IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

JAMES DANIEL WALLACE
AND ALICE SEDENA WALLACE,

Appellants,

v.

NATIONSTAR MORTGAGE LLC,

Appellee.

DCA Case No.: 2D23-0926
L.T. Case No.: 2018CA-005689

ANSWER BRIEF OF APPELLEE, NATIONSTAR MORTGAGE LLC

Appeal from an Order of the Circuit Court

AMBER KOUROFSKY, ESQ.
Florida Bar No. 85100
amber.kourofsky@troutman.com
christina.hill@troutman.com
TROUTMAN PEPPER HAMILTON
SANDERS LLP
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308-2216
Telephone: (470) 832-5580
Attorney for Appellee

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STATEMENT OF CASE AND FACTS[1]

This appeal presents issues of the application of the facts of the case to 24 C.F.R. § 203.604 and 24 C.F.R. § 203.605 (collectively the "HUD Regs"). The HUD Regs are housing and urban development regulations. Specifically, they relate to mortgage and loan insurance programs under the National Housing Act and other authorities. 24 C.F.R. § 203.604 is titled "Contact with the mortgagor" and is more commonly known as the "face-to-face" regulation, because it regulates face-to-face interactions. 24 C.F.R. § 203.605 is titled "loss mitigation performance" since it regulates loss mitigation review.

Appellant has alleged that the following were errors of the trial court in finding that (i) Appellee complied with 24 C.F.R. § 203.604; (ii) Appellee proved delivery based upon Appellee's compliance with 24 C.F.R. § 203.604; (iii) Appellee complied with the face-to-face requirement under 24 C.F.R. § 203.604; and (iv) Appellee complied

[1] All record references are to page number (*e.g.* [R1.] references record, page 1). The trial transcripts are also referenced by page number (*e.g.* [T3.]) refers to the April 21, 2022 and May 9, 2022 combined trial transcripts, page 3 of the record, not p. 3 of the combined trial transcripts. All Initial Brief references are to the Initial Brief and its page number (e.g. [IB1.] references Initial Brief, page 1). Appellee Nationstar Mortgage LLC is referred to as "Appellee."

with 24 C.F.R. § 203.605.

The trial court entered a final judgment of foreclosure for Appellee after finding Appellee complied with the HUD Regs. In arriving at that finding, and in issuance of final judgment, the trial court admitted into evidence testimony and documentation demonstrating Appellee complied with the HUD Regs before commencing the action. It rejected Appellants' lack of compliance with the HUD Regs arguments. The trial court properly held Appellant offered no substantial competent evidence refuting Appellee's testimony and evidence that it complied with the HUD Regs and Appellants suffered no prejudice. Appellants, the trial court found, failed to act to save their home despite Appellee's numerous phone calls and correspondences. The final judgment of foreclosure should be affirmed.

On August 28, 2017 James Daniel Wallace ("Wallace") and Alice Sedena Allen ("Allen") (collectively "Appellants") executed and delivered a mortgage on the property located at 1921 Blue Heron Way, Palm Harbor, Florida 34683, (the "Property"), which was recorded on September 1, 2017 at Instrument number 2017274174

in the Public Records of Pinellas County, Florida (the "Mortgage"). [R25, 196-214.] On August 28, 2017, in conjunction with the Mortgage, Wallace executed and delivered a promissory note to The American Eagle Mortgage of Florida, LLC in the amount of $279,837 (the "Note"). [R25, 29-33, 188-195.]

Appellants defaulted under the Note by failing to make the March 1, 2018 payment, and all subsequent payments. [R6.] Appellee made numerous attempts to contact Appellants to discuss foreclosure alternatives. [R486-510.]

Appellee completed at least one trip to see Appellants at the Property in a reasonable effort to arrange a face-to-face meeting with Appellants and sent, at a minimum, one letter to Appellants certified by the Postal Service as having been dispatched in substantial compliance with 24 C.F.R. § 203.604(d) before commencing the action. [R715; T122-23.]

On August 28, 2018, Appellee filed a complaint of foreclosure against Appellants. [R25-28.]

Appellant asserted these affirmative defenses: lack of standing; no notice of default, failure to provide HUD counseling notice,

recoupment for a RESPA violation, recoupment for forced place insurance, failure to comply with 24 CFR § 203.604 before commencing the foreclosure action; failure to comply with 24 CFR § 203.602 by not sending the form in the time frame descried in 24 CFR § 203.602, failure to comply with HUD regulation 24 C.F.R. § 203.605 which requires the Plaintiff to "evaluate on a monthly basis all of the loss mitigation techniques provided at section 203.501 to determine which is appropriate" before four full payments had been missed; failure to comply with 24 CFR § 203.606's requirement of a three month delinquency at the time of foreclosure; and failing to inform Defendant of the default and the intent to foreclosure. [R68-80.]

