SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002209-11

BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-AB3,	*ON APPEAL FROM*:
Plaintiff-Respondent,	Superior Court of New Jersey Chancery Division Atlantic County Docket No. F-10209-08
vs.	*CIVIL ACTION*
VICTOR and ENOABASI UKPE,	*SAT BELOW:*
Defendants-Appellants	Hon. William C. Todd, III, P.J. CH.

BRIEF OF AMICUS CURIAE
SETON HALL LAW CENTER FOR SOCIAL JUSTICE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Social Justice at Seton Hall Law School ("the Center") is both a state-certified legal services program and a clinical legal education program where law students and professors work together on issues of public interest, including the rights of homeowners facing foreclosure. The Center has provided free legal assistance and advocacy on behalf of lower-income New Jersey homeowners involved in predatory lending, mortgage fraud, and foreclosure litigation for over a dozen years. The Center's cases regularly raise issues regarding notices, pleadings, and other document irregularities. For example, the Center has obtained the dismissal of foreclosure cases due to false pleadings regarding assignment of mortgages and transfer of promissory notes.

Due to its limited resources, the Center can only provide full legal representation to a small number of homeowners facing foreclosure. Thus, in order to achieve a broader impact beyond litigating individual cases, the Center also engages in advocacy for lower-income homeowners at the local, state, and national levels. This advocacy focuses on the relationship between faulty foreclosure practices, mortgage fraud, and the consequences of the foreclosure crisis on homeowners and neighborhoods.

The Center recently participated as amicus curiae before the New Jersey Supreme Court in U.S. Bank, N.A. v. Guillaume, (A-11-11) (068176)(Feb. 27, 2012) (holding notice of intent to foreclose requires inclusion of name of lender). The Center also participated, on behalf of its clients, in the 2011 statewide litigation against the top six foreclosure filers over "robo-signing." See Brief of Applicants-Intervenors Center for Social Justice, In re Residential Foreclosure Pleading & Document Irregularities, No. F-59553-10 (Ch. Div. Mar. 24, 2011). The Center's submission shed light on inadequate record-keeping practices by foreclosing banks and their agents. Id.

PRELIMINARY STATEMENT

The issues presented in this case are typical of the thorny legal questions surrounding the national foreclosure crisis that continue to occupy the courts and delay economic recovery. Shoddy –- and sometimes fraudulent -- subprime mortgage origination and securitization practices resulted not only in staggeringly high default rates, but also in banks' inability to prove that they properly handled mortgage notes and had a legal right to foreclose. Beyond a mere technicality, state statutes requiring physical possession of negotiable instruments serve an important consumer protection purpose by protecting homeowners against multiple enforcement actions on the same debt. As such, courts, government investigators, legislative bodies, and

law enforcement officials throughout the nation have increasingly recognized the need for closer scrutiny of mortgage-related documents to ensure that the foreclosing bank actually has standing to foreclose and that the supporting evidence is authentic and trustworthy.

When standing is at issue, homeowners in foreclosure face a fundamental asymmetry of access to information concerning the internal business practices of foreclosing banks. When hearing an application for summary judgment, courts are often asked to rely solely on the self-serving and incomplete submissions of the banks themselves. For example, the bank in this case proffered affidavits and deposition testimony of employees who relied upon unauthenticated images from the company's computer system and lacked personal knowledge of the bank's actual practices at this time. This case is somewhat unusual, however, because defense counsel did in fact submit evidence regarding the Plaintiff's business practices to counter the Plaintiff's narrative, but the trial court improperly rejected it as irrelevant and inadmissible.

Among the evidence rejected by the court was the prior sworn testimony of Linda De Martini, an employee of Countrywide Home Loans Servicing, who had testified in a case involving the same originator, servicer, and trustee, that Countrywide's original mortgage notes were not sent to the Bank of New York

during the securitization process or prior to the filing of foreclosure complaints, as a matter of normal business practice. Thus, in those cases where the original note was physically transferred to Bank of New York at any point after the filing of the complaint, Bank of New York lacked standing to foreclose.

In a preliminary letter opinion on Bank of New York's motion for summary judgment, the trial judge rhetorically asked, "Is there any reason to believe that the institutions and individuals involved simply ignored the requirements of [mortgage-backed securitization] agreements?" Da79. Five years into the foreclosure crisis, after voluminous litigation, government investigations and other research, the short answer is yes: it is increasingly evident that mortgage notes of this type were routinely mishandled by all parties to the mortgage-backed securitization process. By failing to consider the counter-narrative suggested by the Ukpes' evidence, and relying solely on the untrustworthy and unauthenticated evidence produced by Plaintiff, the trial court prematurely shut the door on this matter, and denied the Ukpes their right to try the issue before a neutral fact-finder.

Accordingly, this Court should ensure the integrity of the judicial foreclosure process by more closely scrutinizing and evaluating the Plaintiff's evidence, and reversing summary judgment while remanding the case for a hearing on the question

of whether the Plaintiff physically possessed the Ukpes' mortgage note at the time it filed this action.

STATEMENT OF FACTS

Amicus relies primarily on the Statement of Facts in the Ukpes' briefs and provides here only a succinct recitation of facts relevant to this briefing. The Appellants, Victor and Enoabasi Ukpe, purchased their home in July, 2005, relying on allegedly false representations by a mortgage broker named Robert Childers. Da1601, Da1603, Da6104-05. To finance the purchase, the Ukpes signed an adjustable interest rate promissory note from Countrywide Home Loans, Inc.[1] in the amount of $224,000 that was secured by a mortgage on the property. Da1174-1177; Da133-142; Da2149-2151.

The Ukpe loan was purportedly pooled with other loans originated by Countrywide Home Loans ("Countrywide" now known as Bank of America Home Loans), through a 2005 Pooling and Service Agreement ("PSA"), and sold to investors. Da243. Bank of New York was to serve as Trustee for the investors in this mortgage-backed security. Da272. Bank of New York Trust Company ("BNY Trust Co."), was listed as the document custodian for the mortgage-related documents, and co-trustee. Da272. Countrywide Home Loan Servicing ("CHLS" now known as Bank of America Home

Loans Servicing or "BACHLS") was listed as the Master Servicer in the PSA. Da272. Notably, the PSA required that the certain documents regarding the loans included in this pool, like the original promissory notes, were to be transferred to BNY Trust Co., in its capacity as document custodian for the trust. Da328-333. BNY Trust Co. was responsible for reviewing these documents for compliance with the PSA's requirements, and certifying the results of their reviews to the investors. Da328-333.

