No. 18-1294

In The

Supreme Court of the United States

MICHAEL D. LYNCH and CANDENCE B. LYNCH,

Petitioners,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY and OCWEN LOAN SERVICING, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents clear conflict on a pure question of law, regarding the Federal Rules of Evidence. According to the Eleventh Circuit, the hearsay statements of an affiant/witness related to the contents of business records which have not been admitted into evidence, are admissible as evidence under Federal Rule of Evidence 803(6). The holding directly conflicts with the Fifth Circuit, which holds such testimony is inadmissible hearsay.

1. Does Federal Rule of Evidence 803(6), authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence?

The Florida Supreme Court agrees with the Fifth Circuit and its holding is inextricably rooted in the statutory and common law of Florida.

2. Under the Erie Doctrine, without a countervailing Federal interest, must a Federal Court apply a State rule of evidence which is inextricably rooted in the applicable State substantive statutory and common law?

The Eleventh Circuit's decision evidences a willful and egregious disregard for this Court's summary judgment precedent and the precedent of all Federal Circuit Courts of Appeals regarding exclusion of inadmissible hearsay on summary judgment.

3. Are the decisions of the courts below such a far departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

Michael D. Lynch and Candence B. Lynch are the Petitioners.

Petitioners are individual people and thus a Corporate Disclosure is not required.

Deutsche Bank National Trust Company and Ocwen Loan Servicing, LLC, are the Respondents.

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OPINIONS BELOW

The unpublished Eleventh Circuit Panel Opinion affirming the District Court is found at *In re Lynch*, 2018 U.S. App. LEXIS 32381 (11th Cir. 2018) and App. 1-10, the Eleventh Circuits denial of petition for rehearing *en banc* is at App.84,85 the District Court order affirming the Bankruptcy Court is found at *Lynch v. Deutsche Bank Nat'l Trust Co.*, 2017 U.S. Dist. LEXIS 215253 (S.D. Fla. 2017) and App.16-39, the District Court order denying reconsideration is at *Lynch v. Deutsche Bank Nat'l Trust Co.*, 2018 U.S. LEXIS 2606 (S.D. Fla. 2018) and App.11-15, the Bankruptcy Court order granting summary judgment is found at *In re Lynch*, 2017 Bankr. LEXIS 4463 (S.D. Fla. 2017) and App. 40-53.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals affirmed the order of the District Court with its order dated November 15, 2018 and denied Petitioners requests for panel rehearing and rehearing *en banc* with its order dated January 11, 2019.

Pursuant to 28 U.S.C. §1254(1) this Court has jurisdiction to review this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeal if submitted on or before the 11th day of April 2019.

FEDERAL RULES AND STATUTE TO BE CONSTRUED

Federal Rule of Evidence 802 and 803(6), Federal Rule of Civil Procedure 56, and 28 U.S.C. §1652.

The preceding Rules and Statute are printed in their entirety at App. 86-90.

STATEMENT OF THE CASE

The order of the Eleventh Circuit Court of Appeal affirmed an order of the *U.S. District Court for the Southern District of Florida* (the "District Court") which affirmed an order of the *Bankruptcy Court for the Southern District of Florida* (the "Bankruptcy Court") which on cross-motions for summary judgment, granted summary judgment for the Respondents and against the Petitioners.

On July 24, 2012 Petitioners filed a voluntary petition for bankruptcy under chapter 7 of the code, in the Bankruptcy Court.

The case is an adversarial proceeding filed in the Bankruptcy Court, objecting to Respondents proof of claim. ("POC") Determination of an objection to a POC is a core proceeding under 11 U.S.C. §157(b)(1)(2)(B)(K). See *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011).

"The seminal date for analysis of a proof of claim, including the question of standing, is the date the bankruptcy case was commenced." *In re Parker*, 445

BR 301 – Bankr. Ct. Dist. Vermont (2011) also *In re Manville Forest Products Corp.*, 225 BR 862 Bankr. Ct., SD New York (1998) citing *In re National Gypsum Co.*, 139 BR 397 – Dist. Ct. ND Texas (1992).

Respondents POC consists of, a copy of a promissory note executed by Petitioner Michael D. Lynch on June 2, 2004 (the "Note") in favor of New Century Mortgage Corporation ("NCMC") and a copy of a mortgage in favor of NCMC, executed contemporaneously therewith by Petitioners together as husband and wife (the "Mortgage"). The Note has an unsigned, undated stamp affixed thereto at the bottom of the third page; there are no assignments of the Mortgage.

The bankruptcy code does not determine the enforceability of promissory notes and mortgages and thus the Bankruptcy Court must apply the substantive state law in the determination of the objection to Respondents POC. See *Butner v. United States*, 440 U.S. 48, 54-55 (1979) and, *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993).

