

STATE OF FLORIDA
DISTRICT COURT OF APPEAL
FOURTH DISTRICT

GARY GLARUM and ANITA
GLARUM,

CASE NO.: 4D10-1372
L.T.CASENO.:
502008CA028930XXXXXMB

Appellants,

vs.

LASALLE BANK NATIONAL
ASSOCIATION, etc., et al.,

Appellee.

APPELLEE'S ANSWER BRIEF

Appeal from the Circuit Court of the
Fifteenth Judicial Circuit,
Palm Beach County, Florida

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PREFACE

Appellants, Gary Glarum and Anita Glarum, shall be referred to hereafter as “Defendants” or “Appellants.”

Appellee, Lasalle Bank National Association, as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-FF1, shall be referred to hereafter as “Plaintiff,” “Appellee,” or Lasalle Bank.

For the purposes of Appellee’s Answer Brief, “R.” refers to the record on appeal and “Supp.R.” refers to the supplemental record on appeal approved by this Court on July 15, 2010. “I.B.” refers to the Appellants' Initial Brief.

STATEMENT OF THE FACTS

The Appellee is mindful of the provisions of rule 9.210, Florida Rules of Appellate Procedure, and writes only to supplement the facts provided by the Appellants in their Initial Brief.

This proceeding involves a mortgage foreclosure action filed in September, 2008. Defendants Gary and Anita Glarum filed an answer on October 27, 2008, an amended answer on February 20, 2009, and a second amended answer January 25, 2010. Although additional affirmative defenses were filed¹, throughout the course of the proceeding the Glarums candidly admitted several key facts including:

- 1) they executed “a” mortgage;
- 2) “a” promissory note was executed and delivered by them;
- 3) they defaulted on their mortgage and note; and,
- 4) the mortgage and note attached to the complaint “appear to be copies of the note and mortgage.” R.Vol.Three p.434.

¹ The five affirmative defenses pled by the Glarums include: 1) reasonableness of attorney’s fees; 2) the authenticity of the note; 3) standing; 4) inability to enforce Mortgage against Anita Glarum; and, 5) inability to enforce Mortgage against Anita Glarum. R.Vol.Three pp.434-35. The trial court considered (Supp.R.p.590) and rejected each of these affirmative defenses before entering summary judgment. See, First Affirmative Defense Supp.R.p.596; Second Affirmative Defense Supp.R.p.597-598; Third Affirmative Defense Supp.R.p.601; Fourth Affirmative Defenses Supp.R.p.607; and, Fifth Affirmative Defense Supp.R.p.607.

In their Second Amended Answer and Affirmative Defenses, Appellants reserved their “evidentiary rights should a dispute arise regarding their contents.”

R.Vol.Three p.434.

In response to the affirmative defenses, Appellees filed the original note, the original mortgage, R.Vol.One pp. 48-73, and an original assignment, R.Vol.One pp. 100-103, all of which had been duly recorded in the public records.

STANDARD OF REVIEW

The instant case contains issues both as to fact and law, and as such, warrants a mixed standard of review. When reviewing a trial court's order of summary final judgment, the appropriate standard of review on appeal is *de novo*. *Everett Painting Co. v. Padula & Wadsworth Construction*, 856 So.2d. 1059, 1061 (Fla. 4th DCA 2003). However, the lower court's ultimate factual determinations may not be disturbed on appeal unless shown to be unsupported by competent and substantial evidence or to constitute an abuse of discretion. *King 205, LLC v. Dick Pittman Roof Services, Inc.*, 31 So.3d 242 (Fla. 5th DCA 2010). In this appeal the Appellant only challenges the lower court's factual findings and whether the court had substantial competent evidence to grant summary judgment in favor of the Appellee.

The Florida Supreme Court set forth the test used in determining whether the trial court abused its discretion in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), when it found that:

In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness. *Id.* at 1203 (emphasis added).

“Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.” *Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942).

“It is well established that the trial judge, sitting as the trier of fact, has the responsibility of determining the weight, credibility and sufficiency of the evidence, and that these findings come to this court on appeal clothed with a presumption of correctness and will not be disturbed unless it is shown that there is a total lack of substantial evidence to support those conclusions.” *See La Rossa v. Glynn*, 302 So. 2d 467 (Fla. 3d DCA 1974).

As set forth above, when reviewing evidence presented to the trial court at summary final judgment the standard of review on appeal is abuse of discretion.

The standard of review of an order imposing sanctions is also abuse of discretion. *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983).

SUMMARY OF THE ARGUMENT

Throughout this case the Appellee has persistently advanced the argument that it is entitled to enforce the Promissory Note in this case because it is in possession of the note. The Appellants have never attempted to refute this argument choosing instead to offer up a fraud defense disguised as a prolix array of evidentiary requirements that, in their view, should be satisfied before anyone could establish the right to enforce a debt. Thus, the majority of issues on appeal center not on the terms of the mortgage or note, or whether there was a default, but rather on the evidentiary issue of whether the mortgage documents submitted to the court – which even the Glarums admit look like their mortgage and loan – are in fact originals, and whether the plaintiff owns them and has standing to proceed. R.Vol.Three pp.437-438.

Central to the Appellants' argument on appeal is the assertion that if a note has been transferred at least once, it is *necessary* to have an expert witness review it to prove authenticity. Supp.R.p.583 ln. 16-24. In short, appellants argue that it may look like a duck, and quack like a duck, but the court would need a zoologist to testify that it is in fact a duck before it could make that finding. The rule which the Appellants sought to have the trial court adopt is at odds with existing Florida Law.

Like so many other states, Florida has adopted the Uniform Commercial Code (“UCC”), in part, to simplify, clarify, and modernize the law governing commercial transactions and to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. See §671.102(1), Fla. Stat. (2009). The UCC must be interpreted in a manner that promotes its underlying purpose and policies. *Id.* The Appellants’ proffered requirements are not obligatory under the Florida Evidence Code and would defeat the purpose of the UCC. The lower court’s order granting summary judgment should be affirmed.