The Ukpes' loan became unaffordable and after they missed several payments, BACHLS stopped accepting any further payments from them in August 2007. Da1607. Bank of New York filed its foreclosure complaint in the Chancery Division on March 13, 2008. Da18-27. The Ukpes filed an answer with affirmative defenses and a third party complaint alleging that Bank of New York lacked standing to foreclose and that Ukpes' loan was the result of fraud, including misrepresentations concerning the monthly payments, false promises to refinance by BOA, BACHLS, and Childers, and fraudulent billing and servicing practices by BACHLS and the law firm of Phelan Hallinan & Schmeig. Da28-62.

After much litigation, Bank of New York moved for summary judgment for a third time on March 15, 2011. Da113 -557. In support of its standing argument, Bank of New York submitted affidavits, deposition testimony, and documentary evidence

through Lester Juarez, Account Administrator at BNY Trust Co., and Glen Mitchell, Vice President of Bank of New York. Da113-557. Their testimony relied primarily on images of records from BNY Trust Co.'s computer system, most of which purported to be images or "screen shots" of "activity journals" from the computerized database of the document custodian. Da242-260; Da261-552.

The Juarez affidavit stated that he was "familiar with the record-keeping of [BNY Trust Co.]... as a result of my employment..." Da243. Jaurez then states that BNY Trust Co.'s computer records indicated that the Ukpe "collateral file" was received and entered in its electronic system on September 21, 2005. Da243. Juarez further alleged that the screen shots indicate that an employee of BNY Trust Co.'s "review area" had verified that the collateral file contained the Ukpe's original loan documents, as of October 21, 2005. Da244.

When asked about the basis for this conclusion during a deposition, Juarez could not reference any personal knowledge of the actual practices of employees in BNY Trust Co.'s review area at the time the records were created. Juarez was not employed by BNY Trust Co. at the time this record was made. Da572-573. In his testimony, Juarez described the process by which he understood the collateral files were handled by BNY Trust Co. Da1144-1145. Under this procedure, an employee allegedly

uploaded the loan number into the system and marked it as "deposited." Da1144. The contents of the folder were not checked at this stage. Da1144. Next, the folder was sent to a "review" area. Da1144. There, an employee was supposed to fill out a checklist in an "activity journal" indicating that required documents, including an original note endorsed in blank, were in the collateral file. Da1145. However, when asked if he had personal knowledge whether these procedures were actually followed by BNY Trust Co.'s review team at that time, Juarez recited the procedural requirements of the PSA and as well as an unidentified policy manual that was not produced in discovery. Da1810-1812.

Bank of New York also submitted the affidavit of Glen Mitchell, Vice President of the Bank of New York. Da261-504. Mitchell relied upon the Mortgage Loan Schedule and various "exception reports" to suggest that BNY Trust Co. had possession of the original Ukpe file as of October 27, 2005. Da261-263. In his deposition, Mr. Mitchell testified that he did not know how the activity journal (the printed screen shot of a computer record that purportedly indicates the deposit of the Ukpe loan into the trust) was created. Da1751. Mitchell could offer no knowledge of the integrity of the record, no knowledge of who made the record, when it was made, or whether it had been altered. Da1751.

In their opposition to the summary judgment motion, the Ukpes questioned the authenticity and competency of the evidence that the document custodian had possession of the note at the time it filed the complaint. Da558-1018. Additionally, the Ukpes submitted the prior sworn testimony of Linda De Martini, a BACHLS employee who had testified in a New Jersey bankruptcy case, also involving a Countrywide loan with Bank of New York as trustee. Da913-976. In that transcript, De Martini testified that it was Countrywide and BACHLS's normal business practice to retain the original version of Countrywide promissory notes even after they were securitized. Da937. That is, she testified that Bank of New York and others, in their capacity as trustees for pools of loans originated by Countrywide, never took physical possession of original Countrywide promissory notes. Da937. The Ukpes argued that because the De Martini testimony was admitted in a case involving the same loan originator, the same servicer and the same trustee, the testimony created a genuine issue of material fact as to the actual business practices of the Plaintiff's document custodian, and whether Bank of New York had standing to foreclose at the time this action was filed. Da580.

On November 17, 2011, in an oral opinion which largely affirmed the reasoning in his preliminary letter opinion of October 24, 2011, the Honorable William C. Todd ruled from the bench that Bank of New York had established that no genuine

issue of material fact had been raised as to its standing to foreclose, and granted summary judgment to Bank of New York by entering a final judgment of foreclosure on November 18, 2011. Da67-112, Da10-12.

LEGAL ARGUMENT

Amicus argues that the lower court abused its discretion in ruling on the standing issue by failing to consider the prior sworn testimony of BACHLS employee Linda De Martini and by granting summary judgment based on evidence submitted by the Plaintiff which was a) offered by witnesses who lacked personal knowledge, and b) based on documentary evidence that was not properly authenticated. De Martini testified under oath in another case that it was her employer's standard practice to keep all original loan documents, and not send them to Bank of New York's document custodian despite legal and PSA requirements to the contrary. This testimony was directly relevant to the standing issue and presented a counter-narrative to the Plaintiff's evidence regarding its business practices for handling mortgage notes that should have been sufficient to avoid summary judgment.

At a minimum, the evidence introduced by the Ukpes, and the questionable evidence introduced by Bank of New York, created a genuine issue of material fact whether the Plaintiff physically possessed the Ukpes' note when it filed this foreclosure action.

