
2 you receive that card that's identified on its
3 certified -- sorry, we missed you, that you got a
4 certified letter from the post office?

5 A I believe I did. I think that's when I --
6 yeah.

7 Q Okay. And this is the card that you received
8 in response to that?

9 A Yes.

10 MS. PLANELL: I'm sorry. I -- I need to
11 object just because I feel that there's a lack of
12 foundation as to the documents being testified to
13 by the witness. And, furthermore, I'm not able to
14 keep track of which document is which, so if you
15 could -- I -- I can't --

16 MS. YERGER: Sure.

17 MS. PLANELL: I need to be able to follow
18 what's going on.

19 THE COURT: For the court reporter, we need
20 you to have your witness speak loudly.

21 BY MS. YERGER:

22 Q I'm going to go back to what's been marked as
23 Defendant's Exhibit 4.

24 MS. PLANELL: Okay. Thank you.

25 BY MS. YERGER:

1 Q Is this the return receipt card that you
2 received from the post office in response to your letter
3 saying that you're going to receive a certified letter
4 on behalf of Mary Jean Ziska?

5 A Yes.

6 Q Do you know when you received that certified
7 letter?

8 A No.

9 Q Is there a date on there?

10 A I don't know. Is it this date here? June the
11 19th.

12 Q And then going back to exhibit -- to
13 Defendant's Exhibit 3, is that the actual certified
14 letter that you picked up from 21st Century?

15 A I believe so. It's addressed to Mary Jean
16 Ziska at my address, but it's not a response to my
17 letter to them. This one.

18 Q Right. Did you ask to receive the certified
19 letter addressed to Mary Jean Ziska at your address?

20 A Yes. I accepted service of her certified
21 letter, yeah.

22 MS. YERGER: Your Honor, I would move for the
23 exhibits -- Defendant's Exhibit 1 is a letter of
24 guardianship signed by Judge Brodie. The Court can
25 also take judicial notice of that because it's also

1 in the file here.

2 The Defendant's Exhibits 2, 3 and 4 is just
3 with regards to the default notice and letter.

4 THE COURT: Any objection?

5 MS. PLANELL: Your Honor, plaintiff does not
6 object to these documents. These documents are
7 contained within our business records.

8 THE COURT: Okay. Admitted.

9 (Defendant's Exhibits 1, 2, 3 and 4 were
10 admitted into evidence.)

11 MS. YERGER: I have no further questions of
12 this witness.

13 THE COURT: Okay.

14 MS. PLANELL: Miss -- but I'd like to ask the
15 witness a question. Should I get closer or speak
16 louder?

17 MS. YERGER: You might want to get closer.

18 CROSS-EXAMINATION

19 BY MS. PLANELL:

20 Q Miss Gregory, did you -- let me try to think
21 about it.

22 Prior to these letters, had you ever notified
23 the bank of Miss Ziska's mental status?

24 A Did I ever notify the bank? What bank?

25 Q 21st Mortgage Corporation.

1 A No.

2 Q No?

3 A No.

4 Q And you're Miss Ziska's legal guardian?

5 A Yes. I'm her mother.

6 Q Have you made any attempts to work something
7 out with the lender that she owes the money to?

8 A No, because she's on SSI and she's mentally
9 incompetent.

10 Q Okay.

11 A And I don't have the funds to -- to make her
12 -- pay her payments for her.

13 Q Okay. Is there any opportunity for her to be
14 able to resume payments on these loans?

15 A Unless there's a miracle, I doubt it. I doubt
16 it.

17 Q Does she live by herself?

18 A Sometimes she doesn't think I'm her mother
19 even, you know.

20 Q Well, I'm have sorry to hear that. She's
21 obviously mental help.

22 You don't reside with her at the property?

23 A No.

24 Q Have any communications been -- have any --
25 anything been done to move her to any other facility?

1 A Yes. We have tried. I have tried. Nothing
2 ever worked out because she was Baker Acted a couple of
3 times and they always released her because she looks --
4 she's very -- has a good presence and she fools people.
5 You know, she's ill.