The case went to a bench trial on November 29, 2022, with continuation on April 19, 2023. [T:1, 92.] In connection with the April 21, 2022 and May 9, 2022 continued trials, Appellee filed its trial exhibits. [T4.] Ilosh Azarsepandan testified as employee witness for Appellee. Through Mr. Azarsepandan's testimony, Appellee authenticated 15 exhibits which were entered into evidence by the trial court:

- Ex. 1: Original Note, *entered without objection* [T18.]
- Ex. 2: Original Mortgage, *entered without objection* [T18.]
- Ex. 3: Merger Document, *entered without objection* [T27.]
- Ex. 4: Demand Letter, *entered without objection* [T27.]
- Ex. 5: Demand Letter Tracking Information, *entered without objection* [T27.]
- Ex. 6: FHA Save Your Home Brochure, *entered without objection* [T27.]
- Ex. 7: FHA Save Your Home Brochure Tracking Information, *entered without objection* [T27.]
- Ex. 8: Face-to-Face Letter, *entered without objection* [T27.]
- Ex. 9: Face-to-Face Letter Green Card, *entered without objection* [T27.]
- Ex. 10: Face-to-Face Visit Results [T43.]
- Ex. 11: Collection Comments [T47.]
- Ex. 12: Payment History, *entered without objection* [T27.]
- Ex. 13: Servicing System Printouts, *entered without objection* [T27.]
- Ex. 14: Fee Affidavit, *entered without objection* [T53.]
- Ex. 15: Cost Affidavit, *entered without objection* [T53.]

Appellant presented his case in chief on April 21, 2022 and May 9, 2022, calling Allen as its only witness. Appellant offered into

evidence four exhibits.

- Ex. A: Affidavit of Allen, *entered as to paragraphs 1-3, 7, 10-28. The photographs attached to it were also excluded as part of Exhibit A.* [T71-73.]

- Ex. B: November 22, 2022 Photo looking out Bay, *entered for the sole purpose proffered, to establish the layout of the front of the house depicting bay windows and Mr. Harrison standing outside.* [T104-106.]

- Ex. C: November 22, 2022 Photo looking at Bay, *entered for the sole purpose proffered, to sole purpose proffered, the layout.* [T106-108.]

- Ex. D: November 22, 2022 Photo Aerial view, *entered for the sole purpose proffered, to sole purpose proffered, the layout.* [T106-108.]

After considering the testimony and admitted evidence exhibits 1-15, the trial court entered Final Judgment finding "Appellee established by a preponderance of the evidence, and the Court is comfortable saying by clear and convincing evidence that it has met all the requisite elements to establish its foreclosure claim and that they're entitled to the relief requested under their complaint." [T125.] Final Judgment entered April 21, 2023. [R771-776]. This appeal followed. [R768-776.]

SUMMARY OF ARGUMENT

The elements of a foreclosure action are (1) an agreement,

(2) default, (3) acceleration and (4) damages or the amount due. *Black Point Assets Inc., v. Fannie Mae*, 220 So.3d 566, 568 (Fla. 5th DCA 2017.) The testimony of both Mr. Azarsepandan, and Allen, coupled with the evidence entered, established that Appellee established by at least preponderance of the evidence, if not by clear convincing evidence, that it has met all the requisite elements to establish its foreclosure claim. [T124-127.]

The testimony of Mr. Azarsepandan met the business records exception as to the boarding process of a prior servicer's records. [T124-127.] Mr. Azarsepandan is a qualified witness to testify as to Appellee's business records and practices. [T124-127.] Thus, the trial court properly admitted Appellee's 15 trial exhibits into evidence, including JMA's Field Call Results, through Mr. Azarsepandan. [T34-36.]

JMA's Field Call Results prove Appellee's compliance with 24 CFR 203.604. [R484.] On April 25, 2018, JMA went to the Property to arrange a face-to-face meeting. No one was home, so JMA taped the HUD Regs documents relative to loss mitigation to the door in a blank sealed confidential envelope addressed to the borrower. [R484.] JMA took pictures of the Property that day.

[R484.] Appellants confirmed the pictures taken by JMA accurately depict the Property that day, as Appellant tried to pass off JMA's face-to-face as a drive by photo shoot. [T127.]

The testimony of Mr. Azarsepandan met the business records exception as to the boarding process of a prior servicer's records. [T124-127.] JMA's Field Call Results are a prior servicers records that were boarded during servicing transfer. [T34-36.] Thus, the trial court properly found Appellee met its burden to establish that it delivered the HUD Regs documents relative to loss mitigation. [T131.]

Importantly, the trial court found that there was not substantial competent evidence to refute that Appellee met its burden to establish that it delivered the HUD Regs documents relative to loss mitigation, and that it was correct and should remain. [T131.] The court stated, "I want to be clear with regard to 24 CFR 203.604, the lender has complied." [T131.]