The four count complaint seeks declarative judgments in counts I, II, and III, that under Florida Law and the Uniform Commercial Code the Respondents are neither a holder, nor a non-holder in possession with the right of a holder to enforce the Note and therefore, that Respondents claim is disallowed under 11 U.S.C. §502(b)(1) as unenforceable by Florida Law. Petitioners requested compensable damages in count IV, seeking to recover money (post-petition monthly

mortgage payments) paid to the Respondents, which they were not entitled to receive.

Essentially the case is analogous to a foreclosure case wherein the Respondents must prove they were entitled to enforce the Note and Mortgage under Florida Law on or before the bankruptcy petition date. See *In re Cerrato*, 504 BR 23, 38 – Bankr. Ct., ED New York (2014) also *In re Raygoza*, 556 BR 813, 823 – Bankr. Ct., SD Texas (2016) collecting cases.

Under relevant Florida Law, Petitioners as the issuer of the Note are obligated to pay the Note according to its terms at the time it was issued; the obligation is owed to the person entitled to enforce the Note. FS §673.4121.

A person is entitled to enforce a note if they are: 1) the holder of the note; 2) a non-holder of the instrument with the rights of a holder; or 3) a person not in possession of the Note who is entitled to enforce it. FS §673.3011 (¶3 relates to lost notes and is not applicable to this case).

Under Florida Law a "holder" is the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. FS §671.201(21)(a) See *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351 (Fla. 1st Dist. 2014) also *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310-11 (Fla. 2d DCA 2013).

Under Florida Law "a party in possession of a negotiable instrument, who is not the "holder" may seek

to foreclose as a "non-holder in possession" *Murray v. HSBC BANK USA*, 157 So. 3d 355, 358 (Fla. 4th DCA 2015).

"A nonholder in possession must account for its possession of the instrument by proving the transaction (or series of transactions) through which it acquired the note" *Bank of New York Mellon Trust Co., NA v. Conley*, 188 So. 3d 884 (Fla. 4th DCA 2016) also *St. Clair v. U.S. Bank Nat'l Ass'n*, 173 So. 3d 1045 (Fla. 2nd DCA 2015).

Prior to answering the complaint Respondents filed a motion to dismiss, arguing the unsigned stamp affixed to the Note is a valid indorsement under Florida Law; Petitioners argued it is not a valid indorsement because it is not signed. The Bankruptcy Court granted the motion, predicated upon its conclusion that the unsigned stamp is a signature and thus a valid indorsement under Florida Law. {App. 66-83} Petitioners timely appealed to the District Court.

The District Court reversed and remanded the case. Stating that it could not conclude that the unsigned stamp alone is a signature and thus a valid indorsement under Florida Law, without evidence that the person at NCMC who placed the stamp on the note, did so with the present intent to indorse it. The Court theorized that perhaps the Respondents could present evidence at the summary judgment stage that conclusively demonstrated that the person who affixed the stamp to the note intended that alone to constitute a signature and thus an indorsement. {Order on remand App. 59-65}

On remand the Bankruptcy Court vacated the dismissal. {App. 54-56} Respondents answered the complaint, the parties completed discovery and filed cross motions for summary judgment.

On summary judgment Respondents did not present any evidence related to the unsigned stamp. {Dist. Ct. order on Appeal App. at 28} In fact Respondents argued count I and II are moot because they are entitled to enforce the Note as a holder pursuant to two documents executed after Petitioners bankruptcy filing; a limited power of attorney (the "POA") and an allonge to the Note. (the "Allonge") {R. 11(3) 101 Pg. 261-278}

Respondents motion sets forth and relies upon three affidavits in which the affiants assert: 1) an unbroken chain of transfers from NCMC to Respondent Deutsche Bank, as Trustee for the securitized trust that is alleged to own the Note, (the "Securitized Trust"); 2) that Deutsche Bank has the right to act as attorney-in-fact for NCMC pursuant to the POA; 3) that Deutsche Bank executed the Allonge pursuant to the POA; and 4) that Respondents are in possession of the original Note with the Allonge attached thereto and thus are entitled to enforce the Note as the holder. The crux of the motions alleged proof of Respondents claim is the affidavit of Donna Walker.

