

**In the Matter of:**

MCCORMICK 106

vs.

RAJYSTMANURA ADJODA

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**HEARING**

*August 21, 2014*

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1                                   IN THE CIRCUIT COURT OF THE  
2                                   15TH JUDICIAL CIRCUIT, IN AND  
3                                   FOR PALM BEACH COUNTY, FLORIDA  
4                                   CASE NO: 50-2009CA029367XXXXMB  
5                                   Division:   AW  
6                                   MCCORMICK 106, LLC.,  
7                                   Plaintiff,  
8                                   vs.  
9                                   RAJYSTMANURA ADJODA, et. al.,  
10                                  Defendants.

11                                  \_\_\_\_\_ /

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14   PROCEEDINGS  
15   BEFORE:           The Honorable Timothy P. McCarthy  
16   DATE:             Thursday, August 21, 2014  
17   TIME:             1:30 p.m. - 4:30 p.m.  
18   PLACE:            Palm Beach County Courthouse  
19                      205 North Dixie Highway  
20                      West Palm Beach, FL 33401  
21   REPORTED BY:   Rhonda L. Buxbaum, Notary Public  
22                      State of Florida  
23  
24  
25

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2 A P P E A R A N C E S :

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Counsel for the Defendants.

14

15 ALSO PRESENT:

16 Brandi Eberly, Representative  
McCormick 106, LLC

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

2 \* \* \*

3 THE COURT: Are you ready to proceed?

4 MR. WASYLIK: Yes, Your Honor.

5 THE COURT: All right. Let's go.

6 MR. PASCALE: Would you like us at the podium,  
7 Your Honor?

8 THE COURT: I don't care where you go. Let's  
9 go because we're running late because of the --  
10 well, it's not this deputy's fault, but we didn't  
11 have any coverage so we're off schedule.

12 MR. PASCALE: I'm Andrew Pascale appearing on  
13 behalf of the Plaintiff, McCormick 106, LLC.

14 THE WITNESS: I'm Brandi Eberly. I'm with  
15 McCormick 106, LLC.

16 THE COURT: Okay, let's go. Raise your right  
17 hand.

18 THE WITNESS: (Complies)

19 THE COURT: Do you swear the testimony you're  
20 going to give in this cause be the truth, nothing  
21 but the truth?

22 THE WITNESS: Yes.

23 THE COURT: Take the stand, please. Let's not  
24 mess around anymore. Which bank case is this?  
25 Which case is this?

1                   MR. PASCALE: It's number two on the Court's  
2 docket, Your Honor, styled -- it may be styled  
3 BankUnited, but it's now been substituted.

4                   THE COURT: I've got it.

5                                   DIRECT EXAMINATION

6 BY MR. PASCALE:

7           **Q     Would you please state your name?**

8           A     Brandi Eberly.

9           **Q     And your occupation?**

10           THE COURT: Spell your name, please.

11           THE WITNESS: B-R-A-N-D-I Last name is Eberly  
12           -- E-B as in boy E-R-L-Y.

13 BY MR. PASCALE:

14           **Q     Can you tell the Court your job duties,**  
15 **please?**

16           A     Assistant Vice-President with McCormick 106,  
17 LLC.

18           **Q     Okay. And does McCormick keep records in**  
19 **connection with its business?**

20           A     Yes.

21           **Q     And are you familiar with McCormick's business**  
22 **records for --**

23           THE COURT: What does McCormick do? Are they  
24 a bank?

25           THE WITNESS: We're an investor.

1 THE COURT: I'm sorry?

2 THE WITNESS: An investor.

3 THE COURT: An investor?

4 THE WITNESS: We purchase mortgages. We don't  
5 lend, so we're not a bank.

6 THE COURT: Okay, go ahead.

7 BY MR. PASCALE:

8 Q Are you familiar the McCormick's business  
9 records for the Defendant's mortgage loan that McCormick  
10 is seeking to foreclose on in this case?

11 A Yes.

12 Q Okay. Does that include the mortgage,  
13 promissory note, payment history, demand letter, and all  
14 collateral documents associated with that loan?

15 A Yes.

16 Q And is McCormick in possession of the original  
17 promissory note?

18 A Yes.

19 Q Does McCormick own the promissory note?

20 A Yes.

21 MR. WASYLIK: Objection. Calls for a legal  
22 conclusion.

23 THE COURT: Overruled.

24 BY MR. PASCALE:

25 Q When did McCormick acquire the promissory

1 note?

2 A November of 2013.

3 Q Okay. In your hand is Plaintiff's Exhibit  
4 Number 1. Do you recognize the document?

5 A Yes, it is the promissory note.

6 Q Have you seen that promissory note before?

7 A Yes.

8 Q And is the note in the same condition now as  
9 when you first saw it?

10 A Yes.

11 Q Okay. And when did you first see the  
12 promissory note?

13 A On or around the time of transfer.

14 Q Okay. Does the note appear to be signed?

15 A Yes.

16 Q Can you read for us on the last page of the  
17 note whose name is printed?

18 A I can read it the best I can; my apologies.  
19 Rajystmanura Adjoda.

20 Q Okay. Is there a printed name?

21 A Yes.

22 Q Can you read that?

23 A Rajystmanura Adjoda.

24 THE COURT: Madam Court Reporter, do you need  
25 the spelling for that?



1 COURT REPORTER: I actually have it right here  
2 in the style. Thanks, Judge.

3 THE COURT: Okay.

4 BY MR. PASCALE:

5 Q And is there a signature by that name?

6 A Yes.

7 Q And what does that signature read?

8 A It appears to match the printed name.

9 Q Okay. And is the note dated?

10 A Yes, it is.

11 Q Can you tell the Court the date of the note?

12 A August 22, 2006.

13 Q Who is the original lender identified in that  
14 note?

15 A BankUnited, FSB.

16 Q And what is the amount of money being  
17 borrowed?

18 A Principal balance \$470,250.00.

19 Q Okay. Does the note contain an allonge?

20 A Yes. There are two.

21 MR. WASYLIK: Your Honor, at this point I'm  
22 going to object. We're going way beyond  
23 identification. The document hasn't been  
24 introduced yet, and so she's testifying as to  
25 contents of records not yet introduced into

1 evidence.

2 THE COURT: Okay. What's your response to  
3 that?

4 MR. PASCALE: Your Honor, I'm not asking for  
5 --

6 THE COURT: Well --

7 MR. PASCALE: I'd like to introduce the note.

8 THE COURT: I'm going to let you do the  
9 allonges because I want to know what -- it might  
10 have something to do with admissibility.

11 MR. PASCALE: Okay.

12 THE WITNESS: There are two allonges. There  
13 is one that transfers the note from FDIC to  
14 BankUnited, N.A., and then there's one that  
15 transfers the note from BankUnited, N.A. to  
16 McCormick 106, LLC.

17 MR. PASCALE: Thank you.

18 Your Honor, at this time I move to introduce  
19 the promissory note into evidence as Plaintiff's  
20 Exhibit Number 1.

21 MR. WASYLIK: Your Honor, I'd like to reserve  
22 an objection on this one. Under 673.3081,  
23 Authenticity, that's going to require me to put on  
24 some evidence later on, and so I think it's  
25 appropriate.

1 THE COURT: How can I do that? How can I  
2 reserve? Your objection is either sustained or  
3 it's not. What's your objection?

4 MR. WASYLIK: Well, my objection at this  
5 point, Your Honor, is for the authenticity of the  
6 note and signature. It's undisputed that Mr.  
7 Adjoda is deceased, and pursuant to 673.3081 the  
8 authenticity of the signature is presumed, unless  
9 the maker is deceased.

10 THE COURT: Well, there's another factor  
11 there, too. What is the other factor? It's  
12 deceased and what else?

13 MR. WASYLIK: Or incompetent, Your Honor.  
14 That's an alternative condition.

15 THE COURT: What's your response to that,  
16 counsel? First of all, you haven't even told me  
17 your names.

18 MR. PASCALE: It's Andrew Pascale.

19 THE COURT: Andrew Pascale. And your name,  
20 sir?

21 MR. WASYLIK: My name, sir, is Michael  
22 Wasylik. It's M-I-C-H-A-E-L. W-A-S-Y-L-I-K.

23 THE COURT: Okay, all right. What's your  
24 response to the objection, counsel?

25 MR. PASCALE: Yeah, Your Honor, our response

1 is that the note is what it purports to be. It was  
2 a negotiable instrument. The Defendant's objection  
3 is a legal argument not contained within the  
4 Defendant's Answer and Affirmative Defenses.

5 THE COURT: You don't need to put affirmative  
6 defenses in to object to evidence.

7 MR. PASCALE: Well, I understand that, Your  
8 Honor, but it's akin to a legal argument. It's not  
9 raised in the Answer and Affirmative Defenses.

10 THE COURT: You don't raise objections to  
11 evidence in answers and affirmative defenses. This  
12 is an evidentiary issue; not a pleading issue. So  
13 what is your position on why it should be admitted  
14 at this point?

15 MR. PASCALE: Because there isn't evidence to  
16 the contrary to show that it is not --

17 THE COURT: Objection sustained. You have to  
18 do better than that.

19 MR. PASCALE: Well, I'd like an opportunity to  
20 have a brief recess, Your Honor.

21 THE COURT: To do what?

22 MR. PASCALE: To be able to formulate a  
23 response to the objection and set forth our legal  
24 position to this Court.

25 THE COURT: Set it forth now. This is an

1 evidentiary objection. You know, I'm sure you've  
2 done this before, and it's the standard objection  
3 to the note when somebody is dead.

4 MR. WASYLIK: And, Your Honor, if I may point  
5 out, this -- we did actually plead this in our  
6 Affirmative Defenses as to 673.3081 so the  
7 Plaintiffs have been on notice of this objection to  
8 the authenticity of the note since January 31st,  
9 2014. Our Answer and Affirmative Defenses for Lisa  
10 Adjoda objects to -- I'm going to direct the  
11 Court's attention to defense number four:  
12 Plaintiff's claims are barred because the  
13 signatures, aside from those of the homeowner,  
14 which is Lisa Adjoda, on any assignments or  
15 endorsements and provide strict proof thereof  
16 pursuant to 673.3081, Sub 1, Florida Statutes. And  
17 that's the --

18 THE COURT: What was the citation?

19 MR. WASYLIK: 673.3081, Subsection 1, judge,  
20 and that's the one Your Honor refers to the  
21 deceased or incompetent maker.

22 MR. PASCALE: And our response to that, Your  
23 Honor, is that there is nothing specific. It's  
24 just a general denial that it wasn't signed. I  
25 think there needs to be more. I think there needs

1 to be some sort of specific negative averment  
2 pursuant to the case law that puts on notice and  
3 establishes sufficient ultimate facts as to that  
4 allegation. I don't think it's enough to just say  
5 it wasn't signed.

6 THE COURT: Again, I'm saying that this is an  
7 evidentiary procedure; not even a pleading  
8 procedure, although you were on notice that the UCC  
9 under 673.3081 came into play here. That takes it  
10 out of the standard of exception under the evidence  
11 rule. And so not only is this simply an  
12 evidentiary matter, but you've also been put on  
13 notice. I've never quite understood why additional  
14 steps aren't taken to establish the identity of  
15 these things before trial, under the Rules of Civil  
16 Procedure, but that's up to you guys.

17 What other evidence are you going to have in  
18 this case, counsel, that this promissory note was  
19 executed by the borrower?

20 MR. PASCALE: Well, we have the mortgage to  
21 introduce which is also --

22 THE COURT: No, I'm talking about Exhibit  
23 Number 1, the promissory note. That's what we're  
24 arguing about now. What other evidence are you  
25 going to produce in this trial today to show that

1 the signatory or the signature was made by the  
2 original borrower who evidently is deceased -- and  
3 I assume that's not contested.

4 MR. PASCALE: Well, my client -- is Your Honor  
5 asking with regard to the specific --

6 THE COURT: I want you to proffer to the Court  
7 now what other evidence you are going to have to  
8 get this into evidence.

9 MR. PASCALE: Well, my client owns the  
10 mortgage loan belonging to the Defendant, so if  
11 payments -- and there are certain payments made  
12 under that mortgage loan by Mr. Adjoda, the  
13 deceased, then the Court can infer that Mr. Adjoda  
14 signed a promissory note for that principal  
15 balance.

16 THE COURT: Why would I infer that a specific  
17 person made payments? What does that have to do  
18 with trying to introduce Exhibit Number 1?

19 MR. PASCALE: Well, Your Honor, typically a  
20 borrower would not sign a note -- or a non-borrower  
21 would not sign a note and make payments towards  
22 that loan.

23 THE COURT: Well, that's an inference that the  
24 Court cannot make. So I'm going to sustain the  
25 objection as to Exhibit Number 1.

1 MR. PASCALE: Well, Your Honor, our final  
2 response is that it's a negotiable instrument, and  
3 the authenticity and authority to make that  
4 signature is admitted.

5 THE COURT: No. That's why he cites 673.3081.  
6 Do you want to read that statute, because that  
7 statute says that if someone is dead or  
8 incompetent, then that presumption does not apply.

9 MR. PASCALE: Yeah, I'd like to take a moment  
10 to review the statute.

11 THE COURT: Counsel, I'm going to give you the  
12 statute, but I'm going to suggest that the next  
13 time you come into court you need to be prepared.  
14 Here, I'm going to let you -- I'm going to give you  
15 about five minutes to do some research.

16 MR. PASCALE: Okay, thank you.

17 THE BAILIFF: Remain seated. We're back in  
18 recess.

19 (A brief recess was taken)

20 (Back on the Record)

21 THE BAILIFF: Remain seated. We're back in  
22 session.

23 THE COURT: All right, counsel.

24 MR. PASCALE: Thank you for that, Your Honor,  
25 and I'm going to try my best to answer Your Honor's



1 question directly.

2 THE COURT: Which question?

3 MR. PASCALE: I believe Your Honor asked what  
4 evidence the Plaintiff intends to --

5 THE COURT: Oh, that question, okay. This had  
6 to do with the admissibility of Exhibit Number 1.  
7 So what other evidence do you have that's going  
8 to -- I want you to proffer to me now as to the  
9 admissibility of this document.

10 MR. PASCALE: Well, Mr. Adjoda was married.  
11 There was an adjustable rate rider taken out after  
12 this note. The adjustable rate rider was dated  
13 August 22nd, 2006. Mr. Adjoda signed that  
14 adjustable rate rider to the note.

15 THE COURT: Well, what evidence do you have  
16 that he signed it?

17 MR. PASCALE: His signature as well as his  
18 wife's signature.

19 THE COURT: Okay. But what evidence do you  
20 have that that's his signature? That's the  
21 underlying question. What evidence do you have  
22 that this document, which purports to be signed by  
23 an individual, is actually signed by that  
24 individual?

25 MR. PASCALE: Well, we have the mortgage loan

1 account belonging to Mr. Adjoda and payments being  
2 made under that mortgage loan account by  
3 Mr. Adjoda.

4 THE COURT: What evidence do you have that he  
5 actually paid those or were paid by him, as opposed  
6 to being made by somebody else?

7 MR. PASCALE: We have the contract itself  
8 which states that it's Mr. Adjoda's obligation to  
9 repay those monies; and, therefore, the payments --  
10 there's no evidence to the contrary that the  
11 payments were received under this mortgage loan by  
12 anybody but Mr. Adjoda.

13 THE COURT: The burden, counsel, is on you --  
14 it's on the Plaintiff to prove. It's not on  
15 somebody else to disprove it at this point. You're  
16 offering a document into evidence, and the burden  
17 of proof is on the person or upon the party  
18 offering it.

19 MR. PASCALE: Well, Your Honor, respectfully,  
20 I did locate a case, and I believe it to be on  
21 point. It's the -- styled Virgil M. Bennett and  
22 Leslie -- oh, I'm sorry. Lissette C. Bennett --  
23 B-E-N-N-E-T-T versus Deutsche Bank National Trust  
24 Company, and that's out of the 4th District Court  
25 of Appeal, 12-2471.