Plaintiff's witnesses blindly recited compliance with the PSA and an unidentified company policy to effectively guess that the original Ukpe mortgage note -- as opposed to a scanned copy -- was physically transferred to Bank of New York's document custodian. The Ukpes presented evidence supporting a counter-narrative, wherein Countrywide and its successor, Bank of America, systematically failed to follow PSAs or their own policies for handling mortgage notes in accordance with the law, by not forwarding the original mortgage notes to the Trust until after the foreclosure complaint was filed.

A party is entitled to summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. N.J. Ct. R. 4:46-2(c). In a foreclosure proceeding, whether the Plaintiff has the right to foreclose is a material issue. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). When faced with a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party. Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995). Thus, to satisfy its burden at the summary judgment level, a moving plaintiff must demonstrate that no genuine issue of material fact exists. Id. at 528-529.

A Plaintiff seeking affirmative summary judgment has the burden of proof both on the motion and on the merits of its

claims. Here, Plaintiff has not demonstrated that no triable issues exist as to its possession of the Ukpe mortgage note at the time it filed this foreclosure action. See Bank of New York v. Raftogianis, 418 N.J. Super. 323 (Ch. Div. 2010) (dismissing foreclosure complaint without prejudice due to Plaintiff's failure to prove physical possession of original mortgage note at the time complaint was filed).

POINT I

ALLEGATIONS OF MAJOR FINANCIAL INSTITUTIONS' SYSTEMIC FAILURES IN HANDLING MORTGAGE-RELATED DOCUMENTS IN ACCORDANCE WITH THE LAW ARE NOW COMMON KNOWLEDGE, AND THUS, A ROBUST REVIEW OF EVIDENCE SUBMITTED BY BANKS IN FORECLOSURE ACTIONS IS REQUIRED.

As the foreclosure crisis enters its fifth year, it has become increasingly evident that documentary evidence submitted by banks in foreclosure actions must be closely scrutinized for trustworthiness and reliability. Traditional assumptions about the reliability of the records of financial institutions are no longer warranted, and the ensuing legal morass created by shoddy practices threatens the State's interest in protecting private property rights and access to the privilege of homeownership.

The proper handling of promissory notes is a critical issue because many foreclosure actions seek to enforce mortgage notes generally considered negotiable instruments under New Jersey's

enactment of the Uniform Commercial Code. N.J.S.A. 12A:3-104.[2] Usually, these notes are made payable to the lender. Myron C. Weinstein, Law of Mortgages 29 N.J. Prac. § 11.5 (2d ed. 2012). However, as part of the mortgage-backed securitization process, most mortgage notes originated in the United States are then sold to several other parties, soon after origination. Michael Simkovic, Competition and Crisis in Mortgage Securitization 88 Ind. L.J. 8 (2011). To facilitate their sale and transfer, many of these notes were endorsed "in blank" -- functioning somewhat like a blank check for a certain amount, payable to any party in physical possession. N.J.S.A. 12A:3-201, 204, 205. A party seeking to be a "person entitled to enforce" a mortgage note endorsed in blank must demonstrate physical possession of the original note at the time the foreclosure complaint was filed. N.J.S.A. 12A:3-301; see also Mitchell, supra. Without such proof, the foreclosing party lacks standing and the matter must be dismissed. Raftogianis, 418 N.J. Super. at 363.

More than mere technicalities, these statutory requirements serve important consumer protection purposes. See Alan White, Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection, 24 Loy. Consumer L. Rev. 468, 494 (2012). Without a bright-line rule requiring physical possession of the

[2] This brief assumes for the sake of discussion that the Ukpe note was a negotiable instrument under New Jersey law, without formally taking a position on the issue.

original note, multiple parties could seek to enforce multiple copies of the same note. This risk is more than hypothetical. Id. at 476 (noting that "there is substantial evidence of a significant breakdown in the system of endorsement and delivery of mortgage notes in the pre-2007 period."). Warehouse lending fraud or "double-booking" is one very real example of this risk, whereby a lender sells the same promissory note to several different parties, who may each claim that they are entitled to enforce the same debt. See e.g. Provident Bank v. Cmty. Home Mortg. Corp., 498 F.Supp.2d 558 (E.D.N.Y. 2007). The proper handling of mortgage notes is a legal issue of great importance, not just to banks and investors, but also to the courts, government, and individuals facing the potential loss of their home to foreclosure.

A. NEW JERSEY'S COURTS HAVE INCREASINGLY IDENTIFIED FAILURES BY BANK OF AMERICA AND OTHER BANKS TO COMPLY WITH STATE LAWS REGARDING MORTGAGE DOCUMENTATION AND FORECLOSURE PRACTICES.

New Jersey courts have taken unprecedented steps to scrutinize the sufficiency of evidence presented by Bank of America and other major institutions in foreclosure actions. In December 2010, General Equity Judge Mary C. Jacobson issued a sua sponte order to show cause against the six largest mortgage servicers in response to the Court's concerns about, inter alia, "the execution of affidavits, certifications, assignments, and

other documents... [that] may not have been based on personal knowledge and may thus be unreliable." See Order Directing the Named Foreclosure Plaintiffs to Show Cause, In re Residential Mortgage Foreclosure Pleadings and Document Irregularities, at p. 3 (Ch. Div., Dec. 20, 2010) (No. F-59553-10), available at http://www.judiciary.state.nj.us/notices/2010/n101220c.pdf. The Order appointed a Special Master to "inquire into the foreclosure document execution practices" and to "evaluate and report to the court on the remediation steps planned or taken." Id. at 5. In Judge Jacobson's view, this Order was necessary to "ensure that Plaintiffs' employees... follow proper policies, procedures, and processes." Id. at 3.

The New Jersey Supreme Court also recognized the need for heightened scrutiny of evidence in foreclosure cases when, on December 20, 2010, Chief Justice Rabner ordered emergency amendments to the court rules in response to the same pervasive document irregularities highlighted in Judge Jacobson's Order to Show Cause. Pressler, Current N.J. Court Rules, comment 1 to N.J. Ct. R. 4:64-1 (2013). As a result, court rules now require attorneys for foreclosing banks to file an affidavit of "diligent inquiry" attesting to communication with a representative for the plaintiff who can confirm, inter alia, possession of the documentation required for foreclosure. N.J. Ct. R. 4:64-2(d) (2013).

