

No. _____

IN THE
Supreme Court of The United States

RICARDO FORNEZA JR. AND
MARK ANTHONY FORNEZA

Petitioners,

v.

FIFTH THIRD MORTGAGE COMPANY AND
FIFTH THIRD BANK
15-02094

Respondents.

ON PETITION FOR A WRIT FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT
17-20324

PETITION FOR A WRIT OF CERTIORARI

Ricardo Fornesa Jr. and Mark Anthony Fornesa
10498 Fountain Lake Drive, Apt. #1416
Stafford, TX 77477
832-704-2872 phone
ricardo.fornesajr@aol.com
Petitioners

QUESTIONS PRESENTED

1. Under Federal law, 11 U.S.C. § 362(a), do Fifth Third Mortgage Company and Fifth Third Bank (“Fifth Third”) have a right to seize a property from debtor’s bankruptcy estate without seeking relief from the bankruptcy court that resulted to eviction that caused debtor’s two major surgeries with costs of \$18,816.25 and \$43,980.00?
2. Pursuant to Federal law, 18 U.S.C. § 371, did Fifth Third create an offense to defraud the United States by the use of third parties to reach target of fraud that resulted to willful foreclosure of Debtors who are the Registered Owners of the property during the time of foreclosure on May 5, 2015?
3. Did Fifth Third’s seizure of Debtors’ property inflict irreparable damages with no available legal remedies to afford compensation for two major surgeries Ricardo Fornesa Jr. suffered “but for” the unlawful taking of the property on February 28, 2018 forcing them to leave the premises that warrants judicial review of constitutional validity of government actions if the Fourth Amendment was violated to determine if the seizure was legal?
4. Is it certwworthy for a judicial review in order to reverse the affirmance of the Court of Appeals Fifth Circuit to let Judge Nancy F. Atlas who STAYED the case on January 18, 2018 in Case No. 4:17-cv-2728 to continue the trial of this case to examine the facts and evidence if Debtors are in automatic stay during the foreclosure or not on May 5, 2015 as well as to determine if the foreclosure was willful and the eviction was unlawful when there is evidence of fraud of altering government document and filing of false affidavit?

LIST OF PARTIES AND RULE 29.6

STATEMENT

Petitioners Ricardo Fornesa Jr. is the debtor and the registered owner while Mark Anthony Fornesa is the original borrower, and they are appellants in the court of appeals for the fifth circuit.

Respondents Fifth Third Mortgage Company and Fifth Third Bank are the appellees in the court of appeals for the fifth circuit.

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PETITION FOR WRIT FOR CERTIORARI

Petitioners Ricardo Fornesa Jr. and Mark Anthony Fornesa petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

The first question before this Court is about a federal law, 11 U.S.C. § 362(a), that protects property of the bankruptcy estate from actions by creditors, including foreclosure and repossession. The second question is also about a federal law, 18 U.S.C. § 371, that creates an offense if two or more persons conspire either to commit any offense against the United States, or to defraud the United

States, or any agency thereof in any manner or for any purpose.

The third question is about constitutional rights that were deprived to Debtors pursuant to the Fourth Amendmend and the Seventh Amendment of the Bill of Rigths that resulted to Fifth Third's illegal seizure of Debtors' property which caused two major surgeries for Ricardo Fornesa Jr. to suffer "but for" the unlawful taking of the debtor's property on February 28, 2018. The fourth question is if it is certworthy for review if it warrants to reverse the affirmance of the U.S. Court of Appeals Fifth Circuit and let U.S. District Court Judge Nancy F. Atlas who STAYED the case on January 18, 2018 in Case No. 4:17-cv-2728 to continue the trial of this case to examine the facts and evidence if Debtors are in automatic stay or not on May 5, 2015 during the foreclosure as well as to determine if the foreclosure was willful and the eviction was unlawful.

On June 28, 2016, an ORDER was entered in Case No. 4:15-cv-02094 under Judge Kenneth M. Hoyt, denying Fifth Third's motion for summary judgment, so the trial was scheduled on August 3, 2016 to determine whether Debtor Ricardo Fornesa Jr.'s ownership interest in the subject property that is protected by bankruptcy is valid. Jury trial was requested by plaintiffs from the very beginning of the case as well as in the Joint Pre-Trial Order, but it ended up in a bench trial and denied the plaintiffs of their constitutional right pursuant to the Seventh Amendment of the Bill of Rights.

On August 3, 2016, the bench trial was conducted and the 22 trial exhibits were submitted by Debtor Ricardo Fornesa Jr. during the trial. These 22 trial exhibits were submitted many times before the bench trial and they were also discussed and were testified during the trial, so a Matter Under Advisement was entered on August 3, 2016. On March 23, 2017, Judge Hoyt entered a FINAL JUDGMENT that plaintiffs shall take nothing their suit.

On April 21, 2017, Judge Hoyt entered an ORDER that the plaintiffs' motion for a new trial should be DENIED.