1 THE COURT: What's the West Law Citation?

2 Because I'm going to have to pull it up on the  
3 computer, and I can't pull it up based on the  
4 citation you gave me.

5 MR. PASCALE: I understand, Your Honor.

6 THE COURT: Well, do you have a citation for  
7 that case?

8 MR. PASCALE: If the Court will allow me one  
9 minute, I can bring it up on my computer.

10 THE COURT: Counsel, you are not prepared  
11 today. You're not; not even close to being  
12 prepared. I don't mean to individually chastise  
13 you, but the fact is you're having difficulty  
14 getting in the fundamental document in the case.  
15 And now you're citing another case, so I'm going to  
16 give you another minute or two to give me a  
17 citation.

18 MR. WASYLIK: Your Honor, I have the citation  
19 of the case. It is 124 So. 3d 320. It's a --

20 THE COURT: 124 So. 3d what?

21 MR. WASYLIK: 124 So. 3d 320.

22 THE COURT: Okay. Let me see if I can make  
23 this computer work. It only works for me about  
24 half the time. I will try to find whatever case we  
25 have that you're talking about.

1 MR. WASYLIK: And after Your Honor's had a  
2 chance to read the case, I can explain --

3 THE COURT: Let me see if I can even make this  
4 computer work.

5 MR. WASYLIK: Your Honor, I have an unmarked  
6 electronic copy if the Court is interested in  
7 reading that.

8 THE COURT: No. I'd rather have a printed  
9 copy. I don't trust computers.

10 MR. WASYLIK: As the court wishes.

11 THE COURT: Well, this is not working. Let me  
12 see your electronic copy, and hope it's the same  
13 case that he's talking about because half the time  
14 they're not.

15 MR. WASYLIK: It is, Your Honor. It's the  
16 2013 case from the 4th DCA that refers to 673.3081.  
17 I'm familiar with the attorneys who actually  
18 litigated that one.

19 THE COURT: Okay. How do you make the page  
20 turn?

21 MR. WASYLIK: Just with a swipe of the finger,  
22 judge. I can show you.

23 THE COURT: Okay.

24 MR. WASYLIK: Just like this. Swipe back and  
25 forth.

1 THE COURT: All right. (Reviewing). That was  
2 a summary judgment case on a trial. Okay, counsel.  
3 Tell me why this case helps the admissibility of  
4 Exhibit Number 1.

5 MR. PASCALE: Well, the Bennett case, Your  
6 Honor -- my interpretation is that the Bennett case  
7 says that, it defines the word, what the Court  
8 means by presumption, and states that there must be  
9 more pled in the denial. They must produce some  
10 sort of evidence. According to Bennett, there must  
11 be a showing of evidence or fraud, forgery, before  
12 the burden would shift back to the Plaintiff.

13 Once they submit such evidence or proffer the  
14 Court, the burden would be on us to prove by  
15 preponderance of the evidence, in the totality, to  
16 show that the signature of Mr. Adjoda is authentic.

17 THE COURT: Okay. Mr. Wasylik.

18 MR. WASYLIK: Yes, Your Honor. The Bennett  
19 case actually involves -- and I'm doing this from  
20 memory because I just pulled it up a few minutes  
21 ago before I gave it to you. The Bennett case,  
22 Your Honor, involves -- first of all me, neither  
23 Bennetts were deceased. They were challenging the  
24 authenticity of an endorsement based on alleged  
25 conflicts with assignment of mortgage.

1           So in the Bennett case they were claiming that  
2           the conflict there was the evidence of fraud or  
3           forgery or something else. However, we don't even  
4           get to that point because that is the burden to  
5           rebut the presumption. We don't get the  
6           presumption because per the statute the presumption  
7           does not apply when the person whose signature is  
8           seeking to be enforced is deceased. And that's the  
9           distinction here.

10           Because Mr. Adjoda has passed -- and I don't  
11           think there's any dispute for that -- the pleadings  
12           are in agreement about that. There is no  
13           presumption as to his signature. Therefore, the  
14           Bennett case -- that doesn't apply because they got  
15           past the presumption. Here, we don't get the  
16           presumption at all because Mr. Adjoda is deceased.  
17           So that has nothing at all to do with the issue  
18           before this Court.

19           THE COURT: What's the part of the statute --  
20           and you have my book over there, so I don't have it  
21           anymore. What's the part of the statute -- I want  
22           you to find that part of the statute that talks  
23           about someone being deceased. Do you have that  
24           here? You can have my book if you want it.

25           MR. WASYLIK: Yes, sir.

1 THE COURT: I just had this come up Monday, by  
2 the way, but the person was not deceased.

3 MR. PASCALE: I think it's important the  
4 timing of Mr. Adjoda's death. I don't think it's  
5 an instance where they're alleging Mr. Adjoda --  
6 that the evidence before Your Honor that he was  
7 deceased before he signed the note; rather he was  
8 deceased after he signed it.

9 THE COURT: How can he be deceased before he  
10 signed the note?

11 MR. PASCALE: Well, if there was fraud or  
12 forgery, then certainly that can be -- that's  
13 certainly a likely scenario.

14 THE COURT: That's why I want counsel to read  
15 that portion of the statute that talks about this  
16 exception not applying. I think it's important.

17 MR. PASCALE: Further, Your Honor, Bennett  
18 also states the rarity of fraud, forgery in the  
19 notes, allonges, which is why the burden is on the  
20 Defendant in this case to show sufficient evidence  
21 of fraud or forgery; just saying he's deceased  
22 doesn't rise to the level. That's not enough.

23 THE COURT: Okay. What does the statute say?

24 MR. WASYLIK: The statute, Your Honor, says  
25 673.3081, Proof of signatures and status as holder

1 in due course. Subsection 1: "In an action with  
2 respect to an instrument, the authenticity of, and  
3 authority to make, each signature on the instrument  
4 is admitted unless specifically denied in the  
5 pleadings. If the validity of a signature is  
6 denied in the pleadings, the burden of establishing  
7 validity is on the person claiming validity, but  
8 the signature is presumed to be authentic and  
9 authorized unless the action is to enforce the  
10 liability of the purported signer, and the signer  
11 is dead or incompetent at the time of trial of the  
12 issue of validity of the signature."

13 THE COURT: Does the statute say at the time  
14 of trial?

15 MR. WASYLIK: It says at the time of trial.  
16 I'm reading this verbatim, judge. I'm not adding  
17 any editorial comment.

18 THE COURT: All right.

19 MR. WASYLIK: It goes on to say, Your Honor,  
20 "If an action to enforce the instrument is brought  
21 against a person as the undisclosed principal of a  
22 person who signed the instrument as a party to the  
23 instrument, the Plaintiff has the burden of  
24 establishing that the Defendant is liable on the  
25 instrument as a represented person under Section



1 673.4021 Subsection 1." And that is the complete  
2 Subsection 1 of the statute, Your Honor.

3 THE COURT: Counsel, how do you get around the  
4 statute?

5 MR. PASCALE: The case law gets around the  
6 statute, Your Honor. Bennett interprets the  
7 statute to define what the Court means by  
8 presumption, and we have to look past that.  
9 Moreover, the Defendant's Affirmative Defenses  
10 admit the signature of the homeowner.

11 THE COURT: Case law never trumps the statute  
12 unless it's found to be unconstitutional; it  
13 clarifies the intent. There is no clarification  
14 that I see in the Bennett case which, by the way,  
15 also discusses within the parameters of a motion  
16 for summary judgment, and this is not a motion for  
17 summary judgment. This is trial. This is an  
18 evidentiary proceeding and evidentiary problem.

19 And the statute clearly says that you can get  
20 it in unless it's denied in the pleadings, which it  
21 is, we see in the Affirmative Defenses. And the  
22 presumption does not apply if the signer is  
23 deceased at the time of trial, and that's the  
24 situation we have here. My ruling stands. The  
25 objection to Exhibit 1 is sustained.

1           MR. PASCALE: Your Honor, we'd like to reserve  
2           the ability to reintroduce that exhibit throughout  
3           the course of this trial.

4           THE COURT: That's why I asked you several  
5           times to proffer what other evidence you're going  
6           to have to introduce, and all you've given me so  
7           far are a lot of presumptions which are not going  
8           to qualify.

9           MR. PASCALE: Well, Your Honor, I do have a  
10          response. If you look at the Affirmative Defenses  
11          --

12          THE COURT: In response to what?

13          MR. PASCALE: What we intend to introduce, and  
14          it's contained within the pleadings. The  
15          Affirmative Defenses raised by the Defendant don't  
16          arguably deny the signature on the note. They are  
17          denying the signatures on the allonges.

18          THE COURT: Okay. This is --

19          MR. PASCALE: And I understand it's an  
20          evidentiary matter, but I think I'm entitled to  
21          hopefully address the issues.

22          THE COURT: I ruled, counsel. Let's move on.

23          BY MR. PASCALE:

24           **Q       Now, I'd like to ask the witness to look at**  
25           **the Exhibit marked Number 2 and ask if she recognizes**

1 the document.

2 A Yes, that's the mortgage.

3 Q Okay. And can you tell the Court the first  
4 time you saw the mortgage?

5 A Around the time of the loan transfer.

6 Q Does the mortgage appear to be recorded?

7 A Yes. It is recorded in Record Book 20816,  
8 page 0651 in Palm Beach County.

9 Q Does the mortgage appear to be notarized?

10 A Yes. It was notarized August 22nd, 2006 in  
11 Palm Beach County.

12 Q Okay. Does the mortgage appear to be an  
13 original mortgage?

14 A Yes.

15 MR. PASCALE: Your Honor, at this time I'd  
16 like to introduce the mortgage into evidence as  
17 Plaintiff's Exhibit Number 2.

18 MR. WASYLIK: Your Honor, may I just examine  
19 that copy to be sure it's the copy that was  
20 provided to me?

21 THE COURT: Yeah.

22 MR. WASYLIK: Thank you. (Reviewing)

23 Your Honor, may I briefly voir dire on this?

24 THE COURT: Yes, you may.

25 MR. WASYLIK: Thank you.

1 VOIR DIRE EXAMINATION

2 BY MR. WASYLIK:

3 Q I'm handing you back what's been designated as  
4 the mortgage, Number 2.

5 Can you please turn to the -- I believe it's  
6 the second page that contains the legal description of  
7 the property?

8 A Okay.

9 Q Can you tell me, is the legal description --  
10 is that printed on original paper, or is it pasted  
11 together or taped in somehow?

12 A It appears to be attached to a separate piece  
13 of paper.

14 Q When you say attached, would it be fair to say  
15 that there's a square cut out of some other piece of  
16 paper and taped onto that mortgage?

17 A Yes, that would be fair to say that.

18 MR. WASYLIK: Okay. Your Honor, I have to  
19 object on that basis. The mortgage has been  
20 altered at some point. We don't know when.

21 THE COURT: Okay. What else you got?

22 MR. WASYLIK: That's --

23 THE COURT: That's not going to fly with me.

24 Do you have any other objections?

25 MR. WASYLIK: Well, Your Honor, if you examine

1 the mortgage, you'll see that the legal description  
2 has been lifted, and I don't see --

3 THE COURT: I've already ruled against you on  
4 that one. I'm asking if you have any others.

5 MR. WASYLIK: That's my only objection, Your  
6 Honor.

7 THE COURT: All right. It will be received.  
8 If that's your only objection it will be received.

9 (Plaintiff's Exhibit No. 2 admitted into  
10 evidence)

11 MR. PASCALE: Thank you, Your Honor.

12 CONTINUED DIRECT EXAMINATION

13 BY MR. PASCALE:

14 Q Ms. Eberly, can you tell the Court -- can you  
15 read for us the date that appears on that mortgage?

16 A It's August 22nd, 2006.

17 Q And whose name appears next to the word,  
18 borrower?

19 A Rajystmanura Adjoda and Lisa Adjoda.

20 Q Who is the lender?

21 A BankUnited, FSB.

22 Q Okay. And the property address contained  
23 within the mortgage?

24 A Hold on a second. 15554 62nd Place North,  
25 Loxahatchee, Florida 33470.

1           Q     And does that mortgage provide for a mechanism  
2     or a default provision pursuant to paragraph twenty-two?

3           A     Yes.

4           Q     Okay. Can you read for the Court that  
5     provision?

6           A     Sure. Paragraph twenty-two: "Acceleration by  
7     lease: Owner shall give notice to borrower prior to  
8     acceleration. Following borrower's breach of any  
9     covenant or agreement in this security instrument, but  
10    not prior to acceleration under Section 18, unless  
11    applicable law provides otherwise. The note shall  
12    specify (a) the default; (b) the action required to cure  
13    the default; (c) the date not less than 30 days from the  
14    date the notice was given to borrower by which the  
15    default must be cured; and (d) that failure to cure the  
16    default on or before the date specified in the notice  
17    may result in acceleration of this sum secured by the  
18    security instrument, foreclosure by a judicial  
19    proceeding and sale of the property.

20                   The notice shall further inform owner of the  
21    right to reinstate after acceleration and the right to  
22    assert in the foreclosure proceeding the non-existence  
23    of the default or any other defense of borrower to  
24    acceleration and foreclosure."

25           Q     Thank you. I'm finished with that exhibit.

1 You're holding in your hand what's been marked as  
2 Plaintiff's Composite Exhibit Number 4 for  
3 identification purposes. Do you recognize those  
4 documents?

5 A Yes. They are two separate -- it's the notice  
6 of default and collection comment.

7 Q Okay. And are they a true and correct copy --  
8 are those records stored in McCormick's business  
9 records?

10 A Yes.

11 Q Are they a true and correct copy of what's  
12 contained within those records?

13 A Yes.

14 Q And would the demand letter have been prepared  
15 in the regular course of business?

16 A Yes.

17 Q I'm sorry. Would the demand letter have been  
18 prepared in the regular course of business by an  
19 employer, agent of BankUnited with the duty to do so at  
20 the time --

21 MR. WASYLIK: Objection. Personal knowledge.

22 THE COURT: Overruled.

23 BY MR. PASCALE:

24 Q -- at the time the Defendant's loan went into  
25 default?

1 A Yes.

2 MR. PASCALE: Your Honor, we move to introduce  
3 the Composite Exhibit number -- I actually skipped  
4 an exhibit inadvertently. I'm asking the Court to  
5 introduce, we'll make this Plaintiff's Exhibit  
6 Number 3, which is a copy of --

7 THE COURT: I don't care what progression you  
8 use. You can call it whatever number you want to.  
9 It doesn't matter.

10 MR. PASCALE: Thank you.

11 THE COURT: So do you want it to be 3 or 4?

12 MR. PASCALE: Three, Your Honor.

13 THE COURT: Okay. Is there an objection to  
14 Plaintiff Exhibit Number 3?

15 MR. WASYLIK: Possibly, Your Honor. May I  
16 voir dire?

17 THE COURT: You may.

18 MR. WASYLIK: Thank you.

19 VOIR DIRE EXAMINATION

20 BY MR. WASYLIK:

21 Q May I see the exhibit, please?

22 A (Complying)

23 Q All right. I'm going to ask you to -- first  
24 of all, tell me, ma'am, you work for McCormick 106, LLC,  
25 correct?



1 A Correct.

2 Q And you've worked for that company since  
3 approximately 2008, haven't you?

4 A Yes.

5 Q In fact, it's related to Development Capital  
6 where you've worked since 2008, correct?

7 A Yes.

8 Q Okay. And you've never worked at BankUnited?

9 A No. I have not.

10 Q And you've never been part of the department  
11 that generates those letters, correct?

12 A Correct.

13 Q And you've never supervised anyone in the  
14 department that generates those letters?

15 A For BankUnited?

16 Q Correct.

17 A Correct.

18 Q And you are not trained in the policies and  
19 procedures of the folks at BankUnited that generate  
20 those letters, correct?