Moreover, in a series of recent cases, New Jersey courts have more closely scrutinized and often rejected evidence produced by banks in foreclosure actions. See Deutsche Bank v. Mitchell, 422 N.J. Super. 214, 226 (App. Div. 2011) (reversing summary judgment and sheriff's sale for lack of proof that Plaintiff possessed the note before it filed the complaint); Wells Fargo v. Ford, 418 N.J. Super. 592, 600 (App. Div. 2011) (reversing summary judgment due to affidavit signed by bank witness who lacked personal knowledge); Deutsche Bank v. Wilson, No. A-1384-09 (App. Div. Jan. 19, 2011) (Unpublished Slip Op. at 5-6) (reversing entry of foreclosure judgment due to bank's failure to properly lay foundation for business records evidence as to its ownership of the mortgage note); Aurora Loan Servs. v. Toledo, No. A-0804-10 (App. Div. Oct. 18, 2011) (Unpublished Slip Op. at 6-7) (reversing summary judgment due to bank witness' lack of personal knowledge as to transfer of mortgage note to Plaintiff); Bank of America v. Limato, No. A-4880-10 (App. Div. July 2, 2012) (Unpublished Slip Op. at 14) (affirming summary judgment for homeowner where bank certifications were "rife with hearsay" and lacked competent witness testimony as to ownership of the mortgage note).[3]

[3] Several recent Appellate Division opinions have refused to disturb foreclosure judgments on standing grounds, but only because they involved post-judgment and/or post-sale applications to vacate default judgments where additional equitable considerations were found to weigh against the court's ability to entertain the standing issues. See e.g. Deutsche Bank v. Russo,

B. FEDERAL AUTHORITIES HAVE ALSO IDENTIFIED FAILURES BY BANK OF AMERICA AND OTHER BANKS TO PROPERLY COMPLY WITH STATE LAWS REGARDING MORTGAGE DOCUMENTATION AND FORECLOSURE ACTIONS.

The federal government has also expressed concern with the failure of foreclosing banks to properly handle mortgage notes and other related documents. Earlier this year, the Inspector General of the U.S. Department of Housing and Urban Development released a report of an investigation into the foreclosure practices of Bank of America. See U.S. Dep't of Hous. and Urban Dev., Mem. No. 2012-FW-1802, Bank of America Corporation Foreclosure and Claims Process Review (2012), available at http://www.hudoig.gov/Audit_Reports/2012-FW-1802.pdf. This report found that "Bank of America did not establish effective control over its foreclosure process." Id. at 5. After a review of 118 Federal Housing Authority claims, the report further concluded that "Bank of America did not consistently retain legal documents supporting the foreclosure." Id.

A 2010 report by the Congressional Oversight Panel for the Troubled Asset Relief Program ("TARP") analyzed document irregularities during the transfer of paperwork in the mortgage securitization process. See Congressional Oversight Panel, November Oversight Report: Examining the Consequences of

___ N.J. Super. ___, ___ (App. Div. Nov. 14, 2012) (Slip Op. at 12)(application filed roughly three years after entry of default); See also Deutsche Bank v. Angeles, ___ N.J. Super. ___, ___ (App. Div. Oct. 11, 2012) (Slip Op. at 7-8) (application also filed more than three years after entry of default).

Mortgage Irregularities for Financial Stability and Foreclosure Mitigation, at 4 (Nov. 16, 2010) available at http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/documents/cop-111610-report.pdf. The report stated that "documentation standards in the foreclosure process have helped shine a light on potential questions regarding the ownership of loans sold into securitization." Id. at 64.

Moreover, in 2011, the United States Government Accountability Office ("GAO") issued a report examining the impact of "Loan Transfer Documentation Problems" on the economy. GAO, Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight, at p. 43 (May 2011), available at http://www.gao.gov/assets/320/317923.pdf. This report assessed the scope of the failure by major financial institutions to properly handle residential mortgage notes, and concluded that the consequent losses could be substantial, while recommending that federal regulators perform a comprehensive risk assessment. Id. at 52.

C. COURTS IN OTHER JURISDICTIONS HAVE INCREASINGLY IDENTIFIED FAILURES BY BANK OF AMERICA AND OTHER BANKS TO PROPERLY COMPLY WITH LAWS REGARDING MORTGAGE DOCUMENTATION.

Both published and unpublished cases also highlight Countrywide's brazen disregard for procedural requirements akin to those at issue here. In In re O'Neal, 2009 Bankr. LEXIS 2666

(Bankr. N.D. Ohio May 1, 2009) (unpublished), the bankruptcy court held:

> Countrywide's system was reckless. It appears to me designed to allow each actor in the process to act with indifference to the truth, and to rely solely on the limited information made available at each step. . . . The errors in this case were plentiful, from the failure to properly account for the receipt of short sale funds to the failure to correctly identify the holder of the Note and Mortgage. They evidence Countrywide's disregard for diligence and accuracy. The cumulative impact of each of the errors in this case rises to the level of sanctionable conduct in this case.

See also In re Hannon, 421 B.R. 728 (Bankr. M.D. Pa. 2009)(holding that Countrywide may have violated Federal Rule of Bankruptcy Procedure 9011 when continuing to collect payments pursuant to an erroneous Proof of Claim because it lacked any procedure to adjust the claim); In re Hill, 437 B.R. 503 (Bankr. W.D. Pa. 2010) (sanctioning law firm that conducted foreclosure work for Countrywide for filing deceptive documents to collect on questionable debt).

An opinion from the United States Bankruptcy Court for the District of New Jersey disallowed a proof of claim on a Bank of America home loan due to the failure of the originator to transfer the loan to the document custodian for the securitized trust. Kemp v. Countrywide Home Loans, Inc., 440 B.R. 624, 634 (Bankr. D.N.J. 2010). Bank of New York argued that physical possession of an original promissory note was unnecessary, and

used the testimony of Countrywide Home Loans Servicing employee Linda De Martini in support of that argument. De Martini testified that it was standard practice for CWHLS to retain the original mortgage notes for loans originated by Countrywide, instead of transferring them to document custodians for the Bank of New York. Id. at 628.

