

IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. JACKSON, ET AL.,

Petitioners,

Case No.: SC18-357

DCA Case No.: 2D15-2038

L.T. Case No.: 2014-CA-3217

vs.

HOUSEHOLD FINANCE CORP III,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

In this answer brief, the Respondent, HOUSEHOLD FINANCE CORP III, will use the following shorthand references:

“Petitioners” or “Jacksons” will collectively refer to the Petitioners, Appellants before the Second DCA and Defendants in the trial court action, Cynthia L. Jackson and Thomas Jackson. If individually referenced, each Petitioner will be referred to by full name.

“Respondent” or “Household” will refer to the Respondent, Appellee before the Second DCA and Plaintiff in the trial court action, HOUSEHOLD FINANCE CORP III.

“(R. page number)” will refer to the Record on Appeal, Volume I.

“(T. page number; line number)” will refer to the Trial Transcript that is a part of the Record on Appeal, Volume II.

“(A.R. page number)” will refer to the Record from the Second District Court of Appeal.

“(I.B. page number)” will refer to the Petitioners’ Initial Brief on the Merits filed August 15, 2018.

STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction via certified conflict to address inconsistent opinions between *Jackson v. Household Finance Corp.*, 236 So. 3d 1170 (Fla. 2d DCA 2018) and *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016). The issue before this Court is whether or not Household's sole witness was qualified to lay the foundation for entry of Household's business records and whether the Trial Court abused its discretion in admitting such business records over the Petitioners' objection.

I. Trial Court Actions.

On April 25, 2006, Household loaned Cynthia L. Jackson \$146,841.79 as evidenced by a Loan Agreement ("Note") dated April 25, 2006, executed by Cynthia L. Jackson. (R. 11-17). To secure repayment of the Note, the Petitioners executed a Mortgage in the amount of \$146,841.79 in favor of Household. (R. 18-23). This is not disputed. (I.B. 2).

The Petitioners defaulted on the Mortgage and Note by failing to make their installment payment due October 1, 2008. (R. 103 ¶6). As a result of the default, on March 18, 2009, Household filed its first foreclosure action naming the Petitioners as defendants. (R. 102-108). In between 2008 and 2010, "[t]here was a workout that [Cynthia L. Jackson] entered into and payments were made and [the] loan was brought current..." (T. 214 ¶24-25; 215 ¶1). On June 22, 2009, as a

result of the workout, Household voluntarily dismissed its first foreclosure against the Petitioners without prejudice. (R. 106-108) (T. 215 ¶3-7).

On September 1, 2010, subsequent to the workout plan, the Petitioners again defaulted on the Mortgage and Note. (T. 215 ¶8-11). On June 23, 2014, as a result of the default, Household filed a second foreclosure action, a one-count, verified mortgage foreclosure complaint naming multiple defendants including the Petitioners. (R. 2-6).

Household's complaint alleges that the Petitioners had defaulted under the terms of the Note and Mortgage for the payment due September 1, 2010, and that all subsequent payments have not been made. (R. 2). Petitioners did not challenge the existence of a default in their affirmative defenses and did not challenge it at trial. (R. 60-63). Instead, Petitioners' answer and affirmative defenses raise four defenses: 1) Statute of Limitations; 2) Statute of Repose; 3) Failure to State a Cause of Action; and 4) Failure to comply with Fla. Stat. §559.715. (R. 59-63).

II. Non-Jury Trial and Testimony.

On December 31, 2014, the Trial Court entered an Order setting the case for non-jury trial to occur on February 3, 2015. (R. 49). On January 13, 2015, in preparation of trial, Household filed its witness and exhibit list. (R. 50-57). Within its exhibit list, amongst other documentation, Household disclosed its intent to rely upon, amongst other business records: "[c]opy of payment history for the

subject loan” and a “[c]opy of the default letter.” (R. 51). At no time did the Petitioners object to these exhibits or move to preclude them.

At the request of the Petitioners, the first trial setting was continued and trial was now to be held on April 7, 2015. (R. 88) (T. 199-221). At trial, Household called Mr. David Birsch as its witness. (T. 204). In addition to testifying in the affirmative to the four elements contained in the business records exception, Mr. Birsch testified that he was an Assistant Vice President of HSBC, had access to records of the subject loan that were maintained by HSBC, and was familiar with HSBC’s business practices and recordkeeping procedures. (T. 204-205, 211).

Further testimony from Mr. Birsch revealed that he reviewed the business records in HSBC’s system of record, he reviewed the file months before trial, and he matched the documents being admitted into evidence with those from HSBC’s records allowing him to confirm nothing was changed or altered. (T. 211).