ARGUMENT AND AUTHORITIES

I. SUMMARY JUDGMENT WAS PROPER BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT REMAINING AS TO THE AUTHENTICITY, OWNERSHIP, OR STANDING TO ENFORCE THE PROMISSORY NOTE IN THIS CASE.

A. Because the note was indorsed in blank, the assignment was unnecessary; however, even if it were required it is self-authenticating.

The Appellants argue the lower court's order should be reversed because the assignment of the Note in this case was not properly authenticated. First, an assignment is not necessary in this case because the Note in question is a bearer note, and second, even if an assignment were required the assignment in this case is self-authenticating under the Florida Evidence Code because it is related to commercial paper, notarized, and properly recorded in the Palm Beach County, Florida's public records.

1. *An assignment in this case is unnecessary because the Note in question is a bearer note and the Appellee is in possession of the Note.*

Under the UCC the holder of an instrument is the party entitled to enforce it. §673.3011(1), Fla. Stat. (2009). This Court has recently held that the possession of the original note, indorsed in blank, is sufficient to establish the person in possession is the holder of the note with the right to enforce its terms. *Riggs v. Aurora Loan Services, LLC*, 36 So.2d 932 (Fla. 4th DCA 2010). The UCC defines "Holder" as "[t]he person in possession of a negotiable instrument that is payable

either to bearer or to an identified person that is the person in possession.” §671.201(21)(a), Fla. Stat. (2009). Because the Note in question here is a bearer note possession alone is all that is required to prove a valid transfer.²

The UCC clearly states the requirements for the transfer of a bearer note:

If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement.” When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.³

§673.2051(2), Fla. Stat. (2009).

The Note in this case was originally made payable to First Franklin a Division of Nat. City Bank of In. (“Original Holder”). R.Vol.One p.50. Subsequently, the Original Holder transferred their interests in the Note to First Franklin Financial Corporation (“Second Holder”) via special indorsement. *Id.* The Second Holder then indorsed the Note in blank. *Id.* Under the UCC a Note that has been transferred by special indorsement can subsequently be converted to a bearer note and transferred accordingly. See §673.1091(3), Fla. Stat. (2009). Once the Note became a bearer note the person in possession of the Note was entitled to enforce it.

² The Appellants have challenged the authenticity of the Note as well and that argument will be addressed below.

³ A special indorsement is made when the note is made payable to an identified person. See §673.2051(1).

Pursuant to the UCC, once the Note was transferred the only thing that could interfere with the Appellee's right to enforce the Note would be proof of fraud or illegality affecting the Note. The legislature has made this clear by adopting the following language:

Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

§673.2031(2), Fla. Stat. (2009).

In Florida, all averments to fraud must be pled with particularity. Rule 1.120(b), Fla.R.Civ.P. (2009). In this case the Appellants amended their answer twice (R.Vol.Three pp.566-567) and never alleged fraud as an affirmative defense. See Supp.R.pp.553-555. They have, however, thrown it around the court room quite a bit. The clearest example of this is the following exchange between Judge Sasser and counsel for the Appellate at the May 4, 2009, hearing on the Defendant's Motion to Compel:

THE COURT: So you say you got me—you've given me a copy of the assignment that they have. Okey.

MR. ICE: No. **They manufactured one that was not in the Trust.** We're looking for substance in the Trust. There's only the documents in the Trust prove that this loan is actually owned by the plaintiff.

R.Vol.One p.139.

The Appellants have raised the specter of fraud disguised as an attack upon the authenticity of the Appellee's documentation. However, this form of covert pleading does not comply with the requirements of Rule 1.120. See *Thompson v. the Bank of New York*, 862 So.2d 768, 769 (Fla. 4th DCA 2003); *Cedars Healthcare Group, Ltd., v. Metha, M.D.*, 16 So.3d 914, 917 (Fla. 3d DCA 2009) and *Elster v. Alexander*, 75 F.R.D. 458 (D.C. Ga. 1977) (stating "the intent of federal Rule 9(b) is to eliminate the type of fraud action in which all the facts are learned after the complaint is filed through discovery")⁴. As the Appellants have not pled fraud it has been waived. An assignment of the Note is unnecessary and the Appellee is in possession of the Note consummating a valid transfer under the UCC. The order granting summary judgment should be affirmed.

2. *The Assignment is self-authenticating.*

The Appellants have argued that the Assignment in this case was not authenticated and the lower court could not properly review it as evidence to support summary judgment in this matter. The assignment in this case is self-authenticating Pursuant to both sections 90.902(8) and (10), Florida Statutes

⁴ Rule 9(b), Fed.R.Civ.P. is similar to Rule 1.120(b) and reads as follows:

(b) Fraud or Mistake; Condition of Mind.

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(2009). The assignment was authenticated and the lower court's order should be affirmed.

Section 90.902(8), Florida Statutes (2009), provides that “[c]ommercial papers and signatures thereon and documents relating to them, to the extent provided in the Uniform Commercial Code” are self-authenticating. While the Assignment is not commercial paper it is related to the Note and is self-authenticating pursuant to 90.902(8).

By analogy, the Assignment in the case is similar to the assumption agreements analyzed by the Eleventh Circuit Court of Appeals in *United States v. Varner*, 13 F.3d 1503 (11th Cir. 1994). In holding that assumption agreements were self authenticating as documents related to commercial paper the *Varner* court stated:

While the assumption agreements may not qualify as “instruments” under Article 3, they are self-authenticating pursuant to Fed.R.Evid. 902(9) as “documents relating thereto.” The language of Fed.R.Evid. 902(9) encompasses a broader range of self-authenticating documents than does Article 3 of the UCC.⁵

Varner at 1510. (internal citations omitted).

