IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. JACKSON and
THOMAS JACKSON,

Appellants/Petitioners,

vs. **Sup. Ct. Case No.: SC18-357**

HOUSEHOLD FINANCE CORP III;
HOUSEHOLD FINANCE CORPORATION III;
THE DRAIN TEAM, INC.; NORTH STAR
CAPITAL ACQUISITION LLC AS ASSIGNEE
OF WELLS FARGO; and CAPITAL ONE
BANK (USA) NA., A CORPORATION,

Appellees/Respondents.
_____/

ON PETITION FOR REVIEW FROM A DECISION OF THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA CASE NO. 2D15-2038

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PREFACE

The Appellants/Petitioners, Cynthia L. Jackson and Thomas Jackson, file this their Initial Brief on the Merits which seeks review of the Second District Court of Appeal's decision in *Jackson v. Household Finance Corp. III*, 236 So. 3d 1170 (Fla. 2d DCA 2018).

The Record on Appeal shall be referred to by the symbol (R.) with the corresponding page number and where appropriate paragraph (para.) or line (ll.) number.

The Appellants/Petitioners shall be referred to as the "Jacksons". The Appellee, Household Finance Corp. III, shall be referred to as "Household".

STATEMENT OF THE CASE AND FACTS

The Jacksons seek review of a decision of the Second District Court of Appeal ("Second District") that affirmed a final judgment of foreclosure entered in favor of Household. *Jackson*, 236 So. 3d at 1170. During the trial, Household called one witness and relied solely upon him to establish the foundation to admit records under the business records exception. The trial court admitted the records over the Jacksons' objections that the witness was unqualified and failed to establish a proper foundation. On appeal, the Second District held that the witness' testimony was

sufficient to satisfy Household's initial burden to lay the predicate for the business records exception and shifted the burden to the Jacksons to prove that the records were untrustworthy and inadmissible.

I. The Loan.

It is undisputed that the Jacksons took out a residential loan to purchase a home on April 25, 2006. (R. 111-117) The loan was memorialized by a note and mortgage (the "Loan Documents"). (R. 111-117, 121-126) The Loan Documents were part of the business records Household relied on at trial. (*Id.*) The Loan Documents identify Household Finance Corporation III as the lender, not Household Finance Corp. III, the Plaintiff below and Respondent herein. (R. 111, 121)

II. The First Action.

On March 18, 2009, Household Finance Corporation III filed a Mortgage Foreclosure Complaint against the Jacksons alleging that it "is now the holder of the Mortgage Note and Mortgage and/or is entitled to enforce the Mortgage Note and Mortgage." (R. 102-105) The case was voluntarily dismissed on June 17, 2009 (the "First Action"). (R. 106-107)

III. The Second Action.

On June 23, 2014, Household, not Household Finance Corporation III, the originating lender, filed a Verified Complaint to Foreclose Mortgage against the

Jacksons (the "Second Action"). (R. 2-7) Household attached the Loan Documents to the complaint identifying Household Finance Corporation III as the lender. (R. 11-23) In contrast to the Loan Documents, Household alleged in the complaint that it was the originating lender. (R. 3, para. 4) Household further alleged that it was the holder of the note as of the date of filing the complaint. (*Id.*) While Household alleged that it was the originating lender, it also named Household Finance Corporation III as a defendant who "may claim some right, title or interest in the property. . . ." (R. 4, para. 11(b)) There were no allegations regarding the loan being transferred or assigned, nor was an assignment or allonge ever filed reflecting a transfer of the loan. The second action proceeded to trial and is the action from which this appeal stems.

IV. The Trial.

At trial, Household sought to admit the following records into evidence under the business records exception as Composite Exhibit 1: (a) a "merger announcement" stating that HSBC was to acquire Household International, Inc. (R. 118-120); (b) the note given to Household Finance Corporation, III (R. 111-117); (c) the mortgage entered into with Household Finance Corporation III (R. 121-126); (d) an internal payment history created by Household (R. 131-140); (e) snapshots of the HSBC servicing system (R. 144-154); (f) breach letters signed by Household

Finance Corp. III (R. 155-164); and (g) a screenshot reflecting the certified mailing number and date the breach letters were sent (R. 165). Exhibit 1(g) does not reflect whose system is reflected in the screenshot. (*Id.*)

Household called one witness at the trial, David Birsh, and relied upon him to establish the foundation for the business records exception. (R. 204-210) On direct examination, Mr. Birsh testified that he is the "Assistant Vice President of HSBC" (R. 204, ll. 7-9), that the records sought to be admitted are prepared and maintained by HSBC (R. 206, ll. 21-23), and that he has access to the records (R. 204, ll. 10-13). In contrast to Household's Verified Complaint, Mr. Birsh testified that Household Finance Corporation III was the originating lender. (R. 207, ll. 19-20) In contrast to the merger announcement, Mr. Birsh testified that HSBC purchased Household Finance Corporation III, not Household International, Inc. as reflected on Exhibit 1(a). (R. 207, ll. 1-3; R. 118-120) Finally, Mr. Birsh attempted to establish the foundation for the business records exception by testifying as follows:

> Q. So are you familiar with the business practice of HSBC?
>
> A. Yes, I am.
>
> Q. And is it the regular business practice of HSBC to record acts, transactions, payment, communications, escrow account activity disbursements, events and analysis with respect to the mortgage

loan account?