Appellants' argument of a second face-to-face requirement is felonious on its face, as there is no such language in the HUD Regs. Appellants are impermissibly reading into 24 CFR 203.604 language that is not there.

Appellants have articulated no actual prejudice. Appellants could have responded to any one of the several calls or letters, or to Appellee's attempt to arrange a face-to-face. Appellants did not. Appellants did next to nothing to try to save their home.

Compliance with the HUD Regs was correctly found based on the evidence, testimony, and case law. The final judgment is supported by competent, substantial evidence and should be affirmed.

ARGUMENT

Standards of Review.

Both the trial court's judgment and underlying factual findings are reviewed for competent, substantial evidence. *Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012). In an appeal from a bench trial, the court defers to trial court findings of fact when they are based on competent, substantial evidence. *U.S. Bank National Association, as Trustee v. Rios*, 166 So. 3d 202, 207 (Fla. 2d DCA 2015). The appellate court should accept the trial court's findings of fact from a non-jury trial and should affirm if there is competent substantial evidence to support the trial court's findings. See e.g., *Casey v. Cohan*, 740 So. 2d 59 (Fla. 4th DCA 1999); *Marcoux v.*

Marcoux, 475 So. 2d 972, 972 (Fla. 4th DCA 1985) ("So long as there is evidence to support the trial court's finding, appellate courts cannot act as new fact finders in the stead of the trial court."). The final foreclosure judgment and trial court findings are presumed correct. See *Michael Anthony Co. v. Townhomes*, 174 So. 3d 428, 432 (Fla. 4th DCA 2015); *JPMorgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004); *Mitchell v. Morse Operations, Inc.*, 276 So. 2d 248, 249 (Fla. 3rd DCA 2015). The Court may affirm based on any ground in the record, viewed most favorably to judgment creditor. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (Holding the "tipsy coachman" doctrine allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons if there is any basis which would support the judgment in the record.)

A lower court's equitable determinations are reviewed under an abuse of discretion standard. *Wait v. Wait*, 886 So.2d 318, 318 (Fla. 4th DCA 2004).

Issues of substantial compliance with conditions precedent are reviewed for competent, substantial evidence. *Kuhnsman v. Wells Fargo Bank, N.A.,* 311 So. 3d 980, 984(Fla. 2d DCA 2020). Upon review of a nonjury finding on disputed evidence, the trial court "is

in the best position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" *Hamilton v. Florida Power & Light Co.*, 48 So. 3d 170, 172 (Fla. 4th DCA 2010) (internal cites omitted).

Questions of fact are reviewed under the clearly erroneous standard. This standard is based on the proposition that the trial judge has presided over the trial, heard the testimony, and has the best understanding of the evidence. Thus, lower courts receive "substantial, but not total, deference." Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 476. (1988). The Supreme Court defined the standard as: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). But, if there are two permissible outcomes, the trial judge's choice is not clear error, even if the reviewing court may have come to a different conclusion.

The standard of review for evidentiary issues is abuse of discretion. *Phoenix Holding, LLC v. Martinez*, 27 So. 3d 791 (Fla. 3d DCA 2010); *Lawrence v. Nationstar Mortgage* LLC, 197 So. 3d 150

(Fla. 4th DCA 2016). "A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." *LaMarr v. Lang*, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001). An appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. *Izquierdo v. Gryroscope, Inc.,* 946 So.2d 115, 117-18 (Fla. 4th DCA 2007) (quoting *Brown v. Estate of Stuckey*, 749 So.2d 490 (Fla. 1999)).

A trial court's ruling on the admissibility of evidence under the business records hearsay exception is reviewed for an abuse of discretion. *Jackson v. Household Fin. Corp. III,* 236. So.3d 1170, 1172 (Fla. 2nd DCA 2018); *Peuguero v. Bank of America, N.A.,* 169 So. 3d 1198, 1202 (Fla. 4th DCA 2015).

Finally, a trial court's interpretation of a statute is reviewed de novo. *Parker v. Parker*, 185 So. 3d 616, 618 (Fla. 4th DCA 2016).

Argument.

I. THE TRIAL COURT PROPERLY FOUND THAT APPELLEE COMPLIED WITH 24 C.F.R. § 203.604.

A. The Trial Court Properly Admitted JMA's Field Call Results.

Appellants argue, JMA's Field Call Results were not admissible through Appellee's witness, Mr. Azarsepandan, because he (1) did not have the required personal knowledge about the normal business practices of JMA to allow for application of the business records exception, and (2) Appellee failed to prove that it had independently verified that the information in the Field Call Results was accurate and reliable. [IB20.] Both arguments fail.