Moreover, courts in other jurisdictions have held banks to higher standards regarding proof of note possession and compliance with the U.C.C. For example, in In re Foreclosure Cases, 521 F. Supp. 2d 650 (S.D. Ohio 2007), a federal district court found that evidence submitted in support of 27 foreclosure complaints in Ohio suggested that the banks lacked standing to foreclose at the time the actions were filed. Id. at 652. There, the court gave the banks thirty days to provide such proof, or face dismissal of their complaints. Id. at 654.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE PRIOR SWORN TESTIMONY OF THE UKPES' PROPOSED TRIAL WITNESS, LINDA DE MARTINI, WAS IRRELEVANT AND INADMISSIBLE.

Countrywide employee Linda De Martini's prior sworn testimony in a case involving the same originator, servicer and trustee directly contradicted the Plaintiff's evidence regarding its note-handling practices and should have been admitted. These practices, in turn, are fundamental to whether the

Plaintiff can meet its burden to prove it has standing. The Ukpes presented evidence that, despite the PSA requirement that the original notes were to be transferred to the trust custodian, the actual practice of Countrywide was to retain the original note. De Martini was listed as a potential trial witness for the Ukpes and her prior testimony was taken under oath in a formal bankruptcy proceeding in New Jersey. By ruling that this testimony was irrelevant and inadmissible, the trial court abused its discretion and denied the Ukpes the opportunity to put the issue to a neutral fact-finder.

A. DE MARTINI'S PRIOR SWORN TESTIMONY IS HIGHLY RELEVANT TO THIS ACTION BECAUSE IT INVOLVES THE SAME PARTIES AND PROVIDES EVIDENCE THAT DIRECTLY CONTRADICTS THE PLAINTIFF'S ASSERTIONS ON SUMMARY JUDGMENT.

Absent a separate basis for exclusion, any evidence "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action" is relevant. N.J.R.E. 401. Relevance "turns on whether there is a 'logical connection' between the evidence offered and the issues in question." JS Properties, L.L.C. v. Brown and Filson, Inc., 389 N.J. Super. 542, 554 (App. Div. 2006) (citing Verdicchio v. Ricca, 179 N.J. 1, 33 (2004)). To establish a logical connection, the proffering party must show that "the thing sought to be established is more logical with the evidence than

without it." State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990).

The relevance of the De Martini testimony here is highlighted by the striking similarities between the Kemp case, in which she testified, and the current case. In both cases, Countrywide originated the loan, BACHLS f/k/a CHLS was the servicer of the loan, and BNY was the Trustee. Compare the Pooling and Servicing Agreement for the Mortgage Trusts in In re Kemp, available at http://www.secinfo.com/drjtj.v51e.d.htm#3ndo with PSA, supra. Both loans were originated within a year of each other. Compare Kemp, supra, 440 B.R. at 627 ("The note and mortgage were executed by the debtor on May 31, 2006") with Da564 (noting that the Ukpe loan was originated on July 29, 2005). And a comparison of both PSAs reveals nearly identical requirements with respect to document possession.[4] Compare PSA, supra, with PSA for the Mortgage Trusts in In re Kemp, supra; see also Kemp, supra, 440 B.R. 624 (portions of the opinion describe the PSA). Because of these similarities, testimony concerning the business practices of the company that originated and then serviced the loan is directly relevant to the current case. Indeed, it certainly makes the Ukpes' argument that BNY did not possess the note when it filed the complaint more

[4] The only material difference is that in Kemp, BNY itself was the document custodian, while in this case a separate entity under the BNY umbrella, BNY Trust, is listed as the custodian.

"logical" if it was the normal course of business for Countrywide/Bank of America to leave the original loan documents for loans it originated with the servicer even after purporting to transfer the loans to others, as Ms. De Martini describes.

B. DE MARTINI'S PRIOR SWORN TESTIMONY IS ADMISSIBLE IN THIS ACTION AS HABIT OR PRACTICE EVIDENCE AND/OR A STATEMENT AGAINST INTEREST.

The De Martini testimony is admissible under N.J.R.E. 406, as "habit or practice" evidence. Under this rule, evidence of habit or routine practice is admissible to prove specific conduct, whether corroborated or not. See SSI Medical Serv. v. State Dept. of Human Serv., 146 N.J. 614, 622-624 (1996) (allowing evidence of past mailing practices to prove that a specific letter was indeed mailed).

In a case that involved the same loan originator, the same trustee, and the same servicer as this case, Ms. De Martini testified that it was the routine practice of Countrywide to retain the original copy of mortgage notes, and not to send them to Bank of New York prior to filing a foreclosure action. This testimony suggests that it is likely that, pursuant to this habit or practice, the Ukpes' original mortgage note was never transferred to Bank of New York prior to the filing of this

action. Therefore, the lower court abused its discretion in refusing to admit this evidence on the issue of possession.[5]

The De Martini transcript is also admissible as a statement against interest under N.J.R.E. 803(c)(25) because it is inimical to Bank of America/Countrywide's interests as key players in the mortgage-backed securities market. Statements that were "so far contrary to the declarant's pecuniary, proprietary, or social interest" that "a reasonable person in declarant's position would not have made the statement unless the person believed it to be true" are admissible as an exception to hearsay rules. The statement of any declarant can be admitted against any party as long as it was against the declarant's interests when it was made. See e.g., State v. West, 145 N.J. Super. 226 (App. Div. 1976).

In Estate of Burnett v. Water's Edge Convalescent Ctr., No. A-4970-06 (App. Div. July 25, 2008) (Unpublished Slip Op), this Court overturned a grant of summary judgment because the trial court failed to make "reasonable inferences. . . in the light most favorable to Plaintiff" when it held that a statement was not against the declarant's interest. Id. at 28. The panel reasoned that the trial judge should have admitted a hearsay

[5] The De Martini evidence may also be relevant under the "opening the door" doctrine. State v. James, 144 N.J. 538, 554 (1996) (doctrine "authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to . . . admissible evidence that generates an issue.") Thus, the De Martini testimony is relevant even if only admitted to challenge the Juarez and Mitchell affidavits and testimony.

statement by an unknown employee because it exposed the company she worked for to "either civil liability or government investigation." Id. The court recognized the issues with the declarant's credibility, but properly recognized that this is a question for the fact finder and not for the judge at the summary judgment stage. Id.