On May 1, 2017, a Notice of Appeal was filed to the United States Court of Appeals for the Fifth Circuit. On June 28, 2017, after 58 days that the appeal is filed, a NOTICE OF SETTING that the parties are hereby notified that a status conference is set for June 28, 2017 at 9:00 a.m. and will be handled as a telephone conference. At this conference, Judge Hoyt stated that 9 out of the 22 trial exhibits will be taken out from the evidence that had been submitted several times before and during the bench trial. Debtor objected to the exclusion of these 9 trial exhibits because they are relevant evidence that if not excluded will make Fifth Third lose the case. Federal Rules of Evidence, Article IV, Rule 401 states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without evidence; and (b) the fact is of consequence in determining the action. Surprisingly, 9 relevant evidence out of the 22 trial exhibits were not admitted that made the Final Judgment of Judge Hoyt to be in favor of Fifth Third.

On September 13, 2018, the court of appeals for the fifth circuit denied the petition for rehearing en banc and affirmed the judgment of the district court, and stated that plaintiffs have waived their claims for wrongful foreclosure and for violation of automatic stay under 11 U.S.C. § 362(a). This is not true because plaintiffs never waived their claims for willful foreclosure and allegation that Fifth Third violated the automatic stay since these are the very claims that plaintiffs raised from the very beginning of the case.

Fifth Third willfully foreclosed the property without first seeking relief from the bankruptcy court and there is a clear evidence of fraud of altering government document and filing false affidavit committed by Fifth Third to pursue

the willful foreclosure. It resulted to debtor's unlawful eviction that caused him two major surgeries and continuous treatment for some other injuries "but for" the illegal seizure of his property in which he is the rightful owner. He was forced to leave the premises on February 28, 2018 within several hours after County Judge Dornburg denied the TRO when lifting heavy furniture, dressers, and beds under pressure where he hurt his neck and his right shoulder when transferring them to a public storage in Rosenberg, Texas on the same day. A lot of other stuffs were left in the house and were also seized by Fifth Third including a Nissan Quest van. Debtor Ricardo Fornesa Jr. was denied of his constitutional right pursuant to the Fourth Amendment of the Bill of Rights.

On November 15, 2018 after two major surgeries on September 5, 2018 at MHHS Memorial City Hospital with a cost of \$18,816.25 and on September 19, 2018 at Memorial Hermann Surgical Center Richmond Bone and Joint with a cost of \$43,980.00 for the surgery of a large tear on his right shoulder, Debtor Ricardo Fornesa Jr. went to Dr. Mohammad Etminan with 3-4 weeks of severe right leg pain and right-sided lower back pain. He has tenderness over his right sciatic notch in the right buttocks with a mildly positive straight leg raise test. X-rays showed severe disc degeneration L5-S1 with possible dish formation. Due to the severity of his pain, Dr. Mohammad Etminan ordered an MRI on November 16, 2018. He is getting injections with Dr. Candice Burnette in his neck pain management because of herniated disc as a result of unlawful eviction on February 28, 2018 where Debtor Ricardo Fornesa Jr. hurt his neck and his right shoulder when lifting heavy furniture, dressers, and beds when they were forced to leave the house within several hours during that day of the unlawful eviction.

The federal law issues and the constitutional issues which are the subjects of this appeal deserve for its solution all of the wisdom that our judicial process makes available

for the vulnerable who are victims in this willful foreclosure and unlawful eviction. The need for soundness in the result of the review in the highest Court of this nation needs to look if the facts and the evidence meet the elements of the rules. The victims are entitled to enjoy the protection of the law and the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals of the Fifth Circuit and of the District Court. The time taken will also be available for the constructive consideration by the parties of their own positions and responsibilities so that the true justice could prevail in this case.

Therefore, this Court has the final say over when a right is protected by the Constitution or when a Constitutional right is violated. The Supreme Court plays a very important role in our constitutional system of government. First, as the highest court in the land, it is the court of last resort for those looking for justice. Second, due to its power of judicial review, it plays an essential role in ensuring that each branch of government recognizes the limits of its own power. Third, it protects civil rights and liberties by striking down laws that violate the Constitution. Finally, it sets appropriate limits on democratic government by ensuring that popular majorities cannot pass laws that harm and/or take undue advantage of unpopular minorities. In essence, it serves to ensure that the changing views of a majority do not undermine the fundamental values common to all Americans, i.e., freedom of speech, freedom of religion, and due process of law.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit dated July 27, 2018 as well as the Panel Rehearing and the Rehearing En Banc were Denied on September 5, 2018 are shown at Appendix A.

The opinion, order, and judgment of the U.S. District Court for the Southern District of Texas under Judge Kenneth M. Hoyt in Case No. 4:15-cv-02094 from June 28, 2016 through June 29, 2017 are shown at Appendix B.