A. Yes, it is.

Q. And are these business practices prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts, transactions, payments, communications, escrow account activity, disbursements and analyses?

A. Yes.

Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events and analyses occur?

A. Yes.

. . . .

Q. And are these records maintained by HSBC in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?

A. Yes, they are[.]

Q. Did HSBC prepare and maintain these records with respect to the subject loan?

A. Yes.

(R. 205-206)

Following the direct examination of Mr. Birsh, Household moved to admit Composite Exhibit 1 into evidence. (R. 209, ll. 15-18) The Jacksons objected that the records were hearsay and that Mr. Birsh did not "lay a foundation upon which to testify as to these business records or to authenticate any of these documents based

on personal knowledge". (*Id.* at ll. 19-24)The trial court overruled the objection and admitted the records.

On cross-examination, Mr. Birsh testified as follows:

> Q. And you testified that you're familiar and I forget the exact language, with the recordkeeping procedures of HSBC. How did you gain that familiarity?
>
> A. Well, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become really familiar with a lot of the different questions. Like cross-training and what have you.

(R. 211-212, ll. 21-25, 1-3)

The trial court entered judgment in favor of Household. (R. 166-171) The Jacksons timely filed a notice of appeal to the Second District. (R. 176-183)

V. The Second District.

On appeal to the Second District, the Jacksons argued that the trial court erred in admitting Composite Exhibit 1 under the business records exception. *Jackson*, 236 So. 3d at 1170. Specifically, the Jacksons argued that Mr. Birsh's testimony did not lay the foundation for the business records exception because (1) it merely affirmed the statutory language of the business records exception, and (2) did not explain how Mr. Birsh acquired personal knowledge of HSBC's record keeping system or otherwise demonstrate his qualification to lay the predicate for admission

of the records. *Id.* at 1173-1174.

The Second District affirmed the trial court, holding:

> [T]he testimony of HSBC's Assistant Vice President David Birsh was sufficient to satisfy Household's initial burden to lay the predicate for the business records exception. Once that burden was met, the Jacksons did not show that Birsh lacked the requisite knowledge to testify as the records custodian. Thus, they failed to meet their burden of proving that the records were untrustworthy and inadmissible.

Id. at 1175. In so holding, the Second District certified that its decision conflicts with the Fourth District Court of Appeal's decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016), stating:

> Although the *Maslak* court determined that the employee merely recited the "magic words" of the business records exception, nothing in her testimony suggested she lacked personal knowledge of Chase's recordkeeping system. Thus, **in our view, the employee's direct testimony satisfied the proponent's initial burden of laying the foundation for the business records exception. At that point, the burden should have been shifted to the opposing party**, Maslak, to establish that the employee did not have personal knowledge of Chase's recordkeeping system or was otherwise unqualified to testify as records custodian. **Instead, the Fourth District concluded that the proponent needed to make further inquiries to lay a satisfactory predicate for the business records exception**.

Id. at 1174 (Emphasis supplied).

The Jacksons timely filed their Notice to Invoke Discretionary Jurisdiction to the Florida Supreme Court. This Court entered an Order accepting jurisdiction on July 6, 2018.

STANDARD OF REVIEW

The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence. *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014). "[W]hether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review." *Id.* (citing *Lucas v. State*, 67 So. 3d 332, 335 (Fla. 4th DCA 2011) (citations omitted)). Thus, "whether evidence is admissible in evidence under an exception to the hearsay rule is a question of law ... [subject to] the de novo standard of review." *Browne*, 132 So. 3d at 316 (quoting *Powell v. State*, 99 So. 3d 570, 573 (Fla. 1st DCA 2012)); *see also Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432 (Fla. 4th DCA 2015).

SUMMARY OF THE ARGUMENT

The trial court erroneously admitted records under the business records exception because its sole witness, David Birsh's, unqualified, "magic words" testimony failed to establish a proper foundation under the business records exception. Except as provided by statue, hearsay evidence is inadmissible. Fla. Stat. § 90.802. Evidence to be admitted under a hearsay exception must be offered in strict compliance with the requirements of the particular exception. *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008). Under § 90.803(6), the records proponent must, through a qualified witness, demonstrate each of the four foundational

requirements set forth therein. A qualified witness is one who has the necessary personal knowledge to testify as to how the record was made. *Pin-Pon*, 155 So. 3d at 441. The record proponent bears the burden to demonstrate that the witness is qualified.