⁵ Rule 902(9), Federal Rules of Evidence and Rule 90.902(8), Florida Rules of Evidence are practically identical. Rule 902(9) provides: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to: Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

The assumption agreements discussed in *Varner* assumed a debt of another party and the assignment in the case at bar obtained the right to enforce a debt. This obvious distinction aside, they are related to their respective notes in a very similar fashion. They are both used to convey an interest associate directly with the note. The Assignment in this case is related to the Note in the same manner that the assumption agreements were related to the note in *Verner*. Therefore, the Assignment is a document related to the Note and self-authenticating under 90.902(8). The Judge did not abuse her discretion in considering the assignment. The summary judgment order should be affirmed.

In addition, Section 90.902(10), Florida Statutes (2009), provides that “[a]ny document properly certified under the law of the jurisdiction where the certification is made is self-authenticating.” The Assignment in this case was properly notarized pursuant to the laws of Florida. See R.Vol.One p.103. The Appellants’ argue that notarization of the assignment is insufficient because the person that executed the assignment did not swear to its content. I.B. p.19. To support this proposition the Appellant cites *McGibney v. Smith*, 511 So.2d 1083 (Fla. 5th DCA 1987). In this instance the Appellant actually argues for the authentication of the document in question.

It is obvious that there is a difference between satisfying a statutory requirement by swearing in an affidavit that the facts alleged are true and

authenticating the execution of an agreement between two parties. *McGibney* involved a motion to disqualify the Judge in that case. *Id.* That procedure is controlled by Section 38.10, Florida Statutes (2009), which requires an affidavit stating the facts and the reasons why the petitioner believes that bias or prejudice exists. In *McGibney* the mere acknowledgment before the notary the petition had been executed was the fatal flaw. In order to satisfy the requirements of 38.10 the petitioner needed to swear that each and every fact alleged was true. See *Hammond v. Eastmoore*, 513 So. 2d 770 (Fla. 5th DCA). The case at bar is inapposite. The acknowledgment that the Assignment was executed is precisely what needs to be established in this case.

When the Assignment was notarized by the Second Holder it confirmed the document had been executed and the transaction was complete. The Assignment is self-authenticating pursuant to either 90.902(8) or (10), and the Appellants' so called "red flags" (see I.B. p.42) do not warrant an opposite result.

B. The Signatures on the Assignment were authenticated.

The Appellants posit that the signature on the Assignment was not authenticated nor shown to have been authorized by the payee. The Appellants claim they put an issue of genuine fact in controversy because they made a specific denial as to the "authenticity of any signatures, and the authority of any persons making them, on the documents related to the promissory note and mortgage,

including, but not limited to, any assignment of mortgage.” I.B. pp.23-24, (citing Supp.R.p.554). Most importantly, this is a general allegation that without additional evidence cannot overcome the fact that the signatures are authentic. Judge Sasser had sufficient facts to support her ruling that the Appellants’ “second affirmative defense would not preclude entry of summary judgment.” Supp.R.pp.597-598. The Appellants’ general claim regarding the signatures authentication does not create a genuine issue of material fact and the judgment should be affirmed.

It is well settled in Florida that general allegations in the form of affirmative defenses are legally insufficient. *Southern Waste v. J & A Transfer*, 879 So.2d 86, 87 (Fla. 4th DCA 2004). The Appellants affirmative defenses suffer from this fatal flaw; however, it is particularly apparent in the Appellants’ second affirmative defense. If one examines the argument advanced by Appellants’ counsel at the summary judgment hearing below it becomes crystal clear that the Appellants would like to use this case to go on an investigation for fraud without going through the trouble of pleading it. Appellants’ following argument at the summary judgment hearing regarding the second affirmative defense illustrates this fact:

[G]iven that high-quality copies are plentiful in foreclosure cases, it is impossible to state with the naked eye if this is authentic. And similar, just to add, we also dispute the authenticity of the signatures on the assignments of the mortgage with the same issue.

Supp.R.p.597.

First, if this argument could carry the day there would never be another document entered into evidence as an original again without an expert opinion. This is an absurd standard that is not embodied in the Florida Evidence Code. Second, the only evidence offered to support this opinion was stricken from the record. See R.Vol.Four p.671. Simply stated, the Appellants want to go on the aforementioned fishing expedition for fraud which is not proper in Florida courts.

With respect to the Assignment in this case the Appellants have tried to argue that the signature cannot be authenticated because the person signing the Note worked for both the Original Holder and the Second Holder. The Appellants also argue that her signature changed if one compares it between two documents. I.B.p.20. First, the difference here is that in one instance the individual signed her full name and in the other she signed using her initials. Some people do that and it is not abuse of discretion for the Judge to find it would not preclude summary judgment. Second, people can work for different companies. The fact that people hold different positions in various subsidiaries and/or a parent company is not evidence of a lack of authority or extrinsic evidence that would overcome a document's authenticity. These are just more "red flags" to the Appellants which do not create a genuine issue of material fact that would prevent the entry of summary judgment. Not allowing the case to proceed to trial is not an abuse of discretion.

The Appellants seem to believe that merely stating an affirmative defense constitutes the magic words which will open the court's doors for their investigation. At the summary judgment hearing the Appellants stated "the factual determination doesn't need to be made today. The issue that we've raised is, the burden of proof is now on them to show this is why it is authentic. Where is the evidence?" Supp.R.p.p.597.

The Appellee does not need the Assignment to prevail in this case. Therefore, "the evidence" is the Note. However, additional evidence is the certified and recorded original Assignment that was filed with the lower court. The Appellants' theories regarding document technology and the stricken affidavit they presented are not enough to place authenticity of the assignment in question.

The Appellants are also under the mistaken belief that invoking the provisions of section 673.3081(1), Florida Statutes (2009), constitutes the magic words that will create a genuine issue of material fact and prevent summary judgment. This incorrect proposition is more appropriately refuted in the Appellee's response regarding the authenticity of the Note below. The lower court correctly found that this sort of generalized argument is not sufficient to preclude summary judgment and the lower court's Summary Final Judgment for Foreclosure should be affirmed.