"[A] defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense, for which the defensive pleader has the burden of pleading and persuasion." *Diaz v. Wells Fargo*, 189 So.3d 279, (Fla. 5th DCA 2016) (citing *Custer Med. Ctr. v. United Auto. Ins. Co.,* 62 So. 3d 1086, 1096 (Fla. 2010)) (citing R. Civ. P. 1.120(c)).

The trial court here found, "The Plaintiff also established by way of the evidence the conditions precedent, especially with regard to establishing the FHA loan requirements. [T129.] And with regard to

24 CFR.604, Defense Counsel has argued extensively about a lack of compliance. [T129.] The Court finds that the Defendant [sic] has complied with loss mitigation requirements. [T129.] At a minimum, the Plaintiff has established substantial compliance, but this Court believes that there was full compliance." [T129.]

i. Mr. Azarsepandan's testimony satisfied the business records exception.

Mr. Azarsepandan testified as to all five elements of the business records exception, and as to his familiarity with Appellee's record keeping system. [T17-68.] He testified he is the Litigation Ambassador and has been employed by Appellee since April of 2015. [T19.] His essential job requirements and functions are to review and research mortgage loan business records and attend legal events, such as trials, depositions, and mediations. [T19.] Mr. Azarsepandan testified as to Appellee's onboarding process when it acquires loans from other servicers. [T 20-22.] Mr. Azarsepandan testified the onboarding process confirms loan data documentation and business practices of the prior servicer. [T20-21.] Mr. Azarsepandan testified Appellee not only reviews the information received from prior servicers, but it reviews prior servicer business practices related to

record creation, record maintenance, relationships with vendors, and its servicing of its loans. [T36.]

Mr. Azarsepandan testified as to his familiarity with Appellee's servicing system used to administer residential home loans, LSAMS. [T19.] Mr. Azarsepandan confirmed LSAMS was the system used to service Appellants Loan. [T20.] He confirmed his familiarity with the normal business practices and recordkeeping procedures of Appellee relating to mortgage servicing. [T20.]

Mr. Azarsepandan established his familiarity with industry standards in recording and maintaining servicing records, based on his years of working in the mortgage origination and servicing field, and based on his personal experience, he demonstrated familiarity with industry standards. [T21.]

Mr. Azarsepandan confirmed he reviewed the documents associated with Appellant's Loan. [T20.] Mr. Azarsepandan testified to and authenticated the business records entered into evidence at trial. [T22-68.] Mr. Azarsepandan also executed an affidavit. [R568-570.] In his affidavit, he attested to how he thoroughly reviewed the records of Appellee and Pacific Union Financial, LLC for the Loan, including the following: (1) the Note, (2) the Mortgage, (3) the merger

documents, (4) the demand letter, (5) the proof of mailing the demand letter, (6) the FHA Save Your Home Brochure, (7) the proof of mailing the FHA Save Your Home Brochure, (8) the face to face letter, (9) the proof of mailing the face to face letter, (10) the face to face visit notes, (11) the collection comments, (12) the payment history, and (13) the judgment figures. [R569.]

Mr. Azarsepandan also attested that a face-to-face letter was sent to Appellants on April 20, 2018, and an FHA Save Your Home Brochure was sent to Appellants on April 13, 2018. [R569.] Importantly, he testified that a face-to-face visit was attempted at the Property on April 25, 2018. [R569.]

Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice. *Peuguero v. Bank of America, N.A.*, 169 So. 3d 1198, 1203 (Fla. 4th DCA 2015); § 90.406, Fla. Stat. (2022). The existence of a routine practice creates an inference that an agent or employee of the organization acted according to the practice. *Peuguero* at 1203. In the absence of contrary evidence, jurors may properly assume that an

employee has adhered to established procedures.

The court in *Jackson v. Household Fin. Corp. III*, 236. So.3d 1170, 1172 (Fla. 2nd DCA 2018) found that if the party offers the testimony of a records custodian to lay the foundation, it is not necessary that the testifying witness be the person who created the business records. The witness may be any qualified person with knowledge of each of the elements. *Id.* And when the records are computer records, the witness must have knowledge of the recordkeeping system. *Id.*

Appellants did not object to Mr. Azarsepandan's competence to testify nor did they impeach him. His testimony satisfied the business records exception as to the onboarding process and the records admitted meeting the elements of foreclosure. [T124-127.]

ii. Appellants misapply the facts to the law.