Household's sole witness merely testified that he is an "Assistant Vice President with HSBC" and then responded "Yes" when the elements of the exception were recited, nearly verbatim, to him. In no way did the witness demonstrate that he possessed the requisite personal knowledge necessary to establish the foundation, moreover, in no way can recitation of the elements of the exception be considered sufficient to establish a foundation.

Nevertheless, the Second District held that Household established a proper foundation. In doing so the Second District certified that its decision conflicts with the Fourth District's decision in *Maslak*. In reality, the decision conflicts with numerous cases out of the First, Fourth, and Fifth Districts. The Second District's opinion essentially eliminates the express foundational burden set forth in § 90.803(6) in favor of assuming that any employee of the business maintaining the records sought to be admitted is qualified to testify and can establish a foundation by nodding their head along as the elements are recited. This cannot be the standard.

The Second District's opinion is also noteworthy in that it ignores the fact that

Household's witness worked for HSBC and yet no admissible evidence was presented explaining the relationship between HSBC and Household. Instead, the witness relied on an inadmissible document that he characterized as a "merger announcement" which on its face does not even mention Household. The document reflects the acquisition by HSBC and a different Household entity.

Finally, it is important to recognize the impact that the Second District's *Jackson* opinion will have. The evidence code applies to all cases, both civil and criminal. Without a doubt, parties will rely on Jackson not only to admit records under the business records exception, but also under all of the other hearsay exceptions. Jackson poses a very slippery slope. This Court should disapprove of Jackson and reaffirm what it means to establish a proper foundation under § 90.803(6).

ARGUMENT

I. Mr. Birsh's "Magic Words" Testimony Failed to Establish a Proper Foundation to Admit Records Under the Business Records Exception.

The trial court erroneously admitted the records contained in Composite Exhibit 1 because Mr. Birsh's unqualified, "magic words" testimony failed to establish a proper foundation under the business records exception.

A. The Business Records Exception Requires Strict Compliance.

"As a rule, hearsay evidence is considered not sufficiently reliable to be admissible, and its admission is predicated on a showing of reliability by reason of something other than the hearsay itself." *Hadden v. State*, 690 So. 2d 573 (Fla. 1997) (citing Fla. Stat. § 90.802). Except as provided by statute, hearsay evidence is inadmissible. Fla. Stat. § 90.802. This Court mandates that "[i]f evidence is to be admitted under a hearsay exception, it must be offered in strict compliance with the requirements of the particular exception." *Yisrael*, 993 So. 2d at 957.

Section 90.803(6), Fla. Stat. provides an exception to the hearsay rule for records of regularly conducted business activities. Section 90.803(6) allows admission of a business record where the proponent demonstrates that:

1. the record was made at or near the time of the event;
2. was made by or from information transmitted by a person with knowledge;
3. was kept in the ordinary course of a regularly conducted business activity; and
4. that it was a regular practice of that business to make such a record.

This may be done through the testimony of the "[r]ecords custodian **or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation.**" *Pin-Pon*, 155 So. 3d at 441

(citing *Yang v. Sebastian Lakes Condo. Ass'n*, 123 So. 3d 617, 621-22 (Fla. 4th DCA 2013)) (emphasis supplied); *see also Hadden*, 690 So. 2d at 956-957. Section 90.604, Florida Statutes, also requires a knowledgeable witness, stating, "[A] witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter".

As codified by §90.803(6), it is the evidentiary proponent's burden to demonstrate that the witness is qualified. *See Yisrael*, 993 So. 2d at 956. While the witness does not have to be the person who created the record, **the witness must be well enough acquainted with the activity to show each of the elements required to establish a proper foundation**. *See Pin-Pon*, 155 So. 3d at 441 (citing *Cayea v. Citi Mortgage, Inc.*, 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014)); *see also Lindsey v. Cadence Bank*, 135 So. 3d 1164, 1167 (Fla. 1st DCA 2014); *see also Lassonde v. State*, 112 So. 3d 660, 663 (Fla. 4th DCA 2013) (explaining that "a qualified person to introduce business records, other than the records custodian, must be a person who, by the very nature of that person's job responsibilities and training, knows and understands the records sought to be introduced."). Stated another way, the witness must demonstrate personal knowledge of how the data is produced and familiarity with the recordkeeping system, only then is the witness qualified to lay the foundation for the exception. *See Nationstar Mortgage, LLC v.*

Berdecia, 169 So. 3d 209, 213 (Fla. 5th DCA 2015) (citing *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819, 823 (Fla. 1st DCA 2014) (citing *Weisenberg v. Deutsche Bank Nat'l Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012)). If the proponent does not establish the necessary foundation, the document is not admissible under § 90.803(6). *See Caldwell v. State*, 137 So. 3d 590, 591-592 (Fla. 4th DCA 2014).