As to Mr. Birsch’s employment, he testified that he had been employed with HSBC for twenty-five (25) years, worked in various departments, received cross-training, and managed various departments. (T. 211 ¶¶21-25, 212 ¶¶1-3). Through Mr. Birsch’s testimony, under Fla. Stat. §90.806(6), Household introduced the following business records of which the Trial Court admitted into evidence: 1) merger announcement indicating the acquisition of Household by HSBC (Exhibit A) (T. 207) (R. 118-120); 2) original note executed by Cynthia L. Jackson (Exhibit

B) (T. 207) (R. 114-117); mortgage executed by the Petitioners (Exhibit C) (T. 207) (R. 121-126); loan payment history (Exhibit D) (T. 208) (R. 131-140); snapshots of servicing system (Exhibit E) (T. 208-209) (R. 144-154); breach letter(s) sent to the Petitioners at the subject property address (Exhibit F) (T. 209-210) (R. 155-164); and screen shot of servicing system reflecting when the breach letter was sent to Cynthia L. Jackson (T. 209-210) (R. 165).

Upon Household's resting of its case, the Petitioners moved for an involuntary dismissal on two grounds. (T. 215, 219). First, the Petitioners moved for involuntary dismissal based on the statute of limitations and statute of repose. (T. 215-219). The Trial Court denied the Petitioners' motion. (T. 219 ¶7-14). In denying the Petitioners' first Motion for Involuntary Dismissal, the Court asked the Petitioners if they "have any evidence to present?" (T. 219 ¶13-14). The Petitioners responded "[n]o, [y]our [h]onor". (T. 219 ¶15).

At this point, the Petitioners moved for an involuntary dismissal again. (T. 219 ¶17-20). This time the Petitioners' motion was based on "the ineffectiveness of [Household's] notice of default and opportunity to cure" and that the letter "[violated] the Fair Debt Collection Practices Act and Florida's version." (T. 219 ¶15-20; 220 ¶1-5). The Trial Court denied the Petitioners' motion. (T. 220 ¶6-7).

The Petitioners did not appear on their own behalf at trial nor was any evidence introduced by the Petitioners at trial to rebut the evidence presented by Household. The Petitioners did not put on a case of their own. (T. 219-220).

On April 7, 2015, the Trial Court entered Uniform Final Judgment of Mortgage Foreclosure in favor of Household. (T. 220 ¶¶6-7) (R. 166-170).

III. Second District Court of Appeal.

On May 5, 2015, the Petitioners timely filed a Notice of Appeal of the Uniform Final Judgment of Mortgage Foreclosure. (R. 176-183). The Petitioners raised multiple issues on appeal. (A.R. 75-103). After briefing, on January 31, 2018, the Second District Court of Appeal filed an opinion affirming Household's judgment. (A.R. 181). In their opinion, the Second District only wrote to explain their reasoning in holding that the testimony at trial provided a proper foundation for the admission of business records into evidence. *Jackson v. Household Finance Corp. III*, 236 So. 3d 1170 (Fla. 2d DCA 2018). None of the other issues raised by Petitioners were addressed in the opinion. *Id.*

Addressing the issue, the Second District held as follows:

“[T]he testimony of HSBC's Assistance Vice President David Birsch was sufficient to satisfy Household's initial burden to lay the predicate for the business records exception. Once the burden was met, the Jacksons did not show that Birsch 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 1174.

In holding this way, the Second District certified conflict 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). *Id.* at 1171. This Court has accepted jurisdiction.

STANDARD OF REVIEW

“As a general rule, a trial court’s ruling concerning the admissibility of evidence will be sustained on review absent an abuse of discretion.” *Twilegar v. State*, 42 So. 3d 177, 194 (Fla. 2010) (citing *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998)).

Petitioners cite to *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) to support a de novo review. (I.B. 8). In *Browne*, it was not a question of exercising discretion in admitting evidence that fit within an established exception to the hearsay rule. *Browne*, 132 So. 3d at 312. Instead, here, where a witness demonstrates personal knowledge and testifies to each of the foundational elements of the business records exception, the trial court’s decision to admit the records is reviewed for an abuse of discretion. *Peugnero v. Bank of Am., N.A.*, 169 So. 3d 1198 (Fla. 4th DCA 2015). “The abuse of discretion standard applies in cases where the proponent of the evidence is seeking to have it come in under a hearsay exception.” *K.V. v. State*, 832 So. 2d 264, 265 (Fla. 4th DCA 2002) (citation omitted).

SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly held that the Trial Court did not abuse its discretion in finding that Mr. Birsch laid the proper foundation for admission of Household's business records. *Jackson* should be approved.