The opinion, order, and judgment of the U.S. District Court for the Southern District of Texas under Judge Nancy F. Atlas in Case No. 4:17-cv-02728 from January 18, 2018 through July 27, 2018 as well as the Joint Status Report of both parties on September 17, 2018 are shown at Appendix C.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 27, 2018. The Court of Appeals denied Plaintiffs' Petition for Rehearing En Banc on September 5, 2018. App. A. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the date of the denial of the Petition for Rehearing En Banc. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

- 1) Ricardo Fornesa Jr. is the father of Mark Anthony Fornesa who obtained a loan from Fifth Third Mortgage Company on February 17, 2010. On February 28, 2010, the father invested in his son's property via an Equity Sharing of Real Property between him as the Investor and his son as the Occupier.
- 2) On September 30, 2012, Ricardo Fornesa Jr. filed Chapter 13 and his investment in the said property totaling to \$18,255.00 during that time was included on the Bankruptcy schedules under SCHEDULE B – PERSONAL PROPERTY and SCHEDULE C – PROPERTY CLAIMED AS EXEMPT per Equity Sharing Agreement in son's house pursuant to 11 U.S.C. § 522(d)(5).
- 3) On January 8, 2015, Mark Anthony Fornesa wanted to move closer to his job as a police officer, so he and his wife executed a QUITCLAIM DEED in favor of Debtors Ricardo Fornesa Jr. and Cynthia Fornesa relinquishing their rights to the said property because they don't want the house anymore. Ricardo Fornesa Jr. who has investment in that house and his wife Cynthia became the

Registered Owners of the title of 6427 Moreland Lane, Rosenberg property since January 8, 2015.

4) Fifth Third Bank's Mortgage Loan Statement dated March 17, 2015 demanded payments for November, December, January, February, March, and for the month of April current payment. The statement stated that when the amount of \$7,019.22 (\$6,996.99 + \$22.23) is received after April 16, 2015 but before April 30, 2015, it will be a FULL PAYMENT to cure the default so the loan will have a CURRENT STATUS as of April 30, 2015.

5) The check in the amount of \$7,019.22 including the bankruptcy case filing were received by Fifth Third on April 29, 2015 signed for by A. Keith. Fifth Third Bank's Senior Vice-President, Brian P. Moore ignored the bankruptcy case filing and the March 17, 2015 Mortgage Loan Statement and instead returned it to Debtors on May 4, 2015 and instructed Mackie Wolf Zientz & Mann, P.C. to pursue the Foreclosure Sale on May 5, 2015. The property has \$50,000 equity that was proven on the bench trial by expert witness Residential Certified Appraiser Michael Benes during the trial on August 3, 2016.

6) Despite receiving the notice of bankruptcy case filing and the check of \$7,019.22 to cure the default on April 29, 2015, seven days before the foreclosure sale date, Fifth Third willfully violated the automatic stay that arises from the filing of bankruptcy by foreclosing Debtors' residential homestead.

7) The unlawful foreclosure was conducted on May 5, 2015 when Kendra Wiley on behalf of Fifth Third submitted a false affidavit in a foreclosure proceeding on May 5, 2015 stating that Registered Owners and Debtors Ricardo Fornesa Jr. and Cynthia Fornesa were not protected by automatic stay.

8) According to Fort Bend Central Appraisal District under Instrument #2015002681, the legal title of Property R335432 was conveyed to Debtors Ricardo Fornesa Jr. and Cynthia Fornesa by Mark Anthony Fornesa and Judy Thanh Fornesa on January 8, 2015. After four (4) months on May 5, 2015, Instrument #2015053907 from Fort Bend Central Appraisal District conveyed the legal title from Debtors Ricardo Fornesa Jr. and Cynthia Fornesa to Fifth Third Mortgage Company via willful foreclosure as part of alleged criminal conspiracy.

9) Malik Cheatam altered official record of Fort Bend Central Appraisal District by changing the names of Ricardo Fornesa Jr. and Cynthia Fornesa into Mark Anthony Fornesa and Judy Thanh Fornesa as the same Instrument #2015053907 in Malik Cheatam's Foreclosure Sale Deed to mislead the County Court in order to pursue the willful foreclosure and fraudulent transfer of title to Property R335432. Tampering government records or fabricating physical evidence with knowledge of its falsity and with intent to affect the course or outcome of official proceeding is forbidden by law.

ARGUMENTS

1) Under Federal law, 11 U.S.C. § 362(a), do Fifth Third Mortgage Company and Fifth Third Bank (“Fifth Third”) have a right to seize a property from debtor’s bankruptcy estate without seeking relief from the bankruptcy court that resulted to eviction that caused debtor’s two major surgeries with costs of \$18,816.25 and \$43,980.00?

A) The court of appeals for the fifth circuit determined that Fifth Third did not violate the automatic stay with the postpetition eviction of Debtors Ricardo Fornesa Jr. and Cynthia Fornesa. The automatic stay provisions of 11 U.S.C. § 362(a) is alleged to have been violated as a question of law that requires of review de novo. *McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072, 1077 (9th Cir.2000) (citing *Cal. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1150 (9th Cir.1996)).