A witness's recitation of the elements of the exception or responding "yes" when they are read to him or her, i.e. "magic words" testimony, does not demonstrate personal knowledge about how the data is produced or familiarity with the recordkeeping system. Lest it not be forgotten, when a record proponent seeks to admit business records into evidence the proponent is asking the court to admit hearsay, i.e. evidence that is not sufficiently reliable for admission without some showing of reliability other than the document itself. Parroting the "magic words" does nothing to demonstrate reliability. Moreover it cannot be construed as "strict compliance" with the exception. There is nothing "strict" about merely reciting elements with no additional information.

B. <u>"Magic Words" Testimony From an Unqualified Witness Does Not Establish a Proper Foundation.</u>

Household's only witness at trial was David Birsh of HSBC. At no point did

Mr. Birsh provide any testimony demonstrating that he possessed the "necessary knowledge to testify as to how the record was made", as is required to establish the required foundation for the business records exception.

On direct, Mr. Birsh non-descriptly testified that he is the "**Assistant Vice President of HSBC**". (R. 204, ll. 7-9) He did not describe his job duties or his responsibilities. Thereafter, he simply responded "Yes" when the elements of the business records exception were recited, nearly verbatim, to him:

> Q. So are you familiar with the business practice of HSBC?
>
> A. Yes, I am.
>
> Q. And is it the regular business practice of HSBC to record acts, transactions, payment, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?
>
> A. Yes, it is.
>
> Q. And are these business practices prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts, transactions, payments, communications, escrow account activity, disbursements and analyses?
>
> A. Yes.
>
> Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events and analyses occur?
>
> A. Yes.

. . . .

Q. And are these records maintained by HSBC in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?

A. Yes, they are[.]

Q. Did HSBC prepare and maintain these records with respect to the subject loan?

A. Yes.

(R. 205-206)

When he was asked on cross examination how he became familiar with HSBC's practices and procedures Mr. Birsh once again non-descriptly testified:

> Well, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become really familiar with a lot of the different questions. Like cross-training and what have you.

(R. 211-212, ll. 21-25, 1-3)

Mr. Birsh's testimony is devoid of any substantive information demonstrating that he has knowledge about how the data is produced, familiarity with the record keeping system, or that his position is any in way related to the activities underlying these records such that he would be qualified to establish a proper foundation to admit them. The only information that the trial court could glean from Mr. Birsh's testimony is that he has worked in and managed "various departments" at HSBC for

25 years, is "familiar with a lot of different questions", and has received "cross-training and what have you". What departments has he worked in? What cross-training has he received? Do they have anything to do with the activities underlying the records in Composite Exhibit 1? Mr. Birsh's testimony can only be categorized as "magic words" testimony. Numerous courts have rejected such testimony. This Court should too.

For example, in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d at 656, the plaintiff's witness testified that she was a "home loan research officer" whose job entailed: (1) reviewing loans which are the subject of litigation and finding ways to resolve those loans; (2) testifying at trials, hearings, and depositions; and (3) appearing at mediations. *Id.* at 658. Regarding the business records, the witness testified:

- She is familiar with Chase's practices for loan servicing.
- She reviewed the loan's payment history, note, mortgage, servicing notes and records, and acquisition documents.
- All of the documents were created and kept in the regular course of business.

. . . .

- [t]he payment history was made at or near the time that payments, credits, or other transactions would have been received.
- The information was transmitted by persons with knowledge and was kept in the course of Chase's regularly conducted business.

Id.

The borrowers argued that "the witness was unqualified to lay the predicate for admission because the witness "simply 'regurgitated the magic words,' but was unfamiliar with, and had no knowledge of, how the records were created and kept." *Id.* at 658-59. The Fourth District agreed, holding:

> Wells Fargo correctly asserts that its witness testified as to each element of the business records exception for admission of the payment history. **However, "[t]he fact that a witness employed all the 'magic words' of the exception does not necessarily mean that the document is admissible as a business record".**

Id. at 659 (citation omitted) (emphasis supplied). More specifically, the Fourth District found that the witness "[f]ailed to testify about how payments were received and processed, Chase's procedures for inputting payment information, or the computer system Chase utilizes." *Id.* at 660.

Likewise, in *McNair v. Nationstar Mortgage, LLC*, 187 So. 3d 371 (Fla. 5th DCA 2016), the Fifth District Court of Appeal ("Fifth District") held that an affidavit from a "Vice President" containing the "magic words" did not establish the foundation for admission. *Id.* at 373 (correcting *McNair v. Nationstar Mortgage, LLC*, Case No.: 5D14-4140 (Fla. 5th DCA, Feb. 19, 2016) (noting that the affiant only stated he was employed as a "Vice President" and did not discuss his job responsibilities, leaving it unknown whether he possessed the requisite personal

knowledge and familiarity).