Household's witness, Mr. Birsch, a twenty-five year employee of HSBC and Assistant Vice President, laid the proper foundation for the admission of these records by testifying to each element pursuant to Section 90.803(6), Florida Statutes. Mr. Birsch answered these questions in the affirmative without any indication of unreliability or untrustworthiness, strictly complying with the statutory requirements. Abiding by this Court's standard, the Second District properly reasoned that the burden then shifted to the Petitioners to establish unreliability, untrustworthiness, or that Mr. Birsch was unqualified.

The Petitioners failed to do so because they did not introduce any contradictory evidence at the trial, did not put on a case of their own, and their cross-examination was favorable to the proponent, Household. As the Second District found, "Birsch's testimony on cross actually bolstered his testimony on direct by explaining that he gained knowledge from managing various department at HSBC for the past twenty-five (25) years." *Jackson*, 236 So. 3d at 1172.

The testimony elicited in *Maslak* was more uncertain than *Jackson*. The *Maslak* witness testified that she had never worked in the payment processing

department. She also testified that outside counsel had brought the payment history to court and she could not testify whether any changes had been made to those documents. The testimony was the opposite in *Jackson*. Although the *Maslak* testimony was more suspect than that of *Jackson*, the Court still found conflict exists between the decisions.

The conflict between *Jackson* and *Maslak* is in the implementation of the burden shifting process. *Maslak's* failure to adhere to this should warrant disapproval while *Jackson* should be approved. The Petitioners argue that the burden shifting standard used in *Jackson* will automatically open up the floodgates to improper business records. This is incorrect. There are still checks in place as the inquiry continues. By multiple avenues, the opponent *still* has the ability to cast doubt on the qualification of the witness or the documents themselves. It just so happens that in *Jackson*, the Petitioners did not do this by any means.

Mr. Birsch answered the four statutory questions in the affirmative. By virtue of his long tenure, Mr. Birsch testified that he had access to HSBC's business records, was knowledgeable of the records pertaining to the subject loan, had been employed in various departments, managed various departments, received cross-training and had gained familiarity with HSBC's record-keeping. Specifically, in regard to the subject loan, Mr. Birsch testified that he had first become familiar with this file months in advance of the trial. In becoming familiar

with this file, Mr. Birsch testified that “upon review of the documents [pertaining to this loan], I went into our imaging system and reviewed those documents and compared them to the ones that were printed today, and they have not been changed. They are the same that have been imaged in our system from the beginning.” (T. 211).

Despite this, the Petitioners still seek to manufacture a limitless standard for the admissibility of inherently reliable documents that would be *stricter* than what the statute requires. Mr. Birsch was a qualified witness and laid the proper foundation under the business records exception for entry of Household’s business records.

At the least, the witness testimony in *Maslak* satisfied the initial burden, regardless of the eventual ruling on admissibility. Because the burden shifting process was not implemented by the Fourth District, *Maslak* should be disapproved.

By not using the burden shifting process, the reasoning in *Maslak* was flawed. On the other hand, *Jackson* should be approved wherein the Second District followed this Court’s reasoning and guidance in *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994).

ARGUMENT

I. Household's Witness Provided the Necessary Testimony to Establish a Proper Foundation to Admit Records Under the Business Records Exception, Which is the Sole Issue Before this Court.

Petitioners raise a standing argument intermittently in their Initial Brief questioning the relationship between HSBC and Household, pointing to a difference between the use of “Corp.” and “Corporation” in Household’s name. This issue is not before the Court. This issue was not raised as an affirmative defense by the Petitioners. This issue was not raised at the non-jury trial by the Petitioners. This issue is not discussed in the Second District Court of Appeal’s opinion that certified conflict to this Court.

The Petitioners waived the right to raise any issue of standing a long time ago. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); See *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits). Accordingly, this argument should not be considered by this Court.

Instead, the sole question before this Court is whether Household’s witness, Mr. David Birsch, provided testimony that established a proper foundation for the entry of business records under section 90.803(6), Florida Statutes (2014). As a

qualified witness, Mr. Birsch's testimony did establish a proper foundation pursuant to the statute.

A. Strict Compliance is the Requirement.

Pursuant to section 90.803(6), Florida Statutes (2014), "records of regularly conducted business activity" are admissible as an exception to the rule barring the admission of hearsay testimony. § 90.803(6), Fla. Stat. (2014). "The business records exception to the hearsay rule provides for the admission of such records if the proponent provides proof of the following:

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

Jackson v. Household Finance Corp. III, 236 So. 3d 1170 (Fla. 2d DCA 2018) (citing *Channel v. Deutsche Bank Nat'l Trust Co.*, 173 So. 3d 1017 (Fla. 2d DCA 2015) (quoting *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015))).