Appellants' attempt to shift Appellee's business record exception burden, from boarding, to a point in time prior to Appellee's servicing of the Loan, is a misapplication of the law. While Appellants correctly explain the factors to satisfy the business records exception, they incorrectly state that Mr. Azarsepandan is required to be actually involved in the onboarding of prior servicer records or

employed by the prior servicer to satisfy it. See *Azran Miami 2 LLC, v. Deutsche Bank National Trust Company, Etc.*, No. 3D18-1394 (Fla. 5th DCA 2019). The *Azari* Court stated,

> The Bank's witness, the records custodian from Select Portfolio Servicing, testified that as his company was the subsequent servicer of the mortgage, that he was familiar with the Bank's boarding process, and that the records were verified and boarded accordingly. It is well-settled that a record custodian who has been called to testify under oath need not be the actual person who prepared the document, but he or she must demonstrate knowledge of each requirement for establishing the business record foundation. *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015). The circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans. *Id.* Azran did not object to the witness's competence to testify, it objected to various admitted documents and that the witness did not personally know who "pushed the button" to create those documents.
>
> The business records exception, section 90.803(6), Florida Statutes (2018), allows a party to introduce evidence that would normally be inadmissible hearsay if:
>
> > The record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.
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> *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008). The foundation for admission of a business record may be

> established by a records custodian or other qualified witness, and the witness authenticating the records need not be the person who actually prepared the business records. See *Deutsche Bank Tr. Co. Ams. v. Frias*, 178 So. 3d 505 (Fla. 4th DCA 2015); *Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209 (Fla. 5th DCA 2015); *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014). The witness just needs to be well enough acquainted with the activity to testify that the successor business relies on those records, and that the circumstances indicate the records are trustworthy. *Calloway*, 157 So. 3d at 1064; *Berdecia*, 169 So. 3d at 216 ("Although [the witness] did not personally participate in the 'boarding' process . . ., [the witness] demonstrated a sufficient familiarity with the 'boarding' process to testify about it."); *Cayea*, 138 So. 3d at 1217. It is not necessary to present a witness who was employed by the prior servicer or who participated in the boarding, process. *Ocwen Loan Servicing, LLC v. Gundersen*, 204 So. 3d 530 (Fla. 4th DCA 2016). "Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.'" *Calloway*, 157 So. 3d 1064, 1071; see also *Bank of N.Y. Mellon v. Johnson*, 185 So. 3d 594 (Fla 5th DCA 2016*); Wells Fargo Bank, N.A. v. Eisenberg*, 220 So. 3d 517 (Fla. 4th DCA 2017); *Deutsche Bank Nat'l Tr. Co. v. de Brito*, 235 So. 3d 972, 975 (Fla. 3d DCA 2017). With this in mind, the Bank's records were properly admissible, as was the testimony of its witness.

Id. at *4-6.

Moreover, in *Deutsche Bank Trust Company Americas v. Harris*, No. 4D17-3009 (Fla. 4th DCA 2019) the borrower moved for dismissal arguing the Bank's witness was not familiar with the policies and

procedures of the third-party vendor. *Id.* at *7. On cross-examination, the witness could not recall the name of the third-party vendor. *Id.* at *8. The witness testified he was not familiar with the third-party vendor's policies and procedures. *Id.* In granting the borrower's motion, the trial court cited the witness's unfamiliarity with the third-party vendor's practices. *Id.* The *Harris* court stated, "On appeal, the Bank correctly argued that it was unnecessary for its witness to testify regarding his knowledge of the third-party vendor's mailing practices to establish that the demand letter had been sent." *Id.* We recently addressed this issue in *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272 (Fla. 4th DCA 2016), in a somewhat different context. *Id.* In *Balkissoon*, we held that the servicer's representative, although unfamiliar with the third-party vendor's practices and procedures, properly laid the foundation for the admission of the demand letter where he demonstrated that he was sufficiently familiar with [the servicer's] practice and procedure. *Id.*

Appellants misconstrue *Azari* and *Harris* in their initial brief. Appellant is making the case that JMA has to be a lending institution in order for records created by JMA to be boarded and qualify under the business records exception. Appellants, in support of their

erroneous interpretation, argue no evidence was presented that JMA is a "lending institution acquiring and selling loans" or that JMA and Appellee share "common practices." [IB27.] The requirement is that a prior servicer must be lending institution acquiring and selling loans and sharing common practices for records transferred by the prior servicer to be boarded and qualify under the business records exception. Not that third party vendors must be lending institutions acquiring and selling loans and sharing common practices for records created by them to onboard and qualify under the business records exception. If the latter were the requirement, any document in a loan file not created by a lending institution would be unverifiable in the onboarding process. Insurance documents, title documents, invoices, reports, borrower correspondence, and other such documents, under Appellants interpretation, would then be not "boardable."

JMA's Field Call Results are admissible through Appellee's witness Mr. Azarsepandan, who's testimony satisfied the business record exception as to the onboarding process of the prior servicer's

loan file transferred to Appellee when the loan transferred.[2] [T34-36.]