The recognition that "magic words" testimony from an unqualified witness is insufficient to establish a proper foundation is not limited to foreclosure cases. For example, in *Pin-Pon*, the insured introduced a composite exhibit using the testimony of an architect. 155 So. 3d at 440-441. The composite exhibit contained approximately twenty different records, only one of which was prepared by the architect's firm. *Id.* at 440. The architect testified that he received and maintained the other records in his file as a part of his business practice. *Id.* at 440-441. The trial court determined that the insured established a sufficient foundation and admitted the records over objection. *Id.*

The Fourth District reversed on appeal, holding that the use of the "magic words" does not mean that the record is admissible; the witness must have the necessary knowledge about how the record was made and be well enough acquainted with activity to lay the foundation. *Id.* at 441. The Fourth District noted that the insured failed to establish that the architect was either in charge of the activity constituting the usual business practice or was well enough acquainted with activity to give the testimony. *Id.* at 442.

Even in cases affirming the admission of records, the courts, including this Court, require more than mere "magic words" testimony. In *Twilegar v. State*, 42

So. 3d 177 (Fla. 2010), this Court concluded that the trial court erred in initially admitting certain Wal-Mart and NAPA receipts through the testimony of a sheriff's deputy without first requiring the State to establish a sufficient foundation. *Id.* at 199. The Court found that the error was cured, however, when employees from Wal-Mart and NAPA "[s]ubsequently testified concerning the business practices of their companies in this respect, **for each of those witnesses possessed sufficient knowledge to attest to such matters**." *Id.*

In *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010), the Fourth District held that the record proponent met its burden when its witness demonstrated knowledge of and familiarity with Verizon's business practices. *Id.* at 493. The witness specifically testified about his training in the record keeping procedures and how the records were made and stored. *Id.*

In *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d at 1164, the First District Court of Appeal ("First District") held that the trial court properly admitted records under an affidavit because the affiant demonstrated a sufficient understanding of the bank's computerized loan processing system. *Id.* at 1168. Specifically, the affiant averred that she was an assistant vice president with the bank and was responsible for handling delinquent loans. *Id.* at 1166. The affiant further averred that the records sought to be admitted were maintained in the bank's computer system that

was specifically designed for banking and to track and reconcile accounts. *Id.* Finally, the affiant averred that the system "automatically maintains account balances and each payment that is received from the [borrowers] or anyone else on their behalf is entered into the system by [the bank's] loan processing center employees." *Id.*

Similarly, in *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272, 1277 (Fla. 4th DCA 2016), the Fourth District held that the bank's witness demonstrated sufficient familiarity with the bank's practices and procedures in creating the payment history and notice of default and acceleration. Regarding the payment history, the witness testified: (1) that he was an assistant vice president of Bank of America and was trained and familiar with the bank's business practices regarding the receipt and posting of payments on loans and the payment histories generated; (2) that when Bank of America receives payments on the loans, the payments are posted on a servicing system called AS400 that contains basic loan information including the payment history, escrow information, and the property address; and (3) that after receiving a payment Bank of America makes disbursements for property taxes and insurance and those disbursements are documented on the AS400 system and reflected in the payment history. *Id.* at 1274. Regarding the notice of default and acceleration letter, the witness testified: (1) that each night Bank of America

transmitted the information for the loans in default to the servicer over a secure connection; (2) that the servicer used a Bank of America template to create the notice within two days of receiving the information; (3) that the servicer did not generate any of the information in the notice; (4) that a copy of the notice was kept in the ordinary course of regularly conducted business; (5) that it was the regular practice to make this record; and (6) that once the servicer generated the notice and mailed it a copy was kept in Bank of America's records along with a note of the mailing date. *Id.* at 1277.

The common thread running through each of these cases is that the witness or affiant through whom the records were sought to be admitted demonstrated substantive knowledge of, and familiarity with, the practices, procedures, and recordkeeping systems related to the creation of the record and was well acquainted enough with the activity to **show** each of the elements required to establish a proper foundation. None of those facts were demonstrated in this case and yet, the Second District held that Household met its burden. This conclusion was in error.

It is clear from *Jackson* that the Second District does not deem it necessary for the witness to demonstrate any knowledge or familiarity with the recordkeeping system or procedures to establish a foundation under the business records exception:

Although the *Maslak* court determined that the employee merely

> **recited the 'magic words' of the business records exception nothing in her testimony suggested she lacked personal knowledge of Chase's recordkeeping system. Thus, in our view, the employee's direct testimony satisfied the proponent's initial burden of laying the foundation for the business records exception.** At that point, the burden should have been shifted to the opposing party, Maslak, to establish that the employee did not have personal knowledge of Chase's recordkeeping system or was otherwise unqualified to testify as records custodian.