21 A Not their specific policies and procedures of  
22 BankUnited, no.

23 Q Okay. What's the date on that letter again?

24 A June 4th, 2009.

25 Q Okay. You didn't witness that letter being

1       **created.**

2           A       No, I did not.

3           Q       Okay. And that letter did not enter  
4       McCormick's records until 2013, correct?

5           A       Correct. When all the other BankUnited  
6       records came over.

7           Q       Now, I'm going to ask you to turn to the  
8       second page. Tell me again how that's identified.

9           A       Collection Comments?

10          Q       Okay. Who created those collection comments?

11          A       BankUnited created them.

12          Q       Okay. And that page appears to have a single  
13       line, doesn't it?

14          A       Yes.

15          Q       Is it your understanding that Bank of  
16       America -- I'm sorry, BankUnited's -- I'll withdraw  
17       that. Collection Comments are usually more than one  
18       line, aren't they?

19          A       It really depends on the comment being  
20       entered.

21          Q       Have you ever seen the original collection  
22       comments for this loan?

23          A       Yes.

24          Q       Okay. Is there more than one line in them?

25          A       It's a spreadsheet. This comment itself is

1 one line.

2 Q So that comment is extracted from a  
3 spreadsheet which is the actual collection comments,  
4 right?

5 A Yes.

6 Q So somebody's cherry picked that to present to  
7 the court today.

8 MR. PASCALE: Objection.

9 THE COURT: Sustained.

10 MR. WASYLIK: Withdraw.

11 BY MR. WASYLIK:

12 Q Someone has --

13 THE COURT: Too late. It's already been  
14 sustained.

15 MR. WASYLIK: I'm sorry?

16 THE COURT: You can't withdraw it after it's  
17 been sustained.

18 MR. WASYLIK: I'm sorry, judge. Just a bad  
19 habit.

20 BY MR. WASYLIK:

21 Q Someone selected that particular line out of  
22 the collection comments to present today for the Court,  
23 correct?

24 A Correct.

25 Q And we don't know what the rest of the

1 collection comments say.

2 A I do not have it in front of me, no.

3 Q And you've never worked for the department  
4 that creates the collection comments.

5 A For BankUnited, no.

6 Q And you don't have any training or knowledge  
7 of the policies and procedures by which BankUnited  
8 creates those comments?

9 A I would expect they follow the general  
10 regulations, but I don't know their specific policies  
11 and procedures.

12 Q You've never seen them do it.

13 A Correct.

14 Q You don't have any personal knowledge of it.

15 A I've never seen them do it.

16 Q Okay. You don't have any personal knowledge  
17 of whether BankUnited creates those entries at or near  
18 the time of the event recorded, do you?

19 A It's my understanding that, based on the  
20 regulations, they need to be -- records need to be  
21 created at or about the time that things have occurred  
22 so --

23 Q I'm not asking for a legal opinion about  
24 regulations. I'm asking for your personal knowledge.  
25 Did you see it? Did you witness it?

1 MR. WASYLIK: Your Honor, this all goes to the  
2 business records foundation.

3 THE WITNESS: I did not see anyone enter this  
4 specific record.

5 BY MR. WASYLIK:

6 Q Okay. And do you know how the person who  
7 created that record acquired the knowledge of the  
8 information recorded?

9 A No, I do not.

10 Q And --

11 THE COURT: Did you answer it?

12 THE WITNESS: I said, no, I did not.

13 THE COURT: I didn't hear. Thank you.

14 MR. WASYLIK: Your Honor, at this point I'm  
15 done with my voir dire. I do have an objection  
16 unless counsel wants to participate.

17 THE COURT: Tell me your objection.

18 MR. WASYLIK: I'm sorry?

19 THE COURT: Your objection is what?

20 MR. WASYLIK: My objection, Your Honor, is  
21 that this witness is not a qualified witness to lay  
22 the business records foundation for the admission  
23 of that exhibit. Specifically, Your Honor, on voir  
24 dire the witness admitted that she doesn't have any  
25 training from BankUnited, which is purportedly the

1 entity that created both the letter and the  
2 collection comments. She doesn't have any direct  
3 personal knowledge of the method in which it was  
4 created; the person who did it; how that person has  
5 knowledge, if at all; and when it was created.

6 So as to the business records foundation  
7 itself, she's demonstrated, you know, her testimony  
8 demonstrates that she cannot actually authenticate  
9 or rather lay the business records foundation. So  
10 it's a hearsay document. Your Honor, I'll quote  
11 from just briefly, under Section 803.6 on page 961  
12 of the 2014 Edition, Ehrhardt's Evidence it talks  
13 about whether or not someone employed by one  
14 company can authenticate the business records of  
15 another company. And specifically, the bottom of  
16 the text of page 961 it starts, "Normally, a record  
17 custodian of one business cannot lay a foundation  
18 for business records of the second business, even  
19 in possession of the first business, because the  
20 witness would not have personal knowledge of how  
21 the second business kept its records and could not  
22 testify to the foundation requirements." It says  
23 to footnote 31, which cites to two cases, Yang  
24 versus Sebastian Lakes, which I have here and I'll  
25 give a copy to counsel. And there's another case,

1 a federal case, Builder versus Wilson. But I'm  
2 going to stick with Yang for a minute.

3 THE COURT: Can you give the Court the case to  
4 read it, or do you want me to just take it from  
5 memory?

6 MR. WASYLIK: I do have a copy for the Court,  
7 judge. May I approach?

8 THE COURT: You may.

9 MR. WASYLIK: And I've already provided a copy  
10 to counsel.

11 THE COURT: Have you guys provided all the law  
12 that you have that you're going to be exchanging in  
13 this case thus far?

14 MR. PASCALE: With each other?

15 THE COURT: Yeah.

16 MR. PASCALE: Well, I provided mine, Your  
17 Honor. I know that counsel here has an entire  
18 repertoire.

19 THE COURT: When did you get provided Yang?

20 MR. PASCALE: I don't think I've ever been  
21 provided the Yang case.

22 MR. WASYLIK: I gave him that at 1:00 o'clock  
23 over the lunch break, Your Honor.

24 THE COURT: It must be a brand new case, then.

25 MR. WASYLIK: No, Your Honor, I was reviewing

1 -- I was preparing this before trial.

2 THE COURT: Here's what we're going to do.  
3 I'm going to take another five-minute break, and  
4 you guys better exchange all of the law that you're  
5 going to be using throughout this trial; all the  
6 law that you're going to be introducing at the  
7 trial. If it takes more than five minutes to read,  
8 I'm striking this case because we don't do stealth  
9 warfare here.

10 MR. WASYLIK: I did give him, Your Honor, the  
11 Yang case law, along with several other cases that  
12 I may rely on.

13 MR. PASCALE: I received a total of four cases  
14 from counsel. It appears that he has several more  
15 than four cases to exchange.

16 THE COURT: See you in five minutes, guys,  
17 after you've done what I told you to do.

18 THE BAILIFF: Court is in recess.

19 (A brief recess was taken)

20 (Back on the record)

21 THE BAILIFF: Remain seated. We're back in  
22 session.

23 THE COURT: Let's try this again. Okay. Have  
24 you guys exchanged all of your cases that you  
25 intend on citing here?



1 MR. WASYLIK: Yes, Your Honor. We have, Your  
2 Honor.

3 THE COURT: And while I was gone, did  
4 something happen?

5 MR. WASYLIK: While you were gone nothing  
6 happened, other than the fact that we confirmed  
7 that I had given counsel at 1:00 o'clock what I  
8 just argued so --

9 MR. PASCALE: I'm not sure but --

10 THE COURT: Let's go ahead, and let me hear  
11 the Plaintiff's response to the objection, and the  
12 objection I believe has already been argued. So go  
13 ahead, counsel.

14 MR. PASCALE: Your Honor, number one, this  
15 isn't coming in to show the truth of the matter  
16 asserted that the loan is in default. In that  
17 regard, it's just coming in to show that the loan  
18 was -- we know that the loan is in default.

19 THE COURT: What's the purpose of the -- I  
20 mean, the purpose is it's not for the truth of the  
21 matter.

22 MR. PASCALE: It's just to simply show routine  
23 habit of the mortgage industry practice of mailing  
24 correspondence to the borrower.

25 THE COURT: What issue before the Court does

1 that go to?

2 MR. PASCALE: Well, conditions precedent  
3 pursuant to paragraph twenty-two of the mortgage  
4 that's required to be done, and it goes to that  
5 issue, to put the borrower on notice as to those.

6 THE COURT: So it's to the truth of the  
7 matter. The truth of the matter in what you're  
8 trying to show is that the demand letter and the  
9 notice of default were sent.

10

11 MR. PASCALE: Yes. Yes.

12 THE COURT: And can I see what evidence you  
13 guys are arguing about -- the document, please?

14 MR. PASCALE: Yes. It's a composite exhibit.

15 THE COURT: I'm going to ask one of the  
16 lawyers to get it.

17 MR. WASYLIK: (Handing).

18 THE COURT: This is a letter from BankUnited  
19 addressed to the lender, right?

20 MR. PASCALE: To the borrower.

21 THE COURT: To the borrower, I'm sorry.  
22 You're right. And it's dated June 4th of '09.  
23 And, ma'am, you do not work for BankUnited; is that  
24 correct?

25 THE WITNESS: That is correct.

1 THE COURT: Okay. All right. Go ahead.

2 MR. PASCALE: May I redirect the witness here?

3 THE COURT: No. I want you to complete your  
4 response. Then I'm going to ask for the moving  
5 party to respond to you.

6 MR. PASCALE: Well, the witness doesn't have  
7 to be the person -- under the business records  
8 exception and with the case law that counsel has  
9 presented to the Court, the witness doesn't have to  
10 be a person that's actually drafted the letter.  
11 The witness just has to be familiar with general  
12 banking and acceptable servicing practices in  
13 making sure that the letter goes out at or near the  
14 time of the event in question.

15 And for that proposition, I would like to  
16 introduce the WAMCO case to the Court. It's WAMCO  
17 v. Integrated Electronics, which actually deals  
18 with the servicing records. It says it's okay to  
19 --

20 THE COURT: Let me see that case. You guys  
21 are pulling these off one card at a time from the  
22 deck. It makes it very difficult for me to try  
23 this case in the time period you folks have  
24 allotted.

25 Okay. Have you given opposing counsel copies

1 of the WAMCO?

2 MR. PASCALE: Yes, I have.

3 THE COURT: All right. Let me see the WAMCO  
4 case. What part of WAMCO case do you want?

5 MR. PASCALE: Well, I'd like you to generally  
6 be familiar with the servicing procedures of your  
7 predecessor.

8 THE COURT: Show me where -- this is kind of a  
9 long case, so show me the part of the case that  
10 you'd like me to read, please.

11 MR. PASCALE: Headnote one referring to  
12 Section 90.803, Subsection 6 in the middle of page  
13 three provides that records may be excluded from  
14 evidence or sources of information indicating a  
15 lack of trustworthy -- or a lack of  
16 trustworthiness. I don't think that's been shown.  
17 There's no objection to any -- or argument that the  
18 documents aren't trustworthy. It's a collection  
19 log in front of the Court and a demand letter,  
20 collection log.

21 Moreover, Ms. Eberly would testify to this.  
22 And I haven't gotten there, but those collection  
23 logs -- well, actually it's been stipulated the  
24 collection logs and demand letter were incorporated  
25 into McCormick's business records, and that's part

1 of the proposition that the WAMCO case stands for,  
2 is that the incorporation of a prior servicer's  
3 business records is okay, so long as they don't  
4 show any lack of trustworthiness. And there were  
5 certain, you know, an audit of the loan was  
6 performed and that's true in this case.

7 THE COURT: What's true?

8 MR. PASCALE: There was an audit of the loan  
9 performed of those business records.

10 THE COURT: By who?

11 MR. PASCALE: That my client would testify by  
12 the servicer. BSI Financial Services is the  
13 servicing agent for the loan.

14 THE COURT: Is that BSI?

15 MR. PASCALE: BSI Financial Services is the  
16 servicing agent of McCormick. BSI Financial  
17 Services.

18 THE COURT: What does BSI have to do with  
19 BankUnited, the author of this letter you're trying  
20 to get into evidence?

21 MR. PASCALE: BSI is the subsequent servicer.  
22 BankUnited serviced the loan. It was serviced,  
23 transferred to BSI. Those records are now BSI's  
24 records which are now McCormick's records.  
25 McCormick's putting them into evidence as such.

1 THE COURT: Well, it's my understanding that  
2 this document that you're trying to get into  
3 evidence was created by BankUnited; is that  
4 correct?

5 MR. PASCALE: Yes, it certainly was created by  
6 BankUnited, Your Honor.

7 THE COURT: And what does BankUnited have to  
8 do with BSI or McCormick?

9 MR. PASCALE: The records of BankUnited were  
10 incorporated and made part of McCormick's business  
11 records, as is common in mortgage foreclosure  
12 cases. Servicers change; loans are transferred.  
13 Those records then become incorporated into the new  
14 servicer's business records.

15 THE COURT: Okay.

16 MR. PASCALE: There's no reason to doubt the  
17 veracity of the information contained within those  
18 records.

19 THE COURT: Okay. Response?

20 MR. WASYLIK: Yes, judge. Before the Court  
21 took its last recess, I was also going to be  
22 talking of a Hunter case. I have provided a copy  
23 of that to counsel, and I have a copy for the  
24 Court.

25 THE COURT: Stop. Everybody give me copies of

1 the cases.

2 MR. WASYLIK: This is the last one I'm going  
3 to cite, judge, and I'm going to tie that into  
4 discussing WAMCO.

5 THE COURT: Then let me have an opportunity to  
6 read it. You guys -- I'm getting ready to grant a  
7 mistrial because you guys are -- this is stealth  
8 warfare. You guys didn't even give me your cases  
9 until this afternoon, and this case is how old?  
10 This case was filed in what year?

11 MR. PASCALE: '09, Your Honor.

12 THE COURT: Right. Five years ago? And you  
13 guys are exchanging case law two hours ago?

14 MR. PASCALE: Respectfully, Your Honor, I have  
15 correspondence, numerous from my office; it went  
16 unresponsive.

17 THE COURT: And when did you send in your case  
18 law?

19 MR. PASCALE: We sent them several in  
20 correspondence and attempted to have a dialogue.

21 THE COURT: Case law. Case law.

22 MR. PASCALE: We didn't just furnish the case  
23 law. We attempted to have a dialogue first.

24 THE COURT: When did you send them the case  
25 law? Please listen to my question.

1 MR. PASCALE: The case law was provided this  
2 morning at approximately 9:30 to opposing counsel.

3 THE COURT: This is what I call stealth  
4 warfare. You guys are sandbagging each other, and  
5 I don't care if you want to do that to each other.  
6 But I do care if you do that to the Court.

7 MR. PASCALE: It's not my intention; I  
8 apologize, Your Honor. I appeared this morning. I  
9 handed the case law when Your Honor made the  
10 announcement, and I would have done so regardless.

11 THE COURT: In a five-year old case you  
12 exchange case law on the day of the trial. That,  
13 to me, is stealth warfare. Now, what part of the  
14 Hunter case do you like?

15 MR. WASYLIK: Your Honor, the Hunter case --  
16 in particular, I'm going to refer to headnote four.  
17 The background of this, Your Honor, is that -- and  
18 actually, I'm going to refer to printed page two,  
19 the second to the last paragraph on the bottom,  
20 right here. It talks about at the time of trial in  
21 2012 the records of the Plaintiff, in this case, in  
22 Hunter, we're seeking to admit, were possessed by  
23 Rushmore Loan. They had been incorporated from a  
24 prior servicer, asserting the records originally  
25 came from a company called Mortgage IT, and then



1 Aurora.

2 And at that point, Your Honor, the Plaintiffs  
3 relied on the testimony of Rushmore employee, Roger  
4 Martin, to attempt to lay a foundation for the  
5 business records evidence, and then it talks about  
6 headnote five.

