

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

SECRETARY OF VETERANS
AFFAIRS OF WASHINGTON D.C.,

PLAINTIFF-APPELLEE,

CASE NO. 3-14-04

v.

SHAWN E. LEONHARDT,

DEFENDANT-APPELLANT,
-AND-

OPINION

PETRA LEONHARDT,

DEFENDANT-APPELLEE.

Appeal from Crawford County Common Pleas Court
Trial Court No. 12 CV 0424

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Brian D. Flick and *Andrew M. Engle* for Appellant

Craig Spadafore for Appellee

PRESTON, J.

{¶1} Defendant-appellant, Shawn E. Leonhardt (“Shawn”), appeals the April 14, 2014 judgment entry of the Crawford County Court of Common Pleas granting foreclosure in favor of the Secretary of Veterans Affairs of Washington D.C. (the “VA”). This is a foreclosure action complicated by the loss of the promissory note. On appeal, Shawn argues that the trial court improperly considered two affidavits that were not referenced or introduced at trial; that the trial court erred by admitting documents offered by the VA that were not properly authenticated; that the VA failed to establish that it was in possession and entitled to enforce the note when it was lost; and that compliance with the VA’s regulations regarding the servicing of his loan were a condition precedent to enforcement of the note and the mortgage. For the reasons that follow, we affirm.

{¶2} On February 24, 2003, Shawn and Petra Leonhardt (“Petra”) (collectively, “the Leonhardts”), then husband and wife, executed a fixed-rate promissory note (the “note”), in the amount of \$115,800.00 payable to Chase Manhattan Mortgage Corporation (“Chase Mortgage”) as lender to purchase a home located at 1467 Linwood Drive, Bucyrus, Ohio. (Doc. No. 1). That same day, the Leonhardts executed a mortgage against the property to secure the debt in favor of Chase Mortgage. (*Id.*). The mortgage was filed on March 3, 2003, recorded in Volume 758 of the Official Records at Page 626, in the Crawford

County, Ohio Recorder's Office. (*Id.*). The mortgage and the note are guaranteed by the VA and, as such, a "VA Guaranteed Loan and Assumption Policy Rider" was executed on February 24, 2013 and incorporated into, and deemed to amend and supplement, the mortgage. (*Id.*).

{¶3} The VA avers that Petra was released from all obligations under the mortgage and note on September 13, 2006 and that the "Assumption Agreement with Release" was recorded in Volume 914 of the Official Records at Page 218, in the Crawford County Recorder's Office.¹ (*See* Doc. No. 64). (*See also* Doc. No. 2).

{¶4} In 2007, Shawn defaulted, and Chase Mortgage instituted a foreclosure action against him. (Dec. 3, 2013 Tr. at 46, 177); (Mar. 25, 2014 JE, Doc. No. 101). To keep his home and prompt Chase Mortgage to dismiss its foreclosure against him, Shawn entered a refunding agreement with the VA on July 25, 2008, which included executing a loan-modification agreement. (Dec. 3, 2013 Tr. at 47, 49, 56). Under the refunding agreement, the VA purchased Shawn's loan from Chase Mortgage, the noteholder. (*Id.* at 53). Under the loan-modification agreement, Shawn agreed to pay the VA \$123,510.49 to purchase and refund his loan. (*Id.* at 50). The loan-modification agreement also reduced Shawn's original interest rate under the note from six percent to

¹ The record does not include the "Assumption Agreement with Release" discharging Petra from all obligations under the mortgage and note. (*See* Doc. No. 64).

four-and-one-half percent. (*Id.* at 50-51). In October 2008, Shawn received a letter from the VA indicating that his refunding application was approved. (*Id.* at 59).

{¶5} On October 1, 2008, the VA notified Chase Mortgage that it refunded Shawn’s loan and instructed Chase Mortgage to transfer “the original mortgage note endorsed to the VA, the original mortgage deed, the original Assignment of Mortgage from the holder to the VA, along with all assignments previously recorded on this account.” (*Id.* at 61). The note was indorsed in blank by Chase Mortgage and physically transferred to the VA. (*Id.* at 32-36). The mortgage was assigned by Chase Home Finance, LLC (“Chase Home Finance”), successor by merger to Chase Mortgage, to the VA on November 24, 2008.² (Doc. No. 1). (*See also* Dec. 3, 2013 Tr. at 175).³ The assignment was filed on December 16, 2008, recorded in Volume 945 of the Official Records at Page 2295, in the Crawford County Recorder’s Office. (Doc. No. 1).

{¶6} On July 21, 2009, Shawn received a letter from the VA indicating that its refunding of his loan was almost complete and that he needed to execute an enclosed loan-modification agreement and return it to the VA within 10 days. (Dec. 3, 2013 Tr. at 63-64). If Shawn did not execute the loan-modification

² The November 24, 2008 mortgage assignment listed “Petra Leonhardt, husband and wife” as the mortgagor. (Doc. No. 1).

³ The transcript from the hearing reflects that the refunding of Shawn’s loan was effective November 28, 2008 rather than November 24, 2008. (Dec. 3, 2013 Tr. at 175).

agreement, the foreclosure action would have “proceeded” against him. (*Id.* at 60-61).⁴

{¶7} On March 24, 2011, Chase Home Finance executed a “Satisfaction of Mortgage,” which stated that the mortgage executed by Shawn and Petra in favor of Chase Mortgage was fully paid and satisfied. (Doc. No. 64). The “Satisfaction of Mortgage” was filed on April 4, 2011 “outside the recorded chain of title,” recorded in Volume 966 of the Official Records at Page 377, in the Crawford County Recorder’s Office. (Doc. No. 1). (*See also* Doc. No. 64); (Dec. 3, 2013 Tr. at 95-97).

{¶8} On November 16, 2012, the VA filed a foreclosure complaint against Shawn, his unknown spouse (if any), Petra, Starkey & Stoll Ltd c/o Geoffrey L. Stoll as registered agent, and the Crawford County Treasurer (collectively, “defendants”). (Doc. No. 1). In its complaint, the VA requested a judgment in the amount of \$121,529.39 plus interest on the outstanding principal balance at a rate of four-and-one-half percent per annum from March 1, 2010, late charges and advances, and all costs and expenses incurred in the enforcement of the note and mortgage. (*Id.*). Shawn was served with a copy of the complaint by certified mail on November 28, 2012. (Doc. No. 5).

⁴ The record reflects that the VA cannot locate an executed copy of the loan-modification agreement. (Doc. No. 64); (Dec. 3, 2013 Tr. at 45).

{¶9} On November 27, 2012, the Crawford County Treasurer filed an answer claiming an interest in the property for current and delinquent taxes. (Doc. No. 12). On December 17, 2013, Petra filed her answer averring that she was released from all liability under the mortgage on May 27, 2004 by the VA because she and Shawn previously terminated their marriage. (Doc. No. 22). On January 17, 2013, Shawn filed a motion to dismiss Petra from the case because she was not a necessary party to the action. (Doc. No. 26). On January 23, 2013, the trial court granted Shawn's January 17, 2013 motion and dismissed Petra from the case. (Jan. 23, 2013 JE, Doc. No. 27).

{¶10} On December 3, 2012, Shawn, pro se, filed a motion to dismiss the complaint alleging that the mortgage was previously satisfied as evidenced by the March 24, 2011 "Satisfaction of Mortgage" filed by Chase Home Finance. (Doc. No. 17). On December 17, 2012, Shawn filed a motion to sustain his motion to dismiss. (Doc. No. 23).

