

No. 18-1339

**In the Supreme Court of the United States**

**RICARDO FORNESA JR. AND**

**MARK ANTHONY FORNESA**

**Petitioners**

**v.**

**FIFTH THIRD MORTGAGE COMPANY**

**AND FIFTH THIRD BANK**

**15-02094**

**Respondents**

**ON PETITION FOR A WRIT OF CERTIORARI**

**TO THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

**17-20324**

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**SUPPLEMENTAL BRIEF OF THE PETITIONERS**

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**Ricardo Fornesa Jr. and Mark Anthony Fornesa**

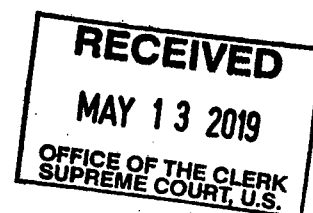
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**Petitioners**



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**SUPPLEMENTAL BRIEF OF THE PETITIONERS**

This supplemental brief, filed pursuant to Rule 15.8 of this Court, brings to the Court's attention the opinion of the court of appeals in these related cases, which was issued after the filing of the petitioners' petition for a writ of certiorari before judgment, and addresses its impact on the pending petition.

On March 23, 2017, the district court entered a Final Judgment pursuant to Memorandum Findings of Fact and Conclusions of Law. Pet. App. 31a-35a. The district court concluded that Debtors and Registered Owners Ricardo Fornesa Jr. and Cynthia Fornesa are not protected of the automatic stay under a federal law, 11 U.S.C. § 362(a), that protects property of the bankruptcy estate from actions of creditors, including foreclosure and repossession. Government record of 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.<sup>1</sup> 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 in violation of 18 U.S.C. § 371.

This Quitclaim Deed is a valid legal document because it is notarized and executed when debtors as "Grantees" and "Grantors" properly recorded it on January 8, 2015. However, on May 5, 2015, the unlawful foreclosure was orchestrated when Kendra Wiley on behalf of Fifth Third Mortgage Company submitted a false affidavit. Debtors filed Chapter 13 Reorganization on September 30, 2012 and the subject property was included and properly amended before the **Second Suit To Evict** was filed on August 2, 2017 after Fifth Third Mortgage Company non-suited the **First Suit to Evict** on May 29, 2015. 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 No. 2015053907 in Malik Cheatam's Foreclosure Sale Deed to mislead the County Court in order

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<sup>1</sup> Know All Men By These Presents: That this QUITCLAIM DEED is made this 8th day of January, 2015 by Mark Anthony Fornesa and Judy Thanh Fornesa, Married, their successors and assigns (hereinafter called ("GRANTOR"), whose address is 6427 Moreland Lane, Rosenberg, TX 77469, for and in consideration of the sum of TEN AND NO/100THS Dollars (\$10.00) and other good and valuable consideration to them paid by Ricardo Fornesa Jr. and Cynthia S. Fornesa, Married referred as ("GRANTEE"), whose address is 2123 Squire Dobbins Drive, Sugar Land, TX 77478 named in this deed, the receipt of which is hereby acknowledged, have quitclaimed, and by this instrument does quitclaim, to the Grantees, all right, title, and interest in and to the real property commonly known as 6427 Moreland Lane, Rosenberg, TX 77469 situated in Fort Bend County, Texas. The Grantors deliver the property to the Grantees "as is" and "with all Faults."

to pursue the willful foreclosure on May 5, 2015. Pet. App. 15a, 52a.

The Foreclosure Sale Deed was altered by Malik Cheatam and Kendra Wiley submitted false affidavit that Debtors and Registered Owners Ricardo Fornesa Jr. and Cynthia Fornesa are not protected by automatic stay despite Fifth Third Mortgage Company received the bankruptcy case filing on April 29, 2015.<sup>2</sup> These two co-conspirators did not show-up in the bench trial on August 3, 2016. Fifth Third Bank's Senior Vice-President, Brian P. Moore and bank's custodian, Michelle Fancher were also sent subpoena by the clerk of court few days before the bench trial on August 3, 2016. Brian P. Moore was the one who purposely did not deposit the check of \$7,019.22 on April 29, 2015. Instead of depositing the check, he returned it on May 4, 2015 to debtors, one day before the foreclosure on May 5, 2015.<sup>3</sup> See R.E. 52, 17-20324.529 in Case 4:15-cv-02094, Document 44-1, Filed in TXSD on 08/01/16. Fifth Third Bank's Mortgage Loan Statement dated March 17, 2015.<sup>4</sup>