Walker asserts that as a consultant to Alan Jacobs, trustee of the New Century Liquidating Trust (the "NCL Trust") she is one of the persons with custody and control of the business records of the New Century Debtors, (the "NC Debtors") and that based upon her

personal knowledge gleaned from review of the alleged records, NCMC sold Petitioners loan to New Century Capital Corp., ("NC Cap.") which then sold the loan to New Century Mortgage Securities, ("NCM Securities") which on or about August 4, 2004 transferred the loan to the Securitized Trust. {Walker affidavit App. 105-113}

Walker[1] did not identify, describe or attach copies of the alleged records to her affidavit as exhibits and no such records were otherwise admitted into evidence for consideration by the Bankruptcy Court. {id. App. 105-108}

Neither of the other affidavits (the "Gostebski" and "Reyes" affidavits) attest to nor contain evidence of the alleged transfer from NCMC to NC Cap. or from NC Cap, to NCM Securities. {R. 11(3) 101 Pg. 291-295 Pg. 525-558 Pg. 902-925}

Walker makes further assertions related to the POA culminating with her claim that she attached a true copy of the POA as Exhibit A to her June 24, 2016 affidavit. {Walker Affidavit App. 108-113} However, the POA was not executed by Mr. Jacobs until July 7, 2016. {POA App. 114-118}

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[1] Both the Bankruptcy Court and District Court orders refer to Walker as the Sole Officer and Director of NCMC and NC Cap., however, she is not and never has been an Officer or Director of any of the NC Debtors. Alan Jacobs, trustee of the NCL Trust is the Sole Officer and Director of the NC Debtors.

Under Rule 56(c)(2) Petitioners objected to the Walker affidavit as inadmissible hearsay. {R. 11(5) 107(2) Pg. 1-19 Petitioners Response}

The Petitioners do not dispute the existence of the POA. However, we argued to the Bankruptcy Court and on appeal that it is an irrelevant document, facially lacking any specificity or particularity to Petitioners loan. Therefore, it does not relieve the Respondents of their burden to prove the unbroken chain of transfers from NCMC to the Securitized Trust. See {POA App. 114-118} {R. 11(5) 107(2) Pg. 13-15, and 11(6) 126 Hearing Trans.}

The NCL Trust was created by order of the Delaware Bankruptcy Court, to administer the liquidation of the NC Debtors. NCMC and NC Cap., are two of the many NC debtors. Significantly, NCM Securities is not an NC Debtor, however, it is also a defunct entity. Respondents and the Courts below, posit that Deutsche Bank has a specifically enforceable right to the unqualified indorsement of NCMC because they were the holder of the Note when it was transferred to the Securitized Trust, as if NCMC transferred the Note to the Securitized Trust. FS §673.2031(3). {D. Ct. order App. 29} As Petitioners argued the statute is of no avail to the Respondents who allegedly received the Note from NCM Securities and thus must prove the unbroken chain of transfers from NCMC to the Securitized Trust. See *St. Clair v. U.S. Bank Nat'l Ass'n*, 173 So. 3d 1045, 1047 (Fla. 2nd DCA 2015).

In this case, Respondents' burden on summary judgment is the same as that which they would bear at trial. They must prove their claim, "a right to payment which is enforceable under Florida Law", existed on Petitioners bankruptcy filing date. {R. 11(5) 107(2) 1-19 Petitioners Response}

Petitioners argued to the Bankruptcy Court that Respondents failed to meet their burden and their motion must be denied because:

- Respondents did not present any evidence related to the validity of the unsigned stamp as an indorsement under Florida Law, nor when and by whom it was affixed to the Note and thus they failed to prove that they were a holder of the Note on the bankruptcy petition date. {id. Pg.9, 13,14}
- The Walker affidavit is inadmissible hearsay, which cannot be considered by the Court on summary judgment, because none of the NC Debtors alleged business records have been submitted as evidence. {id. 10,11,14,15, 11(6) 126 Hearing Trans.}
- Respondents failed to prove they are a non-holder in possession of the Note with the right of a holder to enforce it under Florida Law, because they have not adduced admissible evidence of an unbroken chain of transfers of the Note and Mortgage from NCMC to the Securitized Trust. {R. 11(5) 107(2) 15,16}

- The POA is an irrelevant document from which Respondents do not derive authority to execute any documents related to the Note and Mortgage. {id. Pg. 13-15, 11(6) 126 Transcript}
- The Allonge to the Note is *void ab initio* and or dispositive to Respondents claim. {R.11(5) 107(2) 10,15}

For all of these same reasons, Petitioners on cross-motion for summary judgment argued they were entitled to judgment as a matter of law and thus entry of summary judgment in their favor. {R. 11(6) 113 1-20}

In addition to objecting to the Walker affidavit as inadmissible hearsay, Petitioners with our response to Respondents motion and our cross motion for summary judgment, submitted to the Bankruptcy Court, significant tangible evidence and/or identified parts of the record containing such evidence, which contradicts Respondents motion on all of the genuine material facts; it is all reducible to admissible form at trial.