The De Martini testimony is even more clearly contrary to her employer's interest than the hearsay statement of the unknown employee in Burnett. As noted above, De Martini was an employee of BACHLS, a subsidiary of Bank of America, when she testified. Her testimony had the potential to expose Bank of America to civil liability and government investigation. The federal Congressional oversight panel has found through other testimony similar to Ms. De Martini's that the practices at banks and entities involved in lending have led to potentially mass fraud liability for the companies. See Congressional Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation, at 41 (Nov. 16, 2010) (describing testimony that has "been taken in various foreclosure cases around the country that point to questionable practices by employees at a number of banks" as a source of potential fraud liability for mortgage banks).

Ms. De Martini would not have lied to a court about BACHLS's business practices because the statements damaged her employer's interests, and she would not have lied about something that would jeopardize her own career. By finding the De Martini transcript inadmissible here, the trial court failed to acknowledge the inherent reliability of the testimony and the fact that it qualifies as both habit or practice evidence and a statement against interest.

POINT III

THE PLAINTIFF'S EVIDENCE ON SUMMARY JUDGMENT SHOULD NOT HAVE BEEN ADMITTED BECAUSE ITS WITNESSES LACKED PERSONAL KNOWLEDGE OF ITS ACTUAL NOTE-HANDLING PRACTICES AND ITS DOCUMENTARY EVIDENCE WAS NOT PROPERLY AUTHENTICATED AS COMPUTER RECORDS.

On the central factual issue in the Plaintiff's summary judgment motion -- whether Bank of New York physically possessed the Ukpe note at the time it filed this foreclosure action -- the trial court abused its discretion in relying upon witness testimony that amounted to little more than a guess, and was premised upon unauthenticated computerized business records. At a time in which the document-handling procedures of foreclosing banks have been questioned by almost every corner of society, the court should have more closely scrutinized this evidence for admissibility and authenticity. Even if the Plaintiff's evidence was admissible, it raised serious credibility questions, and when considered in light of the De Martini testimony described

supra at Point II, it created a genuine issue of fact whether the Plaintiff possessed the original Ukpe note when it filed this action.

A. PLAINTIFF'S WITNESS TESTIMONY DOES NOT PROPERLY LAY A FOUNDATION FOR THE BUSINESS RECORDS HEARSAY EXCEPTION BECAUSE THE WITNESSES LACKED PERSONAL KNOWLEDGE AS TO THE PLAINTIFF'S ACTUAL NOTE-HANDLING PRACTICES AT THE TIME.

The standing issue in this case hinges on the nebulous and Byzantine process by which residential mortgages have been securitized. By design, this process involves a division of labor in which many different entities and their agents/employees play a role at each step in the securitization "assembly line" -- especially when the transfer of mortgage notes is supposed to occur. The Plaintiff's core factual contention on the issue of standing was that the Ukpes' original mortgage note was physically transferred to its document custodian soon after origination, where it remained through the filing of this complaint until it was produced by its attorneys several years into this litigation. Da117-122.[6,7] To support its

[6] Far from conjecture or a "fishing expedition" the Plaintiff's own conduct during the course of this litigation raised serious credibility questions. It wasn't until several years into the litigation that the Plaintiff produced the original copy of the Ukpe note that it relied upon for this summary judgment motion. In an earlier October 2008 motion for summary judgment, the Plaintiff produced a photocopy of the Ukpes' promissory note that lacked any endorsements. Da2610-2614;. This unendorsed version of the note was produced four other times between October 2008 and March 2009. Da2606-2609; Da2615-2617; Da3127; Da2618. Then, an endorsed copy of the note was produced on March 17, 2009 during a deposition. Da681-685. Moreover, this copy of the note differed from the version that was later produced during the deposition of BACHLS employee Anna Alvarado on March 15, 2011. Da28-131. The fact multiple versions of the Ukpes' note were produced as part of this litigation

contention, Plaintiff submitted the testimony of two of its employees via affidavit and deposition, and introduced several images depicting its computer records through their testimony. Da242-533. The employees were Bank of New York Vice President Glen Mitchell, and Bank of New York Account Administrator Lester Juarez. Da242-533. These witnesses largely relied on unauthenticated images depicting certain notations in its computer system that they alleged showed that the Ukpes' note was physically transferred to the Plaintiff during the securitization process, well before this action was filed. Da242-533. When asked how they knew that these records meant that the original Ukpe note, not a photocopy or electronic image, was in the custodian's possession, the witnesses could not attest to the actual practices of the custodian at that time. Da1810-1812, Da1751. Instead, an unidentified company policy that required compliance with the PSA was referenced. Da1810-1812.

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suggests that proper procedures were not followed and may itself be sufficient to raise a genuine issue of material fact.

[7] The original "robo-signed" mortgage assignment filed by the Plaintiff also raises significant questions about the authenticity of the Plaintiff's other proofs. The mortgage assignment was created a day after the foreclosure complaint was filed, and was signed by a partner at Plaintiff's law firm, Phelan Hallinan & Schmieg, P.C. ("PHS") Da1178. This assignment purported to transfer the rights to the Ukpe loan from MERS as nominee for "America's Wholesale Lender" to the Plaintiff on March 14, 2008. Da1178-1179. The lower court recognized that the notarization on the original March 2008 assignment was false, and that "[t]he irregularity in the handling of the assignment also bolsters the Ukpes' suggestion that the court should question proofs offered by other parties to this litigation." Da72. If PHS, BOA, BACHLS, and BNY's documentation of mortgage and loan documents was reliable, the original false assignment would not have been necessary.