C. The original Note and Mortgage were self-authenticating.

The Note and Mortgage in this case are properly authenticated and the lower court's order granting summary judgment should be affirmed. The Appellants misstate the law regarding the pleading requirements under Section 673.3081(1), Florida Statutes (2009).

1. The Note is self-authenticating.

The Appellants have argued the case at bar is distinguishable from this Court's decision in *Riggs* because they have challenged the authenticity of the signatures on the Note along with the authority of those persons to sign the Note. I.B.p.24. Yet again, the Appellants are under the mistaken perception that merely stating they are "challenging" the documents constitutes the magic words which create a genuine issue of material fact preventing summary judgment. The distinction between *Riggs* and the case at bar is that the issue of authenticity and authority was not even raised, therefore, this Court did not need to review the proof requirements under the UCC to reach its decision. In *Riggs* this Court held "[t]hat the borrower did not contest that the note at issue was the one he executed in the underlying mortgage transaction." *Riggs* at p.933. The Court did not state what would happen if that challenge had occurred. The *Riggs* Court did not authorize the magic words defense and it is not authorized under the UCC.

Pursuant to section 90.902(8), Florida Statutes (2009), “[c]ommercial papers and signatures thereon and documents relating to them, [are self-authenticating] to the extent provided for in Uniform Commercial Code”. Authentication is addressed in the UCC in section 673.3081(1), Florida Statutes (2009). The Appellant is correct in one respect: the Bank will argue it is entitled to a presumption of authenticity under the UCC. See, I.B. at p.26.

Section 673.3081(1) states in pertinent part:

In an action with respect to an instrument, **the authenticity of, and authority to make, each signature on the instrument is admitted** unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, **but the signature is presumed to be authentic and authorized** unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. (emphasis added).

This section clearly states the legislature’s intent that the authority as well as the authenticity of each signature on an instrument is presumed unless the action involves liability against the signer. A complete review of UCC Comment to section 3-308 leaves no doubt as to the legislature’s intent regarding the necessary proof to challenge authenticity and the authority to sign an instrument. The Comment provides the following definition of “presumed” within the context of the statute:

“Presumed” is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid.⁶

UCC Comment §3-308.

The Appellants belief that merely stating they contest the signatures on the Note is enough to raise a genuine issue of material fact (see I.B. p.23) is clearly in error. But the commentators do not stop there. They describe the level of proof that must be demonstrated by the Appellants before the Bank is required to present additional evidence. The comment reads as follows:

The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor.

Id.

It cannot seriously be argued that what the Appellants have identified as evidence (see I.B.pp.26-27) was enough to allow Judge Sasser to make a finding in their favor. First, as demonstrated more fully below in section E, the servicer's duties

⁶ Section 671.21, Florida Statutes (2009), defines “presumption” as follows:

Whenever this code creates a “presumption” with respect to a fact or provides that a fact is “presumed,” the trier of fact must find the existence of the fact presumed unless evidence is introduced which supports a finding of its nonexistence.

outlined in the Appellee's Pooling and Servicing Agreement are for the benefit of the members of the trust. If the Trustee chooses not to enforce one of those provisions it is not evidence of impropriety or a lack of authentication of documentation; second, as discussed above, the signature on the assignment was not questionable; and lastly, even if there were assignments between subsidiary companies of the same lender that is not evidence the Note in this case is not genuine.

The Appellants assure the court that if they were allowed to pursue additional discovery they "could have adduced evidence that the note never reached the trust (and thus, that the the [sic] BANK was never in possession of the original note)." I.B.p27. In effect, the Appellants are arguing that they have enough smoke to allow them to go searching for the fire. As discussed above, a fishing expedition for fraud is certainly not a permissible use of the Florida court system. In addition, by admitting they need more evidence the Appellants, have in effect, admitted that there was not enough evidence to allow Judge Sasser to rule in their favor at the summary judgment hearing. As such summary judgment was warranted and the lower court's order should be affirmed.

The Appellants argue that the lower court improperly weighed the evidence at the summary judgment hearing. See I.B. p27. To support this position the Appellants cite to this Court's decision in *In re estate of Short v. Heisig*, 620 So.2d

1106 (Fla. 4th DCA 1993). In *Short* this Court held that the Appellant had demonstrated a genuine issue of material fact and then stated that “[s]ummary judgment hearings are **ordinarily** not for weighing evidence.” *Id.* (emphasis added). The *Short* Court did not review what those genuine issues of material fact were. The Appellants seem to argue that the Court cannot look at the evidence at all. *Short* does not stand for this proposition. The lower court must review the evidence to determine if there is a “genuine” issue of material fact. Rule 1.510(c), Fla.R.Civ.P. (2009).

In this instance the Appellants are confusing the issue of materiality with the issue genuineness. The United States Supreme Court reviewed summary judgment requirements in the seminal case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In *Anderson*, the Supreme Court described the proper trial court inquiry as to materiality in the following manner:

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.

Anderson at 248.

Once the materiality of the alleged facts are established the inquiry shifts to their genuineness. The *Anderson* Court provided the following description of the proper inquiry into the issue of genuineness:

More important for present purposes, summary judgment will not lie if the dispute about material fact is “genuine,”

that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

Id.

While authentication of the documents presented by the Appellee can certainly qualify as a material issue, when one reviews the evidence offered to support that issue it becomes apparent that it is not genuine. As stated above, the evidence identified by the Appellants in opposition to summary judgment in this case would not allow a jury to make a finding in their favor. Therefore, the issues presented by the Appellants in opposition to summary judgment were not genuine. Under both the UCC and Rule 1.510, Judge Sasser correctly ruled that the Appellants' authentication arguments "would not preclude entry of summary judgment." Supp.R.p.631. The Judge did not abuse her discretion and the order granting summary judgment should be affirmed.