{¶11} On January 4, 2013, the VA filed a motion to strike and a memorandum in opposition to Shawn's motions to dismiss and to sustain. (Doc. No. 24).

{¶12} Shawn filed a second motion to dismiss the complaint on January 14, 2013. (Doc. No. 25).

{¶13} On January 25, 2013, the VA filed a motion to strike and a memorandum in opposition to Shawn’s January 14, 2013 motion to dismiss. (Doc. No. 28).

{¶14} On February 5, 2013, Shawn filed a “Motion for Dismissal and [sic] Sustain All Evidence Filed.” (Doc. No. 29).

{¶15} On February 6, 2013, the trial court denied Shawn’s December 3, 2012 and January 14, 2013 motions to dismiss and his December 17, 2012 motion to sustain. (Doc. No. 30).

{¶16} On February 12, 2013, Shawn filed a “Motion for Extension of Time to Seek and Hire Counsel to Respond to Order and Filing.” (Doc. No. 31).

{¶17} On February 21, 2013, the trial court denied Shawn’s February 5, 2013 motion and granted Shawn’s February 12, 2013 motion and ordered him to file his answer to the VA’s complaint by March 15, 2013. (Doc. No. 32). On March 15, 2013, Shawn, represented by counsel, filed his answer. (Doc. No. 35).

{¶18} On May 30, 2013, Shawn filed a motion for leave to file a third-party complaint instanter or, in the alternative, to join an indispensable party—Residential Credit Solutions (“RCS”), which serviced Shawn’s loan. (Doc. No. 39). On June 3, 2013, the trial court granted Shawn’s motion for leave to file his third-party complaint instanter. (Doc. No. 40). On June 18, 2013, the trial court vacated its order granting Shawn leave to file his third-party complaint instanter

because it was rendered moot by a stipulation between the parties. (Doc. No. 45). The parties stipulated that the VA had until June 24, 2013 to respond to Shawn's motion for leave to file his third-party complaint instanter. (Doc. No. 44).

{¶19} On June 21, 2013, the VA filed its memorandum in opposition to Shawn's motion for leave to file his third-party complaint instanter, alleging that it was not a derivative of its claims and was beyond the limited class of cases mandated by Civ.R. 14(A). (Doc. No. 46). On July 29, 2013, Shawn filed his reply to the VA's memorandum in opposition to his motion for leave to file his third-party complaint instanter. (Doc. No. 51). The trial court denied Shawn's motion for leave to file his third-party complaint instanter on September 17, 2013. (Doc. No. 55).

{¶20} On October 30, 2013, the VA filed a motion for summary judgment and default judgment. (Doc. No. 64). On November 12, 2013, Shawn filed a motion requesting the trial court to set the matter for court-sponsored mediation. (Doc. No. 69). On November 15, 2013, Shawn filed a motion for leave to file a response to the VA's motion for summary judgment. (Doc. No. 70). On November 18, 2013, the trial court granted Shawn's motion for leave to file his response to the VA's motion for summary judgment. (Doc. No. 73). That same day, Shawn filed his memorandum in opposition to the VA's motion for summary judgment. (Doc. No. 71).

{¶21} On November 20, 2013, the trial court denied Shawn's motion requesting that the matter be set for court-sponsored mediation. (Doc. No. 75). Also on November 20, 2013, the trial court denied the VA's motion for summary judgment. (Doc. No. 76). The VA filed its reply in support of summary judgment on November 22, 2013, requesting the trial court to reconsider its order denying the VA's motion for summary judgment. (Doc. No. 77).

{¶22} On December 2, 2013, the VA filed a motion in limine seeking to exclude all evidence regarding the VA's servicing guidelines and regulations and requesting that the trial court find Shawn in contempt and sanction him. (Doc. No. 81). It appears from the record that the trial court denied the VA's motion in limine and motion for contempt. (*See* Dec. 3, 2013 Tr. at 23).

{¶23} On December 3, 2013, a trial to the court was held. (*Id.* at 1).

{¶24} On the day of trial, Shawn filed a motion in opposition to the VA's motion in limine and motion requesting that the trial court find him in contempt and sanction him and the following motions in limine: to exclude the "non-executed loan-modification agreement"; to preclude the VA's trial witness from referring to "system notes" in support of her testimony; to prevent the VA from entering into evidence any document it did not previously produce in discovery "relating to its status as a holder or owner of the note, as a party entitled to enforce the note, and/or the transfer/assignment history of the note"; and to prevent the VA

from providing any testimony regarding its compliance with any regulation in 38 C.F.R. 36.4350. (Doc. Nos. 83, 84, 85, 86, 87). The trial court granted Shawn's motion in limine requesting that the VA be prevented from entering into evidence any document it did not previously produce during discovery and implicitly or explicitly denied his other motions in limine. (*See id.* at 6, 8, 20).

{¶25} After trial, the VA and Shawn filed post-trial briefs on January 8 and 9, 2014, respectively. (Doc. Nos. 90, 91). On January 17, 2014, Shawn filed a motion to strike certain portions of the VA's post-trial brief relying on out-of-court testimony and attestations made by witnesses that did not appear at trial. (Doc. No. 96). On January 21, 2014, the VA filed its reply to Shawn's post-trial brief. (Doc. No. 98). That same day, Shawn filed a supplement to his post-trial brief. (Doc. No. 99).

{¶26} On March 25, 2014, the trial court issued a judgment in favor of the VA. (Doc. No. 101). The trial court issued its judgment entry and decree in foreclosure on April 14, 2014. (Apr. 14, 2014 JE, Doc. No. 102).

{¶27} Shawn filed his notice of appeal on April 28, 2014. (Doc. No. 104). Shawn raises four assignments of error for our review.

Assignment of Error No. I

The Trial Court Erred in Considering Materials Not Introduced at Trial.

{¶28} In his first assignment of error, Shawn argues that the trial court improperly relied on two affidavits that were not referenced or introduced at trial—a lost-note affidavit and plaintiff’s affidavit in support.

{¶29} As an initial matter, we note that Shawn failed to cite any legal authority or to the record in support of his position that the trial court improperly relied on two affidavits that were not referenced or introduced at trial. App.R. 16(A)(7) requires that Shawn include in his brief: “An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, *with citations to the authorities, statutes, and parts of the record on which appellant relies.*” (Emphasis added.) “[W]e note that pursuant to App.R. 16(A)(7) we are not required to address arguments that have not been sufficiently presented for review or supported by proper authority.” *Pahl v. Haugh*, 3d Dist. Hancock No. 5-10-27, 2011-Ohio-1302, ¶ 27. However, in the interests of justice, we will address Shawn’s first assignment of error. *Id.*

{¶30} “In making its decision following trial, the trial court may only consider the evidence the court admitted at trial. Other evidence in the record but not admitted at trial may not be considered.” *Hoaglin Holdings, Ltd. v. Goliath Mtge.*, 8th Dist. Cuyahoga No. 83657, 2004-Ohio-3473, ¶ 15.

{¶31} Civ.R. 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

“Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision.” *Am. Builders & Contrs. Supply Co., Inc. v. Frank’s Roofing, Inc.*, 3d Dist. Marion No. 9-11-41, 2012-Ohio-4661, ¶ 21, quoting *Cappara v. Schibley*, 85 Ohio St.3d 403, 408 (1999).