7 THE COURT: Five or four?

8 MR. WASYLIK: I'm sorry, four, judge.  
9 Headnote four, that Mr. Martin's testimony failed  
10 to establish the necessary foundation for admitting  
11 those records. He was not a current or former  
12 employee of Mortgage IT. In those records he  
13 asserted otherwise. He otherwise lacked particular  
14 knowledge of Mortgage IT's record keeping  
15 procedures. Absent such personal knowledge he was  
16 unable to substantiate when the records were made;  
17 whether the information they contained derived from  
18 a personal knowledge; whether Mortgage IT regularly  
19 made such records; or indeed whether the records  
20 belonged to Mortgage IT in the first place. And it  
21 basically goes on to say that he failed to lay the  
22 business records foundation that was required.

23 Now the reason why Hunter and Yang control  
24 over WAMCO -- first of all, the distinction between  
25 those cases and WAMCO, is that in WAMCO the witness

1 testified Mr. Grauer was personally involved with  
2 servicing those loans. He was the one who actually  
3 personally handled that loan, and he personally  
4 oversaw the verification procedures and so on and  
5 so forth. What we have by contrast here is that  
6 this witness has never worked for the prior  
7 servicers; cannot testify as to when they were  
8 created; who created them; whether the person who  
9 created them had knowledge; whether they were  
10 created at or near the time it got recorded. And  
11 you'll remember when I asked these questions on  
12 voir dire she said that she wasn't able to give  
13 that specific answer.

14 So in this case, Your Honor, the testimony  
15 that she's given -- the foundational testimony  
16 she's given is itself hearsay. So she's unable to  
17 lay a foundation under the Hunter and the Yang  
18 cases. Hunter, for the record, is 137 So. 3d 570  
19 and Yang is 123 So. 3d 617.

20 THE COURT: Before we move on, do either one  
21 of you have any other cases that you are going to  
22 cite in your argument as to this issue?

23 MR. WASYLIK: No, Your Honor.

24 THE COURT: All right.

25 MR. PASCALE: Not as to this issue.

1           THE COURT: All right. Let me hear from the  
2 Plaintiff.

3           MR. PASCALE: Well, we disagree. The  
4 distinction is simple. There was an audit  
5 performed. Under the WAMCO case that seems to be  
6 one of the primary elements that an audit was  
7 performed on this loan and that the records were  
8 reviewed; and that there was no reason to doubt the  
9 veracity or the accuracy of those records. And  
10 Ms. Eberly can testify to that.

11           Moreover, there's -- and I don't have the case  
12 with me -- but I know as a matter of policy that if  
13 there is any doubt, if the Court's deciding which  
14 way to go as to whether it should admit a document  
15 under the business records exception, it should be  
16 admitted. The goal of the business records  
17 exception is to allow these documents to come in  
18 and not make it so onerous for a failed bank to  
19 come forward six years -- five or six years later  
20 now and produce a witness to testify that this was  
21 done in BankUnited in 2009 seems completely  
22 unreasonable. And I think that that's the policy  
23 argument behind allowing a document to come under  
24 the business records exception.

25           THE COURT: Okay. Under the Yang case, which

1 is from the 4th DCA less than a year ago, I don't  
2 think I have a choice but to sustain the objection.

3 MR. PASCALE: Well, Your Honor, my other -- I  
4 would like to redirect the witness after voir dire.  
5 I feel as though I have not been given an  
6 opportunity to do that.

7 THE COURT: Go ahead. I'm not prohibiting you  
8 from doing anything. I'm ruling on what's before  
9 me as it comes before me.

10 CONTINUED DIRECT EXAMINATION

11 BY MR. PASCALE:

12 Q Okay. So Ms. Eberly, with respect to the  
13 second part of that composite exhibit, the collection  
14 log, that's what you call it, right?

15 A Correct.

16 Q You said that that line of collection notes  
17 was taken from a bigger spreadsheet, correct?

18 A Correct.

19 Q And did that bigger spreadsheet have other  
20 loans with it, other than the subject loan here today?

21 A No.

22 Q Oh, it didn't?

23 A No.

24 Q That spreadsheet was just as to the  
25 Defendant's loan today?

1 A Correct.

2 Q And have you personally seen that collection  
3 log?

4 A Yes.

5 Q And do you recall if it referenced any  
6 additional information about the thirty-day letter being  
7 sent?

8 MR. WASYLIK: Objection. Contents of the  
9 business records not introduced.

10 THE COURT: I have no idea what you just said.

11 MR. WASYLIK: I'm sorry, Your Honor. It's a  
12 hearsay objection. Counsel is asking this witness  
13 to testify as to the rest of the spreadsheet which  
14 was excluded.

15 THE COURT: Overruled. I'm going to allow him  
16 to lay a foundation if he can.

17 BY MR. PASCALE:

18 Q Yeah, do you recall if the information  
19 contained within the spreadsheet touched on or  
20 referenced any additional information regarding this  
21 thirty-day letter being sent, or was this the only line  
22 taken out of that spreadsheet that referenced the  
23 thirty-day letter?

24 A I don't recall offhand.

25 Q Okay. You mentioned, Ms. Eberly, that you

1 weren't personally familiar with the generation of the  
2 demand letter from BankUnited, correct?

3 A Correct.

4 Q Okay. Are you generally familiar with how  
5 banks and loan servicers generate demand letters?

6 A Yes.

7 Q And what is the basis for your testimony to  
8 the Court? How are you generally familiar?

9 A Okay, thank you. I work with our servicer to  
10 draft the demand letters that are sent out on our  
11 behalf.

12 Q Okay. Is there an industry standard or  
13 procedure that is followed by McCormick?

14 MR. WASYLIK: Objection, form. Personal  
15 knowledge, hearsay.

16 THE COURT: Form is a deposition objection.  
17 And I don't know -- what were the others?

18 MR. WASYLIK: Personal knowledge and hearsay,  
19 Your Honor.

20 THE COURT: Okay.

21 MR. WASYLIK: I'll rephrase my form objection,  
22 Your Honor. The question is ambiguous as to  
23 industry standards.

24 THE COURT: Overruled.

25

1 BY MR. PASCALE:

2 Q Do you know if's there's industry standards  
3 that are followed when producing and generating  
4 thirty-day demand letters?

5 A There are consumer protection regulations that  
6 are in place that are followed for all the various  
7 procedures with form servicing.

8 Q Okay. Does McCormick follow those procedures?

9 A McCormick's servicer, BSI, yes, follows those  
10 procedures.

11 Q Okay. In your experience, and if you know,  
12 would BankUnited have followed those procedures?

13 MR. WASYLIK: Objection. Speculation.  
14 Personal knowledge. Hearsay.

15 THE COURT: Overruled, overruled, and  
16 overruled.

17 THE WITNESS: I would expect that they would  
18 follow those same procedures and regulations, yes.

19 BY MR. PASCALE:

20 Q Okay. And was an audit conducted of this loan  
21 at the time that McCormick acquired it from BankUnited?

22 A Yes.

23 Q And was the demand letter part of the business  
24 records that were acquired by McCormick?

25 A Yes.

1           Q     Did the audit that was performed by McCormick  
2     and/or its servicing agent, BSI, find any discrepancy in  
3     any of those business records?

4           MR. WASYLIK:  Objection.  Personal knowledge.  
5     Hearsay.  The witness hasn't testified that she  
6     performed the audit.

7           THE COURT:  Overruled, overruled, overruled.

8           THE WITNESS:  I'm sorry.  Could you please  
9     repeat that?

10          MR. PASCALE:  Sure.

11     BY MR. PASCALE:

12          Q     Did the audit performed by BSI reveal any  
13     discrepancies with any of the business records that were  
14     acquired from BankUnited?

15          A     No.

16          Q     Does that include the demand letter?

17          A     Yes.

18          Q     Do you have any information at all or any  
19     reason to doubt the veracity or accuracy of the contents  
20     of that demand letter, as well as the date upon which it  
21     was sent?

22          MR. WASYLIK:  Objection.  Speculation.  
23     Argumentative.  Calls for information beyond the  
24     witness's personal knowledge.

25          THE COURT:  All of those are overruled.



1 THE WITNESS: Can you please --

2 MR. PASCALE: Sure. I'll ask the court  
3 reporter to read that back if that's a possibility.

4 COURT REPORTER: Sure.

5 (The referred to question was read back by the  
6 court reporter)

7 THE WITNESS: I have no reason to doubt the  
8 accuracy of that.

9 BY MR. PASCALE:

10 Q Now, you stated that the business records of  
11 BankUnited, including the collection log and the demand  
12 letter, became those of McCormick.

13 A Correct.

14 Q Do those business records indicate that that  
15 demand letter was mailed on or about the date indicated?  
16 I believe it to be June 4th, 2009.

17 A Yes.

18 Q Okay. Is it one of the industry standards and  
19 procedures to mail a demand letter at or near the time  
20 that the loan goes into default?

21 A Yes.

22 Q Okay. Is the information contained within  
23 that demand letter derived from the servicing department  
24 of that loan?

25 A Yes.

1           Q     Okay.  And does the servicing department keep  
2     a record of payment?

3           A     Yes.

4           Q     And is it a servicing agent's duty to prepare  
5     a demand letter for the note holder when the loan goes  
6     into default or at or near the time?

7           A     Yes.

8           MR. PASCALE:  Your Honor, I'm just going to  
9     move again to put this demand letter into evidence  
10    with the collection log as a business record.

11          THE COURT:  You still haven't cured the Yang  
12    problem, so the ruling is the same.

13          MR. PASCALE:  And to be clear, Your Honor, I  
14    have been listening to Your Honor the entire time,  
15    but if the Court would just rephrase the problem,  
16    if Your Honor will.

17          THE COURT:  You want me to what?

18          MR. PASCALE:  Rephrase the problem.

19          THE COURT:  You're the lawyer.  I'm the judge.  
20    So you rephrase whatever problems you see, and you  
21    make whatever motions you want.  I am not going to  
22    start paraphrasing your positions for you.  I don't  
23    think that's proper for a judge to do, sir.

24          MR. PASCALE:  No, I'm not asking the Court to  
25    do that.  I was just asking the Court to define the

1 problem.

2 THE COURT: Well, the problem is you haven't  
3 cured the objection in the Yang case as well as the  
4 Hunter case goes against you, and based on those  
5 two cases, I'm sustaining the objection. I did  
6 sustain the objection because I haven't seen any  
7 reason to deviate from that.

8 MR. PASCALE: Well, Your Honor we gave you a  
9 good reason, and that's the WAMCO case.

10 THE COURT: Counsel, I'm not going to argue  
11 with you. Move on.

12 MR. PASCALE: Your Honor -- and can I go back  
13 to -- the Court asked me earlier what evidence.  
14 The proffer --

15 THE COURT: You have a witness on the stand,  
16 counsel. Please ask the witness another question.  
17 We're not going to continue this argument. You can  
18 present whatever evidence you want. I'm not  
19 precluding you from presenting any further  
20 evidence. What I'm doing is trying to move this  
21 case along, so move it along. Ask the witness a  
22 question, please.

23 MR. PASCALE: Okay.

24 BY MR. PASCALE:

25 Q Ms. Eberly, I'm showing you what's in your

1 hand is -- let's refer to it as Plaintiff's Exhibit

2 Number 4. Are you familiar with that document?

3 A Yes.

4 Q Okay. What is it?

5 A It is the pay history for this loan.

6 Q Okay. And does McCormick keep track of

7 payments made under the Defendant's loan?

8 A Yes.

9 Q And does McCormick service the loan?

10 A BSI Financial services the loan for McCormick.

11 Q Okay. Well, tell the Court what BSI's

12 relationship to McCormick is.

13 A They are our servicing agent.

14 THE COURT: Are you saying "B" as in boy or

15 "V" as in Victor?

16 THE WITNESS: "B" as in boy. Boy Sam Igloo.

17 THE COURT: Okay. Igloo begins with an "I"?

18 THE WITNESS: Yes. I had to think about that

19 one.

20 BY MR. PASCALE:

21 Q Can you tell us what the document consists of?

22 A Yes. It shows the current principal balance,

23 escrow balance, all payments that are applied to the

24 loan; all items that are disbursed -- escrow

25 disbursements, fees paid on the account.

1           Q     Okay.  And is receiving mortgage payments  
2     under the furnished loan a regular activity of BSI -- a  
3     regular business activity?

4           A     Yes.

5           Q     And was the record in your hand created and  
6     updated either near or at the time of the payments  
7     towards the defense were either received or not  
8     received?

9           A     Yes.

10          Q     And were the entries made into that record  
11     from a person with first-hand knowledge of the payments  
12     made, from information transmitted by a person with  
13     knowledge of receipt of those mortgage payments?

14          A     Yes.

15          Q     Okay.  And is that record kept in BSI's  
16     regularly conducted business activity of McCormick?

17          A     Yes.

18          Q     Is it the regular practice of BSI to make such  
19     a record?

20          A     Yes.

21          Q     Is that record also part of McCormick's  
22     records?

23          A     Yes.

24                   MR. PASCALE:  Judge, I move to introduce the  
25     payment history into evidence.  I'm sure we'll have

1 an objection.

2 THE COURT: That's number 4?

3 MR. PASCALE: Yes.

4 THE COURT: It's your Exhibit 4.

5 What is your objection?

6 MR. WASYLIK: Your Honor, it's going to be a  
7 Yang objection. The records themselves show that  
8 they were not made by BSI; made by BankUnited, FSB,  
9 judge.

10 THE COURT: Counsel, will you get the records  
11 of those?

12 MR. PASCALE: (Complying)

13 THE COURT: Thank you. Who made these  
14 records? What company?

15 THE WITNESS: Some of them were made, entered  
16 by BankUnited. The top sheet is BSI Financial.

17 THE COURT: Okay. Which ones were made by --  
18 I'm going to hand this back to counsel. I want you  
19 to divide these, please, for the record, into 4A  
20 and 4B. I don't care which one is which, but if  
21 there are two different entities that created these  
22 records, then we need to be able to figure out  
23 which ones did what.

24 THE WITNESS: Should I just write BankUnited  
25 or BSI?

1 THE COURT: Do you want a yellow sticky to  
2 divide them?

3 MR. PASCALE: Yes, please.

4 THE COURT: All right, ma'am. I want you to  
5 tell me -- counsel, I'm going to ask you to hand  
6 these back to her. I want you to divide for me, if  
7 you would please, the records made by BSI and tell  
8 me what they have been marked; and the records made  
9 by BankUnited and tell me what they have been  
10 marked.

11 THE WITNESS: BSI records have been marked 4A.

12 THE COURT: All right.

13 THE WITNESS: BankUnited, 4B.

14 THE COURT: All right. Now, you're holding in  
15 your hand -- your left hand, one page. Is that BSI  
16 records?

17 THE WITNESS: Yes.

18 THE COURT: And your right hand you have a  
19 large packet. Was that BankUnited's records?

20 THE WITNESS: Yes.

21 THE COURT: And where did you get BankUnited  
22 records from?

23 THE WITNESS: From BankUnited when we  
24 purchased the loan.

25 THE COURT: All right. And do you know -- do

1           you want to voir dire?

2           MR. WASYLIK:  If the Court prefers.

3           THE COURT:  Yes, I would because I do not want  
4           to be accused of being biased and taking sides and  
5           asking questions that are more properly asked by  
6           the lawyers for each side.

7           MR. WASYLIK:  Very well, Your Honor.

8                               VOIR DIRE EXAMINATION

9           BY MR. WASYLIK:

10           **Q     As to Exhibit 4B -- and first of all, for**  
11           **identification, can you tell us the date range those**  
12           **records cover?**

13           THE COURT:  You have to divide them into 4A  
14           and 4B, please.  Which ones --

15           THE WITNESS:  Yeah, I'm just -- this is a big  
16           stack, so I'm just going back to the beginning to  
17           get the date.

18           THE COURT:  All right.

19           THE WITNESS:  And this is the annual summary  
20           for 2006, so it looks like the beginning of the  
21           loan through December 30, 2013.

22           BY MR. WASYLIK:

23           **Q     And December 30th, 2013 -- that's when BSI**  
24           **took over servicing?**

25           A     On or about that time; within a few days I



1 believe.

2 Q Fair enough. The 2006 -- the records from  
3 2006 through May 21st, 2009, those were actually made by  
4 BankUnited, FSB; not BankUnited, N.A., correct?