2. *The Mortgage is self-authenticating.*

The Appellants did not plead an affirmative defense challenging the authenticity of the Mortgage in this action and even if they had the Mortgage is self-authenticating in the same manner as the Assignment discussed above.

First of all, the Appellants have never stated that the Mortgage is not authentic. Their second affirmative defense reads as follows:

Defendants specifically deny the authenticity of any document presented as the original promissory note, as well as any endorsements contained thereon and any allonges attached thereto and the authority of any

signatures purporting to transfer the note by way of endorsement, allonge or assignment. Defendant also specifically deny the authenticity of any signatures, and the authority of any person or persons making them, on documents related to the promissory note and mortgage, including, but not limited to, any assignment of mortgage.

Supp.R.p.554.

This defense does not speak of the authenticity of the Mortgage in this case, rather, it is directed to the Note and any documents **related** to the note and mortgage. (emphasis added). Nevertheless, the Appellants have argued the Mortgage was not authenticated. I.B. p.24. This is a bizarre argument because the Appellants are the only party the executed the Mortgage. If it is not the document they executed they should feel free to say so. As the lower court stated:

...when you sign a note and mortgage, they give you a copy. You put it in your file. You know what you signed. You can look at the note and mortgage that's been filed in this case and you say, gee, this note and mortgage filed in this case has a 10 percent interest rate on it and I only have 6 percent on mine. This is not rocket science....

R.Vol.One pp.148-149.

The Mortgage is self-authenticating as stated in the argument regarding the Assignment above. However, the Mortgage bears an even closer relation to the Note. For example, because the two documents were executed by the same parties as part of a single transaction regarding the same subject the doctrine of mutual construction

applies. See 37 Fla.Jur.2d Mortgages, Etc., §94.⁷ There is no doubt the Mortgage is closely related to the Note and it is self-authenticating under 90.902(8), and the judgment should be affirmed.

D. There is no genuine issue of material fact regarding the servicer's authority to act for the Plaintiff in this case.

The fact that the servicing agent changed during the life of the Appellants' loan does not raise a genuine issue of material fact that would prevent summary judgment. This issue is neither material nor genuine.

First of all, Home Loan Servicing ("HLS") is not the lender or plaintiff in this case. HLS is merely the entity retained by the lender to service the loan. This argument is without merit. Who the lender chooses as the servicer of the loan is between the lender and the servicer, and use of a subservicer "which may be an affiliate" is specifically authorized by the trust. Supp.R.p.86. Nothing in the Appellant's argument can be read to articulate how the identity of the servicer or subservicer could be used to interfere with the Appellee's right to enforce the Note. Summary judgment should be affirmed.

E. There is no genuine issue of material fact regarding the Trust's standing to bring this action.

The Appellants make a two pronged attack in an effort to demonstrate that

⁷ The doctrine of mutual construction, by which two documents executed by the same parties as part of a single transaction regarding the same subject matter must be read and construed together, applies to mortgages and the notes they secure. *Id.*

LaSalle Bank lacked standing to bring this action. To support their argument, the Glarums argue 1) The Bank's inability to produce essential trust documents was evidence that it did not have standing, and 2) That the execution date of the assignment was after the closing date of the trust. As demonstrated below, both arguments were rejected by the trial court, Supp.R.p.601, and its ruling should be affirmed on appeal.

The concept of standing is broader than actual ownership of a beneficial interest in a note. Florida's real party in interest rule, Rule 1.210(a), Florida Rules of Civil Procedure, is broad, providing:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existences of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. **When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment** which shall include such supporting particulars as are peculiarly within the pleader's knowledge. (emphasis added).

The Glarum's affirmative defense, which raised the standing issue, simply pled:

THIRD AFFIRMATIVE DEFENSE

Plaintiff is not the owner and holder of the promissory note and/or Plaintiff is not the mortgagee. Therefore, Plaintiff is not the real party in interest and lacks standing to prosecute this foreclosure action.

R.Vol.Three p.487.

This defense, which was pled after the case had been pending 16 months, after discovery, and only 45 days before the summary judgment hearing made no allegations regarding the lack of "essential" trust documents or the date of the assignment raised by Appellants. The court correctly found the lack of specificity in the affirmative defense did not allow for the arguments to be raised for the first time at the summary judgment hearing, and that the failure to raise them was fatal. Supp.R.p.601.

Standing, which is the affirmative defense that was raised, is a broad concept and this court has held that the party in possession of the note has standing to bring the action. *Riggs*, 36 So.2d at 933.⁸ Here, the filing of originals, affidavits of mortgagee, assignments, and evidence of the corporate entities relationship all substantiated LaSalle's ownership of note and mortgage in foreclosure proceedings. *Stanley v. Wells Fargo Bank*, 937 So. 2d 708 (Fla. 5th DCA 2006). The ruling should be affirmed.

⁸ The Fifth District has recently issued a similar opinion, in the case of *Taylor v. Deutsche Bank Nat. Trust Co., Etc.* - So.3d -, 2010 WL 3056612, 35 Fla. L. Weekly D1770 (Fla. 5th DCA Aug. 6, 2010) Fla. L. Wkly (Fla. 5th DCA Aug. 2010). That decision is currently subject to a motion for rehearing.

Appellant's nebulous arguments regarding trust certificates and dates of assignments do not warrant an opposite conclusion. First, in response to a request for production, Plaintiff provided to Defendants their loan specific information from Exhibit B of the Pooling and Servicing Agreement. Supp.R.pp.308-336. Exhibit B lists the schedule of loans included within the agreement. Supp.R.p.49 (definition of "Mortgage Loan Schedule"); p.168. Additionally, the agreement specifically contemplates the deletion and replacement of mortgages in the trust. R.Vol.p.49.

