No. 18-375

IN THE
Supreme Court of the United States

DANIEL H. ALEXANDER,
Petitioner,
v.

BAYVIEW LOAN SERVICING, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITION FOR REHEARING

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Rule 44-2 of the United States Supreme Court permits a petition for rehearing of an order denying a petition for writ of certiorari to assert grounds limited to "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented."

At page 11, the Petition for Writ of Certiorari discussed the Final Judgment undersigned counsel obtained from Palm Beach County Senior Circuit Court Judge Howard Harrison "finding unclean hands in another foreclosure case with the same Cynthia Riley Rubber Stamped WAMU endorsement used here." Judge Harrison's Order Granting Final Judgment to Defendant is attached hereto as Appendix A.

Judge Harrison found unclean hands because JP Morgan Chase presented a witness who gave false testimony, introduced a false mortgage loan schedule into evidence, presented two (2) materially false mortgage assignments which Judge Harrison notes is now a felony under Fla. Stat. §817.535, and defied a discovery order to produce documents that would show how and when the note was endorsed with the Cynthia Riley rubber stamp. Harrison Order ¶¶ 34-38.

On September 6, 2018, JP Morgan Chase voluntarily dismissed its appeal that had tried to challenge Judge Harrison's order detailing the egregious misconduct which led to a finding of unclean hands.

On September 20, 2018, Petitioner filed this Petition for Certiorari asserting that JP Morgan Chase had continued to submit fraudulent evidence of standing in violation of the $25 Billion National Mortgage Settlement. Then, on December 12, 2018, almost three months later, JP Morgan Chase essentially conceded the integrity of Judge Harrison's findings of unclean hands by agreeing to satisfy the mortgage in that foreclosure ***and*** pay a confidential settlement amount to Petitioner's counsel.

At the time this Court denied the Petition for Writ of Certiorari, JP Morgan Chase had just decided to drop its appeal of Judge Harrison's order finding unclean hands in a foreclosure involving the same false endorsement and assignment found in this case. Yet, JP Morgan Chase had not yet agreed to satisfy that mortgage and pay monetary damages to resolve Judge Harrison's finding of unclean hands. This is a striking acquiescence by a party to the $25 Billion National Mortgage Settlement it continued to present false evidence of standing in foreclosures.

Unfortunately, JP Morgan Chase is not the only party guilty of violating is promise to federal regulators. U.S. District Court Judge Robert D. Drain found that Wells Fargo Bank, N.A., another party to the $25 Billion National Mortgage Settlement, also continued to present after-the-fact endorsements and false assignments as evidence of standing in foreclosures. Judge Drain noted "… it does show a general willingness and practice on

Wells Fargo's part to create documentary evidence, after-the-fact, when enforcing its claims, WHICH IS EXTRAORDINARY." *In re Carrsow-Franklin*, 524 B.R. 33, 47 (Bankr. S.D.N.Y., 2015)(emphasis in original). U.S. District Court Judge for the Southern District of New York, Kevin Karas affirmed Judge Drain finding "in the wake of the recent foreclosure crisis, and the dubiousness of the common robo-signing practices of various banks and other foreclosing entities… it may be time to reconsider whether "forged or unauthorized signatures" remain "very uncommon." *In re Carssow-Franklin (Wells Fargo Bank, N.A. v. Carssow-Franklin*), --- F. Supp. 3d ---, --- [2016 WL 5660325, *6-10] (S.D.N.Y. 2016).

Undersigned counsel has one remaining petition dealing with these issues pending consideration by this Court in *Jose Rodriguez v. Bank of America* (No. 18-723). [1] That petition sets forth that Bank of America also affixed after-the-fact endorsements and false assignments to present as evidence of standing. Unlike Wells Fargo who admitted its misconduct, Bank of America defied multiple court orders, repeatedly suborned perjury from its most senior executives, and destroyed nearly two billion records in defiance of a court ordered subpoena.

In response to the *Rodriguez* Petition, Bank of America submitted a litany of false statements of

1 A conference is scheduled for February 15, 2019.

fact, even presenting a false and debunked affidavit to the Supreme Court of the United States. Strikingly, the law firm representing Bank of America and assisting in its egregious, fraudulent misconduct in *Rodriguez* is the same law firm defending this Petition for Certiorari. This is no coincidence. It is a concerted effort by powerful financial institutions, led by a particular law firm, to mislead and defraud even the U. S. Supreme Court.