{¶32} The VA attached an “Affidavit in Support of Motion for Summary Judgment” and a “Lost Note Affidavit” to its motion for summary judgment. (*See* Doc. No. 64). The two affidavits were not admitted into evidence at trial and were supplied by individuals who did not testify at trial and, consequently, were not

subject to cross-examination. In its March 25, 2014 “Decision and Judgment Entry,” in which the trial court determined that Shawn was in default of the note and the mortgage and that the VA was entitled to a judgment of foreclosure against him, the trial court relied, *in part*, on those affidavits to find that: the VA established that Shawn executed and delivered a note to the VA who was in possession of the note; that the note was not canceled, transferred, or negotiated to another party; that the VA performed its due diligence in conducting a thorough search for the note and that it could not be located; and that the VA established that Shawn defaulted on the note and mortgage and that the VA is entitled to enforce it. (Mar. 25, 2014 JE, Doc. No. 101).

{¶33} That the trial court considered evidence not admitted at trial is, at most, harmless error because the trial court could have made the same decision without the evidence not admitted at trial. *Maldonado v. Maldonado*, 5th Dist. Stark No. 2003CA00329, 2004-Ohio-3648, ¶ 30. *See also Cugini and Capoccia Builders, Inc. v. Ciminello’s Inc.*, 10th Dist. Franklin No. 02AP-1020, 2003-Ohio-2059, ¶ 21 (the trial court erred by relying on evidence not admitted at trial or inadmissible evidence in calculating damages where the damages amount was not ascertainable from the evidence that was properly admitted). There is ample other evidence in the record supporting the trial court’s findings.

{¶34} In making those findings, the trial court also relied on Plaintiff's Exhibit 1, admitted at trial, and the trial transcript. The facts alleged in the paragraphs of the "Affidavit in Support of Motion for Summary Judgment" and the "Lost Note Affidavit," upon which the trial court relied, in part, are ascertainable from the trial transcript and Plaintiff's Exhibit 1. (*See, e.g.*, Dec. 3, 2013 Tr. at 31-36, 45-46, 49-53, 71-73, 79, 82-84, 86-95, 101-112, 173); (Plaintiff's Ex. 1). More specifically, Plaintiff's Exhibit 1 and the trial transcript established that Shawn executed and delivered the note, that the VA was in possession of the note and entitled to enforce it when it was lost, that the note was not canceled, transferred, or negotiated to another party, that the VA could not locate the note even though it diligently searched for it, and that Shawn defaulted on the note and mortgage. (*Id.*); (*Id.*).

{¶35} Moreover, in its April 14, 2014 "Judgment Entry and Decree in Foreclosure," the trial court stated that it relied on "the testimony of Virginia Magana, Assistant Vice President of Servicing for Residential Credit Solutions, and the exhibits admitted into evidence." (Apr. 14, 2014 JE, Doc. No. 102). The trial court did not state that it relied on either affidavit in its April 14, 2014 judgment entry or cite either affidavit in that judgment entry.

{¶36} Since the trial court could have made the same decision without the evidence not admitted at trial, its reliance on the affidavits in its March 25, 2014

judgment entry did not affect Shawn's substantial rights because it would not have changed the outcome of the proceedings. *See Fada v. Information Sys. & Networks Corp.*, 98 Ohio.App.3d 785, 792 (2d Dist.1994) (errors are not materially prejudicial and require disturbance of the judgment where their avoidance would not have changed the result of the proceedings). Therefore, we conclude that the trial court's reliance on the affidavits was harmless error because it did not affect Shawn's substantial rights.

{¶37} As such, Shawn's first assignment of error is overruled.

Assignment of Error No. II

The Trial Court Erred In Admitting Evidence At Trial.

{¶38} In his second assignment of error, Shawn argues that the trial court erred by admitting documents and testimony offered by the VA because the VA's witness, Virginia Magana ("Magana"), did not have "personal knowledge" to authenticate the documents. Specifically, Shawn asserts that the trial court erred in admitting the documents under the business-records exception to the hearsay rule because the documents were not properly authenticated by Magana since they were prepared and maintained by entities other than the Magana's employer, RCS. Shawn also argues that the trial court improperly considered the unexecuted loan-modification agreement because there was no testimony that the VA executed the agreement or intended to be bound by it.

{¶39} The trial court has broad discretion concerning the admissibility of evidence. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20. “A decision to admit or exclude evidence will be upheld absent an abuse of discretion.” *Id.* An abuse of discretion suggests the trial court’s decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶40} Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). Under Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence. Evid.R. 803(6) provides an exception to the hearsay rule for business records of regularly conducted activity. *Bank of New York Mellon v. Froimson*, 8th Dist. Cuyahoga No. 99443, 2013-Ohio-5574, ¶ 7. Evid.R. 803(6) provides:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report,

record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See also R.C. 2317.40⁵; *Luckett v. Ryan*, 3d Dist. Allen No. 1-10-49, 2011-Ohio-2999, ¶ 18 (“R.C. 2317.40, Evid.R. 803(6)’s statutory equivalent, was enacted to ‘liberalize and broaden the shop-book rule, recognized at common law as an exception to the general rule excluding hearsay evidence, and to permit the admissions of records regularly kept in the course of business.’”), quoting *Smith v. Dillard’s Dept. Stores, Inc.*, 8th Dist. Cuyahoga No. 75787, 2000 WL 1867272, *3-4 (Dec. 14, 2000), quoting *Weis v. Weis*, 147 Ohio St. 416, 424 (1947). “The rationale behind Evid.R.803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to rely on that information as well.” *Quill v. Albert M. Higley*

⁵ R.C. 2317.40 provides: “A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.”

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Co., 5th Dist. Tuscarawas No. 2014 AP 04 0015, 2014-Ohio-5821, ¶ 44, citing 1980 Staff Notes, Evid.R. 803.

To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the “custodian” of the record or by some “other qualified witness.”

Id., quoting *John Soliday Fin. Grp., LLC*, 190 Ohio App.3d 145, 2010-Ohio-4861, ¶ 31 (5th Dist.), quoting *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 171, quoting Weissenberger, *Weissenberger’s Ohio Evidence Treatise*, Section 803.73 (2007). “Even after the above elements are established, a business record may be excluded from evidence if ‘the source of information or the method of circumstances of preparation indicate lack of trustworthiness.’” *Cent. Mtge. Co. v. Bonner*, 12th Dist. Butler No. CA2012-10-204, 2013-Ohio-3876, ¶ 13, quoting *State v. Glenn*, 12th Dist. Butler No. CA2009-01-008, 2009-Ohio-6549, ¶ 17, quoting *Davis* at ¶ 171.

{¶41} On appeal, Shawn does not argue that the records are not business records under Evid.R. 803(6); rather, he argues that the VA failed to lay an

adequate foundation for their admission under Evid.R. 803(6) because Magana did not have “personal knowledge” to authenticate them. As a result, we will address only the fourth element of the business-records-exception test.