Further, there is an issue as to whether the trust certificate was properly requested, as the trial court found that the Appellant's request for production was not specific enough to identify which documents were being sought. R.Vol. One p.141. In any event, whether a certificate was issued or even required⁹ cannot create a genuine issue of material fact as the borrowers are not third party beneficiaries to the contract and cannot enforce its terms. See, *Cook v. Bank One, National Association*, 457 F.2d 561 (6th Cir. 2006)(debtors are not parties to the Trust Agreement, and lack standing to enforce it); *Thompson v. Commercial Union Insurance Co. of N.Y.*, 250 So. 2d 259, 262 (Fla. 1971); *Jenne v. Church & Tower*,

⁹The provision of the trust cited by Appellants referencing a request for a release is "payment in full of any mortgage." The same section later goes on to prescribe the procedure "[i]f the servicer at any time seeks to initiate a foreclosure proceeding" which has no reference to a request for release. Cf., Supp.R.p.101 section 3.13 at paragraph 1 to Supp.R.p.102 section 3.13 to 4.

Inc., 814 So. 2d 522, 524 (Fla. 4th DCA 2002); *Carretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1031 (Fla. 4th DCA 1994).

As the holder of the original note, LaSalle Bank had standing to enforce it and the judgment should be affirmed.

F. There is no genuine issue of material fact as to whether Anita Glarum is a mortgagor.

The Appellants' next argue that summary judgment is not proper because it is unclear as to whether Anita Glarum is a mortgagor. The Appellants dedicate their fourth and fifth affirmative defenses to this topic. R.Vol.Three pp.437-438. This argument simply cannot create a genuine issue of material fact.

First, the Appellants argued in this fourth affirmative defense that because the mortgage listed Ms. Glarum as Glarum Anita instead of Anita Glarum the mortgage cannot be enforced against her. R.Vol.Three p.437. This argument conveniently overlooks the fact that Ms. Glarum signed and adopted the mortgage by affixing her signature to it. R.Vol.One p.68. In addition, both Appellants admitted that a mortgage was executed regarding the subject property and that the attachments to the Complaint appeared to be **the note and mortgage**. R.Vol.Three p.434. (emphasis added). Given these facts the Appellants cannot sustain an argument that Ms. Glarum is not included on the Mortgage.

Second, there is no factual conflict within the Mortgage as argued by the Appellants. I.B. at p.34. This argument follows the Appellants fifth affirmative

defense. R.Vol.Three pp437-438. The Mortgage states the “Borrower is the mortgagor under this Security Instrument. R.Vol.One p.58. “Borrower” is defined as “GARY GLARUM JOINED BY HIS WIFE GLARUM ANITA.” *Id.* Although the words Non-Borrower appear under Ms. Glarum’s signature on the Mortgage this cannot be used to demonstrate conflict within the document itself. A plain common sense reading of the mortgage indicates that Ms. Glarum did not borrow any money regarding this property, but for the purposes of this Mortgage the term “Borrower” is Gary Glarum **joined** by his non-borrower wife Anita Glarum. *Id.* (emphasis added). The lower court’s ruling reflects this logical reading of the mortgage.

Judge Sasser went out of her way to ensure that Ms. Glarum was not liable on the Note. “I’ll determine that the only defendant liable on the Note is the husband, not the wife.” Supp.R.p.605. Ms. Glarum’s status included a right to redemption which made her an indispensable party to the proceedings below and she was properly included on the Complaint and her interests was properly foreclosed. See, *Sundhoff v. Federal National Mortgage Association*, 942 So.2d 425 (Fla. 5th DCA 2006). The Final Judgment for Foreclosure is an in rem judgment. R.Vol.Four p.675. The Mortgage does not contain conflicts and there is no genuine issue of material fact. This is why the lower court determined “that the

fourth and fifth affirmative defenses do not preclude entry of summary judgment.”
Supp.R.p.607. The Summary Final Judgment for Foreclosure should be affirmed.

G. The Appellee’s Affidavit of Indebtedness is not defective.

The Appellants have advanced the argument that the Affidavit of indebtedness by Mr. Ralph Orsini is defective because the Note was not attached to the Affidavit and Mr. Orsini did not have personal knowledge of the debt and amounts owed. To support this argument, the appellants rely on *Ferris v. Nichols*, 245 So.2d 660 (Fla. 4th DCA 1971). The Appellants’ reading of *Ferris* stretches the Court’s rationale beyond the Court’s holding and Mr. Orsini had more than sufficient knowledge of the Appellants’ debt and amounts owed under the Note.

1. *The Affidavit is not defective because documents were not attached to it.*

Rule 1.510(e), Florida Rules of Civil Procedure, requires “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Clearly the rule envisions a scenario wherein the documents discussed are not attached directly to the affidavit. Further, the rule allows the affidavit to be supplemented. *Id.* The affidavit discusses the debt owed under the Note. The Note was identified by the affiant and it was attached to the Complaint and the original filed with the lower court within days of the filing date of the affidavit. The lower court did not find any defect here that would prevent summary judgment. Therefore, the lower court’s order should be affirmed.

Further, The Appellee complied with the requirements as set out in *Ferris*.

In *Ferris* the Court stated the following:

'* * * Sworn or certified copies of all papers or parts thereof referred to in an affidavit Shall be attached thereto or served therewith.' (Emphasis added. See Rule 1.510(e), F.R.C.P.) Because of the failure of the plaintiff to comply with this rule neither affidavit sufficiently identifies the note referred to therein as the note on which the action is based.

Ferris at 662.

The Court explained that the original note and mortgage were never produced in that case and concluded by stating that "it appears that the plaintiff would have been entitled to a summary judgment had he produced the note and sufficiently identified it by affidavit. *Id.* Clearly the fatal flaw in *Ferris* was that the Note and Mortgage were never produced nor identified. In this case copies of the Note and Mortgage were attached to the Complaint (R.Vol.One pp.1-30), and the Original Note and Mortgage was subsequently filed on December 4, 2008. (R.Vol.One pp.48-73). The Note and Mortgage were identified by Mr. Orsini in paragraph 2. of his Affidavit. R.Vol.One p.81. A review of *Ferris* demonstrates the affiant in that case offered no such identification. The affidavit in question in this case complies with this Court's holding in *Ferris* and summary judgment should be affirmed.