This Court should accept jurisdiction to consider whether the Third District Court of Appeal has affirmed the use of fraudulent evidence and denied Petitioner's due process right to plead and prove that JP Morgan Chase, Wells Fargo and Bank of America have all defied the $25 Billion National Mortgage Settlement and continue to present backdated endorsements and false assignments as evidence of standing in foreclosures.

Recently, the now Chief Judge of the Second District Court of Appeal wrote an opinion finding that it would be an abuse of discretion to deny Petitioner the opportunity to plead and prove that:

> the evidence on which the Bank relied to show standing had been fraudulently created and produced. Specifically, … the Bank had added the undated endorsement …, had provided perjured testimony to falsely backdate the endorsement, and had submitted a false assignment of the note and mortgage to

> support its timeline of events. *Sorenson v. Bank of New York Mellon as Trustee for Certificate Holders CWALT, Inc.,* No. 2D16-273, 2018 WL 6005236, at *1 (Fla. 2nd DCA Nov. 16, 2018)(rehrg denied January 8, 2019).

The Second DCA found this to be an abuse of discretion meaning no reasonable judge could agree Petitioner should be prevented from pleading and proving the fraud alleged in *Sorenson*, which is the same as described here. Yet, the Third DCA issued a per curiam affirmance when addressing the same issues here, in *Rodriguez*, and in many other cases. The Third DCA and the Second DCA have reached polar opposite results on the same fact pattern. Yet, by refusing to write an opinion, the Third DCA denied the Florida Supreme Court jurisdiction to resolve that conflict. Therein lies the constitutional due process infirmity that requires this Court to grant certiorari to protect and defend the borrower's rights under the 5th and 14th Amendments to the U.S. Constitution.

The Court should grant this petition for rehearing which now brings together repeated findings of respected Circuit Court, District Court of Appeal and Federal Judges who have all made written findings that show JP Morgan Chase, Wells Fargo and Bank of America have defied their federal regulators by continuing to use essentially the same false evidence in foreclosures before, during, and after making a promise in the National Mortgage

Settlement to not use false evidence in foreclosures.

The U.S. Court of Appeals for the District of Columbia recently acknowledged that "the 2008 financial crisis destabilized the economy and left millions of Americans economically devastated. Congress … determined that … federal regulators had failed to prevent mounting risks to the economy, in part because those regulators were overly responsive to the industry they purported to police." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018).

In his dissent, now Justice Kavanaugh argued that "[t]o prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government." Id. at 164. Justice Kavanaugh argued it was of utmost importance:

> to guard against 'capture' of—that is, undue influence over—independent agencies by regulated entities or interest groups, for example. As Elizabeth Warren noted in her original proposal for a multi-member consumer protection agency: "With every agency, the fear of regulatory capture is ever-present." Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages. Why We Need a Financial Product Safety Commission*, Democracy, Summer 2007, at 8, 18. Capture

> can infringe individual liberty because capture can prevent a neutral, impartial agency assessment of what rules to issue or what enforcement actions to undertake or how to resolve adjudications. In a multi-member agency, however, the capturing parties "must capture a majority of the membership rather than just one individual." Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence,* 63 Vand. L. Rev. 599, 611 (2010).

The Honorable U.S. District Court Judge Amy Tottenberg of the Northern District of Georgia explained "the potential for regulatory capture is real, and it is not beyond the realm of possibility that a majority of contractors in an industry could submit false claims to the Government with the hope that, because the conduct occurs on a large scale, the Government, whether purposefully or not, would simply overlook such false claims." *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 145 F. Supp. 3d 1220, 1263 (N.D. Ga. 2015), rev'd and remanded, 841 F.3d 927 (11th Cir. 2016).

JP Morgan Chase, Bank of America and Wells Fargo are powerful financial institutions who hope that because their foreclosure misconduct continues on such a large scale, from Miami to Maui and every judicial foreclosure state in between, the Courts will overlook their misconduct. This Court must ensure

lower courts do not overlook, purposefully or not, continued criminal foreclosure misconduct of such magnitude. This Court holds, "the rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212, 128 S. Ct. 791, 803, 169 L. Ed. 2d 665 (2008).