B) Petitioners argue that the automatic stay provided by 11 U.S.C. § 362(a) protects property of the bankruptcy estate from actions by creditors, including foreclosure and repossession. Fifth Third did a willful and egregious foreclosure on May 5, 2015 using altered government document and false affidavit against a bankruptcy estate violating 11 U.S.C. § 362(a)(3) which states that any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate is unlawful and a clear violation of this federal law.

C) The property has \$50,000 equity that was proven on the bench trial by expert witness Residential Certified Appraiser Michael Benes during the trial on August 3, 2016. Fifth Third did not seek for relief to lift the

automatic stay because it will be denied for sure since under 11 U.S.C. § 362(d): On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

- (1)for cause, including the lack of adequate protection of an interest in property of such party in interest;
- (2)with respect to a stay of an act against property under subsection (a) of this section, if-
 - (a)the debtor does not have an equity in such property; and
 - (b)such property is not necessary to an effective reorganization.

D) Defendants did not seek for relief because they knew for sure that debtors have adequate protection of an interest in the property. The debtors have \$50,000.00 equity on the property and such property is necessary to debtors' effective reorganization because the property became the debtors' homestead after they surrendered the previous homestead in the bankruptcy court. It will be impossible for them to lift the automatic stay so Fifth Third just gambled in foreclosing the property hoping that debtors will just walk away from the property.

E) If Fifth Third wants to seize property for lack of adequate protection, 11 U.S.C. § 362(d)(1), or for lack of equity, 11 U.S.C. § 362(d)(2), they cannot do adjudication or a formal judgment on a disputed matter first and then force the debtors to vindicate their rights after the seizure. Instead, Fifth Third must first seek relief from the bankruptcy court.

Where seized property is an arguable property, it is no defense for Fifth Third to defend the foreclosure by claiming that the property was not properly covered by the stay. Trial Exhibit "PX4" – Residential Appraisal Report was excluded as evidence and the testimony of expert witness Certified Appraiser Michael Benes during the bench trial on August 3, 2016 that the property has \$50,000.00 was not also accepted as evidence. Federal Rules of Evidence, Article IV, Rule 401 states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without evidence; and (b) the fact is of consequence in determining the action.

F) Shaping the scope of the stay by retroactive classification of the property would encourage Fifth Third to abuse debtors and make them suffer. Knowing that debtors need a lot of money to vindicate their rights in a later adversary proceeding, Fifth Third could simply seize arguable property without fear of later judicial retribution. Arguable property is debtors' property, so if Fifth Third prevailed, debtors will be permanently deprived of their wrongfully seized asset.

G) The property of the estate includes property as to which the debtors have an "arguable" claim. The Court of Appeals for the Fifth Circuit has ruled that if a debtor asserts an interest in property, a creditor is obliged to recognize that the automatic stay prohibits the creditor from taking action against such property even though the debtor's claim to the property is ultimately determined to be without merit. *Brown v. Chestnut*, 422 F.3d 198 (5th Cir. 2005). The district court erred in absolving Brown's willful violation of the automatic stay with a post-seizure determination of the property's characterization.

H) In 1984, Congress amended the automatic stay provisions of the Bankruptcy Code to add what is now 11 U.S.C.A. § 362(k), which states that a debtor who can prove injury due to a willful violation of the automatic stay can recover actual damages, including costs and attorney's fees, and, potentially, punitive damages. In order to prove a willful violation of the stay, courts will typically examine whether the violator had knowledge of the bankruptcy case when acting, and whether the violator intended to carry out the proscribed act. This alleged willful foreclosure resulted in debtor's two major surgeries with costs of \$18,816.25 and \$43,980.00 respectively.

I) The rule is: Automatic Stay is an injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed. In automatic stay violation litigation, debtors bear the burden of proof to establish by a preponderance of evidence the following elements: (1) that a bankruptcy petition was filed, (2) that debtors are "individuals" under the automatic stay provision, (3) that creditors received notice of the petition, (4) that creditors' actions were in willful violation of the automatic stay, and (5) that debtors suffered damages. Bankr. Code, 11 U.S.C.A. § 362(h).

J) Debtor Ricardo Fornesa Jr. argues that the check in the amount of \$7,019.22 as full payment to cure the default including the bankruptcy case filing were received by Fifth Third on April 29, 2015 signed for by A. Keith. Fifth Third disputes that it received the bankruptcy documents on April 29, 2015. USPS tracking number EK362376418US showed that Fifth Third received the check and the bankruptcy documents on April 29, 2015 at 11:16 A.M.

K) Debtor argues that another set of bankruptcy documents and this time without a check was sent on May 4, 2015. Fifth Third contends that this package would have not been received before May 5, 2015. USPS tracking number EK362376452US showed that Fifth Third's attorney, Mackie Wolf Zientz & Mann, P.C., received the bankruptcy documents on May 5, 2015 at 10:32 A.M. in Dallas, TX. The non-judicial foreclosure sale was conducted at 2:37 P.M. on May 5, 2015.