2. *The Affidavit was based upon personal knowledge.*

The Affidavit of Indebtedness was not defective as the Affiant had personal knowledge of the Note and the Appellants' debt connected to it. The affidavit is not based upon impermissible hearsay.

The Affiant works for HLS and reviewed the payment history on the Note in question. This review consisted of data compilations from both HLS and another loan servicer that had serviced the loan. At his deposition the Affiant testified that the information is kept in a database called Security Connections, Inc. ("SCI") Supp.R.p.250-251. The Affiant indicated that he uses this system in his job for determinations of unpaid debt which he performs five or six times per week. Supp.R.pp.244-246. The Affiant further testified as to the security of the system by stating that no one has the ability to change the data once it is inputted into the system. Supp.R.p.274. While the Affiant did not know the acronyms for each individual screen within the SCI system, he described the data contained on the screens in detail. Supp.R.pp.273-276. In addition, the Affiant testified as to the various calculations he personally performs to verify each item associated with the debt is correct.

First, individuals working for corporations are permitted to review data compilations in computer data bases to acquire personal knowledge of a matter. *Nordyne v. Florida Mobile Home Supply, Inc.*, 652 So. 2d 1283, 1287-88 (Fla. 1st DCA 1993). Second, The Affiant's statements are not merely conclusory. This

affiant's description of the personal calculations he made regarding the line by line entries put to rest any notion that he did not have personal knowledge of the debt in question.

The cases cited by the Appellant are distinguishable from the case at bar. In *Zoda v. Hedden*, 596 So. 2d 1125 (Fla. 2d DCA 1992), the Affiant based his personal knowledge solely upon his review of public records. *Id.* at 1226. Based upon this fact the court held that a review of public records only cannot form the basis of an affiant's personal knowledge. *Id.* The instant case is clearly distinguishable because the affiant here is not reviewing public records. Rather, he is reviewing data compilations of business records as they are routinely kept for his use in his job. These records include the Note itself and the payment history on the Note. He personally works with the data to formulate independent calculations and then provides his testimony. This is sufficient to acquire personal knowledge of the Note and the payment history on the Note. The affiant in *Zoda* took none of these measures, therefore, *Zoda* is not controlling.

In *Thompson v. Citizens National Bank of Leesburg, Florida*, 433 So. 2d 32 (Fla. 5th DCA 1983), the affiant did not even state that the affidavit was based upon his personal knowledge. Therefore, the court was left no choice but to hold that the affidavit was provided upon information and belief. This clearly does not comply with Rule 1.510(e) and this factual scenario is distinguishable from the

case under review. Here the Affiant stated that the Affidavit was made with personal knowledge in paragraph 1, and then described specifically what that personal knowledge was in paragraph 4. R.Vol.One p.81-82. He then gave a line by line breakdown of the sums of money owed under the debt. *Id.* at 82-83. He then testified at deposition regarding where the information was kept and how many times a week he works with it in addition to the calculations he personally made to reach his conclusions regarding the debt under the Note. None of these facts were present in *Thompson* and that case cannot be used to illustrate defects in the Affidavit of Indebtedness in this case.

Lastly, the Appellants argue that the Affiant was not well enough acquainted with the business practices associated with the financial records used by his company in order to testify about them. I.B. p.39. The Appellant further argues that the records are not within his custody as a regular part of his work. *Id.* As stated above, the documents the Affiant works with regarding determinations of debt are maintained in a computer system. Supp.R. pp.250-251. He testified that he must work with these documents to perform the same function at least five or six times per week. Supp.R. pp.244. He gave a detail account of the data contained on the screens that he reviews and how he works with the data to reach his conclusions regarding the debt. Supp.R. pp.273-276. He is obviously well acquainted with the system where the data is stored. In addition, his constant

review of the data in his work requires it to be in his custody quit regularly. The Affiant has personal knowledge of the Appellants' debt and the monies owed as a result. The testimony of the Affiant is not hearsay and was made based upon personal knowledge.

H. The trial court did not impermissibly shift the burden to the Appellants to prove their affirmative defenses.

The Appellants' affirmative defenses are not appropriately pled under Rule 1.110(d), Florida Rule of Civil Procedure (2009). These affirmative defenses are merely evidentiary challenges clothed as affirmative defenses. They are not avoidances, or otherwise authorized by the Rule 1.110(d). *BPS Guard Servs., Inc. v. Gulf Power Co.*, 488 So. 2d 638 (Fla. 1st DCA 1986).

Further, applying the standard used by the *Southern Waste* court discussed above, the Appellants general assertions are legally insufficient to raise an affirmative defense. *See, Southern Waste* at 87. Affidavits that contain conclusions of law without supporting facts are insufficient and will not prevent summary judgment. *Pino v. Lopez*, 361 So.2d 192, 193 (Fla. 3d DCA 1978). Lastly, as also discussed above, under Rule 1.510, these defenses must be tested for their materiality and genuineness.

The Appellants' belief that affirmative defenses always contain the magic words to open the door to trial presupposes that the court cannot consider the evidence at summary judgment thereby ignoring the court's duty to determine the

genuineness of the issues raised. Judge Sasser specifically stated that she must determine if an affirmative defense is valid and sufficient in order to go to trial. Supp.R. pp585. The Judge ruled on each of the affirmative defenses in this matter one by one at the summary judgment hearing to determine their legal sufficiency and whether they presented a genuine issue of material fact. See R.Vol.Four pp.673-680. The Judge granted summary judgment because they are legally insufficient and/or do not present a genuine issue of material fact as they have no evidentiary support. The Judge's order should be affirmed.