The Petitioners argue "[t]his cannot be the standard." (I.B. 23). Pursuant to the statute, however, it is. See § 90.803(6), Fla. Stat. (2014). Rather than a *strict* compliance standard, what the Petitioners seek is a requisite *stricter* compliance. This stricter compliance standard sought by Petitioners offers no end in sight as to what would be required. This is why only strict compliance with the statute is

required. And the statute is clear: the proponent must provide proof of the four elements. Proof of the four elements can be done by live witness testimony, which is a form of evidence. “Evidence to prove personal knowledge may be given by the witness’s own testimony.” § 90.604, Fla. Stat. (2014).

Household offered exactly that through the live witness testimony of Mr. Birsch. In strict compliance with § 90.803(6), Mr. Birsch provided unrebutted testimony that he was familiar with the business practices of HSBC, it was the regular practice of HSBC to record acts, transactions, payments, communications, escrow account activity disbursements, events and analysis with respect to the subject mortgage, HSBC’s business records were prepared by persons with knowledge of or from information transmitted by persons with knowledge, all records were made at or near the time of the events occurring, and that the records were maintained in HSBC’s regular course of business. See *Jackson*, 236 So. 3d at 1172-73. As a qualified witness, in an executive capacity with HSBC, Mr. Birsch’s testimony was more than sufficient to strictly comply with § 90.803(6).

Again, the Petitioners seek a higher, *stricter* standard but fail to specify that standard. Tellingly, the Petitioners do not identify this *stricter* compliance standard – likely because the statute as written already provides a clear and definite meaning. When considering statutory interpretation, courts must first look to the actual language of the statute and “examine the statute’s plain meaning.” *Bank of*

N.Y. Mellon v. Glenville, 43 Fla. L. Weekly S333, Case No. SC17-954 (Fla. Sept. 6, 2018) (quoting *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 1931)). In addition, “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” *Id.*

As the Second District recently observed, a trial court has broad discretion in ruling on the admissibility of evidence, and a plethora of cases exist setting forth the evidentiary foundation necessary for the admission of business records into evidence. *Deutsche Bank Nat’l Trust Co. v. Sheward*, 245 So. 3d 890 (Fla. 2d DCA 2018). While interpreting the plain language of Section 90.803(6), Fla. Stat., this Court noted, “to secure admissibility under this exception, the proponent must show 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.” *Yisrael v. State*, 993 So.2d 952, 957 (Fla. 2008).

There is little dispute between the district courts regarding what the statute requires or whether there are ambiguities in the language of the statute; rather, the Petitioners’ brief relies on manufactured discrepancies among the districts as to the

qualifications of who can lay the foundation set forth by this Court, creating more than is already required. This is unnecessary. For example, the First District noted, “as a general rule, the authenticating witness need not be the person who actually prepared the business records,” and may be “[t]he records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation.” *Morrill v. State*, 184 So. 3d 541, 545 (Fla. 1st DCA 2015).

The Third District observed the same requirements and even held, “the exception does not contain a requirement that the foundational witness be in the employ of the business at the time of the making.” *Bank of Am., N.A. v. Delgado*, 166 So. 3d 857, 861 (Fla. 3d DCA 2015).

The Fourth District went even further and held, “the witness just need be well enough acquainted with the activity to provide testimony.”¹ *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432, 441 (Fla. 4th DCA 2015) (quoting *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014)). Indeed, the Petitioners’ own brief concedes that “any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the

¹ *Pin-Pon Corp.* and *Cayea* are both opinions from the Fourth District, the same DCA that released *Maslak*, which is the case that Petitioners rely on and was certified to be in conflict with *Jackson*.

necessary foundation” but then Petitioners seek an indefinite stricter standard. (I.B. 11).

The “plain language” of the statute must be given its plain and obvious meaning. *Lopez*, 233 So. 3d at 453. The “plain language” approach is only subject to qualification if a part of a statute is inconsistent with another, which the court will examine in arriving at the meaning of the language employed by the legislature. *Bank of N.Y. Mellon v. Glenville*, 43 Fla. L. Weekly S333, Case No. SC17-954 (Fla. Sept. 6, 2018). Judging by the plain language of the statute, Household strictly complied with § 90.803(6), and this Court should approve both the reasoning of the Second District and the result in *Jackson*.