L) Fifth Third sent back the check to debtor on May 4, 2015 to pursue the willful foreclosure on May 5, 2015. Therefore, Fifth Third is lying when they say that they don't have the check on April 29, 2015. Fifth Third asserts that they returned the check because, as of May 1, 2015, the check constituted only a partial payment and could not bring the loan current. Debtor contends that the \$7,019.22 is the full payment including penalty and interest according to Fifth Third Bank's Mortgage Loan Statement dated March 17, 2015 if they received it on April 29, 2015. Fifth Third make it appear that they received the check on May 1, 2015 in order for the May amortization payment to be included so that it will be considered only as a partial payment and not a full payment.

2) Pursuant to Federal law, 18 U.S.C. § 371, did Fifth Third create an offense to defraud the United States by the use of third parties to reach target of fraud that resulted to willful foreclosure of Debtors who are the Registered Owners of the property during the time of foreclosure on May 5, 2015?

A) It is a federal crime “if two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose.” 18 U.S.C. § 371 (2013). This language is the second clause (or “defraud prong”) of the federal conspiracy statute that creates criminal liability for anyone who conspires “either to commit any offense against the United States, *or to defraud the United States . . .*.” *Id.* (emphasis added). Generally, the Government must prove beyond a reasonable doubt that (1) the defendant entered into an agreement, (2) to obstruct a lawful function of the Government, (3) by deceitful or dishonest means, and (4) committed at least one overt act in furtherance of the conspiracy. *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996) (citing *United States v. Caldwell*, 989 F.3d 1056, 1059 (9th Cir. 1993)).

B) Fifth Third’s Malik Cheatam altered official record of Fort Bend Central Appraisal District by changing the names of Ricardo Fornesa Jr. and Cynthia Fornesa into Mark Anthony Fornesa and Judy Thanh Fornesa as the same Instrument #2015053907 in Malik Cheatam’s Foreclosure Sale Deed to mislead the County Court in order to pursue the willful foreclosure and fraudulent transfer of title to Property R335432. Tampering government records or fabricating physical evidence with knowledge of its falsity and with intent to affect the course or outcome of official proceeding is against the law.

C) Fifth Third's Kendra Wiley submitted a false affidavit in a foreclosure proceeding on May 5, 2015 stating that Registered Owners and Debtors Ricardo Fornesa Jr. and Cynthia Fornesa were not protected by automatic stay. The rule is: Under the majority rule, a conspiracy is committed when the defendant enters an agreement to commit a crime and an overt act is done toward the commission of the target offense. The elements of conspiracy are (1) Agreement, (2) Two guilty minds, (3) Unlawful purpose, (4) Violation of federal law, and (5) Overt act. Kendra Wiley and Malik Cheatam agreed and intended to act in concert to present altered document and false affidavit to pursue the willful foreclosure. The objective of their agreement was to commit a lawful act by unlawful means. These conspirators have actually taken a step towards making it a reality and the overt act resulted to willful foreclosure and unlawful eviction of debtor Ricardo Fornesa Jr. that caused him two major surgeries he suffered "but for" the unlawful taking of the property on February 28, 2018 forcing them to leave the premises within several hours. The cost of first surgery on September 5, 2018 at MHHS Memorial City Hospital is \$18,816.25 and the cost of the second surgery on September 19, 2018 at Memorial Hermann Surgical Center Richmond Bone and Joint is \$43,980.00 because of a large tear on his right shoulder as a result of heavy lifting of furniture, dressers, and beds under pressure to transfer them into a public storage on February 28, 2018. 18 U.S.C. § 371.

D) Michelle Fancher became a "late joiner" when she testified under oath during the bench trial on August 3, 2016 and is responsible for any reasonable foreseeable criminal acts done by any of the co-conspirators while the "late joiner" is a member of the Conspiracy. Judge Hoyt and the 3-panel circuit judges believed her testimony that plaintiffs called Fifth Third and were given two weeks to redeem, but that is not true. Debtor Ricardo Fomesa Jr. owned the

residential homestead and the one paying Fifth Third who earlier paid them \$7,019.22 to cure the default, so he should be the one to be contacted by Fifth Third as he became the registered owner of the property as of January 8, 2015 and during the time of foreclosure. Fifth Third should come up with the recorded telephone conversation to find out if Michelle Fancher is telling the truth in her testimony.

E) Fifth Third Bank's Senior Vice-President

Brian P. Moore is alleged to be the "brain" behind the criminal conspiracy when he did not deposit the \$7,019.22 to cure the default as FULL PAYMENT because he received it on April 29, 2015 and not on May 5, 2015. An important feature of the Conspiracy statute is that it enables the investigator to get beyond the first layer of visible members to find and prosecute the "brains" behind a criminal conspiracy. Specific federal anti-conspiracy statutes are found throughout federal law. 18 U.S.C. § 371.

F) Central to the concept of criminal liability

is that, before there can be a crime, there must be an act, or *actus reus*, which must be accompanied by criminal mind, or *mens rea*. When Malik Cheatum tampered the record of Fort Bend Central Appraisal District and Kendra Wiley submitted false affidavit stating that debtors are not protected by automatic stay, they were aware that their conduct will result to willful foreclosure and knowingly cause harm to debtors. The overt act is morally blameworthy known as *actus reus* along with an "evil" frame of mind, known as *mens rea*.