236 So. 3d at 1174 (emphasis supplied). Instead of requiring the record proponent to strictly comply with § 90.803(6) in accordance with *Yisrael*, the Second District assumes that the witness is qualified and places the entire burden on the objecting party to demonstrate that the witness is not qualified. Such an assumption directly contradicts the burdens of proof imposed by § 90.803(6). In this case, the Jacksons did not even have the opportunity to demonstrate that Mr. Birsh was not qualified. The trial court admitted the records immediately following Mr. Birsh's "magic words" direct testimony.

If this Court affirms *Jackson*, the result will be that a record proponent can establish a foundation simply by calling any employee of the business and having said employee intone the "magic words" on direct without any substantive showing of the elements of the business records exception. It will not matter if the employee has any knowledge of the business' recordkeeping practices or system or how the record was created. It will not matter if the record was even created by the business

where the employee worked so long as the record was present in the file. This is an invitation for robo-witness testimony. This cannot be the standard.

Indeed, such a "standard" ignores the purpose behind the requirements of § 90.803(6) – to require the records proponent to demonstrate reliability relating to records that are otherwise not sufficiently reliable to admit into evidence. Business records are hearsay. There is no automatic right to have them admitted into evidence.

As recognized by this Court, as well as the First, Fourth, and Fifth Districts, requiring the record proponent to demonstrate that the witness has the required knowledge and familiarity as a foundational burden ensures that the records being admitted are reliable and trustworthy. This is particularly important in foreclosure cases where there is a demonstrated history of fraudulent practices. *See Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626, n. 2 (Fla. 5th DCA 2012) (referencing the use of robo-signed affidavits executed by persons with no raining, expertise or file review in foreclosure cases); *see also In re Amendments To the Florida Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010), as modified on denial of reh'g (June 3, 2010) (requiring foreclosure plaintiffs to verify the truth of their foreclosure complaints to give trial courts greater authority to sanction plaintiffs who make false allegations); *see also Vidal v. Liquidation Props., Inc.*, 104

So. 3d 1274, 1277 (Fla. 4th DCA 2013) (regarding the falsification of assignments of mortgages to backdate an event to the lender's benefit).

C. Household Never Established a Foundation to Admit Its Own Records.

Even if this Court finds that Mr. Birsh was qualified, and established a proper foundation to admit the HSBC records, it should still find that he was not qualified, and did not establish, a proper foundation to admit the Household records. As set forth *supra*, the payment history and breach letters were created by Household, not HSBC. (R. 131-140, 155-164) It is not clear which business created the screenshot regarding the mailing of the breach letters. (R. 165)

Mr. Birsh's testimony was clear, he is an employee of HSBC. He never testified that he was employed by Household. He never put on any testimony, "magic words" or otherwise, demonstrating that he knew anything about Household's records keeping system or practices. Further, he never put on any testimony demonstrating that he had any knowledge about how Household's records were transferred to HSBC, if indeed they were. Mr. Birsh's "magic words" testimony was strictly limited to HSBC's record keeping practices:

Q. So are you familiar with the business practice of **HSBC**?

A. Yes, I am.

Q. And is it the regular business practice of **HSBC** to record acts,

transactions, payment, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?

A. Yes, it is.

Q. And are these business practices prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts, transactions, payments, communications, escrow account activity, disbursements and analyses?

A. Yes.

Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events and analyses occur?

A. Yes.

. . . .

Q. And are these records maintained by **HSBC** in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?

A. Yes, they are[.]

Q. Did **HSBC** prepare and maintain these records with respect to the subject loan?

A. Yes.

(R. 205-206)

Mr. Birsh's testimony does not establish a foundation to admit the Household records. Even if Household's records were incorporated into HSBC's record keeping system, their mere presence in the file does not cure the lack of any

foundational testimony relating to Household's records keeping system, practices, or procedures, or that Mr. Birsh was in any way qualified to provide such a foundation. Indeed, Mr. Birsh did not even acknowledge that some of the records were Household's records and not HSBC's. He treated them as if they were all HSBC records. On their face, they were not.

The mere presence of a document in a business' records "[d]oes not automatically bring the document within the business records exception to the hearsay rule". *See Pin-Pon*, 155 So. 3d at 442. Regardless of a document's origin, the records proponent bears the burden of establishing a foundation under § 90.803(6) for each document sought to be admitted. In his treatise on Florida evidence, Professor Charles Ehrhardt recognizes that "[n]ormally, a record custodian of one business can not [sic] lay the foundation for business records of a second business, even in possession of the first business, because the witness would not have personal knowledge of how the second business kept it [sic] records and could not testify to the foundation requirements." 1 Fla. Prac., Evidence § 803.6 (2018 ed.).

The District Courts have taken different points of view on the issue of what testimony is necessary to establish a foundation to admit records created by one business and stored in another business' files. The First District holds that proper

authentication requires that the witness demonstrate familiarity with the record-keeping system of the business that prepared the record and knowledge of how data was uploaded into the system. *Rigby v. Bank of New York Mellon*, 22 So. 3d 183, 186 (Fla. 1st DCA 2017). In so holding, the court noted that the "kept in the ordinary course of business" requirement of *Yisrael* requires proof of familiarity with the predecessor's record keeping practices. *Id.* at n. 1. The witness in *Rigby* had knowledge regarding the current servicer's records and systems, but not the prior servicer's. *Id.* at 186.