- Copies of public Florida State Court records establishing the intent of NCMC that stamps such as that affixed to the Note must be signed to be a valid indorsement. {R. 11(3) 69}
- Copies of Miami-Dade County public records which together with other material contained in the record attacks the veracity of Respondents records; arguing they are not trustworthy or reliable. Including but not limited to the alleged Mortgage

Loan Schedule and the extraction thereof submitted to the Court with Respondents motion. {R. 11(5) 107(2) Lynch Affidavit2 Ex. 1,7}

- Respondents' responses to Petitioners discovery requests, which establish that the alleged Mortgage Loan Schedule is not an authenticated document. {id. Ex. 3}
- The expert opinion of Kathleen Cully; a well-qualified expert on the Uniform Commercial Code and Securitization of promissory notes and mortgages. Ms. Cully attests to the documentation necessary for the bulk transfer and securitization of promissory notes and mortgages and her opinion in pertinent part, based on her specialized knowledge, education, skills and the review of all of the materials in Respondents motion and otherwise contained in the record for consideration by the Bankruptcy Court, is that Respondents have failed to show an unbroken chain of transfers from the Originator "NCMC to the Securitized Trust. {Cully expert opinion App. 91-104, R. 11(5) 107(2) Ex. B}

The Bankruptcy Court granted Respondents motion and denied Petitioners cross motion; predicated on its conclusion that over Petitioners hearsay objection, as a matter of law, the Walker affidavit is admissible under the "business records" exception to the Rule against hearsay, FRE 803(6) even though none of the alleged "business records were submitted as evidence. {App. at 48, 49}

The Court construed Walkers' hearsay statements as fact, ("The Walker Affidavit attests to two key facts") and in pertinent part inferred therefrom: (1) the Securitized Trust owns the Note; (2) Deutsche Bank executed the Allonge pursuant to the POA; (3) Ocwen is in possession of both the Note and Allonge; (4) the unsigned stamp was placed on the Note by New Century and/or Magda Villanueva with the present intent of accepting and/or authenticating the language therein. {id. at 44, 46, 47}

Based on the inferred facts the Court concluded as a matter of law the unsigned stamp constitutes both a signature and an indorsement under Florida Law and therefore Respondents can enforce the Note as a holder under Florida Law pursuant to either the unsigned stamp or the Allonge; and in the alternative also as a non-holder in possession with the rights of a holder to enforce the Note. {id. at 47, 48}

The Court dismissed all of Petitioners evidence including the Cully opinion; stating none of the evidence contradicts any material fact contained in the Walker, Gostebski, and Reyes affidavits. {id. at 46}

Petitioners timely appealed to the District Court, in addition to the arguments raised below Petitioners highlighted for the Court the insufficiency of the alleged evidence presented with the Gostebski and Reyes affidavits, to prove the facts asserted by the affiants, and that the declarations do not evidence that

the affiants have the requisite knowledge of the records required under FRCP 56.

The District Court cancelled oral argument and entered an order affirming the Bankruptcy Court order. At bottom the Courts decision is predicated on its agreement with the Bankruptcy Court that the Walkers' hearsay statements are admissible under FRE 803(6), and therefore Respondents can enforce the Note as a holder pursuant to the Allonge or in the alternative as a non-holder in possession with the rights of a holder pursuant to the chain of transfers alleged in the Walker affidavit. The Court declined to affirm the Bankruptcy Courts finding that obtaining the Allonge proved the unsigned stamp was intended as a signature and thus a valid indorsement. The Court excluded the Cully expert opinion stating it was an impermissible conclusion of law, and declined to consider most of Petitioners evidence, claiming the records cited were not submitted to the Bankruptcy Court and thus there consideration is not allowed on appeal. {App. 16-39 Order on Appeal}

In reaching its conclusion the District Court makes citations to several cases, cited by the Bankruptcy Court in its order which Petitioners argued are wholly irrelevant or not on point with the facts presented in this case and are not dispositive to Petitioners case.

The District Court denied Petitioners motion for reconsideration. Petitioners timely appealed to the

Eleventh Circuit Court of Appeal raising all of the same arguments.

The Eleventh Circuits Per Curiam Opinion found that the Bankruptcy Court was within its discretion to admit Walkers' affidavit under FRCP 56(c)(4) and 803(6) and thus the Bankruptcy Court did not abuse its discretion by determining Walkers' statements related to the contents of "New Century's business records" are "*admissible*" hearsay under FRE 803(6). {11th Panel Opinion App. 1-10} Moreover, the Court expressly dismissed Petitioners citation to Florida authorities holding, that under Florida's evidentiary rules, witness statements related to contents of business records are inadmissible unless the underlying business records are separately entered into evidence. See, e.g., *Heller v. Bank of Am., NA*, 209 So. 3d 641, 645 (Fla. 2d DCA 2017); *Sas v. Fed. Nat'l Mortg. Ass'n*, 112 So. 3d 778, 779-80 (Fla. 2nd DCA 2013); The Court further stated, "Nothing in Federal Rule of Evidence 803(6) suggests the hearsay exception applies to statements made in business records only if the records have been separately admitted into evidence." {id. App. at 4, 5 and n5}