5 A I'm not sure if there is a way to see which  
6 ones are which on here. They all came over as the pay  
7 history from the prior servicer, so they were all in the  
8 same format at that point in time. Okay, the 2008  
9 year-end says BankUnited, FSB at the very top. The 2009  
10 year-end just says BankUnited.

11 Q Okay. And just to clarify, BankUnited, FSB is  
12 the entity that was shut down by the FDIC on May 21st,  
13 2009, correct?

14 A I don't know.

15 Q That's fine.

16 MR. WASYLIK: Your Honor, just by way of --  
17 that's a fact not disputed. It's in both side's  
18 pleadings so --

19 THE COURT: What is?

20 MR. WASYLIK: That BankUnited, FSB is the  
21 failed bank shut down by the FDIC. On the same day  
22 the FDIC transferred all of the assets of the  
23 former bank to BankUnited, N.A. So there's  
24 actually two separate entities that are labeled  
25 BankUnited, but they're two distinct entities.

1           It's an undisputed matter --

2           MR. PASCALE: Well, we dispute -- there is a  
3 failed bank, but I'm not quite sure we necessarily  
4 agree that all -- okay, I don't know about that. I  
5 know that there was a failed bank.

6           THE COURT: There's no evidence in this case  
7 that there is a failed bank anywhere.

8           MR. WASYLIK: Your Honor, it's a matter that  
9 they pled in their reply by attaching the FDIC  
10 ledgers.

11          THE COURT: If you guys don't agree to it,  
12 then there's no evidence.

13          MR. WASYLIK: Agreed, Your Honor.

14 BY MR. WASYLIK:

15          **Q     Now, as to the records created by BankUnited**  
16 **after May 21st, 2009, again, do you have any personal**  
17 **knowledge as to the policies and procedures regarding**  
18 **the creation of those records?**

19          A     I don't know BankUnited's specific procedures.  
20 I would expect they would follow the general regulations  
21 that are prevalent throughout the industry.

22          **Q     Is your -- I'm sorry. Go ahead and finish.**

23          A     Prevalent wasn't the right word. They govern  
24 the industry.

25          **Q     Okay. And as to BankUnited FSB, is your**

1 answer the same for that?

2 A Yes.

3 Q Okay. Do you have any personal knowledge as  
4 to the policies and procedures of BankUnited, either  
5 one, as to the keeping of those records?

6 A No.

7 Q And do you have any personal knowledge as to  
8 how persons at BankUnited would have acquired knowledge  
9 of the matters recorded?

10 A I'm sorry. Could you please repeat?

11 Q I'll rephrase it.

12 A Thank you.

13 Q The people at BankUnited who created those  
14 records -- do you have any personal knowledge of how  
15 they acquired the information that they inserted?

16 A The regulations have certain requirements that  
17 need to be met, so they need to have personal knowledge  
18 of something. But I don't specifically know what those  
19 people knew; if they followed the regulations the way  
20 they were supposed to.

21 Q Right, and you don't know if they did.

22 A I don't have any reason to doubt that they  
23 did.

24 Q But you didn't see them doing it.

25 A I did not see them.

1           Q     All right. And as to the time the records  
2 were created, do you have any personal knowledge of the  
3 policies and practices of BankUnited, either one, as to  
4 the date of entry being made at or near the time of the  
5 event?

6           A     Outside the regulations, no.

7           MR. WASYLIK: Your Honor, I'm done with my  
8 voir dire. My objection is the same under Yang.

9           THE COURT: Well, tell me a little bit more  
10 about your objection as to Yang.

11          MR. WASYLIK: Specifically, Your Honor, the  
12 witness has testified as to each of the four prongs  
13 of the business records foundation -- as to the  
14 manner in which the records are created, where she  
15 says she has no personal knowledge. She avers  
16 generally that she has this awareness of the  
17 regulations, but she can't tell whether the people  
18 at BankUnited actually followed them. Secondly,  
19 the same answer as to the manner in which their  
20 kept, goes to the ordinary business -- kept in the  
21 ordinary course of business prong.

22          Thirdly, as to the prong regarding made by a  
23 person with knowledge, she testified that she  
24 didn't know that. She is assuming that they follow  
25 the regulations, but she doesn't have any personal

1 knowledge of that. Fourth, as to whether or not  
2 they were made at or near the time the event  
3 recorded, the fourth prong, she's also testified  
4 she has no personal knowledge of that. And, again,  
5 she simply assumes that they were following  
6 regulations. That's not enough, judge. That's not  
7 enough to lay a foundation of this witness. Under  
8 Hunter and Yang, she doesn't have personal  
9 knowledge under the manner in which BankUnited  
10 created these records or kept the records; the time  
11 they were made; and the knowledge of the people who  
12 entered them.

13 THE COURT: Okay. Response?

14 MR. PASCALE: Your Honor, our response is  
15 going to be the same. We're relying on WAMCO vs.  
16 Integrated Electronics. At the time that McCormick  
17 acquired the loan those records were taken from  
18 BankUnited. The witness testified an audit was  
19 performed. The witness testified that the audit  
20 did not reveal any discrepancy at all in any of the  
21 business records.

22 And, moreover, the witness testified that  
23 she's familiar with and believes that as a result  
24 of her position and title in the industry, that  
25 bank and servicing acceptable practices were

1 utilized in the servicing and generating of  
2 documents throughout the course of the Defendant's  
3 loan. And, again, the policy behind the business  
4 records exception is important because it's to  
5 eliminate the onerous, the arduous task on calling  
6 a witness from BankUnited to testify that Suzy Q  
7 put in these records personally; but rather those  
8 records were acquired in the ordinary course of  
9 business.

10 THE COURT: You know, what I'm looking for is  
11 the business records exception to the evidence  
12 code. Do you guys remember what rule that was?

13 MR. WASYLIK: It's 90.803 Subsection 6, Your  
14 Honor, the statutes.

15 THE COURT: 803?

16 MR. WASYLIK: 803. There's a copy. It's  
17 reproduced in Ehrhardt's, Your Honor. I can pass  
18 it up -- oh, you have a statute book.

19 THE COURT: I have a statute book. I'd rather  
20 use the statute book. What was the --

21 MR. WASYLIK: Subsection 6, Your Honor, of the  
22 business records exception.

23 THE COURT: Let's see 90.803.6, Records of  
24 Regularly Conducted Business Activity -- a) a  
25 memorandum, report, record, or data compilation in

1 any form, of acts, events, conditions, opinion, or  
2 diagnosis, made at or near the time, by or from  
3 information transmitted by a person with knowledge,  
4 if kept in the course of regularly conducted  
5 business activity; and if it was the regular  
6 practice of that business activity to make such  
7 memorandum, report, record, or data compilation all  
8 as shown by the testimony of the custodian or other  
9 qualified witness, or as shown by a certification  
10 unless the sources of information shows lack of  
11 trustworthiness.

12 I don't know, counsel. I understand your  
13 position, and I understand your WAMCO case but two  
14 more recent cases than WAMCO -- one, the Hunter  
15 case which says that testimony in a case about  
16 standard mortgage industry practice arguably  
17 established that such records were generated and  
18 kept in the ordinary course of mortgage loan  
19 servicing. And more importantly, the folks I have  
20 to report to -- the 4th DCA -- less than a year ago  
21 entered, you know, the Yang opinion that I am bound  
22 by. And there they had a substantial problem  
23 because the witness testified about records from  
24 another company. And in that case the Court did  
25 exactly what you're asking me to do, and that Court

1           was reversed, and that's Cynthia Cox, and she's a  
2           pretty smart judge.

3                   I'm going to sustain this objection again  
4           based primarily on the Yang case because we don't  
5           have somebody here who can testify as to even the  
6           policies, let alone the people who entered the data  
7           or any verification as to whether or not they were  
8           correct at the time they were made because she  
9           never worked for that company. I'm going to  
10          sustain the objection to 4B, the BankUnited  
11          records. However, 4A, the BSI records, I think are  
12          admissible. So I'm going to sustain the objection  
13          as to 4B, under the Yang case. I'm overruling the  
14          objection as to 4A. Okay.

15                   MR. PASCALE: Yes, sir, Your Honor.

16                   THE COURT: Let's move on, then.

17                   (Plaintiff's Exhibit 4A was admitted into  
18          evidence)

19                                   CONTINUED DIRECT EXAMINATION

20          BY MR. PASCALE:

21                   **Q     Ms. Eberly, do the business records of 4A**  
22          **belonging to BSI show or reflect that the loan has not**  
23          **been paid?**

24                   A     Yes.

25                   **Q     When is the last date of payment received**



1     **pursuant to BSI records?**

2           A     It shows the last payment date -- and this  
3     isn't necessarily a loan payment. This is any incoming  
4     money so it could be a tax refund or anything. It has a  
5     payment date of 6/12/2009.

6           **Q     Okay. Well, when was the last loan payment**  
7     **date?**

8           A     I'm allowed to look at the --

9           THE COURT: No, you can't read from that.

10          BY MR. PASCALE:

11          **Q     Generally, do you recall when the last loan**  
12     **payment date was approximately?**

13           THE COURT: If you're asking her to refer to

14          --

15           THE WITNESS: We have --

16           THE COURT: Excuse me. If you're asking her  
17     to refer to an inadmissible document --

18           MR. PASCALE: I'm not. To be clear, I'm not  
19     asking her to refer to 4B. I'm just asking for  
20     personal knowledge. You've reviewed the records  
21     prior to today's trial. I'm just asking --

22           THE COURT: Based on the BSI pay history, no  
23     money of any kind has come in since June 12, 2009.

24           MR. PASCALE: Thank you. No further  
25     questions.

1 THE COURT: Okay. Are you done with this  
2 witness, counsel? If so, I'm going to ask you to  
3 return the exhibits to the clerk.

4 MR. PASCALE: I just have one more question.  
5 I apologize if I asked this.

6 BY MR. PASCALE:

7 Q Can you tell us the loan balance as of today,  
8 according to BSI's records? And I apologize if I asked  
9 that.

10 A This pay history is dated 7/31/14, and it's  
11 showing the current principal balance of \$470,363.53.

12 Q I'm just going to ask you if you've reviewed  
13 the proposed final judgment today.

14 A Yes, I reviewed it earlier.

15 Q Okay. And are the figures within that final  
16 judgment consistent with the business records of  
17 McCormick?

18 A Yes.

19 MR. PASCALE: No further questions at this  
20 time, Your Honor. And Your Honor asked me to  
21 return the exhibits?

22 THE COURT: Yes, please. Cross examination.

23 MR. WASYLIK: Thank you, Your Honor. I want  
24 to waive cross subject to my right to call the  
25 witness on my case in chief, if we need to get

1     there.

2             THE COURT:   Well --

3             MR. WASYLIK:   I want to streamline the case,  
4     judge.

5             THE COURT:   All right.  Let me ask counsel --  
6     do you have any other witnesses?

7             MR. PASCALE:   Just any witness that the  
8     Defendant would introduce.  I do not.

9             THE COURT:   Well now is the time for you to  
10    call any other witnesses that you may have.

11            MR. PASCALE:   I do not.

12            THE COURT:   All right.  And you probably have  
13    some motions.

14            MR. PASCALE:   Yes, Your Honor.  I have a  
15    motion --

16            THE COURT:   Wait.  Plaintiffs rest?

17            MR. PASCALE:   No.  We'd like to proffer to the  
18    Court -- I want to go back to Your Honor's earlier  
19    question as to what additional evidence we'd like  
20    to introduce, and --

21            THE COURT:   Now is the time to introduce it,  
22    counsel.

23            MR. PASCALE:   Okay.  Then I'd like to proffer.

24            THE COURT:   Proffer what?

25            MR. PASCALE:   Your Honor asked me earlier what

1 evidence I need to proffer to show the validity of  
2 the Defendant's signature on this note. And I  
3 apologize, Your Honor. I just discovered this.

4 THE COURT: All right. Do you have any other  
5 evidence to present? Do you have any other witness  
6 for whom you are going to present to testify, or  
7 are you going to testify yourself?

8 MR. PASCALE: I was going to offer legal  
9 argument as to the pleadings and the admissions  
10 contained therein. I don't have any further  
11 questions for the witness.

12 THE COURT: Okay. You may step down. Go  
13 ahead. I don't know what you're doing but go ahead  
14 and do it.

15 MR. PASCALE: I'm sorry. It's not my  
16 intention, Your Honor. I'm just going back to Your  
17 Honor's question in trying to preserve and protect  
18 my client's rights. That's all I'm doing. I just  
19 wanted to proffer to the Court. Your Honor asked  
20 me earlier what evidence I intend to put on to show  
21 that the Defendant signed this note, and I have a  
22 copy of the Complaint which raises an allegation in  
23 paragraph -- I believe it's the Amended Complaint,  
24 paragraph four. This alleges that the note was  
25 taken out.

1 THE COURT: Is there any objection to his  
2 offering a verified document to the court?

3 MR. WASYLIK: I'm sorry, Your Honor. Verified  
4 in what way?

5 THE COURT: I don't know. Here, look at it.  
6 This is what he's offering as evidence.

7 MR. WASYLIK: Well, Your Honor, pleadings are  
8 not evidence. However, if there's a statement in  
9 the pleading, anything that he alleges in the  
10 Complaint that we have admitted, I think, is not a  
11 matter of evidence. It's a matter of, it's been  
12 removed from dispute. So to be clear, I'm  
13 objecting to the introducing as evidence, but if he  
14 wants to make legal argument --

15 THE COURT: What's your basis for objecting to  
16 introducing this document into evidence?

17 MR. WASYLIK: Because the pleadings, Your  
18 Honor, are not evidence. It's not authenticated.  
19 Specifically, pleadings are not evidence.

20 THE COURT: It's verified. Does that make a  
21 difference?

22 MR. WASYLIK: In this case, Your Honor, no,  
23 because it's verified under information and belief.  
24 And, Your Honor, under -- there's case law that  
25 talks about pleadings as evidence. There's case

1 law that talks about verified pleadings as  
2 evidence. I have two cases that I didn't expect to  
3 need to introduce today, but I have them with me.  
4 And there's also the K. Boundry case out of the 2nd  
5 DCA that talks about verified --

6 THE COURT: Just for clarification, let me  
7 read the verification question. Under penalty of  
8 perjury, I do declare that I have read the  
9 foregoing Complaint and the facts alleged therein  
10 are true and correct to the best of my belief and  
11 knowledge, dated 22 of September 2011, signed by  
12 somebody. I can't read the handwriting. Printed  
13 Dana Melville, Foreclosure Specialist. Is Dana  
14 Melville here?

15 MR. PASCALE: No, she's not.

16 MR. WASYLIK: So it's also a hearsay  
17 objection, judge.

18 THE COURT: All right. That is hearsay. Go  
19 ahead.

20 MR. PASCALE: Well, to continue with the  
21 proffer, the Defendant admits in its pleadings and  
22 its Answer that the note and the mortgage were  
23 signed by the homeowner.

24 THE COURT: Okay. Show me where, please.

25 MR. PASCALE: Paragraph two is circled for

1 Your Honor.

2 THE COURT: Okay.

3 MR. PASCALE: And it states --

4 THE COURT: In paragraph two.

5 MR. PASCALE: And that's the Answer, for the  
6 record.

7 THE COURT: Counsel, what he is saying is  
8 paragraph two of Count One -- it says admitted that  
9 a note and mortgage were executed; denying as to  
10 other allegations. And let me try and -- and which  
11 corresponding paragraph in your Verified Complaint?

12 MR. PASCALE: Well, You Honor, let me point  
13 out that this is a Verified Amended Complaint, and  
14 that is an Answer that doesn't reference it. I  
15 think that Answer came earlier; however, no  
16 additional Answer that I'm aware of on the record  
17 has been filed that disputes that, and that's an  
18 admission. Moreover, the Answer that's been filed  
19 is on behalf of Lisa Adjoda. Counsel today  
20 represents -- I suppose deceased and Ms. Adjoda.