While the standard for the foundation evidence necessary to admit business records evidence is admittedly low, the Plaintiff's witnesses were at least two steps removed from having sufficient knowledge of the relevant business practices at the time in question. The Plaintiff witnesses' boilerplate references to the terms of the PSA and an unidentified policy manual that was not produced in discovery were not sufficient to show knowledge of the document custodian's actual business practices at the time it handled the Ukpe note. This is especially true in light of the ample evidence that these same guidelines for note-handling were routinely ignored during the period in which the Ukpe loan was allegedly securitized. See discussion supra Points I, II.

Computerized business records are, by default, hearsay, as the foundation witness is rarely the original declarant who inputted the data into the computer system. See N.J.R.E. 801 (defining "hearsay" as an out-of-court statement by a declarant offered for the truth of the matter asserted). While a hearsay statement is normally considered unreliable and excluded from evidence, it may be admitted as a business record, an exception to the hearsay rules under N.J.R.E. 803(c)(6), but only if a proper foundation is laid.

Under the business record exception to the hearsay rule, the proponent must establish that 1) the record was made in the

regular course of business, 2) prepared within a short time of whatever is being described therein, and 3) the source of the information and the method and circumstances of the preparation of the writing must justify its admission into evidence. New Jersey Div. of Youth and Fam. Servs. v. M.C. III, 201 N.J. 328, 347 (2010) (internal citations omitted). The rationale behind the business records exception is an inference that businesses keep accurate records to function properly and are therefore trustworthy. Biunno, Current N.J. Rules of Evidence, comment 1 to N.J.R.E. 803(c)(6) (2010). Key to the business records exception, and critical to the instant case, is the requirement that the foundation witness have personal knowledge of the evidence necessary to admit the documents as a business records. See N.J.R.E. 602 (a witness can only testify to matters he or she has personal knowledge of); see also R. 1:6-6 (a certification in support of a motion for summary judgment must be based on personal knowledge).

New Jersey courts have increasingly rejected documentary evidence submitted by foreclosing banks due to the foundation witness' lack of personal knowledge, including at least one of the witnesses, Glen Mitchell, proffered by the Plaintiff here. See Ford, supra 418 N.J. Super. at 600 ("[t]he trial court should not have considered this document unless it was authenticated by an affidavit or certification based on personal

knowledge"); see also Limato, supra at 12 (finding that the "record contained no authentication of the requisite documents by an individual having personal knowledge of the requisite facts").

In Limato, this Court recently rejected computerized business records submitted by a foreclosure Plaintiff. Limato supra. There, Bank of America appealed the dismissal of its foreclosure complaint. The Defendant's cross-motion to dismiss argued that no competent evidence showed that the original note was physically transferred to the Plaintiff prior to filing the action. Id. at 4-5. The Plaintiff relied upon the certifications of two employees of the servicer and one certification by its attorney. The trial judge found all three certifications insufficient: the two servicer employees' "assertions of facts were based on assumptions or inferences gleaned from the servicing file" and not on their own personal knowledge. Id. at 12.

The Appellate Division upheld the dismissal of Bank of America's foreclosure complaint, specifically noting that its certifications failed to establish the requirements of the business records hearsay exception. Id. at 12, n.5. Because the underlying information in the attached documentary evidence was hearsay, the certifications amounted to "bald assertions"

concerning possession that could not establish standing. Id. at 12.

Here, similar to Limato, neither Juarez nor Mitchell had first-hand knowledge of the document custodian's actual business practices for handling the Ukpe promissory note, particularly those concerning location of the original note. In his deposition, Mr. Juarez cited to an unidentified policy requiring that the custodian check the contents of the collateral file for an original version of the note –- in other words, that it was company policy to comply with the PSA.[8] However, Juarez had little personal knowledge concerning the reviewing team's actual practices at that time, testifying that they were supposed to review the file for the original documents, but he did not know if this practice was actually followed.

Moreover, the policy manual that Juarez relied upon was never produced in discovery. To the extent that Plaintiff relies upon this policy manual to establish the custodian's business practices for purposes of the hearsay exception, Juarez's statements are also unreliable hearsay. Thus, the Plaintiff created yet another level of hearsay, exacerbating doubt about the electronic records that are critical to proving its case on summary judgment.

[8] It would be foolhardy for the company's written policy to condone practices that are not in compliance with the PSA guidelines.

Assuming arguendo that such a policy manual did exist, the existence of the policy itself is not dispositive without evidence that the Plaintiff actually followed the policy. This is especially true in light of the mounting evidence that Countrywide systematically failed to follow its own policies for mortgage securitization during this time period. As a result, the affidavit, just like the evidence in Limato, amounts to nothing more than a "bald assertion" concerning possession, which is insufficient to support a motion for summary judgment. Limato, supra, at 12.

The Mitchell evidence is even more deficient. Glen Mitchell identified himself as the Vice President for Bank of New York, the Trustee, yet he was attempting to authenticate records of a wholly separate entity, BNY Trust Company, the custodian/co-trustee under the PSA. Not only did he recite information from the computer system of an entity that he did not work for, he did so without personal knowledge of BNY Trust Co.'s actual business practices at the time.

This is not the first time that Mitchell's testimony has been rejected by a court for lack of personal knowledge. One year prior, in Raftogianis, the same judge as in this case ruled after a trial that, inter alia, Mitchell "was not in a position to testify as to what had actually occurred" during the alleged physical transfer of notes. Bank of New York v. Raftogianis, 418

N.J. Super. 323, 358 (Ch. Div. 2010). The court noted that Mitchell "would not have been present when any documents were received or reviewed." Id. There, the court rejected Mitchell's boilerplate references to the process described in the PSA because he did not have personal knowledge concerning the actual practice of the document custodian at the time. Id.

B. PLAINTIFF'S COMPUTERIZED BUSINESS RECORD EVIDENCE, PARTICULARLY THE IMAGES OF ITS COMPUTER-BASED "ACTIVITY JOURNALS", WAS NOT PROPERLY AUTHENTICATED.

Foreclosure plaintiffs relying upon computerized business records must still lay a proper foundation for their authenticity. N.J.R.E. 901. The legal standard for authenticating business records kept in electronic format -- and therefore subject to alteration -- is higher than the standard for paper records, where mutability is less of a concern. See In re Vinhnee, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005) ("digital technology makes it easier to alter text of documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to assure the continuing integrity of the records."). The court below should have applied a stricter legal standard in assessing the admissibility of the screen shots of activity journals that Plaintiff used to allege that it possessed the original Ukpe mortgage note.