B. Mr. Birsch was Qualified.

Considering the four elements of the statute were satisfied by Household, the next inquiry was whether or not Mr. Birsch was qualified to lay the foundation. “The witness may be any qualified person with knowledge of each of the elements.” *Jackson*, 236 So. 3d at 1172 (citing *Channel v. Deutsche Bank Nat’l Trust Co.*, 173 So. 3d 1017 (Fla. 2d DCA 2015)). There is no dispute as to this requirement but the parties do dispute whether Mr. Birsch was qualified.

In addition to the four required elements under the business records exception, Mr. Birsch provided important testimony regarding his employment with HSBC. Mr. Birsch’s testimony revealed he was currently employed by

HSBC in an executive capacity and was employed by them for twenty-five (25) years. During his lengthy tenure with HSBC, Mr. Birsch testified that he worked in various departments, managed various departments, and was cross-trained. Because of this Mr. Birsch was able to testify that he was familiar with the recordkeeping and procedures of HSBC. With his extensive background and familiarity, Mr. Birsch was well enough acquainted with HSBC's procedures and record-keeping system to provide testimony. Accordingly, Mr. Birsch was qualified to answer the four questions needed to meet the business records exception.

This standard of familiarity for a foreclosure witness to be qualified to lay the foundation has been applied throughout the different Florida District Courts of Appeal including the Fourth District. *CitiMortgage, Inc. v. Hoskinson*, 200 So. 3d 191, 192 (Fla. 5th DCA 2016) (holding that lender's witness was "well enough acquainted" with activity because she had "observed the entire process," even though she "had never worked in the customer service department"); *Diaz v. Wells Fargo Bank, N.A.*, 189 So.3d 279, 281-82 (Fla. 5th DCA 2016) (holding that "nineteen-year old" bank employee who oversaw individuals who testify at trial had requisite knowledge where she "testified as to her familiarity with the manner in which the Bank creates, stores, and maintains its business records"); *Peugero v. Bank of Am., N.A.*, 169 So. 3d 1198, 1201 (Fla. 4th DCA 2015) (bank employee

had requisite knowledge where she was “familiar with the Bank’s procedures for inputting payment information into the proper computer systems,” “even though she was not responsible for maintaining or updating the records”); *Cayea v. Citimortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014) (“the witness just need be well enough acquainted with the activity to provide testimony”).

In *Cayea*, when affirming the trial court’s admittance of the bank’s business records, the Fourth District held “the witness just need be well enough acquainted with the activity to provide testimony.” *Cayea*, 138 So. 3d at 1216. Here, the unrebutted testimony from Mr. Birsch reveals that he had worked for HSBC for twenty-five (25) years, currently worked in an execute capacity, managed numerous departments, underwent cross-training, and was familiar with HSBC’s record-keeping systems. This is more than sufficient to show he was well enough acquainted with HSBC’s record-keeping system to be qualified to testify to these records. If such testimony were not sufficient to lay the foundation for inherently reliable business records, what would? Just like in *Cayea*, where the Fourth District found no abuse of discretion by the trial court in admitting the bank’s business records, this Court should affirm the same standard that was employed by the Second District in *Jackson*. *Id.* In *Maslak*, had this standard been followed, the proponent would have at least been able to shift the burden to the opponent to establish the records were unreliable or untrustworthy. *Maslak v. Wells Fargo*

Bank, N.A., 190 So. 3d 656 (Fla. 4th DCA 2016). It was not. Therefore, this Court should disapprove of *Maslak*.

In *Peugero*, another decision from the Fourth District, the court affirmed the admission of Countrywide and Bank of America business records where “the witness testified that she was familiar with the record-keeping practices of the prior holder of the note, Countrywide” as well as Bank of America, N.A.’s practices. *Peugero*, 169 So.3d at 1201. “She testified that, based on her training, Countrywide and [Bank of America, N.A.] had identical procedures and record-keeping systems in place.” *Id.* To be qualified to lay the foundation for entry of Bank of America, N.A.’s records, namely the payment history, the witness only had to be “familiar with [Bank of America, N.A.’s] procedures for inputting payment information into the proper computer systems.” *Id.* at 1201. Even though the Bank of America, N.A. witness “was unable to give the precise name for each group in the Bank’s structural hierarchy that was responsible for entering various events into the computerized records, she knew that events/transactions were processed at the time of their occurrence and placed into the Bank’s systems, as per the standard practice of the Bank.” *Id.* Through this knowledge that consisted of the required elements, plus her training experience, the Fourth District deemed the witness qualified to lay the foundation for entry of Bank of America, N.A. and its predecessor’s business records. *Id.* Similar to *Peugero*, just because Mr. Birsch

did not testify to the name of the record-keeping system used, the totality of his un rebutted testimony demonstrated his familiarity with HSBC's systems. If the Fourth District found the testimony in *Peugero* to be sufficient, it must be considered sufficient here.