{¶42} Evid.R. 901 governs authentication or identification of evidence. It states, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(A). ““Authentication and identification are terms which apply to the process of laying a foundation for the admissibility of such nontestimonial evidence as documents and objects.”” *Premier Capital, L.L.C. v. Baker*, 11th Dist. Portage No. 2011-P-0041, 2012-Ohio-2834, ¶ 43, quoting *TPI Asset Mgt. v. Conrad-Eiford*, 193 Ohio App.3d 38, 2011-Ohio-1405, ¶ 13 (2d Dist.), quoting Weissenberger, *Weissenberger’s Ohio Evidence Treatise*, Section 901.1 (2010). “It is actually a rule of relevance connecting the evidence offered to the facts of the case.” *TPI Asset* at ¶ 13, citing Weissenberger at Section 901.2

{¶43} “Evid.R. 901(B) sets out a number of illustrative examples of identification or identification conforming with the requirements of the rule. The most commonly employed is at Evid.R. 901(B)(1): ‘Testimony of a witness with knowledge. Testimony that a matter is what it is claimed to be.’” *Id.* at ¶ 14, quoting Evid.R. 901(B). “Evid.R. 901(B)(1) provides that ‘any competent witness

who has knowledge that a matter is what its proponent claims may testify to such pertinent facts, thereby establishing, in whole or in part, the foundation for identification.” *Id.* at ¶ 15, quoting Weissenberger at Section 901.2. “Conclusive evidence is not required, but the witness’s testimony must be sufficient to satisfy the requirement of Evid.R. 602 that ‘[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.’” *Baker* at ¶ 43, quoting *TPI Asset* at ¶ 15, quoting Weissenberger at Section 901.2. “Evid.R. 901(B)(10) states that the requirements of authentication or identification may include the following: ‘Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.’” *TPI Asset* at ¶ 16-17, quoting Evid.R. 901(B)(10).

{¶44} “Employees of servicing agents are competent to testify in foreclosure actions regarding loans they service.” *Secy. of Veterans Affairs v. Anderson*, 8th Dist. Cuyahoga No. 99957, 2014-Ohio-3493, ¶ 25, citing *Deutsche Bank Natl. Trust Co. v. Gardner*, 8th Dist. Cuyahoga No. 92916, 2010-Ohio-663, ¶ 10. *See also Froimson*, 2013-Ohio-5574, at ¶ 8 (“Courts have routinely allowed a representative from a loan servicer to provide evidence of default, either by affidavit or testimony, consistent with Evid.R. 803(6).”); *U.S. Bank, N.A. v.*

Lawson, 5th Dist. Delaware No. 13CAE030021, 2014-Ohio-463, ¶ 46 (concluding that the bank’s loan-servicing agent was competent to testify on the bank’s behalf under Evid.R. 602).

{¶45} At trial, under Evid.R. 803(6), the foundation for a document must be laid by the testimony of the “custodian” of the record or by some “other qualified witness.” *See Quill* at ¶ 44. “The phrase ‘other qualified witness’ should be broadly interpreted.” *Lawson* at ¶ 22, citing *State v. Patton*, 3d Dist. Allen No. 1-91-12, 1992 WL 42806, *2 (Mar. 5, 1992). “The witness providing the foundation need not have firsthand knowledge of the transaction. Rather, it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record’s preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Rule 803(6).” *Pyles v. Midwest Neurosurgeons*, 3d Dist. Allen No. 1-98-41, 1999 WL 152886, *5 (Feb. 18, 1999), citing *State v. Vrona*, 47 Ohio App.3d 145, 148 (9th Dist.1988).

{¶46} Shawn contends that Plaintiff’s Exhibits 4, 5, 6, 7, 8, 9, 12, 14, and 16 were not properly authenticated because Magana did not have “personal knowledge” of them since they were prepared by entities other than Magana’s employer, RCS. Moreover, Shawn argues that, because Magana did not properly

authenticate those records, the trial court erred in admitting them. However, of the exhibits Shawn complains of in this assignment of error, he objected only to Magana's testimony regarding Plaintiff's Exhibits 4 and 14 at the time her testimony concerning the documents was elicited. (*See* Dec. 3, 2013 Tr. at 45, 53-81, 84-85, 100, 111-112). Likewise, of the exhibits Shawn challenges in this assignment of error, he objected only to the admission of Plaintiff's Exhibits 4, 5, 9, and 14. (*See id.* at 185, 187, 189, 195-197).

{¶47} The failure to timely object to errors concerning testimony waives all but plain error on review. *Gardner*, 2010-Ohio-663, at ¶ 11, citing *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43 (1975). Likewise, the failure to timely object to the admission of evidence also waives all but plain error on review. *Am. Builders*, 2012-Ohio-4661, at ¶ 17. “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Id.*, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶48} Shawn waived all but plain error as to Magana's testimony regarding Plaintiff's Exhibits 5, 6, 7, 8, 9, 12, and 16 and waived all but plain error as to the

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admission of Plaintiff's Exhibits 6, 7, 8, 12, and 16. The circumstances of this case are not exceptional and do not give rise to plain error. *Am. Builders* at ¶ 17; *Gardner* at ¶ 11.

{¶49} The trial court did not abuse its discretion in concluding that Magana was competent to testify as a qualified witness to authenticate Plaintiff's Exhibits 4 and 14. *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 13, 27 (concluding that the business records may be authenticated by a witness of an entity other than the maker of the records under Evid.R. 803(6)). *See also Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 12-13 (1st. Dist.) (concluding that a representative of Great Seneca Financial could properly testify about documents related to the defendant's credit card account); *Gardner* at ¶ 10; *Froimson*, 2013-Ohio-5574, at ¶ 8. Nor did the trial court abuse its discretion in admitting Plaintiff's Exhibits 4, 5, 9, and 14 because the records satisfied the requirements of business-records exception—namely, because Magana properly authenticated the records. *Anders* at ¶ 28 (concluding that the trial court did not abuse its discretion in admitting a record created by an entity other than the business seeking to admit the record because the witness's testimony established that the record was incorporated into that business's records and it relied on the record).

{¶50} Similar to the argument presented in *Anders*, Shawn contends that Magana could not properly authenticate the records because the records were prepared and maintained by an entity other than Magana’s employer, RCS, and Magana did not have “personal knowledge” of the records. However, “[a] qualified witness need only ‘demonstrate that he or she is sufficiently familiar with the operation of the business and with the circumstances of the preparation, maintenance, and retrieval of the record in order to reasonably testify on the basis of this knowledge that the record is what it purports to be, and was made in the ordinary course of business.’” *Id.* at ¶ 15, quoting *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, ¶ 60 (10th Dist.).

{¶51} Magana could reasonably testify that the records are what they purport to be and that they were made in the ordinary course of business consistent with Evid.R. 803(6) because her testimony established that she is sufficiently familiar with RCS’s business operations and the preparation, maintenance, and retrieval of Shawn’s loan documents. *See Pyles*, 1999 WL 152886, at *5; *Anders* at ¶ 15. Magana averred that she is the Assistant Vice President of Servicing for RCS, the servicing agent for the VA, and that the VA authorized her to testify on its behalf as a representative of RCS. (Dec. 3, 2013 Tr. at 25-27). In her capacity as Assistant Vice President of Servicing for RCS, she testified that she “oversee[s] the loan portfolio * * * for the loans that are in foreclosure.” (*Id.* at 25). She

testified that she is familiar with RCS's business processes and its recordkeeping systems. (*Id.* at 27). Magana testified that RCS maintained all of Shawn's loan-account records, including the records from prior loan servicers, which were incorporated into RCS's records when RCS became the servicer of Shawn's loan. (*Id.* at 28-29). Magana testified that she reviewed the loan documents, servicing records, and file notes to verify the information relating to Shawn's loan history. (*Id.* at 29).