In contrast to the First District, the Fourth and Fifth District's impose a heightened burden on the records proponent seeking to admit the records of a predecessor. Recognizing that records created by a separate business "lack the hallmarks of reliability inherent in a business' self-generated records", the Fourth and Fifth District require that the records proponent not only demonstrate familiarity with the predecessor business' records keeping system and knowledge of how the data was uploaded into the system, but also that the current holder of the record verified the document's accuracy.

For example, in *Hidden Ridge Condo. Homeowners Assoc., Inc. v. Onewest Bank, N.A.*, 183 So. 3d 1266 (Fla. 5th DCA 2016), the Fifth District found that the record proponent's affidavit failed to establish a foundation because the affidavit

lacked necessary information. *Id.* at 1268. Specifically, "[t]he affidavit failed to 'demonstrate familiarity with the record-keeping system of [the] business that prepared the document[s] and knowledge of how the data was uploaded into the system" and "whether OneWest verified the documents' accuracy and compliance with industry standards." *Id.* at 1269-1270.

Similarly, in *JPMorgan Chase Bank v. Pierre*, 215 So. 3d 633 (Fla. 4th DCA 2017), the Fourth District held that the trial court properly admitted default letters where the witness demonstrated that she was sufficiently familiar with the then servicer's practices and procedures for generating and sending the default notice and that the current servicer verified the default letter's accuracy. *Id.* at 638.

In contrast, in *Deutsch Bank Nat. Trust Co. v. De Brito*, 235 So. 3d 972 (Fla. 3d DCA 2017), the Third District held that it was not necessary for the witness to be familiar with a third party vendor's recordkeeping practices and policies because the business records exception does not contain such a requirement. *Id.* at 975. Instead, the witness need only provide explanation of the "boarding process" to authenticate it. *Id.* at 975-976. The Jacksons respectfully submit that the Third District has misconstrued § 90.803(6). Contrary to the Third District's holding, § 90.803(6) requires that a proper foundation be established as to each record being admitted, which requires that the witness have personal knowledge of how the

record was created. There is no exception in the language of the statute. The Jackson's urge this Court to adopt the better reasoned opinions from the First, Fourth, and Fifth Districts.

Regardless of whether this Court adopts the position of the First District or the positions of the Fourth and Fifth District, it cannot be disputed that Household did not meet its burden to establish a foundation to admit the Household records under the business records exception. There was no testimony demonstrating any familiarity with Household's records keeping system or how the data was uploaded to HSBC (assuming that it was). Moreover, if this Court adopts the position taken by the Fourth and Fifth District then Household further failed to establish a proper foundation because there was no testimony that HSBC took any steps to verify the accuracy of the Household records.

The Jacksons submit that this Court should adopt the position of the Fourth and Fifth District and not only require that the record proponent demonstrate knowledge and familiarity with the records keeping practice and procedures of the records creator, but also that the information contained therein was verified. Records passed from one business to another are inherently less reliable then self-generated records. Requiring the records proponent to demonstrate that the records were verified for accuracy will in turn require the business relying on the

record of another business to in fact verify that the information and data therein is accurate and reliable.

It should further be noted that Mr. Birsh's treatment of Household and HSBC's records as being one and the same does not satisfy the foundational burden. Household and HSBC are separate entities, regardless of any merger or acquisition. It cannot be assumed, as Mr. Birsh apparently assumes, that their records are one and the same, particularly where there was no evidence presented reflecting that they share a recordkeeping system, follow the same policies and procedures, or in fact have any relation to one another.

Indeed, Household never presented any evidence demonstrating the relationship between Household and HSBC. The only evidence presented was Mr. Birsh's testimony that HSBC purchased Household. Mr. Birsh did not demonstrate that such testimony was based on his personal knowledge, instead, he relied on what he characterized as a "merger announcement" which was not properly admitted. Even if the "merger announcement" was properly admitted, it does not explain the relationship between HSBC and Household Finance Corp. III, the Plaintiff. On its face, the "merger announcement" states that HSBC was acquiring Household International, Inc. (R. 118-120) No evidence was presented reflecting the connection between Household International, Inc. and Plaintiff, Household Finance

Corp. III, let alone between HSBC and Household Finance Corp. III. Household and HSBC's records cannot be regarded as one and the same simply because an unqualified witness treats them as such based on unsupported testimony that the entities merged.