G) The conspiracy of Brian P. Moore, Malik

Cheatam, Kendra Wiley, and Michelle Fancher was intentional that resulted in a willful foreclosure and unlawful eviction. The People must prove that Fifth Third and another person specifically intended to agree

or conspire to commit an offense, including its elements, and at least one overt act such as altering government document or submitting false affidavit in furtherance of the conspiracy was done by one or more of the parties to the agreement. However, they do not have to prove that any particular conspirator committed any particular act, because "the act of one conspirator is the act of all." In any event, the People do not need to prove that Fifth Third personally did any particular overt act. If Fifth Third participated in the conspiracy, any act done by Fifth Third's coconspirators became Fifth Third's act as a matter of law. (18 U.S.C. § 371).

3) Did Fifth Third's seizure of Debtors' property inflict irreparable damages with no available legal remedies to afford compensation for two major surgeries Ricardo Fornesa Jr. suffered "but for" the unlawful taking of the property on February 28, 2018 forcing them to leave the premises that warrants judicial review of constitutional validity of government actions if the Fourth Amendment was violated to determine if the seizure was legal?

A) Under the **Fourth Amendment**, the Court must determine if Fifth Third's seizure of petitioner's property pursuant to the evidence available to the lender was "objectively reasonable." Under this standard, a mortgage company violates the Fourth Amendment if the Court determines that the lender had "no reasonable grounds" for believing that a seizure was legal. Submitting and presenting altered government document and false affidavit are not reasonable grounds to pursue foreclosure.

B) Fifth Third filed a forcible entry and detainer action in justice court on June 4, 2015, further violating the automatic stay. Fifth Third non-suited this First Suit To Evict on June 29, 2015 and Judge Mary Ward entered an Order of Non-Suit on June 30, 2015. However, Fifth Third did not file a Notice of Rescission and did not return the title to debtor. Ricardo Fornesa Jr. and his son Mark Anthony Fornesa filed a lawsuit against Fifth Third to get back the title of the property in the 240th Judicial District Court on June 23, 2015 as a response to Fifth Third's **FIRST SUIT TO EVICT** and docketed as Case No. 15-DCV-224304. Debtor Ricardo Fornesa Jr. continued to be in possession of the property until February 28, 2018 although the title was unlawfully registered in the name of Fifth Third.

C) Following Fifth Third's admittance of an unlawful foreclosure, an attorney for Mackie Wolf Zientz & Mann P.C., Philip W. Danaher on July 21, 2015, made a Declaration that Debtors Ricardo Fornesa Jr. and Cynthia Fornesa are the Registered Owners of Property R335432 recorded in Central Appraisal District for Fort Bend County. The **FIRST SUIT TO EVICT** was non-suited by Fifth Third but they did not file a Notice of Rescission and did not transfer the title of the property back to debtors. The 240th Judicial District Court lawsuit was removed to Federal Court docketed as Case No. 4:15-CV-02094 and a bench trial was conducted on August 3, 2016 by Judge Hoyt although a **jury trial** was requested from the very beginning of the case. Judge Hoyt ruled in favor of Fifth Third despite the stay violation and despite Fifth Third did not seek relief to lift the stay from the bankruptcy court plus the fact that altered government document and false affidavit were submitted to pursue the willful foreclosure.

D) Petitioners' constitutional right was violated pursuant to **Amendment 7 of the Bill of Rights** stating that: "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Petitioners argue that Trial Exhibit "PX10" – 3-Day Notice to Vacate dated June 4, 2015; Trial Exhibit "PX11" – Suit to Evict; Trial Exhibit "PX12" – Eviction Citation; and Trial Exhibit "PX13" – Motion for Non-Suit dated June 30, 2015. These four (4) Trial Exhibits were taken out as evidence so that Fifth Third could prevail in this case in violation to Federal Rules of Evidence, Article IV, Rule 401 stating that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without evidence; and (b) the fact is of consequence in determining the action.

E) Article III, Section 2, Clause 3 of the Constitution stated that: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

F) Fifth Third was not successful on their first attempt to evict the debtors on June 4, 2015 on their **FIRST SUIT TO EVICT** because they non-suited it. On August 2, 2017 after 2 years and 2 months, Fifth Third filed again the **SECOND SUIT TO EVICT** attempt to evict the debtors at the time when a properly amended **SCHEUDLE C -- PROPERTY CLAIMED AS EXEMPT** in Case 12-37238 Document #120 Filed in TXSB on 05/15/17 and named Fifth Third as creditor. Debtors filed a counter lawsuit in State Court as a response to Fifth Third's **SECOND SUIT TO EVICT** filed on August 2, 2017, but it

was removed to United States District Court as Case No. 4:17-cv-02728. A Pretrial Conference was set for 1/16/2018 and on January 18, 2018, U.S. Senior District Judge Nancy F. Atlas entered an ORDER that this case is STAYED and ADMINISTRATIVELY CLOSED until all the Related Litigation is fully resolved by final judgments.