Undersigned counsel has presented this evidence of widespread fraud in foreclosures to many respected jurists. A growing chorus of those jurists agree this fraud exists and is unacceptable in the good order of society. There can be no free markets or rule of law if any party, especially a party to the $25 Billion National Mortgage Settlement, may present false evidence, commit perjury, destroy evidence and defy court orders with impunity. The rule of law must be jealously guarded and equally applied to the voiceless and to the most powerful voices. Equal justice under law protects against tyranny or protections individual freedoms. This view is not conservative or liberal, it is fair and impartial.

WHEREFORE, this Honorable Court should grant this Petition for Rehearing, grant the writ of certiorari, and consider these issues on the merits.

Respectfully submitted,

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Certification of Counsel

The Undersigned hereby certified that this Petition for Rehearing complies with Rule 44(2). This Petition is presented in good faith not for delay.

BRUCE JACOBS, ESQ.

APPENDIX

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2016-CA-010759-XXXX-MB

WELLS FARGO BANK, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-PR4 TRUST,

Plaintiff,
vs.

JOHN M. RILEY, *et. al.,*

Defendants.

ORDER GRANTING FINAL JUDGMENT TO DEFENDANT

THIS CAUSE, having come before the Court for trial on November 14, 2017, and having been duly advised, it is hereby ORDERED AND ADJUDGED as follows:

I. **Plaintiff Engaged in Unclean Hands Trying to Prove Standing to Foreclose**

A. *Unclean Hands, Generally*

1. "One who comes into equity must come with clean hands else all relief will be denied him **regardless of merit of his claim**, and it is not essential that act be a crime; it is enough that it be condemned by honest and reasonable men." *Roberts v. Roberts*, 84 So.2d 717 (Fla. 1956)(emphasis added).

2. Therefore, even if Plaintiff had standing to foreclose (a meritorious claim), Plaintiff would be denied the equitable relief of foreclosure upon a finding that Plaintiff took actions in pursuing this foreclosure that reasonable and honest men would condemn.

3. The Florida Supreme Court noted "the principle or policy of the law in withholding relief from a complainant because of 'unclean hands' is punitive in its nature." *Busch v. Baker*, 83 So. 704 (Fla. 1920). As U. S. Supreme Court Justice Black wrote:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238,

246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

B. *Unclean Hands Re: the Purported Mortgage Loan Schedule for the Trust*

4. Plaintiff attempted to establish standing to foreclose by introducing the Pooling and Servicing Agreement ("PSA") and what purported to be the Mortgage Loan Schedule ("MLS") for the Plaintiff Trust.

5. Plaintiff's Trial Witness, Darlene Marcott, a former Washington Mutual employee who presently works for the servicer, JP Morgan Chase, testified that the MLS admitted in evidence was the same MLS attached to the PSA when the Trust closed in 2005.

6. On cross-examination, Plaintiff's Trial Witness read the definition of the Mortgage Loan Schedule found on page 15 of the PSA into evidence. Ms. Marcott then conceded that "over thirty (30)" of the data fields expressly delineated as required information for the MLS were not included in what was purported to be the MLS presented as evidence in this equitable action.

7. Plaintiff's Trial Witness then attempted to explain the missing data fields by giving what seemed to be compelling testimony that the data fields were missing because they were intentionally redacted to protect the borrower's privacy interests.

The Trial Witness even suggested she herself had personally redacted the MLS for other cases to ensure this private information was not impermissibly disclosed.

8. On further cross-examination, Ms. Marcott conceded that a significant number of required data fields missing from the MLS had nothing to do with the borrower's privacy interests, such as the "lien position" and the "Loan to Value Ratio at the time of origination."

9. The Court cannot reconcile the testimony of Ms. Marcott and the evidence introduced at trial. It is apparent the document which Plaintiff admitted as the purported MLS for this Trust is not the actual MLS as defined at page 15 of the PSA

C. *Unclean Hands re: the Mortgage Assignments Attached to the Complaint*

10. Plaintiff prepared two assignments of mortgage recorded in the public records and attached as exhibits to its complaint which purport to document a sale of the Defendant's Note and Mortgage from JP Morgan Chase to the Plaintiff (the "Mortgage Assignments").