6 Q Who pays her other bills?

7 A She gets SSI.

8 Q And the electrical bill?

9 A Yeah. I pay them. And I was temporarily -- I
10 was getting her check for awhile, but then she was
11 unsettled with that, so --

12 MS. PLANELL: Thank you. I have no further
13 questions.

14 MS. YERGER: I just have brief redirect, Your
15 Honor.

16 REDIRECT EXAMINATION

17 BY MS. YERGER:

18 Q Have you ever seen some of the mail that came
19 to Miss Ziska's property where she resides?

20 A Have I seen her mail? No.

21 Q Did you ever see a mail that came directed to
22 her previous guardian, Patrick Weber?

23 A No. But I think mail was sent to him in care
24 of her address and I don't know whatever happened. I
25 don't think she ever got it.

1 Q You mean she didn't ever pick it up.

2 A Yeah. She never picked up her mail.

3 Q But I'm asking how the letter would have been
4 addressed?

5 A To Patrick Weber, guardian, and then 5632
6 Whispering Wood Boulevard.

7 Q Okay. And was that correspondence from the
8 bank?

9 A I don't know.

10 MS. YERGER: Okay. Nothing further.

11 THE COURT: Okay. Very good. If there are no
12 other witnesses, if you'd like to proceed to your
13 closing.

14 MS. PLANELL: Your Honor, plaintiff
15 believes -- it's the position that plaintiff has
16 met its burden of a prima facie case with competent
17 and substantial evidence as demonstrated by a
18 witness, who is a records custodian, who has fairly
19 testified as to the trustworthiness and accuracy of
20 the business records.

21 The defendant has offered no evidence to
22 contradict the plaintiff's evidence presented today
23 and the plaintiff's testimony that was taken today.

24 The defendant -- the witness has provided
25 again competent and substantial evidence to support

1 plaintiff's prima facie burden of a prima facie
2 case of the fact that there is a note and mortgage
3 of which plaintiff is in possession of the original
4 which includes an allonge.

5 Also further testified -- further supported by
6 these certified copies of the Assignment of
7 Mortgage, which clearly show the chain of ownership
8 of said loan, up to and including the plaintiff --
9 the plaintiff -- the present plaintiff, 21st
10 Mortgage Corporation, all of which predated the
11 filing of the complaint, which is the subject of
12 this foreclosure action filed on June 2015.

13 That also further supported by the Bailee
14 letter, which demonstrates that plaintiff and their
15 counsel was in possession of the original
16 collateral documents prior to the filing of this
17 foreclosure action. Again, as further
18 substantiated by the assignments and the -- the
19 Bailee letters.

20 Furthermore, the defendant has complied with
21 all of the conditions precedent pursuant to
22 Paragraph 22 of the service of the subject
23 mortgage.

24 The loan was properly boarded from the prior
25 servicer as testified by the witness. There has

1 been nothing to put into question the
2 trustworthiness and the accuracy and the
3 truthfulness of the business records presented to
4 the Court today.

5 There, again, the defendant has made no -- has
6 provided no evidence of any payments having been
7 made to the plaintiff.

8 Furthermore, there is the defendant or her
9 guardian did not ever notify 21st of the
10 incompetent -- incompetence of the borrower.

11 It's plaintiff's position that the lender,
12 21st Mortgage, is under no obligation to determine
13 the mental health status of their borrowers when
14 they are servicing a loan and purchasing a loan.

15 Furthermore, with respect to the argument
16 regarding the -- the demand letter and the receipt
17 of the demand letter, the conditions precedent that
18 plaintiff must comply with and must demonstrate
19 compliance would only indicate the requirement that
20 the default letter be mailed and provide the
21 defendant with the amount to cure, the date to cure
22 and the opportunity to cure.