{¶52} Based on Magana's testimony, the trial court could conclude that Magana is sufficiently familiar with RCS's business operations and with the circumstances of the preparation, maintenance, and retrieval of the records. As such, the trial court did not abuse its discretion in concluding that Magana is an "other qualified witness" to authenticate Plaintiff's Exhibits 4 and 14 under Evid.R. 803(6). *See Gardner*, 2010-Ohio-663, at ¶ 10; *Froimson*, 2013-Ohio-5574, at ¶ 8.

{¶53} Because Magana is an "other qualified witness," the trial court could conclude that Magana could reasonably testify that the records are what they purport to be and that they were made in the ordinary course of business. Specifically, Magana testified that Plaintiff's Exhibit 4 is an unexecuted copy of the loan-modification agreement between Shawn and the VA. (*Id.* at 44-46). According to Magana, the executed copy was lost. (*Id.* at 45). Magana testified

that the loan-modification agreement was executed in conjunction with the refunding agreement in order for Shawn to “avoid” foreclosure after Chase Mortgage obtained a judgment in foreclosure against Shawn. (*Id.* at 46-47, 51-52). Magana described the terms of the loan-modification agreement, including, for example, the first payment under the loan-modification agreement coming due on August 1, 2009 and a new interest rate of four-and-one-half percent. (*Id.* at 49-52). Magana averred that RCS’s records reflect that Shawn’s loan account has a four-and-one-half percent interest rate and that Shawn made the first payment under the loan-modification agreement on August 1, 2009. (*Id.* at 52).

{¶54} Magana testified that Plaintiff’s Exhibit 5 comprises the VA’s records regarding the refunding agreement, which includes a series of letters reflecting Shawn’s name, address, and loan numbers. (*Id.* at 53-54). The series of letters includes: a letter from the VA dated July 23, 2008 describing the VA’s refunding process; the refunding agreement executed by Shawn on July 25, 2008, which also contains information submitted by Shawn documenting his wages, social security number, and date of birth; a letter from Homecomings Financial, a prior loan servicer, dated August 20, 2008, indicating that Homecomings Financial would accept no less than \$3,600 “in full and complete satisfaction of its note and second mortgage dated August 15th, 2005, and secured against [Shawn’s]

property”; a letter from the VA dated October 1, 2008 indicating that Shawn’s loan-refunding application was approved and instructing him to execute and return the enclosed loan-modification agreement; a letter from the VA to Chase Mortgage dated October 1, 2008 indicating that the VA refunded Shawn’s loan and instructing Chase Mortgage to “furnish the V.A. with the original mortgage note endorsed to the V.A., the original mortgage deed, the original Assignment of Mortgage from the holder to the V.A., along with all assignments previously recorded on this account”; a letter dated May 8, 2009 indicating that the refunding agreement was effective November 28, 2008; and a letter from the VA dated July 21, 2009 indicating to Shawn that the refunding agreement is “almost complete and providing him with the new balance of his loan and specifying that his payment of \$905.33 is due on August 1, 2009 and instructing him to execute and return the enclosed loan-modification agreement within ten days.” (*Id.* at 54-57, 59-65).

{¶55} Magana testified that Plaintiff’s Exhibit 9 is the notice of intent to accelerate sent to Shawn by Bank of America, a prior loan servicer, on June 2, 2010. (*Id.* at 78). The notice, which includes Shawn’s name, address, and loan account number, indicates that Shawn defaulted on his loan on April 1, 2010 and that he could cure his default before July 2, 2010. (*Id.* at 78-79). The notice also provided Shawn with his loss-mitigation options. (*Id.* at 80).

{¶56} Magana testified that Plaintiff's Exhibit 14 comprises Bank of America and RCS's collection notes. (*Id.* at 97-98). Magana averred that Bank of America's collection notes were incorporated into RCS's business records and RCS relied on Bank of America's collection notes in servicing Shawn's loan. (*Id.* at 98). According to Magana, the collection notes included entries from October 2010 through February 2013 regarding Bank of America's and RCS's communication with Shawn relative to his default and the possibility of modifying his loan. (*Id.* at 98-111).

{¶57} Although Plaintiff's Exhibits 4, 5, 9, and 14 were prepared by entities other than Magana's employer, Magana properly authenticated Plaintiff's Exhibits 4, 5, 9, and 14. As summarized by the Tenth District Court of Appeals in *Anders*, "[n]umerous federal courts have addressed whether documents may be admitted as business records of an entity other than the maker of the records under Fed.R.Evid. 803(6)⁶" and admitted them when the records were incorporated into a business's records and relied on, and when the circumstances indicate that the records are trustworthy. *Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, at ¶ 17-24. *See also Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 14 (1st Dist.) ("[E]xhibits can be admitted as business records of an entity, even

⁶ Because Fed.R.Evid. 803(6) is nearly identical to Ohio's version of the business-records exception, it is instructive on the issue of whether documents may be admitted as business records of an entity other than the maker of the records. *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 17 (10th Dist.), citing *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 14 (1st Dist.).

when that entity was not the maker of those records, provided that the other requirements of Fed.R.Evid. 803(6) are met and the circumstances indicate that the records are trustworthy.”).

{¶58} Magana’s testimony established that Plaintiff’s Exhibits 4, 5, 9, and 14 were incorporated into RCS’s records and that RCS relied on those records in servicing Shawn’s loan for the VA. Since RCS incorporated Plaintiff’s Exhibits 4, 5, 9, and 14 into its own records and relied on them in servicing Shawn’s loan, the trial court could conclude from Magana’s testimony that Plaintiff’s Exhibits 4, 5, 9, and 14 are trustworthy. *See Quill*, 2014-Ohio-5821, at ¶ 44.

{¶59} “Another circumstance that may indicate the trustworthiness of a document proffered as a business record is an ongoing business relationship between the business that created the record and the incorporating business.” *Anders* at ¶ 24, citing *White Industries, Inc. v. Cessna Aircraft Co.*, 611 F.Supp. 1049, 1060 (W.D.Mo.1985). Because of the nature of the mortgage industry, many mortgage lenders rely on mortgage servicers to handle the daily functions of mortgages. Similarly, the mortgage servicer may change throughout the life of the loan. Considering the business relationship between the mortgage lender and the mortgage servicer, as well as amongst successor mortgage servicers, these entities rely on the underlying loan records for accuracy in conducting ordinary business functions—that is, the mortgage servicers are under a business duty to the

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mortgage lender to be accurate and successor mortgage servicers rely on the records of prior mortgage servicers for accuracy in servicing the loan. Here, RCS, as well as Shawn's prior loan servicers, were under a business duty to the VA—or Chase Mortgage or Chase Home Finance prior to the time the VA refunded Shawn's loan—to produce accurate records. Therefore, it is reasonable to conclude that Plaintiff's Exhibits 4, 5, 9, and 14 are trustworthy business records. *See Anders* at ¶ 28, citing *E. Savs. Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363, ¶ 110.

{¶60} Accordingly, because of the nature of the business relationship between a mortgage lender and a mortgage servicer, the VA could authenticate Plaintiff's Exhibits 4, 5, 9, and 14 through Magana's testimony. Based on Magana's testimony, the trial court could conclude that Plaintiff's Exhibits 4, 5, 9, and 14 are what they purport to be and that they were made in the ordinary course of business consistent with the elements of Evid.R. 803(6). In particular, Magana's testimony established that the documents were created contemporaneously to the maintenance of Shawn's loan and reflected information relevant to Shawn's account. As such, the trial court did not abuse its discretion in admitting Plaintiff's Exhibits 4, 5, 9, and 14.