11. Plaintiff identified the "assignment of mortgage" as a trial exhibit on its Renewed Witness and Exhibit List filed on October 11, 2017.

12. Ms. Marcott testified she had testified in many trials where similar Mortgage Assignments were introduced at trial as evidence as Plaintiff's standing to foreclose.

13. This Court takes judicial notice of the court file from the first attempt by this Plaintiff to foreclose this mortgage against this Defendant in Palm Beach County Case Number 50 2010 CA 019708 XXXX MB.

14. The complaint in the first foreclosure action was filed in August of 2010.

15. Four months later, Plaintiff recorded the first mortgage assignment in the public records of Palm Beach County on December 16, 2010.

16. The first mortgage assignment purported to document a transaction wherein "JP Morgan Chase N.A. as successor in interest to Washington Mutual Bank…." sold Defendant's note and mortgage to the Plaintiff Trust.

17. The Court takes judicial notice that the Honorable Judge John Hoy granted Defendant's Motion for Involuntary Dismissal of the first foreclosure action because "Plaintiff failed to prove standing on the date it filed the complaint" on March 25, 2014.

18. The following year, on May 1, 2015, JP

Morgan Chase recorded the second "corrective assignment of mortgage" which purported to document a transaction wherein JP Morgan Chase Bank, N.A., Successor in Interest by Purchase from the Federal Deposit Insurance Corporation as Receiver of Washington Mutual Bank…" sold the Defendant's note and mortgage to the Plaintiff.

19. Thereafter, on September 22, 2016, Plaintiff refiled the instant foreclosure action and attached both the 2010 assignment and the 2015 corrective assignment as exhibits to its complaint.

20. In this case, Defendant's second affirmative defense alleged the assignments were evidence of unclean hands because they represented a transaction that never happened.

21. At trial, Ms. Marcott admitted that any claim JP Morgan Chase ever owned or sold Defendant's note and mortgage was false. She testified that Defendant's note and mortgage were not assets of Washington Mutual after 2005. As such, the 2010 assignment could not truthfully document a transaction that JPMorgan Chase obtained Defendant's note and mortgage from Washington Mutual and sold it to the Plaintiff Trust. This transaction never happened.

22. Moreover, the 2015 assignment contains a materially false statement that JP Morgan purchased Defendant's note and mortgage from the

Federal Deposit Insurance Corporation ("FDIC") as Receiver for Washington Mutual.

23. The note and mortgage were not assets of Washington Mutual to be sold by the FDIC Receiver to JP Morgan Chase and or to be sold by JP Morgan Chase to the Plaintiff Trust. Plaintiff's Trial Witness admitted the statement that the FDIC sold this loan as Receiver to Washington Mutual to JP Morgan Chase who sold it to the Plaintiff is materially false.

D. *Unclean Hands re: the Endorsement on the Note*

24. Plaintiff attached to its complaint a copy of the original note with an undated rubber-stamped endorsement purportedly signed by Cynthia Riley, while she was Vice President of Washington Mutual Bank.

25. Defendant filed its first affirmative defense which raised a challenge to the validity of the endorsement on the note as required by Fla. Stat. §673.3081.

26. Defendant's third affirmative defense alleged the note did not meet the requirements to be a negotiable instrument under Fla. Stat. §673.1041 and Fla. Stat. §673.1061.

27. On April 20, 2017, the Court granted Defendant's Motion to Compel Better Answers to

Defendant's Request for Production re: Standing.

28. The Order required Plaintiff to produce the electronic and paper records of any custodian who held the original note and to any documents that show how and when the rubber-stamped endorsement of Ms. Riley was affixed to the original note.

29. Plaintiff's Trial Witness testified the note did not meet the requirements of a negotiable instrument under Fla. Stat. §673.1041 and Fla. Stat. §673.1061. Specifically, the note was not an unconditional promise to pay a fixed amount of money because of its negative amortization provision. She conceded the note contained a banner in all caps across the top that expressly stated the principal balance could fluctuate based on the performance of the loan.

30. Ms. Marcott further stated the note was not an unconditional promise as it was subject to and governed by the mortgage. Specifically, she testified the "uniformed secured note" provision in the note provides there are "additional protections in the mortgage" which provide authority for the Plaintiff to collect all the amounts due under the mortgage for property taxes, insurance, inspections, and other fees.