The Court goes on to say that Petitioners should have made additional objections to the Walker affidavit such as "best evidence", "relevance" or "impermissible legal conclusions" and misplaces Respondents burden of production of the records on the Petitioner {id. at 5, 6 and n5, n6}

Like the District Court the Eleventh Circuit dismissed the Cully opinion as an impermissible conclusion of law, declined to consider most of Petitioners evidence claiming it was not submitted to the Bankruptcy Court and declined to consider if the alleged evidence submitted with the Gostebski and Reyes Affidavits was sufficient to prove the assertions made by the affiants. {id. at 7 and at n1}

Petitioners requested panel rehearing and rehearing *en banc*, which argued among other things that:

"A district court by definition abuses its discretion when it makes an error of law" *Koon v. United States*, 518 US 81, 100 (S. Ct. 1996). Also *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 405 (S. Ct. 1990).

Literally every Federal Circuit Court of Appeal including the Eleventh, excludes hearsay on summary judgment, which is not otherwise admissible at trial under FRE 801-804. See *Rowell v. Bellsouth Corp.*, 433 F.3d 794, 800 (11th Cir. COA 2005). Also *Macuba v. Deboer*, 1316, 1322, 1323 (11th Cir. COA 1999);

Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial; *Celotex Corp. v. Catrett*, 477 US 317, 323 (S. Ct. 1986) and that the Panels Opinion relating to the transfer of an interest in a claim after the commencement of a bankruptcy case, failed to apply the facts presented in this case. NCMC did not file a claim and then transfer it to the

Respondents, nor have the Respondents adduced admissible evidence that it was ever transferred to them. {Request for panel rehearing and rehearing *en banc*}

The petition for rehearing was denied. {App. 84, 85}

REASONS FOR GRANTING CERTIORARI

This Court Should Grant Certiorari Because: The Eleventh Circuits' Decision Directly Conflicts With The Decision Of The Fifth Circuit On The Same Important Matter Related To Federal Rule Of Evidence 803(6); It Is Inconsistent With Supreme Court Precedent Regarding The Erie Doctrine; It Defies The Public Policy Interests Expressed By The Federal and State Governments In The National Mortgage Settlements; It Is Such A Far Departure From This Courts Precedent And Accepted And Usual Summary Judgment Proceedings As To Call For The Exercise Of This Courts Supervisory Power

A. This Court Should Grant Certiorari To Resolve Conflict Between The Eleventh Circuit's Decision And The Fifth Circuit On The Same Important Matter Relating To Federal Rule Of Evidence 803(6); The Exception To The Rule Against Hearsay, For Records Of A Regularly Conducted Activity

1. The Constitutional Rights of Due Process and Equal Protection of the Laws for all citizens, demands the uniform interpretation and application of the Federal Rules of Evidence.

There is one set of Federal Rules of Evidence and there must be one interpretation and uniform application thereof. The Eleventh Circuits decision creates a clear conflict related to the interpretation and application of FRE 803(6). The Federal Rules of Evidence are

to be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination; FRE 102.

Inter-Circuit Conflict, Is An Intolerable Subversion Of The Federal Rules Of Evidence.

- Inter-Circuit Conflict, related to the Federal Rules of Evidence, necessarily means that one case or the other has been administered unfairly and one litigant or the other has been denied equal protection of the law.
- Inter-Circuit Conflict, squanders vital judicial resources and results in unjustifiable expense and delay.
- Inter-Circuit Conflict, stifles development of evidence law and inhibits a just determination based in truth.

Thereby relegating the Constitutional rights of Due Process and Equal Protection of the Laws for all citizens to an unattainable utopian ideology.

2. The Eleventh Circuit decision squarely conflicts with the long established law of the Fifth Circuit.

In *United States v. Marshall*, 762 F.2d 419, 423-28 (5th Cir. 1985) the government relied on a witness who testified based upon her review of records which were not admitted as evidence. Over defendants' objection, the District Court ruled the testimony was admissible even though the records had not been submitted at trial. (because, the government had provided copies of the records to counsel for the defendants prior to trial) On appeal the defendant maintained the objection that the testimony was inadmissible hearsay; the government argued even if it was found to be inadmissible the error was harmless and that the Fifth Circuit should find the District Court did not abuse its discretion in admitting the records (as if they had been admitted into evidence even though they had not) The Fifth Circuit ruled the testimony to be inadmissible hearsay and dismissed the governments alternative argument. id. 422, 426.