As electronic business recordkeeping has proliferated, our courts have developed higher standards of authentication to keep

pace with technological change. Higher standards are necessary for computerized records in particular because of the assumption of reliability that underlies the policy behind admission of hearsay statements as business records. See Biunno, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 803(c)(6) (2010) ("records trusted and relied upon by businessmen" can be relied upon by a court, because it can be assumed that businesses keep accurate records to function properly). However, the mutability of digital records undermines this assumption, and therefore a closer look at authenticity is required. In particular, the Plaintiff failed to properly authenticate the activity journals that purportedly demonstrated possession of the original note.

This Court established a test for admitting computerized business records in Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11 (App. Div. 1996), ruling that "[a] witness is competent to lay the foundation for systematically prepared computer records if the witness (1) can demonstrate that the computer record is what the proponent claims and (2) is sufficiently familiar with the record system used and (3) can establish that it was the regular practice of that business to make the record." Id. at 17-18. This admissibility test incorporates the authentication requirement of N.J.R.E. 901 in its first step, but does not provide further details on its requirements. However, it has been long noted that

authentication requirements are fundamental because they "go to the heart of procedural due process." Celino v. General Acci. Ins., 211 N.J. Super. 538, 544 (App. Div. 1986).

A recent trend in federal bankruptcy courts recognizes the need to apply heightened authentication requirements to printouts of computerized information.[9] See Vinhnee, supra 336 B.R. at 446 (adopting an eleven-part authentication test designed to ensure the reliability of computerized records); see also In re Vargas, 396 B.R. 511 (Bankr. D. Cal. 2008). These federal courts ensured the reliability of computerized records by insisting on rigorous authentication standards. These cases indicate that advances in computer technology mandate discarding old assumptions about the trustworthiness of bank records; further authentication is often required.

The failure to provide evidence on the computer and software generating an electronic record proved fatal to the proffering party in Vinhnee. There, American Express filed a proof of claim and moved to have a portion of the debt excepted from discharge. In re Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005). The company attempted to support its argument with computer printouts of monthly statements. Id. The bankruptcy court required that "in addition to the basic foundation for a

[9] The federal rule for authentication, F.R.E. 901(a), is materially identical to the New Jersey rule.

business record, an additional authentication foundation regarding the computer and software [be] utilized in order to assure the continuing accuracy of the records." Id. at 442. The trial court then rejected the evidence after American Express could not provide that authentication. Id. In affirming, the bankruptcy appellate panel noted the inherent reliability and trustworthiness problems contained in computerized records, and articulated an 11-part authentication test for computer-generated records adopted from a popular evidence treatise.[10] Id. at 445-446.

This test requires that the proponent show that "[t]he procedure has built-in safeguards to ensure accuracy and identify errors." Id. at 446. This element includes "details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup

[10] Edward J. Imwinkelried, *Evidentiary Foundations* § 4.03[2] (5th ed. 2002). The recommended eleven-part authentication test is as follows:
1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

practices, and audit procedures to assure the continuing integrity of the records." Id. at 446-447. The appellate panel then examined the computer printout exhibits and affirmed the trial court's rejection because the printouts were not properly authenticated by the proponent.

The authentication process for the Plaintiff's electronic business records evidence was largely non-existent in this case. Bank of America's argument as to standing largely relied upon unauthenticated screen shots from the document custodian's computer system indicating some sort of activity by a "review team." Da119-121. These documents were introduced as exhibits to the certifications and deposition testimony of Lester Juarez. Da119-121. However, when asked, neither Juarez nor Mitchell could provide details on the computer systems used to produce the documents they called "activity journals" and no other evidence as to the reliability of these systems was introduced.[11] Critically, Juarez testified that he in fact had no actual knowledge of what was actually in the Ukpe collateral file at that time.

[11] It is conceded that under Hahnemann, the Ukpes had the burden to provide evidence of untrustworthiness under the hearsay exception. However, the burden to establish that the record "is what its proponent claims" under cases like Vinhnee, supra, falls squarely on the party offering the evidence--the Plaintiff in this case, Bank of New York. N.J.R.E. 901; see also Ford, supra.

Similarly, the affidavit of Glen Mitchell, Vice President of the Bank of New York Mellon, was based on review of the business records of BNY Trust, a separate entity. Mr. Mitchell testified in his deposition that he did not know how the activity journal was created. Da1751. Mitchell could offer no knowledge of the integrity of the record, no knowledge of who made the record, when it was made or whether it had been altered. Despite this inability to authenticate the document, his testimony was used to assert that BNY had possession of the Ukpe file from October 27, 2005, until it was produced in this litigation. Da119-120.

These certifications simply regurgitated information contained on the screen shots, without properly establishing that those screen shots were accurate and trustworthy. The inherent flaw of these documents is that they consist of undated images of what appeared on a computer screen at a particular time. Da1703-1708. They do not indicate whether the information was altered before it was taken, or whether the computer system would even permit such an alteration. The Ukpes actually requested information on the "meta-data" contained in these records, which would have shown when the data was inputted and whether it was modified. This evidence would have gone to the heart of the reliability issue. However, the trial court did not permit further discovery, and thereby denied the Ukpes the

ability to gather factual evidence about the authenticity of these records. Da10.

Instead, the trial court seemed to suggest that the Plaintiff's evidence of possession was inherently trustworthy, asking rhetorically, "[I]s there any rational reason to believe that the collateral files were *not* delivered to BKNY or its representative, or that the Ukpe note was not held in the Ukpe collateral file?" Da79. The answer, unfortunately, is yes. In light of BAC and BACHLS's systemic failures to properly handle mortgage notes, infra at Points I and II, and the questionable documents submitted in this foreclosure action, there was ample reason to question the authenticity of the Plaintiff's evidence -- especially when submitted in a motion for summary judgment.

CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment in favor of the Plaintiff should be reversed.

Respectfully submitted,

Linda E. Fisher 12/14/12

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