On April 28, 2015 at 11:40 AM, Petitioner Ricardo Fornesa Jr.'s package of Bankruptcy Case Filing and CK #2606 dated 04/28/15 in the amount of \$7,019.22 as FULL PAYMENT to cure the default to have a CURRENT STATUS

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<sup>2</sup> At the time of the Foreclosure Sale the debtors were alive, were not protected by any stay under the United States Bankruptcy and were not involved in any divorce proceedings where a receiver had been appointed.

<sup>3</sup> Enclosed please find your recent payment. Due to the delinquent status of your loan, the payment received was not enough to bring the mortgage loan current at this time.

<sup>4</sup> YOU ARE LATE ON YOUR MORTGAGE PAYMENTS. Failure to bring your loan current may result in fees and foreclosure – the loss of your home. As of 03/17/2015, you are 135 days delinquent on your mortgage loan. Total Due: \$6,996.99. (\$22.23 late fee will be charged after 04/16/2015). \$7,019.22 is the Full Payment Amount to have a Current Status as of April 30, 2015.

as of April 30, 2015 were sent to Fifth Third Bank. See R.E. 255, 17-20324.253 in Case 4:15-cv-02094, Document 15-3, Filed in TXSD on 09/09/15. This check was received by Fifth Third Bank on April 29, 2015 at 11:16 AM at Cincinnati, OH 45263, signed for by: A KEITH as per USPS Tracking Number: EK362376418US known as **Trial Exhibit 20**. See R.E. 645, 17-20324.643 in Case 4:15-cv-02094, Document 44-6, Filed in TXSD on 08/01/16. **Trial Exhibit 20** was removed by Judge Kenneth M. Hoyt on 06/29/17.

These three persons have papers and other physical evidence needed to bring to trial but failed to attend the scheduled bench trial last August 3, 2016. In *re United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court held that even President Nixon was obligated to comply with a subpoena, ordering him to produce tape recordings of his conversations with his aides. In *re United States v. Burr*, 25 F. Cas. 30 (No. 14, 692d) (C.C.Va. 1807), Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena *duces tecum* can be directed even to the presidents who are subject to judicial process in appropriate circumstances.

When presidents take official action, the Court has the authority to determine whether they have acted within the law. President Nixon produced tapes in response to the subpoena. In *re United States v. Fromme*, 405 F.Supp. 578 (E.D.Cal.1975), President Ford complied with an order to give a deposition in a criminal trial. In *re United States v. McDougal*, 934 F.Supp. 296 (E.D.Ark.1996) and *re United States v. Branscum*, No. LRP-CR-96-49 (E.D.Ark.1996), President Clinton gave videotaped testimony in these criminal proceedings. It is just fair that this case be remanded and be reversed to obligate Fifth Third's

employees to appear in the district court for retrial of this case.<sup>5</sup>

Fourteenth Amendment's Equal Protection Clause is the most litigated section of the United States Constitution. This clause is being referred to the fact that all citizens are guaranteed equal protection under U.S. laws. When this statute discriminates against an individual, and that individual files a lawsuit, the Court shall apply one of the three levels of scrutiny which are: rational basis; intermediate scrutiny; and strict scrutiny. Strict scrutiny is the highest level of scrutiny to be enforced by the Court when the laws discriminate on the basis of race, national origin, alienage, or religion, as well as for laws which infringe on fundamental rights.<sup>6</sup>

The only witness who showed-up at the bench trial was Fifth Third Bank's records custodian, Michelle Fancher. She testified under oath that there were notes in the system that Petitioners made multiple calls right after the foreclosure and Petitioners were given two weeks to make the loan current. This was never true because Petitioners never called Fifth Third after the foreclosure. Below is the testimony of Michelle Fancher:

THE COURT: Okay. Well, you are right. You are right because they said it's an opportunity to redeem. So what can you tell me under oath as it relates to the opportunity to redeem.