21 I don't have anything of record, and I'm just  
22 asking, judge, just so we cross our T's and dot our  
23 I's. Is there something of record to this Court  
24 that indicates that counsel represents Mr. Adjoda  
25 because this entire proceeding --

1 THE COURT: (To Clerk) Can I see Number 1,  
2 please?

3 MR. PASCALE: Obviously, argument has been  
4 made, objections on behalf of the deceased, and the  
5 deceased is not represented here today. I feel as  
6 though the Court shouldn't give any weight to those  
7 arguments.

8 THE COURT: You raised about six issues. I'm  
9 looking at your propounded Exhibit Number 1 which  
10 shows, I believe, you've already told me -- let me  
11 make sure. It shows two signatures, one by Lisa  
12 and one by Mr. Adjoda, whose first name I cannot  
13 pronounce. Okay, you've also shown me an Answer  
14 from Lisa that says admitted that a note and  
15 mortgage were executed; denied as to other  
16 allegations.

17 And you've then shown me a verified -- a  
18 Verified Amended Complaint.

19 MR. PASCALE: I believe that Answer refers  
20 to -- counsel can back me up or stipulate to this.  
21 That Answer refers to the Amended Complaint  
22 pursuant to a footnote on one of these pleadings  
23 that it shall refer to the Amended Complaint.

24 THE COURT: He's also raised another issue --  
25 who do you represent in this proceeding?



1           MR. WASYLIK: Your Honor, to be abundantly  
2 clear, I represent Lisa Adjoda only; however that  
3 doesn't affect the analysis because the decedent is  
4 dead. And it's redundant, right, 673.3081 simply  
5 says that if the maker of the note is deceased, the  
6 presumption vanishes. Now we have a right to raise  
7 that because they're seeking to enforce -- well,  
8 they're seeking to be introduced as evidence.  
9 They're seeking to introduce as evidence against my  
10 client, Lisa Adjoda. And that's what I'm talking  
11 about, Your Honor.

12           MR. PASCALE: We are not asking the Court to  
13 determine liability under the promissory note as to  
14 Ms. Adjoda. This is not a deficiency hearing.  
15 This is not a money judgment. This is a  
16 foreclosure of the lien, the mortgage lien. We're  
17 asking the Court to foreclose on the mortgage lien,  
18 so we're not going through that liability under the  
19 note.

20           THE COURT: Because I think I've lost  
21 jurisdiction over the dead guy. Can we all agree  
22 to that? There's no estate here. And without an  
23 estate, I don't really have jurisdiction over  
24 Rajystmanura, I don't believe. He's gone to a much  
25 higher court somewhere.

1 MR. WASYLIK: Your Honor, I believe the record  
2 shows he's never been served so --

3 THE COURT: Well, okay. He hasn't been  
4 served?

5 MR. WASYLIK: I don't believe so. I think he  
6 passed before the Complaint was filed. I'm not 100  
7 percent certain.

8 THE COURT: Okay. Thank you for that  
9 clarification. I have now learned something about  
10 the case that I didn't know. So you may go ahead  
11 with your argument.

12 MR. PASCALE: Well, to continue to proffer the  
13 --

14 THE COURT: Your proffer.

15 MR. PASCALE: Yes. To continue the proffer,  
16 Your Honor, the evidence shows that at least one of  
17 the parties has admitted to the taking of a note  
18 and mortgage. But more so I'd just like to go back  
19 to that Bennett case that Your Honor has, and I'd  
20 like to point out that there was no -- and  
21 additionally in that Answer, Your Honor --

22 THE COURT: Which case?

23 MR. PASCALE: The Bennett case.

24 THE COURT: I've got Hunter. I've got Yang,  
25 and I've got WAMCO.

1 MR. WASYLIK: Bennett was the one that Your  
2 Honor referred to on my device.

3 THE COURT: Oh.

4 MR. WASYLIK: Well, he brought it up. I  
5 actually have a copy of it. He didn't bring a  
6 copy.

7 THE COURT: The one I read that we have no  
8 record of, and I read it on somebody's computer.  
9 Okay, go ahead. I understand.

10 MR. PASCALE: Under that Bennett case -- and  
11 Your Honor read it -- the Defendants have failed to  
12 deny that they have made that note in their  
13 pleadings. They're referring to -- and first of  
14 all, they don't represent the deceased, and they  
15 shouldn't be allowed to make argument on the  
16 deceased's behalf. But their pleadings go to a  
17 denial of authenticity as to the allonges and the  
18 assignments in this case. They don't reference the  
19 note, and that's contained within their affirmative  
20 defenses.

21 So not only have they not even raised it, but  
22 then they haven't actually provided this Court with  
23 any evidence of fraud or forgery, and the Bennett  
24 case is controlling. It says you need something  
25 more than just a mere denial or a mere, someone has

1    been deceased.  You need to present evidence that  
2    there's been fraud or forgery in this case.  
3    There's been no evidence presented of that.

4           And in addition to that, Your Honor -- and I  
5    don't normally do this, but I have to ask.  Under  
6    these conditions today -- and I'm not making  
7    excuses for myself or my client -- but there are  
8    additional documents that we'd like to put into  
9    evidence, which I don't have because there was a  
10   TILA disclosure hearing; there was a HUD statement  
11   with this mortgage loan; there was a loan  
12   application.  Then they had limited power of  
13   attorney.  There was a W-9.  All of these documents  
14   show that Mr. Adjoda took out this mortgage loan  
15   and signed this mortgage note.

16           And so because of that, I would like to ask  
17   for a continuance to get those documents and to  
18   show the Court and put them into evidence so that  
19   we can present our entire case.

20           THE COURT:  I'm not going to continue this  
21   case.  This case has been set too long to continue  
22   it at this point.

23           MR. PASCALE:  Respectfully, I hear the Court's  
24   ruling, and I'm just merely -- I hope the Court can  
25   understand where I'm coming from.

1 THE COURT: Well, I can, but I'm not going to  
2 continue this case at this late date. This is a  
3 2009 case, and now we're in the second half of  
4 2014. It's a five-year old case. Motion for  
5 continuance mid-trial is denied.

6 So let's move on for whatever else you want to  
7 proffer.

8 MR. PASCALE: I don't have anything else to  
9 proffer.

10 THE COURT: All right. Now you have some  
11 motions, I'm sure.

12 MR. WASYLIK: That's correct, Your Honor. The  
13 Court has sustained objections as to the note, as  
14 to the notice of default letter, and the collateral  
15 comments and also sustained objections as to the  
16 pay history from 2006 through 2013; more or less  
17 the end of 2013.

18 And in that regard, Your Honor, the Plaintiff  
19 has its burden to prove the agreement between the  
20 parties; i.e. the note. It has to prove the breach  
21 of that agreement. It has to prove the amount due  
22 and owing. It has to prove conditions precedent.  
23 Because the note has not come in; because the  
24 default letter has not come in; and because the  
25 vast majority of the history of this loan has not

1 come in through the end of 2013, the evidence  
2 before the Court is insufficient to sustain a  
3 judgment for Plaintiff. And, therefore, under  
4 1.420(b) Rules of Civil Procedure, the Court can  
5 and should grant a motion to dismiss for  
6 insufficiency of the evidence.

7 THE COURT: I'm going to deny, but let me also  
8 bring out a problem that I didn't even know existed  
9 until the proffer. In the Verified Amended  
10 Complaint, which was filed September 22nd, 2011,  
11 paragraph number two specifically identifies on  
12 August 22nd, 2006, promissory note and mortgage  
13 that were signed by both of these -- by Lisa  
14 Adjoda, and it specified the book and page number,  
15 and it specified the date, of course, as we've  
16 already said. It said a copy of the note and  
17 mortgage are attached hereto and made a part  
18 hereof. Let me have Number 1, please.

19 In comparing -- and the answer to that, or the  
20 answer was, admitted that a note and mortgage were  
21 executed. In comparing the attached note and  
22 mortgage -- and let me see if these are the same.  
23 The originals do not have a book and page number on  
24 them that I can find. And counsel for Plaintiff,  
25 if you can look at these and tell me -- I'm trying

1 to match up the book and page, and that's not  
2 possible to do because there is no book and page.

3 Number two is in evidence so we don't have to  
4 worry about that. But let me just, for the record  
5 while I've got it, the book and page of Exhibit  
6 Number 2 is the mortgage which is in evidence is  
7 identical to the copy on the Verified Amended  
8 Complaint. Let me see if the note is attached  
9 here. The note was not recorded. There is one  
10 note signed only by Mr. Adjoda, and there is an  
11 adjustable rate rider which does appear to have  
12 been attached to the Complaint -- the Verified  
13 Amended Complaint I should say. It wasn't.

14 So part of this Exhibit Number 1, counsel, the  
15 adjustable rate rider, was not attached to the  
16 Complaint.

17 MR. PASCALE: Your Honor, is it possible that  
18 it's attached to the mortgage, which is in  
19 evidence?

20 THE COURT: Hang on, hang on. And I will  
21 allow you to reply once I've gotten through all of  
22 this. There is an addendum to the note signed by  
23 Rajystmanura that is attached to the Complaint, and  
24 it appears to be the same, identical, to this  
25 Verified Amended Complaint. All right. So what we

1 seem to have, then -- let me see if the mortgage is  
2 correct. No, there's nothing attached to the  
3 mortgage. I will let you verify that.

4 So you have the adjustable rate note signed by  
5 Rajystmanura but not by the wife, which is attached  
6 to the Complaint. The adjustable rate rider, which  
7 is part of the -- not in evidence, Exhibit Number  
8 1, was signed by the wife but it's not in evidence.  
9 It is not attached to the Verified Complaint and,  
10 therefore, it would not have been part of the  
11 admission.

12 So what I'm going to do is I'm going to  
13 reverse myself partially but not totally. I'm  
14 going to admit that part of Exhibit 1 where  
15 Rajystmanura signed it, but I'm not going to admit  
16 the part where the wife signed it. And my  
17 rationale for doing this to my friends at the 4th  
18 DCA -- again, there is that Verified Amended  
19 Complaint recited to in paragraph two that  
20 Rajystmanura executed and delivered a promissory  
21 note that was attached to the Verified Amended  
22 Complaint, and that note signed by Rajystmanura  
23 that was admitted by Lisa as having been  
24 admitted -- she admitted that note and mortgage  
25 were executed. She didn't admit who executed it,



1 and the only allegation is that Rajystmanura, Mr.  
2 Adjoda, executed it.

3 And so I'm going to admit that portion of it  
4 where Mr. Adjoda executed it. I'm not going to  
5 admit that portion of the addendum where Lisa  
6 signed it. I find that that still has not been  
7 sufficient to be proven. But having said that, I  
8 don't know that it really makes a difference  
9 because Mr. Rajystmanura is deceased anyhow.

10 MR. WASYLIK: Well, Your Honor, if I  
11 understood the Court's ruling correctly, I move to  
12 dismiss for lack of evidence as to -- not only lack  
13 of evidence as to the note, but also because the  
14 Court kept out the letter which was the notice of  
15 default. That's a failure of conditions precedent,  
16 which is the burden of the Plaintiff to prove. And  
17 if I understood the Court's ruling correctly, the  
18 Court denied that motion or is that --

19 THE COURT: I haven't ruled on it yet because  
20 I'm taking the evidence. I have now reversed  
21 myself, and I'm admitting part of Exhibit 1. So  
22 here's what I'm going to do. I'm going to ask the  
23 Clerk to modify the enumeration of Number 1 and  
24 make Number 1A the promissory note signed by the  
25 husband, and 1B the rest of it, so that the Court

1 of Appeals does not get confused as to what I'm  
2 doing here.

3 (Plaintiff's Exhibit 1A admitted into  
4 evidence)

5 THE COURT: Now, I haven't ruled on your  
6 motion yet, and I'm going to give opposing counsel  
7 an opportunity to respond to your outstanding  
8 motion.

9 MR. WASYLIK: Very well, Your Honor. At the  
10 end of that, if it's necessary, I didn't get a  
11 chance to argue about the --

12 THE COURT: Well, make all your motions, then.

13 MR. WASYLIK: I didn't get a chance to argue  
14 about the issue of what was actually admitted by  
15 the pleadings.

16 THE COURT: All right.

17 MR. WASYLIK: And I think that's important.  
18 Your Honor, as the Court read correctly that the  
19 admission number two is admitted that a note and a  
20 mortgage were executed, but it's denied as to all  
21 other allegations. In other words, we're not  
22 admitting that note, that mortgage. So I want to  
23 make that clear. If that changes the Court's  
24 ruling, then so be it. And if it doesn't change  
25 the Court's ruling, then --

1           THE COURT:  It's still clear on the Verified  
2 Amended Complaint what note was being discussed in  
3 the Complaint.  So I find that there is no  
4 confusion as to which note was being discussed in  
5 both the Complaint and the Answer.

6           MR. WASYLIK:  And I'll just proffer to the  
7 Court, I unfortunately drafted that Answer, and it  
8 was my intention to specifically not admit that  
9 note and that mortgage.  And I'll just leave that  
10 for what it's worth.

11          THE COURT:  Okay.

12          MR. WASYLIK:  Now I stated -- and the Court  
13 can stop me if it already heard this -- I move to  
14 dismiss as insufficient the evidence based on  
15 initially the note but also, too, conditions  
16 precedent, properly denied which has been in our  
17 pleadings.  We have denied that they provided a  
18 letter required by paragraph twenty-two of the  
19 mortgage.  So the letter was proffered by counsel.  
20 The Court sustained the objection to it.  The  
21 letter never came in, and the collection notes  
22 never came in showing whether or not it was sent.  
23 The Plaintiff has failed to meet his burden as to  
24 conditions precedent.

25          Thirdly, Your Honor, the Plaintiff has the

1     burden to prove both the default and also the  
2     amounts due and owing under the note. And the  
3     reason for that, Your Honor, why it matters to  
4     Lisa, is because she, as the owner of the property,  
5     has a statutory right of redemption. And the  
6     amount of her statutory right of redemption is  
7     affected by the exact dollar amount that the Court  
8     enters in judgment, if it does enter judgment.  
9     And, therefore, it is Plaintiff's burden to prove a  
10    precise dollar amount. Because the Court excluded  
11    the pay history from 2006 until the end of 2013,  
12    the evidence as to the amounts due and owing and  
13    even, Your Honor, the evidence as to whether a  
14    default happened, there's no documentation of that  
15    whatsoever. So there's insufficient evidence as to  
16    that point.

17           So as to conditions precedent and as to the  
18    things that would be proven by the pay history --  
19    namely, the default and the amounts due and owing,  
20    those things are not in evidence, and the Court  
21    cannot enter judgment without them.

22           THE COURT: Okay. Plaintiff?

23           MR. PASCALE: Respectfully, Your Honor, we  
24    disagree. Even if that letter hasn't come into  
25    evidence, despite Ms. Eberly's testimony and

1 despite the WAMCO case, that letter was only  
2 required to be sent to the borrower. Defendant,  
3 Ms. Adjoda, is not the borrower. Ms. Adjoda is the  
4 spouse of the borrower. She has no entitlement to  
5 that notice. She is precluded from arguing. She  
6 does not have standing to argue that today as to  
7 the borrower, Mr. Adjoda.

8 THE COURT: May I see Number 1? I'm sorry,  
9 Number 2.

10 MR. PASCALE: And that's clear under the terms  
11 of the mortgage contract as to what the Plaintiff  
12 is required to do.

13 THE COURT: Okay. Which?

14 MR. PASCALE: Paragraph twenty-two of the  
15 mortgage contract, Your Honor, requires --

16 THE COURT: That's what I thought it was --  
17 mortgage, twenty-two.

18 MR. PASCALE: And it specifically uses the  
19 word, borrower. Ms. Adjoda is not a borrower. Her  
20 rights are not going to be prejudiced by entry of a  
21 judgment here today.

22 THE COURT: But the mortgage begins by saying,  
23 the borrower is Rajystmanura and Lisa, husband and  
24 wife. Does that make a difference?