The facts presented in Marshall differ from this case only in that the alleged "business records" of the NC Debtors were never produced by the Respondents. The Eleventh Circuit decision is in direct conflict with the Fifths decision.

The hearsay statements of affiants/witnesses related to the contents of records which have not been admitted into evidence is a fact pattern which is repetitively occurring in Federal and State Courts in both

criminal and civil cases. See *Infra* at §B(2) also *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002), *Gilbert v. Infinity Ins. Co.*, 186 F. Supp. 3d 1075 (Dist. Ct. CD California 2016).

This Court has previously addressed, what constitutes a record which would be admissible under 803(6) and the explicit requirements which must be met to admit a record under 803(6), however the Court has never considered the fact pattern presented in this case and guidance from the Court will promote efficiency in our court system, the elimination of unjustifiable expense and delay and the equitable administration of the laws; and in the Eleventh Circuit prevent forum shopping.

B. This Court Should Grant Certiorari Because The Eleventh Circuits Decision Promotes Forum Shopping And Inequitable Administration Of The Laws, Defying This Courts Precedent Under The Erie Doctrine

1. The *Erie doctrine* modified through this Courts subsequent precedent.

Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights. As *Erie* read the Rules of Decision Act: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. Classification of a law as

"substantive" or "procedural" for *Erie* purposes is sometimes a challenging endeavor. (internal citation omitted) *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

Under the Erie Doctrine as modified through this Courts subsequent precedent, Federal Courts sitting in diversity jurisdiction, must employ an outcome determinative test, *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) unless applicable State law is proscribed by a countervailing Federal interest *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958).

Application of the test must be guided by "the twin aims" of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

"Accordingly, we should not apply this test so as to produce a decision favoring application of the state rule unless one of these aims will be furthered. Therefore, we must determine if the forum States law is outcome affective in the sense: application of it would have so important an effect upon the fortunes of one or both of the litigants that failure to apply it would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court." *Gasperini*, 518 U.S. at 427.

2. Florida law is clear and it is outcome determinative.

Like many states Florida has codified Rules of Evidence which essentially mirror the Federal Rules (See FS §§90.802, 90.803(6)).

The Florida Supreme Court expressly adopted the holding of the Fifth Circuit, See *Yisrael v. State*, 986 So. 2d 491, 497 (Fla. Sup. Ct. 2008) and its holding that "the business-records exception to the hearsay rule . . . does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence" is inextricably rooted in the common law of Florida State Courts. See *Heller v. Bank of America, NA*, 209 So. 3d 641, 645 (Fla. 2nd DCA 2017), *Bowmar v. SunTrust Mortg. Inc.*, 188 So. 3d 986, 989 (Fla. 5th DCA 2016) – *Collecting* 4 Cases *Sas v. Fed. Nat'l Mortg. Ass'n*, 112 So. 3d 778, 780 (Fla. 2nd DCA 2013) – *Collecting* 4 Cases.

Significantly, the Alabama Supreme Court also holds hearsay testimony related to the contents of records which have not been admitted into evidence is inadmissible. See *Ex parte Head*, 572 So. 2d 1276, 1281 (Ala. Sup. Ct. 1990) and, *Welch v. Houston County Hosp. Bd.*, 502 So. 2d 340, 343-344 (Ala. Sup. Ct. 1987)).

Unlike some cases which present issues for which there are conflicting State Court decisions or even a total lack of any precedent, the issue at hand has clearly been determined by Florida Statute, the Florida Supreme Court and the Florida District Courts of Appeal.

3. Intra-Circuit conflict is a harbinger which necessitates the *Erie* analysis.

For the purpose of *arguendo*, we posit, under Federal Rule of Evidence 803(6), hearsay testimony related to the contents of business records is admissible even without admission of the records into evidence and thus the Eleventh Circuit determined that the Federal Rule conflicts with the substantive Florida State law applicable to the case.

The Court must determine if a countervailing federal interest demands application of the Federal Rule, regardless of the State law.

> Property interests are created and defined by state law . . . Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, and to discourage forum shopping. . . . *Butner v. United States*, 440 US 48, 54-55 (1979).

Absent such a countervailing federal interest the Federal Court must apply the outcome determinative test guided by the twin aims of *Erie*, and thus unfettered by a countervailing Federal interest, the result clearly demands application of Florida Law.

If left to stand the Eleventh Circuits decision, opens the doors of Federal Courts in Florida and Alabama to forum shopping and will lead to the inequitable administration of the laws; not just in foreclosures, but in any case where diversity jurisdiction is available and genuine issues of material fact could plausibly be proved with records of a regularly conducted activity.

C. This Court Should Grant Certiorari Because The Elevenths Decision Defies The Important Public Policy Interests Expressed In The National Mortgage Settlements.