23 And that has been demonstrated by the
24 substantial compliance with Paragraph 22.

25 The letter was sent to multiple addresses to

1 ensure that they were sent to the defendant. There
2 is a case that came back -- that came out of the
3 Fourth DCA on August 3rd, 2016. It is Federal and
4 National Mortgage Association versus Lambert
5 Hawthorn.

6 For the Court and opposing counsel.

7 It specifically states that the -- that the
8 plaintiff substantially complied with the mortgage
9 by mailing the default notice to the defendant's
10 address, which was typewritten underneath the
11 defendant's signature on the mortgage.

12 In this case, the Court had dismissed the
13 action because the plaintiff did not mail the
14 default notice to the defendant at the property
15 address.

16 Again, here the Court goes even further and
17 states that there is no -- the only requirement is
18 that plaintiff be in substantial compliance with
19 sending the defendant/borrower a notice that
20 complies with the terms and that is sufficient as
21 plaintiff's burden.

22 Furthermore, there is no prejudice to the
23 defendant on the terms of -- included within the
24 demand letter since the borrower had not
25 demonstrated any attempts to cure the default.

1 With respect to the amendment of the
2 complaint, the -- I believe the documents speak for
3 themselves.

4 Both the initial complaint and the amended
5 complaint both state the same date of default,
6 which is August 1st, 2010.

7 The only difference in the initial complaint
8 and the amended complaint are the dates from which
9 the plaintiff is seeking to collect, which is the
10 unpaid principal balance and the interest that it
11 is due from the terms of the subject note and
12 mortgage.

13 And based upon, again, all of the evidence
14 presented today, which is uncontradicted by the
15 defendant, the defendant's position that the
16 letters were not -- were not received by a person
17 with mental competency is -- is beyond plaintiff's
18 burden at this point.

19 Plaintiff simply needs to provide sufficient
20 and competent substantial evidence with compliance
21 with the subject note and mortgage, which it
22 believes it has done at this time.

23 Thank you for your time, Your Honor.

24 THE COURT: Okay.

25 MS. YERGER: Your Honor, this complaint fails

1 on many levels, and I go back to the initial
2 statement that was made at the opening under McLean
3 versus JPMorgan Chase, that the plaintiffs lack of
4 standing at the inception of the case is not a
5 defect that may be cured at the acquisition of
6 standing after the case is filed.

7 If you look at the initial complaint, it
8 gives -- Paragraph 7, it gives a default of
9 March 1st, 2010, supported by that Exhibit D, which
10 is the only exhibit that goes to the -- to the
11 borrower at two different addresses. But it states
12 the date of default is April 1st, 2010.

13 It then does not have an allonge also to the
14 initial complaint. So, there's been corrections
15 that are attempted to be made in -- in the filing
16 of the amended complaint.

17 The Motion to Amend the Complaint,
18 February 16th, 2016, which attaches a complaint
19 said it was for specifically to attach a complete
20 copy of the original note and mortgage, front and
21 back, which were not -- which were inadvertently
22 not attached to the plaintiff's initial complaint.

23 If you look at the court records and the
24 amended complaint, every other page is blank on
25 those notes and mortgages, so the original

1 complaint was intact.

2 And you heard testimony from the witness,
3 Mr. Warkins, that what was missing was the allonge.
4 So, not only do they add the allonge to the
5 complaint, then they change Paragraph 7 to reflect
6 what the compliance with 95.11(2)(c), which is the
7 five-year Statute of Limitations, because they knew
8 that a date of going in of March of 2010 is not in
9 compliance with the five-year Statute of
10 Limitations.

11 So, those two changes and the addition of the
12 letter tries to put them in compliance, but that --
13 that is improper when they don't have standing at
14 the initiation of the complaint filed, which was
15 June 26th of 2015.