The court in *Jackson v. Household Fin. Corp. III*, 236. So.3d 1170, 1172 (Fla. 2nd DCA 2018) found that once the proponent lays this predicate, the burden shifts to the opposing party to prove that the records are untrustworthy. *Id.* If the opposing party fails to meet this burden, then the trial court should admit the business records into evidence. *Id.*

The trial court in this case agreed and orally pronounced, "The Court finds that the Plaintiff has established by a preponderance of the evidence, and the Court is comfortable saying by clear and convincing evidence that it has met all the requisite elements to establish its foreclosure claim and that they're entitled to the relief requested under their complaint" [T129.] "and there isn't substantial competent evidence to refute that." [T127.]

JMA's Field Call Results were substantiated by a qualified witness and properly admitted. The final judgment is supported by competent substantial evidence and should be affirmed.

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[2]If Appellants desired testimony as to how field call results were verified, Appellants were required to call a representative from the prior servicer. Appellants did not.

II. THE TRIAL COURT PROPERLY FOUND DELIVERY BASED ON ITS CORRECT FINDING THAT APPELLEE COMPLIED WITH 24 C.F.R. § 203.604.

Appellants' argument regarding an alleged failure for Appellee to deliver documents misstates 24 C.F.R. § 203.604. The trial court found Appellee established it delivered documents relative to loss mitigation and Appellants failed to offer competent refuting evidence. [T131.] The court stated, "I want to be clear with regard to 24 CFR 203.604, the lender has complied." [T131.]

A. Appellee Complied with 24 CFR 203.604.

i. The conditions precedent standard is substantial compliance.

The standard is whether the party seeking foreclosure has substantially complied with the conditions precedent. See *Lopez v. JPMorgan Chase Bank*, 187 So. 3d 343, 345 (Fla. 4th DCA 2016); *Bank of N.Y. Mellon v. Nunez*, 180 So. 3d 160, 162 (Fla. 3d DCA 2015); *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 13 (Fla. 2d DCA 2015). Several District Court of Appeals have held that "[a]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." *Gorel v. Bank of N.Y. Mellon*, 165 So. 3d 44, 47 (Fla. 5th DCA 2015) (citing

Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242, 1248¬49 (Fla. 5th DCA 2012)).

The trial court found compliance. [T129, 131.]

ii. A reasonable effort must include at least one trip to see the mortgagor at the mortgaged property.

The requirement is in the conjunctive—that (a) the mortgagee has a face-to-face interview with the mortgagor or (b) makes a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. 24 C.F.R. § 203.604(b).

Kuhnsman held, "A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property .... § 203.604(d)." *Id.* at 985. Neither *Kuhnsman*, nor § 203.604(d) require a showing of any particular pictures depicting any particular aspect of the Property or of the driveway, or of any other specific action taken at the Property during the face-to-face visit to arrange/coordinate pre-foreclosure counseling. All that is required is a "reasonable effort" to arrange a

face-to-face meeting, i.e., one letter and one trip to arrange a face-to-face meeting. See *Kuhnsman*; § 203.604(d).

The evidence supported the trial court finding that at least one trip to meet the mortgagor at the Property to coordinate the face-to-face interview was performed. [R715; T122-23.] Appellee mailed one letter and made one trip to arrange a face-to-face meeting. Entered into evidence, without objection, as Exhibit 13 was Appellee's Servicing System Printouts. [T27.] Contained within Exhibit 13 is a printout of a log of all of the attempted contacts Appellee made to Appellant after the April 25, 2018 face-to-face reasonable attempt. [R493-510.] There are over 30 notations of Appellee's fruitless attempts marked as no contact, no answer, number disconnected, or party immediately hung up. [R493-510.] In addition, noted were several broken promises to pay, checks returned due to insufficient funds, and other bank account issues. [R493-510.] Appellee mailed several letters to the Property and sent emails to Appellants after April 25, 2018. [R493-510.]

Allen's contention she felt there was nothing she could do, that she was confused, and would have appreciated the ability to speak with someone at the servicer ignores the dozens of times Appellee

tried to contact Appellants, but Appellants were unresponsive or evasive. The trial court commented on Allen's selective memory and self-serving testimony when it said,

> I know Defense Counsel has shifted the burden onto Plaintiff at that juncture to say that they could have and should have offered other alternative plans to the borrower, but this Court finds that the relationship between lender and borrower is not one way. Even though there is (*sic*) requirements for the lender to do certain things, a borrower can't sit back and wait for a lender. They can't say that it's a one-way relationship and it's up to the lender 100 percent of the time to contact them.
>
> I find her voracity to be intact, however, the Court is hard-pressed in believing that they were making every attempt to save their home, but there's no recollection by way of testimony of any efforts to contact the lender. Just today on cross-examination, a request to inform the Court as to any communication with the lender between March 1 of 2018 and March 25 of 2018 and there is no memory any of that contact.
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> And again, Plaintiff's Counsel has argued, in effect, selective memory by Ms. Wallace. She is very detailed in her memory in a lot of events. She is not remembering too much in terms of communications with the lender.
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> And again, notwithstanding the legal requirements, the Court believes it's not just a one-way communication. It requires, especially with a borrower who wants to save their home, efforts made to reach out to the lender to talk about what other options may be available. I want to be clear with regard to 24 CFR 203.604, the lender has complied.
>
> For those various reasons, the Court finds that the Plaintiff

> has met its burden today to establish, again, that it's delivered the documents relative to loss mitigation and there isn't substantial competent evidence to refute that.