25 MR. PASCALE: Black's Law Dictionary, Your

1 Honor -- if you'll allow me the opportunity to  
2 refer to it, I think that a borrower is someone who  
3 has an obligation to pay a debt. Ms. Adjoda has no  
4 such obligation.

5 THE COURT: Here. Also both parties signed  
6 this mortgage, and the borrower is defined as both  
7 of them. It doesn't say or -- it says  
8 Rajystmanura --

9 MR. WASYLIK: Your Honor, if you want to call  
10 him Ray Adjoda if that helps.

11 THE COURT: Thank you. Ray Adjoda and Lisa  
12 Adjoda, husband and wife, is the definition of  
13 borrower in the mortgage itself. And I'll show it  
14 to you if you want to see it.

15 MR. PASCALE: I concur with Your Honor. I  
16 certainly would just like to point out that there  
17 is a mortgage contract and, again, the definition  
18 of a borrower, according to the Black's Law  
19 Dictionary, is a person or entity to who money or  
20 something else is lent.

21 THE COURT: It also says at the end of the  
22 mortgage, by signing below, the borrower accepts  
23 and agrees to the terms and covenants contained in  
24 pages one through eleven of this security  
25 instrument and in any rider executed by borrower

1 and recorded with it. And it appears that both of  
2 these folks signed as borrower, and that was before  
3 a Notary Public.

4 MR. PASCALE: Again, Your Honor, I understand  
5 the Court has made its ruling as to the  
6 admissibility of the letter, but I'd just like to  
7 reemphasize that the business records exceptions  
8 isn't our only means of having the letter  
9 introduced or admitted into evidence. And it's not  
10 necessarily going -- it's not going to show the  
11 truth of the matter asserted in that necessarily,  
12 that information contained within it as to the  
13 amount and date of the default is correct. It's  
14 just going to show that the letter was mailed and  
15 notified the Defendant of such -- the borrower of  
16 such.

17 And, moreover, in response to prong number two  
18 of Defense counsel's motion to dismiss, Ms. Eberly  
19 was able to testify to a default today. I asked  
20 her, Do any of McCormick's business records reflect  
21 that a payment forthcoming was necessary to cure  
22 the default? She has the payment history from BSI.  
23 That payment history includes and incorporates the  
24 outstanding principal balance of the loan and  
25 carries through.

1 THE COURT: Okay. I'm going to deny the  
2 motion to dismiss. Let's start proceeding to a  
3 final argument. You guys want to take a break  
4 before we do that?

5 MR. WASYLIK: Sure, Your Honor.

6 THE COURT: I think you basically made your  
7 final arguments, but I'm going to let you do it  
8 formally.

9 MR. WASYLIK: Yeah, I don't think I need to  
10 add anything else, Your Honor, other than the fact  
11 as far as the default letter goes, they're now  
12 claiming that they didn't have to send a letter to  
13 Ms. Adjoda. Well, we pled that as an affirmative  
14 defense and instead of raising that as part of  
15 their reply, they just said, oh, we sent a letter.  
16 So they didn't raise that as --

17 THE COURT: Here's what we're going to do.  
18 Let's take a five-minute break. I'm going to allow  
19 both of you to present your final arguments, okay.

20 MR. WASYLIK: Okay, Judge.

21 (Recess was taken)

22 (Back on the record)

23 THE BAILIFF: Court's back in session.

24 THE COURT: Okay. Plaintiff goes first. I  
25 think I basically heard all the arguments, but I'll



1 give you the opportunity.

2 PLAINTIFF'S CLOSING ARGUMENT

3 MR. PASCALE: You have, Your Honor, I just --  
4 the only argument I'd like to make is that the  
5 burden of proving an affirmative defense rests with  
6 the Defendant. The alleged failure to send a  
7 letter, that Ms. Eberly was on the stand, had in  
8 her hands, that Your Honor had along with the  
9 collection log -- the burden to show that that  
10 letter was not mailed is on the Defendant. The  
11 Defendant has not put on any evidence here today to  
12 meet its burden.

13 So by preponderance of the evidence Plaintiff  
14 should prevail. And that's the only point I'd like  
15 to make.

16 THE COURT: Well, section twenty-two of the  
17 mortgage says, Lender shall give notice to borrower  
18 prior to acceleration. So what evidence is there,  
19 other than in the letter, that is not in evidence?  
20 What evidence is there in this record that notice  
21 was given by the lender to the borrower?

22 MR. PASCALE: Clearly, only in the letter  
23 itself, which the Court did not allow in evidence.  
24 But clearly we're raising it in paragraph  
25 twenty-two, as the Defendant did as an affirmative

1 defense, and contained within their Answer, the  
2 burden again to prove an affirmative defense, and  
3 the acceleration is on the Defendant. They haven't  
4 met their burden. There's been no evidence  
5 presented that it hasn't been received.

6 Ms. Adjoda is not here. No other witness has  
7 testified for the Defendant that this letter was  
8 received -- or sent. Conversely, Ms. Eberly  
9 testified that the letter was sent and that  
10 pursuant to her collection log notes and the letter  
11 itself, it put the Defendant on notice.

12 THE COURT: Let me see the collection log  
13 note. I want to see what you're talking about.

14 MR. PASCALE: Part two of the Composite  
15 Exhibit, Your Honor.

16 THE COURT: Well, the only one that's in  
17 evidence is A. So let me hand this to you again  
18 and ask you where it shows that it was sent.

19 MR. PASCALE: That's the payment history, Your  
20 Honor. I'm referring to the demand letter as not  
21 -- the Court did not allow it into evidence.  
22 Nonetheless, she testified to that in my closing  
23 argument. And, again, the affirmative defense  
24 burden rests with the Defendant. We acknowledge  
25 that the mortgage contract says the language,

1 shall, but if you're going to assert that, if  
2 that's been asserted as an affirmative defense,  
3 that is going to have to rest with the Defendant.  
4 There is no evidence here today to controvert that.

5 THE COURT: Okay. Is that it?

6 MR. PASCALE: Yes.

7 THE COURT: Okay.

8 DEFENDANT'S CLOSING ARGUMENT

9 MR. WASYLIK: Your Honor, counsel's argument  
10 is very eloquent; unfortunately it is founded on a  
11 fundamentally incorrect principal of law and a  
12 fundamentally incorrect understanding of what  
13 exactly we pled. Rule 1.260 required the Plaintiff  
14 to plead generally performance of conditions  
15 precedent. The mortgage contract itself tells us  
16 what those conditions are. Then it becomes my  
17 burden to say what exactly I think they didn't do.

18 And in paragraph ten of our Answer, we  
19 specifically deny conditions precedent, and let me  
20 read the paragraph to the Court. And this is our  
21 Answer and Affirmative Defenses to the Verified  
22 Amended Complaint filed on -- let me get the date  
23 for you, judge -- on or about January 31st of this  
24 year. Paragraph ten of those Answer and  
25 Affirmative Defenses say, Denied. Specifically,

1 Plaintiff has failed to provide the notice required  
2 by paragraph twenty-two in the mortgage in a matter  
3 that strictly complies with the requirements of  
4 that provision prior to commencing this foreclosure  
5 action. Also, Plaintiffs fail to provide a notice  
6 of assignment required by 559.715 of Florida  
7 Statutes as a condition precedent to enforcement.

8 Now, the effect of that denial, Your Honor,  
9 under the law is to shift the burden back to the  
10 Plaintiff to prove affirmatively that it performed  
11 those conditions. Now, there's two components to  
12 proving the condition as to the notice letter,  
13 judge. The two components are a) we mailed a  
14 letter; and (b) here's what the letter says.  
15 Because paragraph twenty-two of the mortgage,  
16 judge, says that that notice in question shall  
17 specify four things: It shall specify the default;  
18 the action required to cure the default; a date not  
19 less than thirty days from the date the notice was  
20 given by which the default must be cured; and (d)  
21 that failure to cure the default will result in  
22 foreclosure proceedings, acceleration of the loan,  
23 and sale of the property. Then it goes on to say  
24 that the notice shall further inform the borrower  
25 of the right to reinstate and the right to raise

1 defenses in the foreclosure proceedings.

2 Now, in order to tell, judge, whether or not  
3 the Plaintiff has sent a notice that contains all  
4 of that information we need in evidence the letter,  
5 and it's not. As to the second part of our denial,  
6 there's been no evidence whatsoever as to the  
7 notice of assignment required by 559.15. No  
8 argument by Plaintiff that they provided nothing.  
9 So that's as to the conditions precedent. That  
10 alone, judge, is grounds to deny the Plaintiff's  
11 Request for Foreclosure and to enter judgment on  
12 behalf of -- in favor rather of the Defendant.

13 THE COURT: Well, does that mean she gets a  
14 free house?

15 MR. WASYLIK: No, Your Honor, it does not.  
16 They can re-file. They can re-file. They might  
17 have certain payments that are beyond the statute,  
18 but under the current case law as it is in the 4th  
19 and the 5th, there's no statute of limitations that  
20 would bar them from re-filing.

21 MR. PASCALE: Can I briefly respond --

22 THE COURT: When he's done. Let me make sure  
23 he's done. Anything further?

24 MR. WASYLIK: Now, Your Honor, I do also want  
25 to address the issue of standing because that we

1 specifically denied as well. Standing -- they have  
2 stated that McCormick 106, LLC bought the note  
3 from -- in their pleadings they claim they have  
4 some kind of connection with BankUnited and so on  
5 and so forth. Now the problem with that is that  
6 they haven't produced any actual evidence of that.  
7 And here's why this is important.

8 First of all, Your Honor, as to their actual  
9 Count One for foreclosure, they've alleged in  
10 paragraph two that the note was negotiated and/or  
11 transferred to the Plaintiff. They don't say  
12 which. Now what they can't do, though -- the  
13 problem here is that they didn't prove that that  
14 was done for BankUnited at the time the Complaint  
15 was filed. And here's why this is important,  
16 judge, because at the time this Complaint was  
17 filed, the Plaintiff was BankUnited, FSB. And in  
18 their Amended Complaint they admit that BankUnited,  
19 FSB was shut down by the FDIC -- this is paragraph  
20 three. Plaintiff's predecessor in interest was  
21 closed on May 21st, 2009 by the Office of Thrift  
22 Supervision and the Federal Deposit Insurance  
23 Corporation was appointed receiver. Now, Your  
24 Honor, there on paragraph four they say subsequent  
25 to the closure of BankUnited, FSB. Plaintiff,

1 BankUnited, a newly chartered federal savings bank  
2 acquired the assets and most of the liabilities of  
3 BankUnited, FSB. So FSB is the failed savings  
4 bank. BankUnited, N.A. is the new association.

5 So those are the admissions in the pleadings.  
6 Those allegations are binding on that, and they  
7 can't prove anything different, but here is where  
8 this becomes problematic. The original Complaint  
9 was filed by BankUnited, FSB in September of 2009,  
10 four months after BankUnited was shut down and all  
11 of its assets transferred to some other entity. So  
12 here where Plaintiff, McCormick 106, LLC, claims to  
13 have acquired the loan from BankUnited, N.A. --  
14 well, they have to prove it all the way back to the  
15 original Plaintiff because BankUnited, FSB is the  
16 original Plaintiff. Now they did amend their  
17 complaint but that amendment, because it brings a  
18 new party in, doesn't relate back. They have to  
19 prove it all the way to BankUnited, FSB. The  
20 original Complaint says BankUnited, FSB, and that's  
21 the entity which no longer existed and by its own  
22 pleadings had already assigned away the right, Your  
23 Honor, to this loan four months before the  
24 Complaint was filed.

25 So they're claiming a change of title from

1 BankUnited, FSB, the original Plaintiff in this  
2 case. The undisputed facts show that at the  
3 inception of this foreclosure suit BankUnited FSB  
4 didn't have standing because it had already signed  
5 those things away based on their own admitted  
6 pleadings. Now that was the standing issue. I  
7 will also note, Your Honor, that they did not  
8 prove -- there's no evidence whatsoever as to the  
9 date of the alleged endorsements; the date on which  
10 McCormick 106 acquired possession of the note; the  
11 date in which BankUnited acquired possession; none  
12 of that -- date of possession and date of  
13 inception. The 4th DCA under the McClain and the  
14 Venture case; the Bedell case -- all those cases  
15 that we didn't have a chance to bring up, but I'm  
16 sure the Court's heard before, they all require the  
17 Plaintiff to prove standing at inception when  
18 standing is denied.

19 Finally, Your Honor, as to the evidence of the  
20 default and amounts due and owing, Your Honor, the  
21 Plaintiff has the burden to show by evidence, all  
22 those things were denied by the Defendant's Answer.  
23 And in order to do that, it must bring evidence of  
24 those three things: It must be admissible; it must  
25 be legally sufficient to overcome a denial, a



1 directed verdict, or dismissal for insufficient  
2 evidence; and thirdly, it must be sufficiently  
3 credible in weight.

4 Now what we have here, Your Honor, is the  
5 problem that the testimony of the witness, to the  
6 extent that that overcomes any sufficiency -- which  
7 I don't think it does -- but to the extent it might  
8 overcome any insufficiency, the problem is that it  
9 is admittedly based on documents that have not been  
10 produced and documents that were active and  
11 excluded by this Court because the Plaintiff  
12 couldn't prove up that they were non-hearsay. So  
13 the entire house of cards is founded on this shift  
14 in the sand of hearsay.

15 Now if they had brought in admissible records  
16 or if they brought in a witness who actually had  
17 personal knowledge of the loan throughout the  
18 entire time period, they would be able to prove  
19 those things. But to the extent that there's any  
20 evidence in the record at all about date of  
21 default, the existence of a default, any of that,  
22 and then the amounts due and owing -- to the extent  
23 there's any evidence at all is based solely on  
24 hearsay documents that this Court excluded or that  
25 the Plaintiff chose not to present.

1           So at this point, judge, the Plaintiff's  
2     burden to prove the things it needs to prove -- the  
3     Plaintiff has not met that burden, and I'd ask that  
4     the Court enter judgment in favor of the Defendant.

5           THE COURT:   Okay.

6           MR. PASCALE:   Your Honor, it's simple.   With  
7     respect to the default issued by -- the default  
8     letter, conditions precedent, if the Court looks at  
9     the affirmative defenses as pled, the affirmative  
10    defense is not that I didn't receive the letter;  
11    it's not that Ms. Adjoda didn't receive it or it  
12    wasn't sent, because being sent is all that's  
13    required under paragraph fifteen of the mortgage.  
14    It was mailed.   That's not the affirmative defense  
15    raised by the defense, though.   The affirmative  
16    defense is rather, I received the letter -- Ms.  
17    Adjoda -- and I'm drawing, I think I'm drawing a  
18    fair inference as to what that affirmative defense  
19    says.   It says I received the letter, but I'm  
20    disputing.   I don't think the Plaintiff put in the  
21    required information in that letter.

22           THE COURT:   Does anybody have a copy of that  
23    affirmative defense because I don't have it here?  
24    It may be in the file but -- I'm not exactly sure  
25    which affirmative defense you guys are talking

1 about, but the affirmative defense I just looked at  
2 bears no resemblance to what you were reading.

3 MR. WASYLIK: Your Honor, it's paragraph ten  
4 which is the denial -- admissions and denial  
5 section.

6 THE COURT: That's not the affirmative defense  
7 I have in front of me. The affirmative defense I  
8 have has a different paragraph ten than what you  
9 read.

10 MR. WASYLIK: Let me be very clear, Your  
11 Honor. The paragraph ten I read for you --

12 THE COURT: Here's paragraph ten: The  
13 Plaintiff's claims are barred by the doctrine --

14 MR. WASYLIK: That's from the affirmative  
15 defenses, judge; not from the admissions and denial  
16 in the proceeding. In the general denial answers,  
17 see Count One?

18 THE COURT: Okay. Show me what you're  
19 referring to, because I'm not sure I got that right  
20 one. I also notice on the letter that's not in  
21 evidence, it's not addressed to Lisa. It's  
22 addressed to her husband. Does that matter?