G) Fifth Third argues that Debtor's failure to fulfill his Chapter 13 duty by amending his asset schedules "impliedly represented" to the bankruptcy court that his financial status was unchanged. This was plainly inconsistent with his subsequent assertion of an undisclosed claim based on the undisclosed asset. Debtor contends that on May 15, 2017, he amended his **SCHEDULE C -- PROPERTY CLAIMED AS EXEMPT** in Case No. 12-37238 Document #120 Filed in TXSB and named Fifth Third as creditor. Despite of the properly amended schedule, Fifth Third filed their **SECOND SUIT TO EVICT** on August 2, 2017 after two months and 18 days which is again a violation of automatic stay provided by 11 U.S.C. § 362(a) that protects property of the bankruptcy estate from actions by creditors, including foreclosure and repossession.

H) Fifth Third's **SECOND SUIT TO EVICT** went to a bench trial on January 10, 2018 when the County Court entered a Final Judgment in favor of Fifth Third against the Registered Owners who are Debtors protected by automatic stay pursuant to 11 U.S.C. § 362(a). County court's decision was based on Judge Hoyt's judgment which is demonstrated on a portion of the Transcript of Eviction Appeal hearing. Debtor Ricardo Fornesa Jr. was not given due process of law and equal protection of the laws when Associate Judge Dornburg could have decided the eviction appeal based on documentary evidence submitted before the trial and not based on Judge Hoyt's alleged abuse of discretion.

THE COURT: But I'll tell you right now, Judge Hoyt has flat out said you don't get to claim. You are estopped -- that we're estopped from going forward with the -- from the --

THE COURT: -- from the -- we're not -- we can't -- that we're not stopped from going forward with the foreclosure because of your bankruptcy proceedings.

THE COURT: According to what I'm seeing right here, Fifth Mortgage is the rightful owner of this property. They have a foreclosure sale deed. They have a Deed of Trust stating that they are the owners of this property.

MR. FORNESA: Your Honor, it is -- it is protected by the automatic stay according to (*unintelligible*).

THE COURT: There is no automatic -- no. No, it is not. That's what -- that's what Plaintiff's Exhibit 4 flat out states. That's what Judge Hoyt up in -- up in the --

MR. FORNEZA: That's why I'm appealing, Your Honor, because the findings of fact and the conclusions of law, that that's how it committed because he excluded nine very important documents in evidence, Your Honor; and that's what I'm appealing, Your Honor. And if you can see -- if you will only, you know, get this I -- I expect everything to here and from here, my reply brief, I explained everything to them and this is -- this is really -- this is really unfortunate that this district judge -- and I even came and, you know, I was not treated fairly. You know, this was abuse of discretion over there.

I) When nine (9) important Trial Exhibits were taken out as evidence, this judgment can be termed as an abuse of discretion if the adjudicator has failed to exercise sound, reasonable, and legal decision-making skills and the lower court overstepped its boundaries of discretion by improperly denying admissible evidence. In *re General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court reversed and remanded this instant case because the question whether exposure to furans and dioxins contributed to Joiner's cancer is still open. REHNQUIST, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined.

J) On February 28, 2018, Debtors and Registered Owners were unlawfully evicted and lost the most basic protections of the bankruptcy court and suffered actual damages, personal injuries, and severe emotional distress. The illegal seizure of Debtors' residential homestead deprived them of their constitutional right pursuant to the Fourth Amendment of the Bill of Rights stating that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The lower court is constitutionally required to prove beyond a reasonable doubt every element of a criminal offense, including Fifth Third's *mens rea*. Crime is a public wrong when Fifth Third's Malik Cheatam altered government document and Fifth Third's Kendra Wiley submitted false affidavit under oath to commit the overt act in concerted effort to foreclose the property. They acted maliciously, intentionally, knowingly, recklessly, and negligently committing social harm that constitutes the *actus reus* of the offense. Article III, Section 2, Clause 3 of the Constitution

4) Is it certworthy for a judicial review in order to reverse the affirmance of the Court of Appeals Fifth Circuit to let Judge Nancy F. Atlas who STAYED the case on January 18, 2018 in Case No. 4:17-cv-2728 to continue the trial of this case to examine the facts and evidence if Debtors are in automatic stay during the foreclosure or not on May 5, 2015 as well as to determine if the foreclosure was willful and the eviction was unlawful when there is evidence of fraud of altering government document and filing of false affidavit?

A) U.S. District Court Judge Nancy F. Atlas on January 18, 2018 **ORDERED** that this case is **STAYED** and **ADMINISTRATIVELY CLOSED** until all the Related Litigation is fully resolved by final judgments. Upon final resolution of the Related Litigation, either party may move the Court to restore this case to its active docket. It is further **ORDERED** that the parties jointly, if possible, shall (i) provide the Court with an update as to the status of the Related Litigation every one hundred twenty (120) days following the date of this Order and (ii) shall notify the Court of any rulings in the Related Litigation as promptly as practicable.