16 Now, let's look at the default that Marian
17 Gregory, as the guardian, signed for Mary Jean
18 Ziska.

19 We heard testimony from Mr. Warkins that we
20 don't know if any of these notices were received by
21 Mary Jean Ziska that were sent to her property.

22 They were on notice though from the guardian
23 that there was a problem here in June, and their
24 receipt of the -- of the correspondence from
25 Mary -- from Marian Gregory said that she was the

1 guard and she would accept service.

2 The date on the card that they received was
3 June 19th of 2015, and that was six days before
4 they filed a complaint.

5 They didn't provide the 30-day time period for
6 it, even give Mrs. Gregory an opportunity to cure
7 on behalf of the guardian, so they fail in their
8 condition precedent from this. They fail on the
9 Statute of Limitations, which is still a valid
10 argument, 95.11(2)(c).

11 Even if you consider the rehearing on the
12 Beauvais case that cites the Singleton, we still
13 have in our Second DCA the Stadler case, versus
14 Cherry Hill Developers, Second DCA, 1963, that
15 says, once there's an acceleration to put all
16 future payments in issue foreclosures for success
17 -- successive suits.

18 There was testimony that there was a previous
19 foreclosure that was filed with all due payments of
20 the default of September of 2007.

21 Now, we have another complaint and foreclosure
22 that -- filed with the default date of March 1st,
23 2010.

24 We're handed this case that's -- I say
25 Dhanasar, but I'm sure I just butchered that one.

1 Dhanasar versus JPMorgan, which is a Third DCA
2 case, that says now we can toll the Statute of
3 Limitation based on the filing of the complaint.

4 But yet on the testimony we're providing
5 what's due and owing as of August 1st of 2010, a
6 date in time that this witness doesn't even have
7 the balance due and owing.

8 They have an accounting given from 2011, so
9 obviously there is a five-year Statute of
10 Limitations that you're using. They're tried to
11 correct the amended complaint to reflect that they
12 should have had at the inception of the case. And
13 because they did not have it corrected, they did
14 not have standing and this complaint needs to be
15 dismissed.

16 THE COURT: Let me ask both counsel a
17 question, and that is, in any documents that have
18 been filed in this case, is there ever any
19 reference to the competence or lack of competence
20 of the defendant/mortgagor?

21 I heard some testimony today, but I've looked
22 at the documents that -- I guess the one that was
23 really kind of surprising is that apparently the
24 mortgagor/defendant in this case filed bankruptcy
25 or attempted to file bankruptcy, and then there

1 was -- discharged out.

2 In August of 2015 there was a plan -- I guess
3 there was a plan confirmed as a result of that.
4 And there was a discharge by Judge Delano, let's
5 see, February the 17th, 2015.

6 But even when I look at the answer that was
7 filed by the defense, there's no -- well, anyway, I
8 mean, I -- if there's any indication anywhere in
9 the court file of competency or lack of competency,
10 then please feel free to bring it to my attention.

11 But my review of the court file though is the
12 first time I've ever heard anything about this is
13 in some testimony today.

14 But there is absolutely nothing in the record
15 that would -- you know, any of the pleadings that
16 have been filed up to this date.

17 I mean, it's almost like -- I mean, I'm not --
18 wouldn't say I would be surprised, but if in fact
19 there's some testimony today that says that the
20 mortgagor/defendant was incompetent even before she
21 ever applied for and received a mortgage, that's
22 rather odd.

23 And -- but there's never -- there's -- well,
24 the only observation I could make is that there's
25 never been anything placed in the court file to

1 reflect that there was a question about competency
2 until today's testimony.

3 The other -- the other thing is that in
4 looking at the answer that has been filed, it
5 appears that the primary defense of the mortgagor
6 is the Statute of Limitations.

7 And, obviously, I think that, based on the age
8 of the Second District Court that you referenced,
9 more than likely that was taken care of in 2004 in
10 the Singleton decision by the Florida Supreme
11 Court.