1. The Settlements

In February 2012, the Federal Government and 49 state attorneys general, including Florida entered into the largest consumer financial protection settlement in U.S. history with what were then the nation's five largest mortgage servicers. The agreement settled state and federal claims against Ally/GMAC, Bank of America, Citi, JP Morgan Chase and Wells Fargo that they routinely signed foreclosure related documents without knowing if they were correct, a practice referred to at the time as "Robo-signing." The settlement provided over $50 billion in relief to distressed borrowers harmed by the wrongful foreclosures and direct payments to the states and the federal government. Similar settlements were later made with HSBC, Ocwen and Suntrust. (www.nationalmortgagesettlement.com)

The complaint against Respondent Ocwen Loan Servicing LLC., included allegations of: "preparing, executing, notarizing, and presenting false and misleading documents, filing false and misleading documents with courts and government agencies, or otherwise using false or misleading documents as part of the foreclosure process (including, but not limited to, affidavits, declarations, certifications, substitutions of trustees, and assignments); and preparing, executing, notarizing, and filing affidavits in foreclosure proceedings, whose affiants lacked personal knowledge of

the assertions in the affidavits and did not review any information or documentation to verify the assertions in such affidavits." (https://files.consumerfinance.gov/f/201312_cfpb_complaint_ocwen.pdf)

In addition to a monetary cost of over $2 billion Ocwen the largest non-bank servicer is mandated by the settlement to stop robo-signing official documents and ensure that facts asserted in its documents about borrowers' loans used in foreclosure and bankruptcy proceedings are accurate and supported by reliable evidence (https://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing)

Even after this settlement Ocwen persists in these same actions. *i.e.* Submitting the Walker affidavit without any of the alleged business records attached or otherwise in evidence; having her sign an affidavit claiming to have reviewed an attached the POA, which did not exist at that time. The Gostebski and Reyes affidavits are equally unreliable making assertions and either not attaching records in support thereof or the records attached do not prove the asserted facts. Respondents and their counsel combined have decades of experience in these types of matters and have purposefully submitted these affidavits in an attempt to sidestep the bankruptcy code and Florida law. They are inadmissible, unreliable, deceptive and misleading at the very least. {R. 11(3) 101 Gostebski Affidavit and Ex. F, G Reyes Affidavit and Ex. 3, 4}

2. By the numbers; a matter of great public importance

In Miami-Dade County, Florida there were 18,036 new foreclosure cases filed between January, 2016 and December 2018 and 1021 in the first 2 months of 2019 according to the clerk of courts for Miami-Dade County. (www.miamidadeclerk.com/property_mortgage_foreclosures_2018.asp).

As of March 2019, the state of Florida has the fourth highest new foreclosure filing rate in the Country. According to Attom Data Solutions 1 out of every 1,365 housing units in the month of February 2019 received a foreclosure filing notice; which translates to an average of 6,783 per month. (www.attomdata.com/news/uncategorized/top-10-states-with-the-worst-foreclosure-rate/)

As is shown by these numbers, this is a matter of great public importance; the citizens of the Eleventh Circuit are entitled to Due Process and Equal Protection of the Law.

The advent of private label securitization of mortgage loans by Wall Street Bankers, between 2003-2008 and all of the related shenanigans which have since been exposed, exponentially multiplied the importance of FRE 803(6). The well documented actions of the entities involved in all aspects of the securitization of notes and mortgages, necessitates adherence to the letter of the law which requires submission of the records into evidence.

Eliminating the requirement of submitting the records as evidence defies the public policy interests that have been expressed by the Federal and State Government and effectively negates the consumer protections established by the settlements. This Court should uphold this important public policy and close the door on forum shopping and unequal administration of the law.

D. This Court Should Grant Certiorari Because The Decisions Of The Courts Below Evidences A Willful Disregard For The Letter Of The Law, This Courts Precedent And That Of All Federal Circuit Courts Regarding Summary Judgment; It Is Such A Far Departure From The Accepted And Usual Course Of Summary Judgment Proceedings, As To Call For An Exercise Of This Courts Supervisory Power.

1. FRE 803(6) is clear and unambiguous.

The Eleventh Circuits decision is clearly wrong and evidences a blatant and egregious disregard for the letter of the law. The decision eviscerates the rule against hearsay, (FRE 802) and renders 803(6) and several other Rules of Evidence a surplusage. See *Corley v. US*, 556 US 303 1566 (2009).

"The Government's reading is thus at odds with one of the most basic interpretive canons, that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .'" *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172

(2004) (quoting 2A N. Singer, Statutes and Statutory Construction §46.06, pp.181-186 (rev. 6th ed.2000))."