II. Admission of the Records Was not Harmless Error.

The trial court's error in admitting Composite Exhibit 1 was not harmless. It is well established that in order to demonstrate entitlement to foreclosure, the plaintiff must introduce the subject note and mortgage, an acceleration letter, and some evidence of the outstanding debt on the note. *See Kelsey v. SunTrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014). "Typically a foreclosure plaintiff proves the amount of indebtedness through the testimony of a competent witness who can authenticate the mortgagee's business records and confirm that they accurately reflect the amount owed on the mortgage. Thereafter, the business records are admitted into evidence." *Wolkoff v. American Home Mortgage Servicing, Inc.*, 153 So. 3d 280, 281 (Fla. 2d DCA 2014).

As set forth *supra*, Household failed to establish a proper foundation for the business records, including the default letters and the payment history. Without a proper foundation, the documents Household relied upon to establish the amount due on the note and acceleration of the debt were indisputably inadmissible hearsay.

Household did not present any other evidence that would satisfy these prima facie elements for its case. Accordingly, the judgment is not supported by admissible evidence. This Court should reverse for entry of an order of dismissal. *See Wolkoff,* 153 So. 3d at 283 ("When a party seeking monetary damages fails to establish an evidentiary basis for the damages ultimately awarded at trial, reverse for entry of an order of dismissal is warranted."); *see also Sanchez v. Suntrust Bank*, 179 So. 3d 538, 543 (Fla. 4th DCA 2015) ("Because this erroneously admitted evidence was necessary for appellee to prove not only its standing to foreclose, but also the outstanding balance on the loan and its compliance with the conditions precedent to foreclosure as outline in the mortgage, the final judgment must be reversed for entry of judgment in favor of appellants.").

III. The Issue as to Whether a Proper Foundation has Been Established is Not Limited to Foreclosure Cases.

Although this case arises out of a foreclosure, the evidentiary issues it presents are not limited to foreclosure cases. The Florida Evidence Code, including, § 90.803(6), applies to all civil and criminal proceedings. Fla. Stat. § 90.103(2). Moreover, unlike in some other cases, the Second District did not limit its opinion in this case to foreclosure cases. The *Jackson* decision can and will be used in **all** cases in which a party seeks to admit records under the business records

exception. Imagine the impact on proceedings if the only burden a records proponent had to satisfy to admit a record under the business records exception was to call **any** employee of the business where the record is currently stored and have said employee recite the "magic words". That is the standard set by *Jackson*.

The impact will not be limited solely to cases involving the business records exception. The Jackson standard can easily be applied to other hearsay exceptions. For example, in *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), a claims representative who was not a sales agent testified that he was familiar with Allstate's procedures relating to sales agents sending out policies. *Id.* at 593. The Fifth District held that the witness was not proven to be qualified to testify as to the usual business practices of the sales agents under § 90.803(7), stating:

> In order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony.

Id. Under *Jackson*, the Fifth District should have assumed the witness was qualified and that the foundation was established by simply stating that the missing record was of a kind which is regularly made.

Similarly, under *Jackson*, without demonstrating any personal knowledge, a witness would need only state that a declarant made a spontaneous statement while

perceiving the event or condition, or immediately thereafter and the statement would be admissible. *See* § 90.803(1), Fla. Stat. Likewise, without demonstrating any personal knowledge, a witness would need only state that a declarant made a statement relating to a startling event or condition while under the stress of excitement caused by the event or condition and the statement would be admissible. *See* § 90.803(2), Fla. Stat. Moreover, a witness would need only state that a record sets forth the activities of a public office or agency, or matters observed pursuant to duty imposed by law as to mattes which there was a duty to report and the record would be admissible. *See* § 90.803(8), Fla. Stat. The list of examples goes on. *Jackson* poses an extremely slippery slope.

This Court should disapprove of *Jackson* reaffirm what it means to "strictly comply" with § 90.803(6). The District Courts have taken divergent positions such that differing "rules" of evidence are being applied throughout the state and litigants are left to wonder what is required to establish a proper foundation for a hearsay exception. The Jacksons respectfully suggest that this Court should adopt the position taken by the First, Fourth, and Fifth Districts and require more than mere "magic words" testimony from an unqualified witness. Requiring the record proponent to present a qualified witness who provides substantive testimony as to each of the elements of the business records exception accomplishes the purpose

behind barring business records as hearsay until a proper showing of reliability has been demonstrated.

CONCLUSION

For all of the reasons set forth in this Brief, the Jacksons respectfully request this Honorable Court to disapprove of the Second District's *Jackson* opinion and reverse and remand for entry of an involuntary dismissal in their favor.

Dated: 8/15/2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 15th day of August, 2018, I electronically filed with the Clerk of the Court through Florida Court's E-filing Portal (www.myflcourtaccess.com) by using the E-Service Option, which will send a Notice of Electronic Filing, in compliance with the Florida Rules of Judicial Administration Rule 2.516 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief on the Merits uses Times New Roman 14-point font and complies with all font requirements of Fla. R. App. P. 9.210.

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