12 And while we're still waiting for an update
13 via the Bartram decision, I think Singleton is
14 still controlling, and then you do have -- in my
15 mind, the Third District has made a valiant attempt
16 to make its law comply with Singleton and you end
17 up with some very odd -- in my mind, some odd
18 rulings. And Dhanasar is one of them.

19 And -- and for -- I'll give a copy to the
20 court reporter, but D-h-a-n-a-s-a-r.

21 This is the July the 27th, 2016 decision that
22 you provided. And, I mean, it says what it says
23 and -- and it basically says that the acceleration
24 begins with the date of the filing of the mortgage
25 foreclosure lawsuit, not with the date of the

1 Notice of Default.

2 And, so -- and as counsel for the plaintiff
3 emphasizes, as the Dhanasar case points out, they
4 allege that the defendant, Dhanasar, had failed to
5 pay the April 2008 payment and all subsequent
6 payments and the action was filed within the five
7 years.

8 And the -- and, so, if we're to follow the
9 Dhanasar case, then the defendant's current
10 argument before us today of Statute of Limitations
11 impediment is -- is actually not supported by the
12 case law.

13 And I don't know whether they do this on
14 purpose, but in the -- Judge Suarez in the Dhanasar
15 case says, you know, we -- they're following the
16 analysis that they made in Deutsche Bank versus
17 Beauvais, and as they say, it is entirely
18 applicable to the facts at hand.

19 As I have commented before, I think actually
20 Beauvais, Bartram and Singleton are all wrong, and
21 I still have hopes that Justice Pariente will
22 probably be tasked with rewriting Singleton in the
23 Bartram case, and they'll take an opportunity to
24 clarify this, because the Statute of Limitations
25 arguments -- you know, I'm not going to go back

1 through all of those issues, but when you choose to
2 accelerate, which is not a mandatory requirement,
3 then you choose to accelerate. You put it all on
4 the table.

5 I think the Statute of Limitations should
6 apply. Singleton obviously makes an exception,
7 Beauvais makes an exception, and now you end up
8 with Dhanasar along the same lines.

9 Bartram has a lot of problems of its own that
10 when you watch the oral arguments before the
11 Supreme Court, Justice Pariente points out several
12 problems in Bartram, including the with and without
13 prejudice concepts.

14 So, unfortunately, I think this is all a
15 serious mess that has been created almost in
16 deference to mortgage foreclosures and alleged
17 crisis.

18 So, the problem I have here is that -- so,
19 I -- so, I don't think the Statute of Limitations
20 argument has merit based on the case law that I
21 would follow and they're under Singleton, Beauvais
22 and Dhanasar. So, that wouldn't hold up.

23 The other problem is that in looking at the
24 answer, there is no -- I don't believe. Let me
25 just pull it back up real quick in the computer.

1 But I don't believe that the -- let me see.

2 There's no argument in the answer that there
3 is a standing argument unless -- where is it?
4 Because it -- it homes in on -- well, and then the
5 other issue is the Residential Mortgage --
6 Residential Funding case that we did judicial
7 notice of.

8 I think that because that points your -- your
9 answer, and presumably the documents, but I'm
10 relying on the mortgagor's answer, says that it was
11 dismissed without prejudice and, you know, finally
12 the -- common sense seems to have prevailed in some
13 of the appellate cases that say, you know, a
14 dismissal without prejudice is not on the merits
15 and is, in essence, a nullity, which I think should
16 be the law, but there was some question about that
17 for awhile and maybe still is.

18 So, I don't know -- let me see.

19 MS. YERGER: It's in the affirmative defenses,
20 Your Honor. And the affirmative defenses raised
21 that the -- the notice provision was defective,
22 didn't provide the defendant with the 30 days.
23 There was a lack of standing on the Affirmative
24 Defense 3, condition precedent.