31. She further testified that Plaintiff's standard operating procedure is to service the note and mortgage as one integrated agreement such that the note is subject to and governed by the mortgage.

Accordingly, the note is not a negotiable instrument.

32. Even if the note were a negotiable instrument, it would be inequitable to permit Plaintiff to flagrantly violate an order compelling discovery that could show the endorsement for Washington Mutual was added after Washington Mutual went into the FDIC receivership.

33. Pursuant to Fla. R. Civ. P. Rule 1.380, the Court finds Plaintiff cannot introduce the endorsement as evidence of standing after disobeying a court order to compel the evidence in its possession that would establish whether the endorsement violated Fla. Stat. §673.3081.

E. *Unclean Hands, Conclusion*

34. The Court finds Plaintiff has unclean hands by virtue of their (i) introducing into evidence a document which was purported to be the actual MLS for the Plaintiff's PSA, but in fact was not the real MLS for the Plaintiff Trust; and (ii) for Ms. Marcott giving testimony this court finds is not credible that the missing data fields for the purported MLS for the Trust were redacted for privacy concerns as the redacted information did not disclose private information.

35. The Court finds that Plaintiff has unclean hands by attaching the 2010 and 2015 mortgage assignments to its complaint as evidence of

standing which contained materially false statement, that Plaintiff obtained its standing from JP Morgan Chase which is admittedly false.

36. In support of this finding of unclean hands, the Court notes that Fla. Stat. §817.535, effective October 1, 2013, made it a felony to record "any instrument containing a materially false, fictitious, or fraudulent statement or representation…." in the public records.

37. Finally, the Court finds the Plaintiff has unclean hands by its violation of the Court's discovery order related to the electronic and paper records of the custodian and the documents that show when and how the note was endorsed. The failure to comply with this order interfered with the orderly administration of justice.

38. The Court cannot make a finding whether Plaintiff had standing because of the Plaintiff's unclean hands in presenting its evidence of standing.

II. <u>The Failure of Condition Precedent</u>

39. Ms. Marcott admitted the default letter was not sent to the Defendant's property address as required under paragraph 15 of the mortgage.

40. Plaintiff admitted there was no other procedure that would permit the notice address to be

changed besides the procedure set forth in paragraph 15 of the mortgage which required the borrower to provide written notice substituting a new address for notice.

41. Plaintiff admitted there was no evidence that the Defendant provided any such notice changing the address for service of notice required under paragraph 15.

42. Plaintiff did not send the default letter to the property address. Instead, Plaintiff sent the letter to the law firm of Jacobs Keeley, PLLC, ("JK") in 2015. At the time, JK had represented the Defendant in the 2010 foreclosure that ended in 2014.

43. The condition precedent in paragraph 15 does not permit the Plaintiff to send the default notice to the borrower's attorney in lieu of sending a copy to the property address.

44. Therefore, Plaintiff failed to prove it sent the notice of default to the property address are required by paragraphs 15 and 22 of the mortgage before filing this action. This failure of an express condition precedent is, by itself, grounds to grant judgment to Defendant.

III. The Failure to Prove Damages by Competent Evidence

45. The Court admitted the payment

histories into evidence under the business records exception, over timely objection and subject to cross-examination, after the witness testified that each entry was made at or near the time of the transaction or occurrence in accordance with Fla. R. Evid. §90.803(6).

46. On cross-examination, the witness admitted she lacked personal knowledge that each entry was made at or near the time of the transaction. Instead, the witness testified she based her knowledge that each entry was made at or near the time of the transaction on (i) the training manuals she reviewed which were not in evidence; and (ii) the training she received by sitting down with someone from the department that had personal knowledge that each entry was made at or near the time of the transaction.

47. The witness conceded she asked the court to accept as true the out of court statements from the training manuals and from the person from the department with personal knowledge that each entry was made at or near the time of the transaction.

48. The witness conceded that Plaintiff could have produced a witness with actual personal knowledge that each entry was made at or near the time of the transaction.

49. Instead, Plaintiff decided to produce Ms. Marcott and to ask the Court to accept as true the

hearsay statement from that person with knowledge. Plaintiff chose not to produce the witness with knowledge at its own peril.