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<sup>5</sup> Witnesses are called to court to answer questions about a case to set out the facts of the alleged false affidavits they presented and submitted to the court.

<sup>6</sup> The Equal Protection Clause of the 14th Amendment prohibits states from denying any person within its jurisdiction the equal protection of the law by treating that individual in the same manner as other people in similar conditions and circumstances.



MS. FANCHER: There were notes in the system that there were actually multiple calls right after the sale that had taken place and said, because your check wasn't enough, we'll give you two weeks to be able to reinstate or make the loan current. We held – we advised them that we would hold off on recording the foreclosure deed to give them two weeks to go on ahead and catch it up, get it current.

THE COURT: Was there any indication in your records that contact was, in fact made?

MS. FANCHER: Absolutely, yes.

It was a perjury if Michelle Fancher made a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath. Pursuant to Penal Code Chapter 37 Sec. 37.03(1), Michelle Fancher had committed Aggravated Perjury when a false statement was made during or in connection with an official proceeding such as during a trial and the false statement became a material fact.<sup>7</sup>

On June 4, 2015, 3-Day Notice to Vacate Prior to Filing Unlawful Entry and Detainer known as **Trial Exhibit 10** together with First Suit to Evict known as **Trial Exhibit 11** were filed by Petitioners two (2) days before the bench trial that was conducted on August 3, 2015. See R.E. 602-606, 17-20324.600-604 in Case 4:15-cv-02094, Document 44-4, Filed in TXSD on 08/01/16. On June 15, 2015, Eviction Citation known as **Trial Exhibit 12** from Judge Mary S. Ward was served to Debtors and Registered Owners, Ricardo Fornesa Jr. and Cynthia Fornesa. Debtor Ricardo Fornesa

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<sup>7</sup> Pursuant to Penal Code Chapter 37 Sec. 37.02(1), Michelle Fancher had committed a Perjury when she testified under oath that Petitioners called Fifth Third multiple times after the foreclosure.

Jr. filed an Answer to First Suit to Evict and stated that the property's title was conveyed to him and is protected by automatic stay pursuant to 11 U.S.C. § 362(a).

On June 29, 2015, Fifth Third Mortgage Company's Motion for Non-Suit known as **Trial Exhibit 13** was filed in Cause No. 15-JEV12-11136, In The Justice Court, Precinct 1 Place 2 at Fort Bend County, Texas. Fifth Third found out that the Registered Owners, Ricardo Fornesa Jr. and Cynthia Fornesa are Debtors in Chapter 13 Reorganization and protected by automatic stay pursuant to 11 U.S.C. § 362(a). Fifth Third also discovered that Debtor Ricardo Fornesa Jr. is the one paying the mortgage company for several months, being the Registered Owner and Occupant of 6427 Moreland Lane, Rosenberg, TX 77469 property.<sup>8</sup>

On June 30, 2015, an Order of Non-Suit was entered by Judge Mary S. Ward known as the continuation of **Trial Exhibit 13** pursuant to the Motion for Non-Suit filed by Fifth Third Mortgage Company on June 29, 2015.<sup>9</sup> See R.E. 610, 17-20324.608 in Case 4:15-cv-02094, Document 44-4, Filed in TXSD on 08/01/16. These four (4) trial exhibits are solid and relevant evidences because each and every one of them makes a fact more or less probable than it would be without the evidence. Each fact of this evidence is of the consequence in determining the action why Fifth Third Mortgage Company non-suited their complaint. Federal

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<sup>8</sup> FIFTH THIRD MORTGAGE COMPANY, ("Plaintiff"), hereby moves this Court for an Order of Non-Suit dismissing MARK ANTHONY FORNESA AND JUDY THANH FORNESA, from and out of the above-entitled and numbered cause and in support thereof would show the Court the following: Plaintiff no longer desires to prosecute this action against these defendant(s).