Why include an exception to the rule against hearsay, if without the exception the hearsay is allowed? Why include rules identifying the requirement of authentication or certification of records if the records themselves are not required?

2. The Eleventhsʼ decision evidences a willful disregard for the well-established law of all Federal Circuit Courts regarding inadmissible hearsay on summary judgment.

It is the well-established law of literally every Federal Circuit Court including the Eleventh, that hearsay which cannot be reduced to admissible form cannot be considered on summary judgment, See *Jones v. UPS Ground Freight*, 683 F. 3d 1283, 1293 (Court of Appeal, 11th Cir. 2012), *Rowell v. Bellsouth Corp.*, 433 F. 3d 794 (Court of Appeal, 11th Cir. 2005), *Macuba v. Deboer*, 193 F. 3d 1316, 1322 (Court of Appeal, 11th Cir. 1999), *Pritchard v. S. Co. Servs.*, 92 F. 3d 1130, 1135 (Court of Appeal, 11th Cir. 1996).

Walkers' hearsay statements are not reducible to an admissible form and thus Petitioners objection should have been sustained and her statements excluded from consideration by the Bankruptcy Court.

3. The Decisions of the Courts below evidence a willful disregard for Supreme Court precedent on summary judgment.

Respondents as the moving party had the initial burden of showing the absence of a genuine issue as to any material fact. If a moving party fails to meet its initial burden, summary judgment must be denied. *Celotex Corp. v. Catrett*, 477 US 317, 323 (1986) and *Adickes v. Kress & Co.*, 398 US 144, 153, 159, 160 (Sup. Ct. 1970).

In this case Respondents burden is to prove possession of the original Note and either validity of the unsigned stamp as an indorsement under Florida Law and that it was affixed to the Note on Petitioners bankruptcy filing date, or an unbroken chain of transfers from NCMC to the Securitized Trust.

The Respondents motion failed; in the accepted and usual course of judicial proceeding all across the country including in the Eleventh Circuit, inadmissible hearsay is not considered on summary judgment *Supra* at §D(2) and Respondents motion would be denied. See *Fitzpatrick v. City of Atlanta*, 2 F. 3d 1112 (COA, 11th Cir. 1993) quoting *Coats & Clark*, 929 F. 2d 604, 608 (11th Cir. COA 1991).

Unlike the Respondent, as the movant on cross motion for summary judgment Petitioners, have met their initial burden, pointing out to the court that Respondents cannot present sufficient evidence which meets the burden that they would bear at trial and also submitting significant, tangible, admissible evidence which contrary to the Bankruptcy Courts' order is all

completely relevant to the genuine issues of material fact in this case.

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), should be construed to mean that the burden on the moving party may be discharged by "showing" – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the burden shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial." *Id.* at 324.

"The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) also *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

"Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." " *Bodin v. Butler*, 338 Fed. Appx. 448 (5th Cir. COA 2009) quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, at 323 (1986).

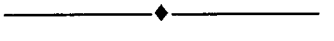
There are 33,476 citations similar to the one directly above, listed on googlescholar.com; including many from the Eleventh Circuit. See *Jones v. UPS Ground Freight*, 683 F. 3d 1283, 1292 (Court of Appeals, 11th Cir. 2012), *Johnson v. Board Of Regents Of*

University Of GA, 263 F. 3d 1234, 1243 (Court of Appeals, 11th Cir. 2001), *Graham v. State Farm Mut. Ins. Co.*, 193 F. 3d 1274, 1282 (Court of Appeals, 11th Cir. 1999), *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1247 (Court of Appeals, 11th Cir. 1999), *Hairston v. Gainesville Sun Pub. Co.*, 9 F. 3d 913, 918 (Court of Appeals, 11th Cir. 1993), *Earley v. Champion Intern. Corp.*, 907 F. 2d 1077, 1080 – (Court of Appeals, 11th Cir. 1990).

In the accepted and usual course of judicial proceedings all across this country, Respondents failure to meet their burden of production of evidence as the nonmovant on Petitioners cross motion would result in summary judgment for the Petitioners and against the Respondents.

This case traveled through three courts, five Federal Judges had direct responsibility to review the case as presented to them and apply these well-established Laws; ten additional Judges expressly sanctioned the decisions below when not one of the Eleventh Circuit Courts active judges requested a poll of the Court on the petition for rehearing *en banc*.

The Elevenths' decision is clearly wrong and evidences such a willful disregard for this Courts precedent and that of all Federal Circuit Courts of Appeal regarding summary judgment; it is such a far departure from the accepted and usual course of summary judgment proceedings that it calls for the exercise of this Courts supervisory power.



CONCLUSION

For the compelling reasons set forth in the above and forgoing, Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeal.

Submitted by,

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