It is important to note that the Fourth District in *Peugero* pointed out that the trial court "did not find any indication that the witness's testimony was unreliable." *Id.* The *Peugero* decision is from the Fourth District despite their holding in *Maslak*. The difference between *Maslak* and *Peugero* is not only what the testimony may have lacked, but rather what the witness did say. This distinction shows the necessity of the burden-shifting employed by the Second District in *Jackson*, which the Second District adopted from this Court. *Jackson*, 236 So. 3d at 1172 (citing *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994)).

In *Maslak*, the Fourth District held that the bank's witness was unqualified to testify to the payment history and its admittance was an abuse of discretion. *Maslak*, 190 So. 3d at 658. In doing so, the *Maslak* court did not implement the burden shifting as was done in *Jackson*. Had *Maslak* done so, the burden would have properly switched to the opponent to establish unreliability. It is clear that the *Maslak* court was concerned about the reliability and trustworthiness of the records but the *Maslak* court still failed to properly consider the burden shifting. *Maslak*, 190 So. 3d at 658. This is why *Maslak's* reasoning is flawed. It is not necessarily

the result that was flawed in *Maslak* but the process that led them to that result was.

The *Maslak* testimony quoted in the Fourth District's opinion reflects where it may have been within a Judge's discretion to question the reliability or the trustworthiness of the records. Unlike *Maslak*, there is no testimony in *Jackson* that would possibly give discretion for a Judge to question the reliability or trustworthiness of the records. Cross-examination in this case regarding Mr. Birsch's familiarity with HSBC's records consisted of three questions. In fact, to be further explored in this brief, "Birsch's testimony on cross actually bolstered his testimony on direct by explaining that he gained knowledge from managing various departments at HSBC for the past twenty-five (25) years. *Jackson*, 236 So. 3d at 1172.

The *Maslak* opinion emphasizes additional testimony from the proponent outside of the standard testimony required pursuant to 90.803(6). Specifically, beyond answering yes to those elements, the proponent in *Maslak* testified that a separate department is responsible for the payment history, that she never worked in that department, and outside counsel brought the copy of the payment history to court. *Maslak*, 190 So. 3d at 660. Further, the Fourth District highlighted that "[t]he witness did not know whether someone at outside counsel's office changed or modified the document in any way." *Id.* at 660. This additional testimony

offered by the proponent in *Maslak* may have led to the inadmissibility of the records but should not have impacted the burden shifting analysis. In its totality, the *Maslak* testimony is distinguishable from the succinct testimony offered in *Jackson*. *Maslak*, however, still should have employed the burden shifting analysis as the Second District did in *Jackson*.

More like *Peugnero*, Mr. Birsch testified to his cross-training over his twenty-five years of employment with HSBC. Unlike *Maslak*, where the witness could not confidently answer all questions, Mr. Birsch's responses, on both direct and cross, could not possibly have called into question the reliability or trustworthiness of the records. *Maslak*, 190 So. 3d at 660. This testimony was in addition to the "magic words" and sufficiently qualified Mr. Birsch.

C. Sources of Information or Other Circumstances did not Reflect a Lack of Trustworthiness Where Mr. Birsch's Testimony was not Impeached on Cross-Examination and Petitioners did not Put on Their Own Case.

The business records exception permits the introduction of business records "unless the sources of information or other circumstances show lack of trustworthiness." §90.803(6), Fla. Stat. (2016). "The rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." *Nationstar Mortgage, LLC v. Berdecia*, 169 So.3d 209, 212 (Fla. 5th DCA 2015).

“Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records.” *Ocwen Loan Servicing, LLC v. Gundersen*, 204 So.3d 530, 534 (Fla. 4th DCA 2016) (quoting *Love v. Garcia*, 634 So.2d 158, 160 (Fla. 1994)). Here, the Petitioners presented no evidence and called no witnesses to contradict the evidence presented by Household. The Petitioners did not put on a case. The Petitioners did not show any indicia of lack of trustworthiness of the business records. Instead, the Petitioners merely assert the “magic-words” defense. If the opposing party cannot show lack of trustworthiness, as is the case here, then the records must be admitted if the proper foundation is laid. See *Peugero v. Bank of America, N.A.*, 169 So. 3d 1198 (Fla. 4th DCA 2015).