B) Fifth Third admitted and stated on their Joint Status Report submitted to District Judge Nancy F. Atlas on May 18, 2018 that: "Case No.: 12-37238, In Re: Ricardo Deleon Fornesa, Jr. and Cynthia Fornesa, was transferred from Judge Karen K. Brown to Judge Jeffrey P. Norman on April 2, 2018. The Debtors have received their discharge in that matter." This means that Fifth Third agreed that Debtors are under the protection of automatic stay during the unlawful eviction on February 28, 2018.

C) On July 26, 2018, Judge Nancy F. Atlas entered an ORDER that Plaintiffs may file a supplemental complaint in this case (4-page limit) referring only to events and damages since January 2018, by **July 31, 2018**. Defendants to inform the Court in writing regarding application of the automatic stay to the property in issue and status of the bankruptcy case, by **August 13, 2018**. This case will be administratively closed at 5pm on July 31, 2018, until the State Court case enters final judgment, and Judge Hoyt's case that is on appeal is completed.

D) Fifth Third stated on their Joint Status Report on September 17, 2018 that: "The appeals of the two state court eviction matters (Petition for Writ of Mandamus and an Appeal to State Court) are fully briefed and are presently pending before the 14th Court of Appeals of Texas. To date that Court has not issued an opinion in either matter." There are still a lot of unanswered questions of exceptional importance in this case that warrant a continuous trial so that justice can truly prevail."

REASONS FOR GRANTING THE PETITION

A) Judicial discretion is the power of judiciary to make some legal decisions according to their discretion. United States Court of Appeals for the Fifth Circuit has entered a decision in *Brown v. Chestnut*, 422 F.3d 198 (5th Cir. 2005) that the property of the estate includes property as to which the debtors have an “arguable” claim. The Court of Appeals for the Fifth Circuit has ruled that if a debtor asserts an interest in property, a creditor is obliged to recognize that the automatic stay prohibits the creditor from taking action against such property even though the debtor’s claim to the property is ultimately determined to be without merit. The district court erred in absolving Brown’s willful violation of the automatic stay with a post-seizure determination of the property’s characterization.

B) In re *Fornesa v. Fifth Third Mortgage Company* in Case No. 17-20324, the court of appeals for the fifth circuit entered a decision in conflict of their own decision that if a debtor asserts an interest in property, a creditor is obliged to recognize that the automatic stay prohibits the creditor from taking action against such property even though the debtor’s claim to the property is ultimately determined to be without merit. The court of appeals for the fifth circuit affirmed the willful foreclosure on September 5, 2018 despite Fifth Third submitted altered government document and false affidavit in violation of federal laws, 11 U.S.C. § 362(a) and 18 U.S.C. § 371. Debtors’ constitutional rights were also violated, the fourth and seventh amendments of the Bill of Rights.

C) Although there are still pending cases in state court, federal court, and this petition for a writ of certiorari, Fifth Third sold the property on October 10, 2018 to Jessie Feng to make the matter worse and to show that they are very confident that they are going to win in these three

pending cases. Based on the chain of title of Property R335432 from official record of Fort Bend County Central Appraisal District, Instrument 2015053907 conveyed the title from Debtors Ricardo Fornesa Jr. and Cynthia Fornesa to Fifth Third Mortgage Company on May 5, 2015. Instrument 2018085577 conveyed the title from Fifth Third Mortgage Company to Secretary of Housing and Urban Development on December 29, 2015. Instrument 2018114974 conveyed the title from Secretary of Housing and Urban Development to Jessie Feng on October 10, 2018. Fifth Third altered Instrument 2015053907 and changed the names of Debtors into Mark Anthony and Judy Thanh Fornesa in the Foreclosure Sale Deed on 5/05/2015.

D) Judicial review is best described as the best-known power of the Supreme Court. The courts of United States are duty-bound to take notice of the constitution. In the landmark case, *Marbury v. Madison* 1 Cranch 137 (S. Ct.1803), the courts of the United States are bound to take notice of the constitution. In writing the decision, John Marshall argued that acts of Congress in conflict with the Constitution are not law and therefore are non-binding to the courts, and that the judiciary's first responsibility is always to uphold the Constitution. If two laws conflict, Marshall wrote, the Court bears responsibility for deciding which law applies in any given case. The basic principle of fairness and due process define our legal system in our country. Taking allegations seriously means that due process and the rule of law must be upheld.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted and that the case be remanded for trial on the merits and let Judge Nancy F. Atlas who STAYED the case on January 18, 2018 in Case No. 4:17-cv-2728 to continue the trial of this case to examine the facts and evidence if Debtors are in automatic stay during the foreclosure or not on May 5, 2015 as well as to determine if the foreclosure was willful and the eviction was unlawful.

Respectfully submitted,

/s/
RICARDO FORNEZA JR.

/s/
MARK ANTHONY FORNEZA
10498 Fountain Lake
Drive, Apt. 1416
Stafford, TX 77477
Tel. (832) 704-2872
ricardo.fornesajr@aol.com
PETITIONERS