{¶61} Although not relevant to the admissibility of evidence, Shawn also argues in his second assignment of error that the trial court improperly considered

the unexecuted loan-modification agreement because there was no testimony that the VA executed the agreement or intended to be bound by it. Specifically, Shawn argues that the loan-modification agreement was not effective because it was not recorded in accordance with R.C. 5301.231(A) and that, because it was not effective, the trial court erred in awarding a judgment in excess of the amount due under the original note.

{¶62} R.C. 5301.231(A) provides:

All amendments or supplements of mortgages, or modifications or extensions of mortgages or of the debt secured by mortgages, that have been executed in the manner provided in section 5301.01 of the Revised Code shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. Sections 317.08, 5301.23, and 5301.231 of the Revised Code do not affect the enforceability, validity, or legal effect of instruments recorded in those mortgage records prior to October 10, 1963.

In support of his argument, Shawn relies on *Community Action Commt. of Pike Cty., Inc. v. Maynard* for the proposition that an unrecorded mortgage modification is ineffective. 4th Dist. Pike No. 02CA695, 2003-Ohio-4312, ¶ 8-10. However, Shawn's reliance on *Maynard* is misguided. While the Fourth District

Court of Appeals concluded that a mortgage modification that is not recorded is an ineffective modification, it did so in the context of a mortgage modification's effectiveness as to the priority of lienholders. *Id.* Indeed, as a recording statute, R.C. 5301.231(A) affects the rights of third parties as to the priority of mortgage liens, but has no effect on the underlying obligation as between the parties. *See GMAC Mtge. Corp. v. McElroy*, 5th Dist. Stark No. 2004-CA-00380, 2005-Ohio-2837, ¶ 16, citing *Sidle v. Maxwell*, 4 Ohio St. 236, 238 (1854) and *Gossard v. Hillman*, 4th Dist. Jackson No. 478, 1984 WL 3482, *1 (May 16, 1984). Accordingly, because whether the loan-modification agreement was recorded in accordance with R.C. 5301.231(A) has no effect on the underlying obligation between the VA and Shawn, Shawn's argument is meritless.

{¶63} For these reasons, Shawn's second assignment of error is overruled.

Assignment of Error No. III

The Trial Court [sic] as a Matter of Law in Concluding that Plaintiff was Entitled to Enforce the Lost Note.

{¶64} In his third assignment of error, Shawn argues that the trial court erred in concluding that the VA was entitled to enforce the lost note under R.C. 1303.38. Specifically, Shawn argues that the VA did not offer any credible evidence that it was in possession of the note or entitled to enforce it when it was lost. In addition, Shawn avers that the trial court failed to find that he was protected from loss should another party later attempt to enforce the note.

{¶65} Because whether the VA is entitled to enforce the note is a question of law, we review the trial court’s judgment de novo. *See Bank of Am., N.A. v. Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, ¶ 24 (determining whether a plaintiff is the person entitled to enforce a note is a legal determination); *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 90. De novo review is independent and without deference to the trial court’s judgment. *City Rentals, Inc. v. Kesler*, 191 Ohio App.3d 474, 2010-Ohio-6264, ¶ 11 (3d Dist.).

{¶66} “R.C. 1301.01 et seq., Ohio’s version the Uniform Commercial Code (“UCC”), governs the creation, transfer, and enforceability of negotiable instruments, including notes secured by mortgages on real estate.” *U.S. Bank, N.A. v. Gray*, 10th Dist. Franklin No. 12SP-953, 2013-Ohio-3340, ¶ 23, citing *U.S. Bank, N.A. v. McGinn*, 6th Dist. Sandusky No. S-12-004, 2013-Ohio-8, ¶ 15. R.C. 1303.31(A) identifies three persons entitled to enforce an instrument:

- (1) The holder of the instrument;
- (2) A nonholder in possession of the instrument who has the rights of a holder;
- (3) *A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.*

(Emphasis added.) R.C. 1303.38 discusses the enforcement of lost, destroyed, or stolen instruments and provides:

(A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

(2) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.

(3) The loss of possession was not the result of a transfer by the person or a lawful seizure.

(4) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(B) A person seeking enforcement of an instrument under division (A) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, divisions (A) and (B) of section 1303.36 of the Revised Code applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay

the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection for the person required to pay the instrument may be provided by any reasonable means.

See also Natl. City Mtge. v. Piccirilli, 7th Dist. Mahoning No. 08 MA 230, 2011-Ohio-4312, ¶ 23 (“R.C. 1303.31 and 1303.38 specifically provide for the enforcement of lost, destroyed or stolen negotiable instruments.”). Under Ohio law, a party must establish its entitlement to recover under a lost note by a preponderance of the evidence. *Fifth Third Mtge. Co. v. Fillmore*, 5th Dist. Delaware No. 12 CAE 04 0030, 2013-Ohio-312, ¶ 42, citing *In re Perrysburg Marketplace Co.*, 208 B.R. 148, 158 (Bankr.N.D.Ohio 1997).

{¶67} For the VA to be a person entitled to enforce the note under R.C. 1303.31(A)(3), it must first show by a preponderance of the evidence that it was in possession of the note when it was lost *and* entitled to enforce the note when it was lost. R.C. 1303.38(A)(1); R.C. 1303.31(A)(3). *See also In re Harborhouse of Gloucester, LLC*, Bankr.D.Ma No. 10-23078-HJB, 2014 WL 184743, *4 (Jan. 15, 2014) (“[A] person seeking to enforce a lost note must meet two tests: ‘it must have been both in possession of the note when it was lost and entitled to enforce

the note when it was lost.”), quoting *Dennis Joslin Co., LLC v. Robinson Broadcasting Corp.*, 977 F.Supp. 491, 495 (D.D.C.1997).⁷

{¶68} Shawn argues that Magana “repeatedly testified that she had no knowledge of when the note was lost or in whose possession it was when lost” and that “without knowledge of possession, there can be no knowledge of entitlement to enforce.” (Appellant’s Brief at 15). Shawn’s argument is belied by the record.

{¶69} Magana identified Plaintiff’s Exhibit 1 as a true and accurate copy of the note. (Dec. 3, 2013 Tr. at 30). She indicated that the note was payable to Chase Mortgage. (*Id.*). Magana testified that the note was indorsed in blank by Chase Mortgage and transferred to the VA in November 2008. (*Id.* at 32-33, 34-35). Magana averred that the VA was “in actual physical possession” of the note; however, the note was lost while it was in the VA’s possession. (*Id.* at 35, 36). Magana avowed that the note has not been canceled, transferred, or negotiated to any other party. (*Id.* at 36). Likewise, Magana testified that the VA diligently searched “the collateral files, searching our custodians for that, keeper of original notes for safekeeping” to locate the note, but was unable to locate it. (*Id.* at 35).

⁷ *Dennis Joslin Co. LLC v. Robinson Broadcasting Corp.* construed UCC 3-309, which is enacted in Ohio under R.C. 1303.38. 977 F.Supp. 491 (D.D.C.1997). See also *EquiCredit Corp. of Am. V. Provo*, 6th Dist. Lucas No. L-03-1217, 2006-Ohio-3981, ¶ 11 (Ohio’s enactment of UCC 3-309 is R.C. 1303.38). In response to *Dennis Joslin*, “the Uniform Commercial Code was amended to delete the requirement that the transferee be in possession at the time the instrument was lost and now provides that the person seeking to enforce the instrument either was entitled to enforce the instrument when loss of possession occurred, or acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.” *State St. Bank and Trust Co. v. Lord*, 851 So.2d 790, 792 (Fla.2003), citing UCC 3-309(a)(1) (2002). Ohio has not amended R.C. 1303.38 since 1994. See R.C. 1303.38.