The Petitioners had every opportunity to attempt to convince the Trial Court that Household’s business records were unreliable and cast doubt on them. “Each defendant in a trial is entitled to engage in vigorous cross-examination of the witnesses presented against him.” *Lugo v. State*, 845 So. 2d 74, 101-02 (Fla. 2003) (citation omitted). The same is true in civil actions. “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Baan v. Columbia Cnty.*, 180 So. 3d 1127 (Fla. 1st DCA 2015) (quoting *United States v. Ala. Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013)).

The Petitioners chose either not to do so or their attempt was inadequate. Far from vigorous, the Petitioners' cross-examination actually bolstered the reliability and trustworthiness of Mr. Birsch's testimony. *Jackson*, 236 So. 3d at 1172. Even if viewed most favorably to the Petitioners, the three questions answered by Mr. Birsch on cross-examination cast no doubt on the reliability and trustworthiness of Household's business records.

Further, there are no signs that Mr. Birsch's testimony was suspect. Despite the Trial Court judge being in the best position to make this determination, the transcript alone reflects Mr. Birsch was never unsure in responding on direct and cross-examination. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (concluding the trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial). In review of the *Jackson* transcript, there is nothing contradictory, questionable or suspect in Mr. Birsch's testimony. In applying the abuse of discretion standard, it would be difficult to conclude that reasonable people could differ as to the propriety of the action taken by the trial court. *Id.* at 1203. The same cannot be said about *Maslak*. In *Maslak*, a portion of the testimony focused on in determining whether a proper foundation was laid was as follows:

- (1) the witness testified that she never worked in the payment processing department;

- (2) the witness testified that she printed the payment history and sent it electronically to outside counsel;
- (3) the witness testified that outside counsel brought the copy of the payment history to court;
- (4) the witness testified she did not know whether someone at outside counsel's office changed or modified the document in any way.

Maslak, 236 So. 3d at 660.

Although the *Maslak* testimony could reasonably be considered shaky, unlike *Jackson*², the Fourth District never implemented or discussed the burden shifting to the opponent as set forth in *Love*. *Love*, 634 So. 2d at 160. The witness in *Maslak* did, however, answer the four statutory questions in the affirmative. This should have placed the burden on the opponent of the records to show lack of reliability or trustworthiness. At the least, the witness testimony in *Maslak* satisfied the initial burden, regardless of the eventual ruling on admissibility. Because the burden shifting process was not implemented by the Fourth District, *Maslak* should be disapproved.

By not using the burden shifting process, the reasoning in *Maslak* was flawed. On the other hand, *Jackson* should be approved wherein the Second

² Unlike the *Maslak* testimony, in *Jackson*, there was no testimony that Mr. Birsch never worked in the payment processing department. Instead, Mr. Birsch testified that he had worked in various departments over his twenty-five (25) year employment. Additionally, completely opposite from *Maslak*, Mr. Birsch further testified that he checked the business records at trial with Household's records to ensure the accuracy of the evidence being introduced.

District followed this Court’s reasoning and guidance in *Love*. The Petitioners argue that such a standard would turn business records into a “robo-signing” process. This is incorrect. The records are not automatically admissible simply because the “magic words” are answered. Instead, the burden shifts to the opponent to show otherwise. The ultimate inquiry becomes whether reliability or trustworthiness is lacking. The opponent has the ability to establish this³. Most notably, this can be done on cross-examination. In *Jackson*, the Petitioners did not put on their own case and it would be unreasonable to think that Mr. Birsch’s testimony on cross-examination weakened the reliability or trustworthiness of the business records. If anything were to be considered “robotic” it would be the Petitioners’ “magic words” and “more is needed” argument. This is especially the case where the Petitioners had ample opportunities to seek more but did not do so.

Accordingly, the Second District’s opinion in *Jackson* should be approved where the burden was properly shifted to the opponent, and the opponent failed to establish any reason why the business records were unreliable or untrustworthy.

³ Although used in the context of a criminal case, a “defendant’s right to confront witnesses has long been identified as among the minimum essentials of a fair trial.” *Conner v. State*, 748 So. 2d 950, 954-55 (Fla. 1999) (citations omitted). “We have previously observed that the right of confrontation ‘has been a cornerstone of Western society for a number of centuries.’” *Id.* (citations omitted). In *Jackson*, the Petitioners had this right but failed to even come close to raising a question of Mr. Birsch’s qualification.

Maslak should be disapproved where the burden was not shifted, thus creating a stricter requirement than the statute sets forth.

II. Even if not Harmless Error, Involuntary Dismissal is Improper.

As argued by the Petitioners, involuntary dismissal would not be the proper remedy if *Jackson* is disapproved. “To establish their entitlement to foreclose it was incumbent upon the plaintiffs to prove their agreement, a default by the defendants, that plaintiffs properly accelerated the debt to maturity, and the amount due.” *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979). Out of these elements, if this Court somehow did disapprove *Jackson*, only the payment history would have been excluded.