<sup>9</sup> On this date the Court considered Plaintiff's Motion for Non-Suit, and after reviewing the Motion, is of the opinion that said Motion should in all things be granted; and therefore, MARK ANTHONY FORNESA AND JUDY THANH are hereby dismissed without prejudice from the above-entitled cause and all costs of Court be taxed against the party incurring same.

Rules of Evidence Rule 401(a) and Rule 401(b). **Trial Exhibit 10, Trial Exhibit 11, Trial Exhibit 12, and Trial Exhibit 13** were removed by Judge Kenneth M. Hoyt on 06/29/17 after the bench trial was held on 08/03/16.

These trial exhibits were submitted to the court on 08/01/16 and Fifth Third made an objection on 08/02/16, two days before the bench trial on August 3, 2016. Petitioner responded to Fifth Third's objection on 08/02/16, one day before the trial.<sup>10</sup> See R.E. 17-18, 17-20324.677-678 in Case 4:15-cv-02094, Document 50, Filed in TXSD on 08/02/16. Federal Rules of Evidence Rule 401 had been satisfied because (a) each one of these trial exhibits has tendency to make a fact more or less probable than it would be without the evidence and (b) each one of these trial exhibits has fact that is of consequence in determining the action.

The final admission was evidenced by the declaration of Philip W. Danaher on July 21, 2015 that Debtors Ricardo Fornesa Jr. and Cynthia Fornesa hold the legal title and possession of the property.<sup>11</sup> A judgment will be termed an abuse of discretion if the adjudicator has failed to exercise sound, reasonable, and legal decision-making skills. *In re General Electric Co. v. Joiner*, 512 U.S. 136 (1997), the Supreme Court reversed and remanded this instant case

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<sup>10</sup> Pursuant to the Court's trial procedures, the parties are to exchange trial exhibits. Fifth Third's trial exhibits were received by Plaintiffs on Friday night, July 29, 2016 while Plaintiffs' trial exhibits were received by Fifth Third on Sunday afternoon, July 31, 2016, stating that for the best interest of justice, these trial exhibits should not be suppressed as they can shed light to the fair trial of this case.

<sup>11</sup> My name is Philip W. Danaher. I am over the age of 21 years and am fully competent to make this Declaration. All statements of fact made herein are true, correct, and within my personal knowledge. I am an attorney for Mackie Wolf Zientz & Mann, P.C., attorneys for Fifth Third Mortgage Company. Fort Bend Central Appraisal District. Property: R33543; Owner: Fornesa Ricardo Jr & Cynthia S; Property Address: 6427 Moreland Lane, Rosenberg, TX 77469; 2015 Assessed Value: \$146,130.

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. BREYER, J., filed a concurring opinion.

United States Supreme Court is the highest court in the U.S. pursuant to Article III of the Constitution which established the federal judiciary. Congress was permitted to organize it under the Judiciary Act of 1789 and in addition, the lower federal court system was also created. Section II of Article III of the Constitution established the jurisdiction of the Supreme Court which means that Supreme Court has original jurisdiction and has the final say whether a case should be affirmed, should be remanded, should be reversed, or should be retried.

Under Section 1 of Fourteenth Amendment, no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. All human beings are created equal, whether men or women and whether whites or blacks, according to the Declaration of Independence and the truth founded in the scripture that all human beings are equally created by God in His image.

On January 16, 2018, Senior Judge Nancy F. Atlas of the United States District Court held a pretrial status conference in this case. See Hearing Minutes and Order dated December 18, 2017 [Doc. # 18]. The parties discussed an appeal currently pending before the Fifth Circuit in

related matters (the "Fifth Circuit Appeal"), all of which concern Plaintiff Ricardo Fornesa's claims arising from a 2015 foreclosure on the deed of trust covering the property in issue in this case (the "2015 foreclosure"). Mr. Ricardo Fornesa made it clear that they expect to appeal any result adverse to them in the Related Litigation. *See* Pet. App. 40a.<sup>12</sup>

### 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 Senior 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/

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/s/

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PETITIONERS

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<sup>12</sup> Because of the pendency of the Related Litigation, it is hereby **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.