According to Magana, the material terms of the original note are the same as those reflected in Plaintiff's Exhibit 1.

{¶70} On cross-examination, Magana testified that she did not know the date the note was lost or "who lost it." (*Id.* at 119-120).

{¶71} On re-direct examination, Magana confirmed that the note was transferred to the VA in November 2008 and was lost while in the VA's possession. (*Id.* at 172-173). Likewise, Magana confirmed that the VA conducted a diligent search for the note and that note has not been satisfied, transferred, canceled, or negotiated away from the VA after the VA repurchased it. (*Id.* at 173).

{¶72} Moreover, as we noted in Shawn's second assignment of error, Plaintiff's Exhibit 5, which comprises the VA's records regarding the refunding agreement, includes a letter from the VA to Chase Mortgage instructing Chase Mortgage to transfer the note to the VA. (*See* Plaintiff's Ex. 5); (Dec. 3, 2013 Tr. at 61).

{¶73} Accordingly, the VA proved by a preponderance of the evidence that it was entitled to recover under the lost note. First, the VA established that it was in possession of the note and entitled to enforce it when the note was lost because it was the *holder* of the note. *See* R.C. 1303.31(A)(1) (a person entitled to enforce an instrument is a *holder* of that instrument). "A 'holder' includes a person who is

in possession of an instrument payable to bearer.” (Emphasis added.) *HSBC Mtge. Servs., Inc. v. Watson*, 3d Dist. Paulding No. 11-14-03, 2015-Ohio-221, ¶ 25, citing *BAC Home Loans Servicing, L.P. v. Haas*, 3d Dist. Marion No. 9-13-40, 2014-Ohio-438, ¶ 27, citing *U.S. Bank, N.A. v. Kamal*, 7th Dist. Mahoning No. 12 MA 189, 2013-Ohio-5380, ¶ 18 and R.C. 1301.01(T)(1)(a).⁸ “A ‘blank indorsement’ is “an indorsement that is made by the holder of the instrument that is not a special indorsement.”⁹ *Watson* at ¶ 25, citing R.C. 1303.25(B). ““When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” *Id.*, citing R.C. 1303.25(B) and *Wells Fargo Bank, N.A. v. Byers*, 10th Dist. Franklin No. 13AP-767, 2014-Ohio-3303, ¶ 14 (“A blank indorsement makes the instrument payable to the bearer pursuant to R.C 1303.25(B).”).

{¶74} Indeed, Magana testified that Chase Mortgage indorsed the note in blank and delivered it to the VA in November 2008, and that the note was lost while it was in the VA’s possession. Therefore, the VA established that it was in possession of the note when it was lost and entitled to enforce it when it was lost.

⁸ “R.C. 1301.01 was repealed by 2011 Am.H.B. No. 9, effective June 29, 2011. That act amended the provisions of R.C. 1301.01 and renumbered that section so that it now appears at R.C. 1301.201. As R.C. 1301.201 applies only to transactions entered on or after June 29, 2011, we apply R.C. 1301.01 to this appeal. We note that the R.C. 1301.201(B)(21)(a) definition of “holder” is substantially similar to the R.C. 1301.01(T)(1)(a) and (b) definition of ‘holder.’” *Flagstar Bank, F.S.B. v. Richison*, 3d Dist. Union No. 14-12-01, 2012-Ohio-3198, ¶ 15, fn. 1.

⁹ “A ‘special indorsement’ is ‘an indorsement that is made by the holder of an instrument * * * and that identifies a person to whom it makes the instrument payable.’” *HSBC Mtge. Servs., Inc. v. Watson*, 3d Dist. Paulding No. 11-14-03, 2015-Ohio-221, ¶ 25, citing R.C. 1303.25(A).

{¶75} Second, the VA established that it was entitled to recover under the lost note because it established by a preponderance of the evidence that the loss was not the result of a transfer by the VA or a lawful seizure, that the VA cannot reasonably obtain possession of the note because its whereabouts cannot be determined, and because it established the terms of the note. *See* R.C. 1303.38(A)(2), (3), (B). Magana averred that the note had not been satisfied, transferred, canceled, or negotiated away from the VA and that, despite diligently searching for the note, the VA could not locate it. Further, Magana testified that the terms of the note are reflected in Plaintiff's Exhibit 1. *See Beal Bank, S.S.B. v. Caddo Parish-Villas South, Ltd.*, 218 B.R. 851, 855 (Bankr.N.D.Tx.1998) (for purposes of UCC 3-309, the terms of a lost instrument may be proven by submitting copy of note and mortgage). Therefore, the VA established by a preponderance of the evidence the elements of R.C. 1303.38(A)(2) and (3) as well as the terms of the note as required by R.C. 1303.38(B).

{¶76} Also, in this assignment of error, Shawn avers that the trial court erred in entering judgment on the lost note because it failed to specifically find that Shawn was protected from loss should someone else try to enforce the lost note in the future as required under R.C. 1303.38(B). Shawn's interpretation of the statute is erroneous.

{¶77} The statute requires the trial court to find “that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.” R.C. 1303.38(B). The statute further provides, “Adequate protection for the person required to pay the instrument may be provided by *any reasonable means*.” (Emphasis added.) *Id.* The official comments to the statute describe the requirement as “a flexible concept” and that “the type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case.” *See* 1990 Official Comment to UCC 3-309.

{¶78} While Ohio courts have not discussed what constitutes “adequate protection,” at least three federal courts have touched on the issue. *See In re Caddo Parish-Villas South, Ltd.*, 174 F.3d 624 (5th Cir.1999); *Ameriquest Mtge. Co. v. Zimmerle*, D.Co. No. 08-cv-02046-MSK-BNB, 2009 WL 3122873 (Sept. 29, 2009); *CitiFinancial Mtge Co., Inc. v. Frasure*, N.D.Ok. No. 06-CV-160-TCK-PJC, 2007 WL 2401750 (Aug. 17, 2007).

{¶79} In *In re Caddo Parish-Villas*, the Fifth Circuit Court of Appeals was presented with the issue of whether indemnification was sufficient to constitute adequate protection. *See In re Caddo Parish-Villas* at 627. Although the Fifth Circuit did not decide whether indemnification was necessary for the debtor to be “adequately protected,” it commented that courts must “determine whether a threat

of third-party enforcement of the Note exists, and if so what constitutes adequate protection against loss that might occur by reason of such enforcement. These functions require the district court to make findings of fact and apply existing law to those facts.” *Id.* at 628. The Fifth Circuit remanded the case to the lower court to make that factual determination. *Id.*

{¶80} In *Zimmerle* and *Frasure*, the federal district courts concluded that the parties required to pay under the instruments were adequately protected based on the circumstances of the cases. *Zimmerle* at *4; *Frasure* at *15. Specifically, those courts concluded that the parties were adequately protected because the instruments were payable only to the bearer and because no other entities made competing claims under the terms of the instruments. *Id.*; *Id.*

{¶81} Under the facts and circumstances of this case, the trial court did not err in concluding that the VA is entitled to recover under the lost note under R.C. 1303.38. While the trial court did not specifically state that it found that Shawn “is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument,” it did not need to explicitly recite the language of the statute. Rather, we are able to discern that the trial court reasonably calculated that Shawn is adequately protected against loss that might occur by reason of another claim to enforce the instrument. First, the trial court found that the note was not canceled, transferred, or negotiated to another party.