[T130-31.]

iii. A trip to the Property to coordinate a face-to-face was indisputably made.

Appellants maintain their theory that the JMA agent cut corners. [T122-23.] The complaint alleges he took a photograph of the house to prove he was there and then left. [T123.]

Appellants offered yet an alternate theory of the case in their affidavit. Allen attested that she believed the JMA field agent came to the Property, saw all the people and cars, became intimidated, took a photo, and left. [R715.][3]

Under either theory, the testimony establishes JMA was at the Property that day. [R715;T122-23.]

[3]Appellants argue in addition that the pictures attached to the report do not show the documents taped to the door and the pictures do not depict the driveway. [IB29.] Appellants also argue the documents posted to the door were not introduced into evidence. [IB10.] These arguments are irrelevant and are a distraction for the actual issue, substantial compliance with the regulation. The regulation does not dictate specific acts that need to be done while at the property. Appellants are reading into the regulation words that were not there.

While all evidence points to compliance with the face-to-face requirement, the HUD Regs themselves do not mandate how compliance shall be made. See *Lakeview Loan Servicing, LLC v. Walcott-Barr*, 307 So.3d 705 (Fla. 4th DCA 2020). Appellee need not to show a picture of the document taped to the door, or any other specific act Appellees maintain in their brief is necessary to show substantial compliance. The comment entered into the trial admitted Field Call Results demonstrates the documents were taped to the door in a blank sealed confidential envelope addressed to the borrower. [R484.] A second field on the Field Call Results titled "left letter codes" contains the comment "taped to door." [R484.] The collection notes entered into evidence contain the same comment on the same date, that the agent made an attempt and was unable to make contact at the address provided, and that the documents were left taped to the door in a blank sealed confidential envelope addressed to the borrower. [R493.]

There is no requirement that a picture of the documents taped to the door needs to be introduced into evidence or that the driveway be depicted in the photographs. The requirement is one trip to the Property to attempt to arrange/coordinate pre-foreclosure counseling

to show substantial compliance. JMA was specifically hired to conduct the face-to-face, and all parties agree JMA was at the Property that day. Appellant's attempt to relitigate her testimony presented at trial is improper. The evidence and the testimony established at least one trip to the Property was indisputably made in order to attempt to coordinate a face-to-face.

III. THERE IS NO SECOND FACE-TO-FACE REQUIREMENT IN 24 CFR 203.604.

A. There is No Second-To-Face Attempt Requirement.

Appellants contend that even if this Court finds that the Field Call Results were admissible and that a reasonable attempt to arrange pre-foreclosure counseling as required by 24 CFR 203.604(d) was made, that Appellee would not be entitled to a judgment because a second attempt to arrange a counseling session was not made. This is contrary to the clear and unambiguous language of the regulation.

24 CFR 203.604(b) states:

> (b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least

30 days before foreclosure is commenced.

It further states:

> (c) A face-to-face meeting is not required if:
>
> (1) The mortgagor does not reside in the mortgaged property,
> (2) The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either,
> (3) The mortgagor has clearly indicated that he will not cooperate in the interview,
> (4) A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current, or
> (5) A reasonable effort to arrange a meeting is unsuccessful.
>
> (d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property.

i. A face-to-face meeting is not required if a reasonable effort to arrange a meeting is unsuccessful.

Kuhnsman stated,

> However, the regulation acknowledges that "reasonable efforts" may be fruitless. § 203.604(c)(5) (providing that "a face-to-face meeting is not required if," among other things, "a reasonable effort to arrange a meeting is unsuccessful").

> Therefore, a lender complies with the regulation, despite not conducting the interview, so long as it demonstrates its "reasonable efforts" to do so.

Id. at 985. The plain language of the regulation states a face-to-face meeting is not required if a reasonable effort to arrange a meeting is unsuccessful. See § 203.604(c)(5).

Appellant is reading into the regulation a second face-to-face requirement where there is none. The second sentence of the paragraph does not call for a subsequent, additional, or second face-to-face. None of those words (subsequent, additional, or second) are contained within the second paragraph. The second sentence of the paragraph is clarifying the first sentence of the paragraph. The paragraph is saying, "There must be a face-to-face if there is a default, unless the default was from a plan made during the face-to-face." The paragraph is not saying, as Appellants argue, "A face-to face is required, then if there is another default after the face-to-face, another face-to face is required." If that were the case, and a face-to-face was required every time there was a default, it would be an endless circle of face-to-face's, payment plans, and defaults.