II. THE TRIAL COURT DID NOT COMMIT ERROR BY DENYING DISCOVERY IN THIS CASE.

The trial court did not deny discovery to the Appellants regarding the ownership of the Note. The Appellants abandoned their efforts to acquire the Trustee's certification.

The Appellants complain that they were denied discovery of request number 3. In DEFENDANT'S REQUEST FOR PRODUCTION REGARDING TRUST DOCUMENTATION AND MORTGAGE OWNERSHIP filed on November 21, 2008, which reads as follows:

3. The trustee's certification that all documents required under Section 2.01 were executed and received. 2.02(a).
Supp.R.p.352.

The Appellee objected to these discovery requests, primarily based upon relevance, and a hearing regarding a Motion to Compel filed by the Appellants (R.Vol.One

pp.84-98) took place on May 4, 2009. (R.Vol.One pp.135-143). Judge Sasser ruled on each of the objections to the requests one at a time. The first request the Appellants made was for the "Mortgage File" as defined by the Pooling and Servicing Agreement ("PSA"). Supp.R.p.352. The Judge ruled that the Appellants had not defined what the Pooling and Servicing Agreement ("PSA") is, so she could not tell if the request was relevant. R.Vol.One p.141. When ruling on this issue the Judge told the Appellant all they needed to do was to define the PSA and resubmit the request "and then [she would] be able to tell whether it's going to be relevant or non relevant or what was going on." Supp.R p.142. Subsequent to this ruling the Judge made the same ruling regarding any request connected to the PSA, including the complained of request number 3, as seen in the following exchange between the Judge and Appellants counsel:

THE COURT: Okay, Number 3, Trustee certifications.

MR. ICE: Again, this is something that's required by the PSA....

...
THE COURT: ...But if they have given you everything they have got, I'm not, you know – and I don't know what this trust is, what it provides. You seem to know, but it's not something I'm privy to. So I'm going to deny it as to 3.

R.Vol.One p.144-145.

We know that the Appellants made additional requests because we have the PSA in the record on appeal (see Supp.R.pp.1-228) along with a lot of other

documentation associated with the PSA. However, there is no record of the Appellants having made any additional requests for the trustee's certification contained in their original request to produce.

The bottom line here is either it does not exist or they abandoned their efforts to acquire it. Either way, it cannot be said the trial court committed error by denying discovery to the Appellants regarding the ownership of the Note.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING SANCTIONS AGAINST ICE LEGAL, P.A.

The standard of appellate review for discovery sanctions is abuse of discretion. *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983). Therefore, review is not governed by whether the appellate court "might have imposed a greater or lesser sanction, but whether reasonable persons could differ as to the propriety of the sanction imposed by the trial court." *First Healthcare Corporation v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA 1999) (citing *Mercer*). Thus the trial court will be affirmed with the proper findings and a record of bad faith. Although findings are required, the findings may be in the order or appear on the face of the record. *Patsy v. Patsy*, 666 So. 2d 1045 (Fla. 4th DCA 1996)(upholding court award of sanctions based upon the court's inherent authority after court made finding at hearing).

Here, the transcript of the pleadings sets forth the specific factual basis for the trial court's imposition of the sanction at issue. At the heart of the ruling was the Appellant's filing of an affidavit of a purported expert witness, Rita M. Lord,

("the Lord Affidavit"). Supp.R.pp.343-344. The Lord Affidavit opines that it is impossible to ever determine whether a document is in fact an original without the use of an expert witness, and asserted: "based upon my experiences and expertise, it is my expert opinion that it is extremely difficult to determine if the document is an original or high-quality digital color reproduction..." Supp.R.pp.343-344. (emphasis added).

The trial court found that the use of the term "the document" was misleading as it indicated Ms. Lord had reviewed the records in this file when in fact she had not. Supp.R.p.587. Further, upon inquiry, defense counsel informed the court that the affidavit had been filed in at least ten other cases. Supp.R.p. 578 ln. 25- 579 ln. 9.

Judge Sasser clearly stated what she found to be the sanctionable conduct:

THE COURT: My question – my concern, Mr. Zacks, is to have a purported expert witness file affidavits in ten different cases with ten different scenarios and ten different lawsuits; some in Broward County, some in Palm Beach county, that have nothing to do with this particular case. I'm concerned about essentially, I hate to say a bastard expert, but we have that upstairs in a medial case where the same expert gives – it's a sought-out opinion, and you can't just shout that affidavit around without even reviewing the file in this case. How is that proper?

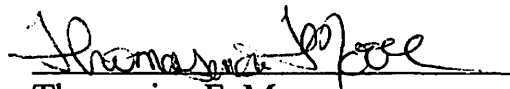
Supp.R.p. 580-581.

The trial court reiterated this point not once, but four separate times throughout the summary judgment hearing,¹⁰ before ultimately awarding sanctions. Supp.R.p. 588. It was within the court's discretion to impose sanctions for use of a "sought-out" opinion which misled the reader into thinking it was based upon a review of the actual case record. The court should be affirmed.

CONCLUSION

For the foregoing reasons the lower court's Order granting Final Judgment of Foreclosure via Summary Judgment in this matter should be affirmed.

Respectfully Submitted,



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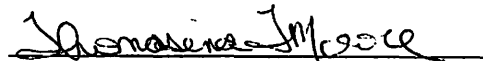
¹⁰(Supp.R.p. 584;585;586;587).

CERTIFICATE OF SERVICE

I certify that a copy of this Answer Brief was served by U.S. Mail this 31st

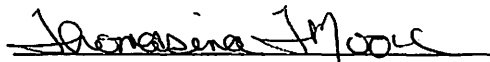
day of August 2010 as follows:

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CERTIFICATE OF COMPLIANCE

I certify that this computer generated brief is composed in 14-point Times New Roman font and complies with the font requirements of Fla. R. App. P. 9.100(l) and 9.210(a)(2).


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