50. The Florida Supreme Court holds, "if evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception. *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008), as revised on denial of reh'g (July 10, 2008).

51. "Except as provided by statute, hearsay evidence is inadmissible." See, Fla. Stat. § 90.802 (2014). The Florida Business Records Exception to the hearsay rule, codified at Fla. Stat. § 90.803(6) requires that a custodian or "other qualified witness" lay a proper predicate that, *inter alia*, the records are made in the regular course of business at or near the time of the transaction or occurrence. See, Fla. Stat. § 90.803(6). Any witness who attempts to supply testimony to meet the requirements of Fla. Stat. § 90.803(6) must testify from personal knowledge. See, Fla. Stat. §90.604.

52. An "other qualified witness" must have perceived the documents being made in the regular course of business and be able testify from that memory. See, C. Ehrhardt, Florida Evidence § 604.1 (2014 Edition), p. 535; *Roman v. State*, 475 So.2d 1228 (Fla. 1995). Florida law requires that "testimony must be based on matters perceived by the senses of the witness." See, C. Ehrhardt, Florida Evidence §

604.1 (2014 Edition), p. 535; *Roman v. State*, 475 So.2d 1228 (Fla. 1985). "A witness who has actually perceived and observed a fact is the most reliable source of information." See, C. Ehrhardt, Florida Evidence § 604.1, p. 535 (2014 Edition), p. 535; *State v. Eubanks*, 609 So.2d 107, 110 (Fla. 4th DCA 1992).

53. Where a witness has no personal knowledge of a matter, and the witness's knowledge is derived from information given by another, or in training, the witness's testimony is incompetent and inadmissible as hearsay. *See, Bryant v. State*, 124 So.3d 1012 (Fla. 4th DCA 2013); Roman v. State, 475 So.2d 1228 (Fla. 1985); *Kennard v. State*, 28 So. 858 (Fla. 1900).

54. The Second DCA has held business records are admissible only if the custodian or other qualified witness testified to "the manner of preparation and the reliability and trustworthiness of the product." *Specialty Linings Inc. v. BF Goodrich Company*, 532 So. 2d 1121 (Fla. 2nd DCA 1988); *citing Pickrell v. State*, 301 So. 2d 473 (Fla. 2nd DCA 1974)("to prove usual business practices it must first be established that the witness is either in charge of the activity constituting the usual business practices or is well enough acquainted with the activity to give the testimony"); *See also, Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980); *Landmark Am. Ins. Co. v. Pin-Pon Corp.,* 155 So. 3d 432, 435-43 (Fla. 4th DCA 2015)(rejecting testimony of architect who was neither in charge of the activity

constituting usual business practice or well enough acquainted with the activity to qualify to lay the foundation to admit general contractor's business records incorporated into the architect's file under the business records exception).

55. Here, Ms. Marcott admitted she was trained by someone with personal knowledge that the payment history was made in the regular course of business at or near the time of the transaction or occurrence. Plaintiff could have brought that person, or anyone else who worked alongside that person, to be a witness with personal knowledge in this trial.

56. Plaintiff chose, at its peril, to produce Ms. Marcott to testify about out of court statements she offered to prove that the truth is the payment history was made in the regular course of business at or near the time of the transaction or occurrence. It does not matter that the out of court statements came from training manuals or conversations with someone with personal knowledge. The statements are classic hearsay and inadmissible.

57. Plaintiff failed to strictly comply with Fla. R. Evid. §90.803(6) by failing to produce a "qualified witness" with personal knowledge as required by Fla. R. Evid. §90.604 to testify that the payment history was made in the regular course of business at or near the time of the transaction or occurrence.

58. As such, the payment histories are not admissible and Plaintiff failed to prove its damages by substantial competent evidence. This failure to prove damages is, by itself, grounds to grant judgment to Defendant.

WHEREFORE, the Court finds Plaintiff failed to prove every element of its case by substantial competent evidence and has unclean hands, and enters judgment in favor of the Defendant, John Riley, who shall go forth without day, and the Court reserves jurisdiction to award attorney's fees, and any further relief deemed mete and just.

DONE AND ORDERED in Chambers, in West Palm Beach, Florida this 12th day of December 2017.

Howard Harrison Jr.
CIRCUIT COURT JUDGE

Copies furnished to:
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