However, it is not necessary to parse through subparagraph (b) and try to decipher the unartfully worded section. All one has to do

is read further down the regulation, and the regulation itself explains a face-to-face meeting is not required if a reasonable effort to arrange a meeting is unsuccessful. Appellee reiterates its arguments set forth above.

IV. THE TRIAL COURT PROPERLY FOUND THAT APPELLEE COMPLIED WITH 24 C.F.R. § 203.605.

Appellants argue in their initial brief that the decisive factor is that a plain reading of the HUD Regs does not reveal any text which conditions a lender's duty to comply on actions taken by the borrowers. [IB43.] Appellants' contention that that no reviews pursuant to the HUD Regs were done because Appellee's print outs do not specifically state "review reviewed for pre-foreclosure sales under section 203.370," "reviewed for assumptions under 203.512," "reviewed for special forbearance under sections 203.471 and 24 203.614," or "reviewed for a partial claim under section 203.414" [IB39-40.] is mere unsupported allegation. Appellant cites to *Kuhnsman,* and argues it, as written, required Pacific Union to review all the loss mitigation options set forth at 24 CFR 203.501 to determine which one was best for the Homeowners and FHA as the insurer of the Homeowners' loan. [IB38.]

Not only does Appellants' argument miss the mark, but it also improperly shifts the burden of saving Appellants' home on Appellee. Before Appellee can take action on foreclosure avoidance options, Appellants must engage in the process. Here, Appellants did not engage and ignored or refused to take telephone calls and respond to correspondences.

The trial court correctly founds Appellants were nonresponsive:

> Okay. Counsels, I've reviewed the evidence, considered the law. I'm granting judgment for the Plaintiff in this foreclosure action based upon the evidence that Plaintiff submitted, Documents 1 through 15 in evidence.
>
> The Court finds that the Plaintiff has established by a preponderance of the evidence, and the Court is comfortable saying by clear and convincing evidence that it has met all the requisite elements to establish its foreclosure claim and that they're entitled to the relief requested under their complaint.
>
> Specifically, the Court makes a finding that the Plaintiff has established by way of the evidence proper standing in this case. I won't rehash because we're short on time, but the endorsement in blank, the merger that the Plaintiff was able to establish.
>
> The Plaintiff has established standing to pursue this cause of action in a foreclosure case. The Plaintiff also established by way of the evidence the conditions precedent, especially with regard to establishing the FHA loan requirements.

And with regard to 24 CFR 604, Defense Counsel has argued extensively about a lack of compliance. The Court finds that the Defendant [sic] has complied with loss mitigation requirements. At a minimum, the Plaintiff has established substantial compliance, but this Court believes that there was full compliance.

As far as the Save Our Homes plan, the evidence is, is clear. There was an established plan, if you will, that resulted in a non-sufficient fund payment by the borrower, which basically, therefore, lacked compliance with that plan.

I know Defense Counsel has shifted the burden onto Plaintiff at that juncture to say that they could have and should have offered other alternative plans to the borrower, but this Court finds that the relationship between lender and borrower is not one way. Even though there is (*sic*) requirements for the lender to do certain things, a borrower can't sit back and wait for a lender. They can't say that it's a one-way relationship and it's up to the lender 100 percent of the time to contact them.

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>
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[T124-127.] (emphasis added.)

As detailed above, trial Exhibit 13 shows over 30 notations of Appellee's attempted calls to Appellant alone. [R493-510.] Several entries show loan mod account reviews, collection account reviews, Loss Mitigation inquiries and reviews, payment plan reviews, letters sent, and other attempts Appellee made to make the Loan a working loan. [R486-510.] Appellee by itself can't make the Loan a working loan, Appellants have to participate.

CONCLUSION

Appellants avoided Appellee. Mr. Azarsepandan's testimony satisfies the business record and the onboarding process as testified by the witness. Appellee presented competent, substantial evidence as to each of the elements of foreclosure. Appellee complied with the

HUD Regs, as found by the trial court. The final judgment is supported by competent, substantial evidence and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on July 26, 2023 a true and correct copy of the foregoing has been furnished by E-Mail to: Malcolm E. Harrison, Esq. and Michelle Moore, Esq., Law Office of Malcolm E. Harrison, P.A., 12161 Ken Adams Way, Suite 110R, Wellington, FL 33414, mail@mehrealproperty.com

/s/ *Amber Kourofsky, Esq.*
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation and font requirement set forth in Rule 9.045, Florida Rules of Appellate Procedure. This brief contains 8,226 words including the table of contents. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

/s/ *Amber Kourofsky, Esq.*
Attorney