The Note and Mortgage are “not hearsay” and are “admissible for their independent legal significance.” *Deutsche Bank Nat’l Trust Co. v. Alaqua Prop.*, 190 So.3d 662, 665-66 (Fla. 4th DCA 2000). The demand letter is also not hearsay. It is non-hearsay because it is not being offered to prove the truth of the matter asserted within its contents. Additionally, the Petitioners’ did not raise the failure to satisfy the condition precedent found in paragraph 22 of the mortgage as an affirmative defense. Therefore, the Petitioners “had no right to demand proof

from the plaintiff of conditions precedent that were not preserved in the pleadings.”
Bank of Am. v. Asbury, 165 So. 3d 808, 810 (Fla. 2d DCA 2015).

This leaves the admittance of the loan payment history as the alleged harmful error. When a payment history is improperly admitted for lack of foundation, the proper remedy is remand to establish the amounts due and owing. *Maslak*, 190 So. 3d at 660 (citing *Channell v. Deutsche Bank Nat’l Trust Co.*, 173 So. 3d 1017, 1020 (Fla. 2d DCA 2015) (citing *Sas v. Fed. Nat’l Mortg. Ass’n*, 112 So. 3d 778, 780 (Fla. 2d DCA 2013))). If this Court does not approve of *Jackson*, the proper remedy would be remand of the case for further proceedings for Household to establish the amounts due and owing.

III. The Business Records Exception is Not a Slippery Slope and will not Create a New Policy with an Unlimited Impact on Other Cases.

In addition to imposing their own standard of applying the business records exception, the Petitioners warn of a new policy that will adversely impact **all** cases if *Jackson* is approved. (I.B. 32-35). To the contrary, the Trial Court’s admission of Household’s business records and the Second District’s affirmation, pursuant to section 90.803(6)(a), Fla. Stat., is consistent with public policy and in compliance with the established requirements set forth by this Court in both *Love* and *Baber*, of which a long list of cases follow their precedent.

In support of the fictional impact on future cases, the Petitioners argue that a “slippery slope” would occur and negatively affect other exceptions to the hearsay

rule, such as section 90.803(7), Fla. Stat. The Petitioners do not explain how this cross-over will occur. Even if it did, however, the case cited to by Petitioners, *Alexander v. Allstat Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), does not reflect how the burden shifting standard would automatically open up the floodgates to improper business records. *Id.* In fact, not only was the witness in *Alexander* not qualified but his testimony was insufficient even if he had been qualified. *Id.* at 593.

Alexander exemplifies how perfectly the standard of determining the admission of business records works. In failing to be deemed qualified the Court points to the opponent's extensive objection and voir dire. *Id.* This is exactly what was lacking in *Jackson*. Approval of *Jackson* will not disallow opponents of entry of business records to establish why they should not be admissible.

Further, in comparing section 90.803(6) to other exceptions, the Petitioners tellingly do not acknowledge the alternative methods for admitting business records into evidence, such as a certification of business records, which requires even less than a live witness. Pursuant to Fla. Stat. § 90.803(6)(c):

A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence.

The admission of business records can actually be admitted into evidence in a less burdensome manner to proponents of the records. *Id.* While this less restrictive exception may be used to admit business records, the Petitioners only focus on one of three ways that inherently reliable business records may be admitted.

As the record in this case reflects, Household provided a qualified witness at trial who testified to the statutory requirements stated in Section 90.803(6). Once Household met its initial burden, the Petitioners failed to meet its burden or sufficiently object and establish the business records showed a lack of trustworthiness. See *Twilegar*, 42 So. 3d at 199.

Here, the Trial Court properly admitted the business records into evidence in accordance with the standard established by this Court in following section 90.803(6). The Second District in *Jackson* properly applied that standard in its affirmance. This Court's approval of *Jackson* will not recreate or simplify the standard for a proponent to lay the necessary foundation, and what an opponent may do to establish otherwise. In fact, approval of *Jackson* will only serve to reinforce what is already required of the parties who either introduce or object to the entry of business records.

CONCLUSION

The Petitioners have not shown that the Trial Court abused its discretion in awarding Final Judgment in favor of Household or that the Second District's affirmation was improper. To the extent the *Jackson* opinion conflicts with *Maslak*, the latter should be disapproved for not employing the proper burden shifting standard as set forth by this Court as was done in the former, which should receive the approval of this Court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2018 a true and correct copy of the foregoing has been furnished to all parties listed below.

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