25 THE COURT: Well, there is on Paragraph 7, a

1 statement that the plaintiff lacks standing on the
2 day that the action was filed and cannot acquire
3 standing, quote, after the fact.

4 And, so, that -- that one argument is the only
5 one, quite frankly, I think that is of any value to
6 the Court in looking at the defense.

7 The others are -- there appears to be, you
8 know, the substantial compliance with Paragraph 22
9 requirements and -- and, as I say, I'm not going to
10 even venture out on the competency issue because
11 there's nothing in the record that's ever been
12 provided to the Court that would support that and,
13 so, bringing it up today at trial is I think a
14 nullity.

15 The -- so, the -- the original and, clearly,
16 the plaintiff has to have standing when they file a
17 complaint.

18 So, let me ask you the question that they --
19 if the plaintiff did file a Certificate of
20 Possession of the original note on June the 26th,
21 2015 with the filing of the lawsuit and they advise
22 that they are in possession of the original
23 Promissory Note, upon which the action is brought,
24 and they give you the location of the Promissory
25 Note and the title of the person giving the

1 certification.

2 And it appears that they have introduced
3 through their business records a sufficient chain
4 of title to establish that possession of the
5 original note and, however, one of the, you know,
6 critical areas of inquiry in these appellate cases
7 is where an amended complaint is filed and, you
8 know, for lack of a better term, lo and behold,
9 there is evidence of an allonge or some type of
10 document that reflects a transfer.

11 And, so, as it -- my -- am I incorrect in
12 saying that there's no evidence in the original
13 complaint that reflects that the allonge was
14 present --

15 MS. YERGER: That's correct.

16 THE COURT: -- that it only shows up in the
17 second amended complaint?

18 MS. YERGER: That's correct.

19 MS. PLANELL: Yes, Your Honor.

20 The original -- the initial complaint failed
21 to include several of the pages that travel with
22 the original note as evidenced by the Bailee
23 letter, which was Plaintiff's Exhibit -- I believe
24 it was Plaintiff's Exhibit 7.

25 THE COURT: And, so -- and the Bailee

1 letter -- let me -- maybe if I can see that or if
2 you can refer to that, if you have a copy, was that
3 Bailee letter created prior to or after the
4 original complaint?

5 MS. PLANELL: The Bailee letter was created,
6 sent and received prior to the filing of the
7 complaint.

8 And it does indicate original note, original
9 mortgage and the -- the other --

10 THE COURT: The allonge.

11 MS. PLANELL: -- the other attachments checked
12 off, which unfortunately were not attached to the
13 initial complaint and were attached to the amended
14 complaint.

15 The Bailee letter from 21st Mortgage to
16 plaintiff's counsel, as the witness testified, does
17 indicate that those documents were sent
18 contemporaneously.

19 THE COURT: Okay. Well, it's a -- it's a red
20 flag, obviously warning area, but it does look like
21 the Bailee letter is dated June the 23rd and
22 actually dated June the 25th. And -- and there has
23 been testimony as to how that was provided.

24 So, it -- that's a -- that's a, you know, a
25 negative for the plaintiff and it does present a

1 red flag for the -- that the defendant can raise.

2 But I think in the overall looking at the
3 testimony and the documents provided, I will agree
4 that that's not going to be dispositive in
5 defeating the plaintiff's claim.

6 And, quite frankly, without getting into
7 Judge Altenbernd's concurring opinion and the -- I
8 think it's spelled correctly, F-o-c-h-t case,
9 and -- and in a more recent case by one of our
10 newer judges from -- on the Second District Court
11 of Appeals.

12 I think that the concerns with regard to that
13 standing argument have been satisfactorily met.
14 So, I will grant the plaintiff's claim.

15 MS. YERGER: Your Honor, if I could just have
16 some clarification. If the Court is making a
17 decision based on Dhanasar for the filing of the
18 complaint as the tolling of the Statute of
19 Limitations, then shouldn't the Final Judgment
20 start in terms of calculating an amount of
21 judgment, damages, to be the date of the filing of
22 the complaint rather than an earlier date of
23 August 1st, 2010?