23 MR. WASYLIK: It doesn't matter, judge. It's  
24 not in evidence.

25 THE COURT: Well, all I mean is if it were in

1 evidence, would that matter?

2 MR. WASYLIK: It would not. Paragraph fifteen  
3 of the mortgage provides a notice to either  
4 borrower or notice to both borrowers.

5 THE COURT: Okay.

6 MR. WASYLIK: The confusion, judge, is that we  
7 pled both as a denial and also as an affirmative  
8 defense -- doing belt and suspenders. Does that  
9 make sense?

10 THE COURT: I'm just trying to figure out what  
11 you guys are talking about, which paragraph,  
12 because the paragraph you read is not the paragraph  
13 that I found.

14 MR. WASYLIK: The paragraph I read -- judge,  
15 1.2 --

16 THE COURT: Stop, stop, stop.

17 MR. WASYLIK: I'm sorry.

18 THE COURT: He's got it now. He's going to  
19 show me the affirmative defense, and then I'm going  
20 to ask you to tell me what your -- you can show me  
21 what you read from. And I'm not deciding this case  
22 today either. I'm going to take this under  
23 advisement, and I'm going to ask you both for  
24 proposed judgments.

25 MR. WASYLIK: Very well.

1 THE COURT: I have far too many new cases for  
2 me to --

3 MR. PASCALE: I'm not surprised, Your Honor.

4 THE COURT: And you came up with new cases,  
5 too.

6 MR. PASCALE: Just four.

7 THE COURT: Just four? Just four? That's an  
8 oxymoron.

9 MR. PASCALE: Your Honor, I'm referring you to  
10 Defendant's --

11 THE COURT: All I want to know is what  
12 affirmative defense it is.

13 MR. PASCALE: It's paragraph seven.

14 THE COURT: Paragraph seven.

15 MR. PASCALE: It states what it states.  
16 Again, I'm going to rely on the WAMCO case.

17 THE COURT: Plaintiff has failed to comply  
18 with the pre-suit and notice of assignment required  
19 for which the courts require strict compliance, and  
20 in addition, Plaintiff has failed to provide the  
21 notice required by paragraph twenty-two of the  
22 mortgage -- let me finish -- prior to commencing  
23 the foreclosure action, right?

24 MR. PASCALE: Yes, Your Honor. And what the  
25 Defendant has just argued is at their closing --

1 and the court reporter can read it back -- is not  
2 that they didn't receive the notice or that it  
3 wasn't sent; they're saying they got it according  
4 to the argument. We got it. We're just not  
5 convinced that it's legally sufficient. So that's  
6 the difference. And that's what I'm saying. The  
7 answer says what it says. I'm responding to the  
8 argument that was just heard before the Court.  
9 That was the argument. I'm responding.

10 In addition to that, we're going to rely on --  
11 and, again, I don't have the case with me but,  
12 generally, in this case to assert a affirmative  
13 defense that burden rests with the Defendant. They  
14 did not put on any evidence, have one single  
15 witness here today; has not even bothered to cross  
16 examine the Plaintiff's witness as to -- well, I  
17 take that back. There was cross examination -- has  
18 no witness as to whether this, in regards to  
19 failure of the demand letter. Moreover, section  
20 559 is a consumer protection statute. It goes to  
21 consumer debt. I think it's completely irrelevant  
22 to today's case and is not an affirmative defense  
23 to a mortgage foreclosure. That's section 559 that  
24 was asserted in closing argument.

25 Moreover, with respect to standing, judge,

1 that's been no stipulation; there's been no facts  
2 here today that the assets, all of the assets were  
3 sent on a particular date to BankUnited and,  
4 therefore, BankUnited, FSB didn't have standing to  
5 foreclose on this case. Rather, what we have is a  
6 bank -- BankUnited, FSB who issued the loan and who  
7 also filed the lawsuit.

8 And just a final case that we're all aware of  
9 is the Saber v. J.P. Morgan Chase Bank case that's  
10 cited at 114 So. 3d, 352, it just reads that a  
11 foreclosure can have standing so long as it was a  
12 holder of the mortgage at the time.

13 THE COURT: Is it So. 2nd or So. 3d?

14 MR. PASCALE: So. 3d.

15 THE COURT: Okay.

16 MR. PASCALE: Out of the 4th district, and it  
17 states if the Plaintiff's name is not on the  
18 mortgage, it can establish standing by proving that  
19 the mortgage was either assigned or equitably  
20 transferred by the filing of the Complaint. So to  
21 draw an inference it reads, If the Plaintiff's name  
22 is not on the mortgage -- BankUnited, FSB issued a  
23 loan. BankUnited, FSB filed this lawsuit. There  
24 is no issue as to standing.

25 If there's additional facts they should have

1 come in at trial as to contest or otherwise show  
2 that this loan was out of BankUnited, FSB's hands  
3 and it hasn't been. Moreover, there was a date of  
4 acquisition that Ms. Eberly testified to. The  
5 Court heard testimony of Ms. Eberly that McCormick  
6 acquired the loan in November of 2013. That's when  
7 they acquired the loan. There's allonges to the  
8 note to that fact. I don't think there's any  
9 dispute to that or any question as to the issue as  
10 to that.

11 Finally, the pay history that Ms. Eberly  
12 relied on carries forward. Yes, it's true, BSI has  
13 the pay history, and that pay history carries  
14 forward. That's reflected in the new pay history.  
15 There was a principal balance given and a default  
16 shown. So, Your Honor, all the Court needs to do  
17 is look at the preponderance of the evidence and  
18 see that note was signed; taken out; McCormick owns  
19 that note; there's a pay history alleging a  
20 default, showing a default; and the Defendant  
21 hasn't met its burden with respect to the contents  
22 of the demand letter, or the accepting of the  
23 demand letter.

24 And for those reasons, I think the Court  
25 should find today -- enter a final foreclosure



1 judgment in favor of the Defendant. Thank you.

2 THE COURT: Response?

3 MR. WASYLIK: Judge, first of all, to clarify  
4 the issue of what exactly we pled, a copy of our  
5 Answer and Affirmative Defenses -- this is the same  
6 one the Court had a moment ago. Page two of our  
7 Answer, under Count One where we admit and deny the  
8 various allegations in the Complaint, they  
9 correspond, Your Honor, to the Amended Verified  
10 Complaint. Paragraph ten of the Verified Amended  
11 Complaint says all conditions precedent to the  
12 filing of this action have been performed or  
13 occurred. It becomes our burden to admit or deny  
14 that after they plead it.

15 So what we did in our Answer, judge, is in  
16 paragraph ten of our Answer, in response to their  
17 allegation in paragraph ten on page two of our  
18 Answer we say, Denied. But we have to go beyond  
19 that. We have to deny specifically what happened,  
20 and so we said -- and that's the paragraph I read  
21 you earlier. Specifically, Plaintiffs failed to  
22 provide a notice. Okay -- so that's the first  
23 thing.

24 Now, counsel has correctly stated that we also  
25 pled an affirmative defense number seven addressed

1 to that same issue. We have pled both the denial  
2 and the affirmative defense because the case law  
3 sometimes get a little muddled, but the reality is  
4 that 1.260 says that Plaintiff generally avers;  
5 Defendant specifically denies. We did that. And  
6 that's what the Rule requires. The case law says  
7 -- and this is in the 4th DCA; it's in the 5th DCA.  
8 It's in the 2nd as well, and I'm sure it's good law  
9 throughout the state as well.

10 But upon a specific denial of their general  
11 averment of conditions precedent, the burden shifts  
12 to the Plaintiff. They don't just have to prove  
13 that the letter was mailed. They also have to  
14 prove in this case the contents of the letter,  
15 because the contents of the letter are the  
16 condition, and they failed to do that. Your Honor,  
17 I know you don't want me dropping new case law --

18 THE COURT: No, I don't because I told you  
19 guys before, earlier, to give it to me earlier.

20 MR. WASYLIK: And I understand. But this is  
21 an argument I didn't anticipate from counsel,  
22 however --

23 THE COURT: When he drops a new case on me,  
24 I'll allow you --

25 MR. WASYLIK: Well, Your Honor, I'm just going

1 to rely on the 4th DCA; and in all candor, judge, I  
2 haven't yet delivered this to counsel because I  
3 didn't expect he was going to argue that we had the  
4 burden to prove this. But it's Berg vs. Bridal  
5 Path. I have a copy for counsel. I have a copy  
6 for the Court.

7 THE COURT: Don't give it to me until he's had  
8 a chance to read it.

9 MR. WASYLIK: Very well, judge. The citation  
10 is 809 So. 2d 32. It's Berg vs. Bridal Path  
11 Homeowner's Association. It's a 4th DCA case from  
12 2002, and when the Court is ready, I have a copy.

13 THE COURT: Why didn't you give this to me  
14 before when I asked you for all of the case law?  
15 Why didn't you give this to opposing counsel before  
16 we started this?

17 MR. WASYLIK: Judge, I bring --

18 THE COURT: I haven't seen anything in this  
19 case that is not -- wasn't noticed by the pleadings  
20 yet. Is this something that just come up; and if  
21 so, tell me how it's just come up and tell me why  
22 it related to this case.

23 MR. WASYLIK: His assertion that it was my  
24 burden to prove the denial of the initial  
25 proceeding was something that I wasn't

1 anticipating. It was not pled by them. And I  
2 bring this case with me to every trial.

3 THE COURT: He gave me a case that I'm aware  
4 of and I've seen before, and I'm going to let you  
5 do the same.

6 MR. WASYLIK: Very well, judge. After he's  
7 had a chance to read those --

8 THE COURT: Stealth warfare is when you can't  
9 see it; it's not on the radar screen; you can't  
10 smell it; you don't know it's coming. It's just a  
11 weapon. So go ahead with your case.

12 MR. WASYLIK: Judge, the issue in Berg vs.  
13 Bridal Bath is that -- and this is a homeowner's  
14 association case. They're seeking to foreclose on  
15 a homeowner's lien. The Plaintiff in that case,  
16 the homeowner's association, was required to plead  
17 a condition precedent. They complied with all  
18 the -- well, they pled generally they complied.  
19 The homeowner then denied that they complied with  
20 the HOA covenants. And at trial -- I believe it  
21 was at trial -- yeah, it was the greater weight of  
22 the evidence decision. So at trial the Court found  
23 that the Defendant hadn't proved that they  
24 violated. And on reversal -- and I'm referring to  
25 the second printed page here -- does the Court want

1 a copy now?

2 THE COURT: Sure. I'll put it in the stack of  
3 cases that I've never seen before this afternoon.

4 MR. WASYLIK: Your Honor, what that case says,  
5 although framed as an affirmative defense, Berg  
6 essentially denied that the Association had  
7 properly levied the assessment pursuant to the  
8 declaration of covenants, conditions, and  
9 restrictions of Bridal Path. This denial squarely  
10 placed the burden on the Association to prove in  
11 its case against Berg by preponderance of the  
12 evidence.

13 This is well-settled in Florida law that the  
14 Plaintiff is required to prove every material  
15 allegation of its Complaint which is denied by the  
16 party defending against the claim. And that is  
17 exactly, Your Honor, what we have expected them to  
18 do by denying it. We raised it as an affirmative  
19 defense in addition to -- and Your Honor's probably  
20 well aware of the Rules of Civil Procedure that say  
21 a pleading shall be construed as to their substance  
22 and the matter pled as a defense rather than any  
23 denial, and its vice versa, are to be construed as  
24 whatever they should be.

25 So the fact that we pled them both in an

1 abundance of caution shouldn't prejudice us. The  
2 fact that we denied it with specificity puts the  
3 burden on them to prove not only delivery of the  
4 letter but the contents of the letter. The  
5 contents of the letter are not in, and the delivery  
6 of the letter is proven up. So it's our position  
7 that they failed to prove conditions precedent.

8 THE COURT: Okay. You get the last shot.

9 MR. PASCALE: I'm not going to touch the  
10 Bridal Path case, Your Honor, because,  
11 respectfully, I don't think it has any bearing on  
12 the issues here today. The homeowner's  
13 association were facts that are not present here  
14 today. The only thing I will point out to the  
15 Court -- and I really kind of just became aware of  
16 this; I'm not passing the buck -- but I would like  
17 to make it clear there was a Complaint filed in  
18 this case. My understanding is that there was an  
19 Answer filed to that Complaint, okay, and that's  
20 the Answer before Your Honor. There was also a  
21 Verified Amended Complaint filed in this case. I  
22 haven't seen an amended answer or Answer to that  
23 Amended Verified Complaint.

24 THE COURT: Then why are we in trial if the  
25 pleadings are not there? Who noticed it for trial?

1 MR. PASCALE: The Court noticed it for trial  
2 in a CMC conference, Your Honor.

3 THE COURT: Did anyone object to it, though,  
4 because it wasn't at issue?

5 MR. PASCALE: We did. We asked for a summary  
6 judgment -- and I'm not stating this as gospel.  
7 I'm just --

8 THE COURT: Let me ask the question again.  
9 You're answering a different question. Did anyone  
10 object this going to trial because it was not at  
11 issue?

12 MR. PASCALE: Not that I'm aware of. I'm just  
13 letting the Court know. I feel as though the Court  
14 can make a determination, and we respectfully, as  
15 quirky as it may be, move for a default against the  
16 Defendant here because there is no responsive  
17 Answer to the Amended Complaint that I'm aware of.

18 THE COURT: It's denied.

19 MR. PASCALE: Respectfully, nothing further,  
20 Your Honor. Thank you for the Court's time.

21 THE COURT: I want both of you to submit to me  
22 proposed orders with findings of fact and  
23 conclusions of law. And I want you to submit that  
24 to me not only in paper form, but I also want you  
25 to contact my JA and send it to her electronically.

1 That way I can alter and modify it as I determine  
2 is necessary. Having said that, how long do you  
3 gentlemen want to submit proposed orders to me?

4 MR. PASCALE: I would prefer at least ten  
5 days, Your Honor.

6 THE COURT: I'm going to give you ten days max  
7 because I got another twenty of these tomorrow.

8 MR. PASCALE: Okay. I would also ask the  
9 opportunity to present a bench brief or memorandum  
10 of law --

11 THE COURT: You can send me whatever you want  
12 as far as your bench brief. What I'm really  
13 looking for is memorandum of law that has findings  
14 of fact and conclusions of law, okay? Ten days.

15 MR. WASYLIK: Your Honor, we're going to need  
16 to order the transcript in order to get that done  
17 because we want to make sure that --

18 THE COURT: Ten days. Ten days is all I can  
19 give you. I have too many other cases between now  
20 and then to give you any more than that. Like I  
21 said, I got nineteen more of these cases tomorrow.  
22 Ten days is what I'm going to give you. I don't  
23 know that you need the transcript to do your  
24 proposals. I don't think you do. I'll give you  
25 ten days.



1           MR. WASYLIK: I understand. The tenth day  
2 would fall on a Sunday, a weekend, so it would be  
3 --

4           THE COURT: A week from Monday.

5           MR. WASYLIK: It's Labor Day.

6           THE COURT: Oh God.

7           MR. WASYLIK: Sorry.

8           THE COURT: A week from Tuesday. And I hope I  
9 still remember this case a week from Tuesday.

10          MR. WASYLIK: We'll just order rush I guess.

11          THE COURT: Why do you need the transcript?  
12 You made the same argument six times. So did you.  
13 But you're certainly free to hire this lady to do  
14 whatever you want.

15          Okay, a week from Tuesday you guys.

16          MR. WASYLIK: Thank you, Judge.

17          MR. PASCALE: Thank you, Your Honor.

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19          (Proceedings concluded at 4:30 p.m.)

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C E R T I F I C A T E

STATE OF FLORIDA        )  
COUNTY OF PALM BEACH )

I, RHONDA L. BUXBAUM, Court Reporter, do  
hereby certify that I was authorized to and did  
stenographically report the foregoing proceedings at the  
time and place herein stated, and that the foregoing is  
a true and correct transcription of my stenotype notes  
taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 28th day of August, 2014.

\_\_\_\_\_  
RHONDA L. BUXBAUM  
Court Reporter

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