Second, the trial court concluded that because Ohio law “creates an equitable transfer of the note” when ownership of the mortgage is proven, the VA has the rights of a noteholder because it owned the mortgage.

{¶82} In addition to the trial court’s conclusions, there are other circumstances surrounding this case that indicate that Shawn is adequately protected against any loss that might occur by reason of a claim by another person to enforce the note.

{¶83} Evidence in the record suggests that it is unlikely that another party will come forward to enforce the note against Shawn. As we determined in Shawn’s second assignment of error, Magana’s testimony established that the VA was in possession of the note when it was lost and entitled to enforce it when it was lost. Also, as the trial court concluded, the VA’s ownership of the mortgage is evidence that the VA also owns the note. *Mtge. Electronic Registration Sys., Inc. v. Vascik*, 6th Dist. Lucas No. L-09-1129, 2010-Ohio-4707, ¶ 25, citing *Bank of New York v. Dobbs*, 5th Dist. Knox, 2009-Ohio-04742, ¶ 31-36. The mortgage was assigned by Chase Home Finance to the VA on November 24, 2008, and the assignment was recorded in the Crawford County Recorder’s Office. (Doc. No. 1). (See also Dec. 3, 2013 Tr. at 175). The language of the two instruments indicates a clear intention of the original parties to the agreement to keep them together—that is, the mortgage refers to the note and the note refers to the

mortgage. (See Doc. No. 1). See also *Vascik* at ¶ 25, citing *Dobbs* at ¶ 31-36. In addition, due to the nature of a VA loan, the tops of the note and the mortgage include, “NOTICE: THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.” (Doc. No. 1). This statement will put any subsequent holders on notice that the note and mortgage are secured by the VA and approval must be granted by the VA to assume the loan. Moreover, the mortgage and note were amended by the “VA Loan and Assumption Policy Rider,” in which the VA guaranteed or insured Shawn’s indebtedness. (*Id.*). Further, there is no evidence in the record that the note was negotiated to a third party. Last, because Shawn has been in default since April 1, 2010, and no other party has come forward in that nearly five-year period claiming an interest, it is unlikely that another party will come forward to enforce the note against Shawn. Compare *Zimmerle*, 2009 WL 3122873, at *4; *Frasure*, 2008 WL 2401750, at *15.

{¶84} Therefore, based on the facts and circumstances of this case, we conclude that the trial court’s finding satisfies R.C. 1303.38(B).

{¶85} Accordingly, because the VA is entitled to recover under the lost note under R.C. 1303.38, we conclude as a matter of law that the VA is entitled to enforce the note under R.C. 1303.31(A)(3).

{¶86} Shawn’s third assignment of error is overruled.

Assignment of Error No. IV

The Trial Court Erred as a Matter of Law in Concluding that Compliance With Regulations of the Department of Veterans' Affairs are a Condition Precedent to Enforcement of the Note and Mortgage.

{¶87} In his fourth assignment of error, Shawn argues that the trial court erred in concluding that compliance with the VA's regulations regarding the servicing of his loan was not a condition precedent to enforcement of the note and foreclosure of the mortgage. Although the trial court concluded that the VA was not required to comply with the regulations as a condition precedent to foreclosure, the trial court found that the VA "provided notice of default to [Shawn] in accordance with the note and mortgage terms and *any VA servicing regulations.*" (Emphasis added.) (Mar. 25, 2014 JE, Doc. No. 101). The VA's servicing regulation, 38 C.F.R. 36.4350(g), regarding collection actions provides:

(1) Holders shall employ collection techniques which provide flexibility to adapt to the individual needs and circumstances of each borrower. A variety of collection techniques may be used based on the holder's determination of the most effective means of contact with borrowers during various stages of delinquency. However, at a minimum the holder's collection procedures must include the following actions:

(i) An effort, concurrent with the initial late payment notice to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due.

(ii) A letter to the borrower(s) if payment has not been received within 30 days after it is due and telephone contact could not be made. This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default.

(iii) In the event the holder has not established contact with the borrower(s) and has not determined the financial circumstances of the borrower(s) or established a reason for the default or obtained agreement to a repayment plan from the borrower(s), then a face-to-face interview with the borrower(s) or a reasonable effort to arrange such a meeting is required.

(iv)(A) A letter to the borrower if payment has not been received:

(1) In the case of a default occurring within the first 6 months following loan closing or the execution of a modification agreement pursuant to § 36.4815, within 45 calendar days after such payment was due; or

(2) In the case of any other default, within 75 calendar days after such payment was due.

(B) The letter required by paragraph (g)(1)(iv)(A) must be mailed no later than 7 calendar days after the payment is delinquent for the time period stated in paragraph (g)(1)(iv)(A) and shall:

(1) Provide the borrower with a toll-free telephone number and, if available, an e-mail address for contacting the servicer;

(2) Explain loss mitigation options available to the borrower;

(3) Emphasize that the intent of servicing is to retain home ownership whenever possible; and

(4) Contain the following language:

The delinquency of your mortgage loan is a serious matter that could result in the loss of your home. If you are the veteran whose entitlement was used to obtain this loan, you can also lose your entitlement to a future VA home loan guaranty. If you are not already working with us to resolve the delinquency, please call us to

discuss your workout options. You may be able to make special payment arrangements that will reinstate your loan. You may also qualify for a repayment plan or loan modification.

VA has guaranteed a portion of your loan and wants to ensure that you receive every reasonable opportunity to bring your loan current and retain your home. VA can also answer any questions you have regarding your entitlement. If you have access to the Internet and would like to obtain more information, you may access the VA web site at www.va.gov. You may also learn where to speak to a VA Loan Administration representative by calling 1-800-827-1000.

(2) The holder must provide a valid explanation of any failure to perform these collection actions when reporting loan defaults to the Secretary. A pattern of such failure may be a basis for sanctions under 2 CFR parts 180 and 801.

38 C.F.R. 36.4350(g).

{¶88} On appeal, Shawn neither alleges how the VA failed to comply with its servicing regulations nor points us to evidence in the record describing the VA's failure. However, the record reflects extensive contact and correspondence between the VA's loan servicers, RCS and its predecessor servicer, Bank of America, and Shawn over the lengthy period preceding the VA's filing of this

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foreclosure action. *Compare Wells Fargo Bank, N.A. v. Sowell*, 10th Dist. Franklin No. 11AP-622, 2012-Ohio-2987, ¶ 13 (concluding that the VA complied with its servicing regulations based on extensive contact and correspondence between Wells Fargo Bank, N.A. and the Sowells preceding foreclosure of their note). (*See also* Plaintiff's Exs. 9, 10, 11, 12, 13, 16). Therefore, even if we assume without deciding that the regulations are a condition precedent to enforcement of the note and mortgage, the trial court found that the VA complied with them, and Shawn does not specify which regulations he believes the VA violated. Accordingly, Shawn's fourth assignment of error is without merit and is overruled.

{¶89} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW, J., concurs.

WILLAMOWSKI, J., concurs in Judgment Only.

/jlr