24 THE COURT: No. Because Dhanasar for -- and
25 this was the point in Dhanasar. The -- let me just

1 give you a couple of dates.

2 It says Dhanasar defaulted on her mortgage
3 payments in April of 2008. The foreclosure
4 complaint was filed in August of 2013 and the 2013
5 complaint sought the accelerated payments due from
6 August 2008.

7 Dhanasar's position at the trial was that the
8 Statute of Limitations would have expired on --
9 well, would have started to run with the Notice of
10 Default on July the 18th, 2008 and, therefore,
11 expired on July the 18th, 2013, and that the bank's
12 complaint was time barred because they filed it on
13 August the 31st, 2013.

14 The bank in that case appears to have argued
15 that the complaint was filed on -- no dispute on
16 this. It was filed on August the 31st, 2013, and
17 they allege that that triggered the start of the
18 Statute of Limitations.

19 The Appellate Court pointed out that the
20 mortgage says, as this one does and most of them
21 do, that the lender may, at its option, choose to
22 accelerate the note. And then they say, in other
23 words, comma, the acceleration did not occur
24 automatically 30 days after the default letter was
25 sent but, rather, when the bank sought to foreclose

1 by filing its 2013 complaint.

2 And then they go -- they say the question is
3 whether the bank could proceed with the action for
4 foreclosure where Dhanasar failed to make her
5 April 2008 payment and any subsequent payments
6 where the notice letter was sent to her on July of
7 2008 and where the foreclosure complaint was not
8 filed until August of 2013.

9 And the language -- I think telling language
10 here is where it says -- the next sentence says
11 because the bank's complaint specifically alleged
12 that Dhanasar had failed to pay the 2008 payment
13 and all subsequent payments and the action was
14 filed within five years, and I think they put this
15 language in here on purpose, clearly. I think we
16 have to presume they did.

17 But it says, and the action was filed within
18 five years of a default payment, we agree with the
19 trial court's conclusion that the action survived
20 the asserted Statute of Limitations bar and then
21 they cite to Beauvais.

22 So, it's -- I think it was not by accident
23 that they referred back to the August default
24 payment, but they're saying to a default payment
25 because they're arguing pursuant to Beauvais that

1 each and every month that occurs thereafter is a
2 default.

3 You know, as I've said I'm just going to
4 follow what I think the law is. But I -- my -- my
5 humble opinion is they're all wrong. And that's
6 just easy for me to say, I guess, but I've actually
7 put a lot of thought into it. I just think they're
8 all wrong and I'm hoping, you know, that the
9 Supreme court will get this clarified because the
10 guys in the Third District are doing their best, in
11 my opinion, to comply with Singleton. And that's
12 how we end up with Beauvais and now we end up with
13 Dhanasar.

14 You know, it's kind of like that's actually
15 bad law.

16 So, I think the Appellate Courts are doing the
17 best they can. The responsibility of this lies
18 with the Florida Supreme Court, in my opinion, and
19 they really need to -- and I -- and I appreciate,
20 and clearly they must be readdressing this.

21 And the fact that it's taken them this long to
22 come up with an opinion, and we're still waiting,
23 shows that there is a lot of -- you know, there is
24 a lot of discussion going on.

25 I don't think they put this on the back burner

1 by a long shot. They just can't come to a
2 resolution at their own level.

3 So, anyway, I -- I think that the judgment
4 would be granted.

5 MS. YERGER: Thank you, Your Honor.

6 THE COURT: Okay.

7 (The proceedings concluded at 12:18 p.m.)
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CERTIFICATE OF REPORTER

State of Florida)

County of Collier)

I, Rose Marie Witt, RPR and Notary Public in and for the State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes to the best of my ability.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties, attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 14th day of October, 2016.



Rose Marie Witt