IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DANIEL H. ALEXANDER AND JACQUELINE P. ALEXANDER,

Appellant,

vs.

BAYVIEW LOAN SERVICING, LLC,

Appellee. /

CASE No. 3D16-2228
LT No. 14-019290-CA

APPELLANTS' MOTION FOR REHEARING, FOR REHEARING EN BANC, AND REQUEST FOR A WRITTEN OPINION

Daniel H. Alexander and Jacqueline P. Alexander, ("Appellants"), pursuant to Fla. R. App. P. 9.330 and 9.331 file this Motion for an order (i) granting rehearing, (ii) granting re-hearing *En Banc*, or (iii) for a written opinion and state:

Respectfully, this Honorable Court should not have cancelled oral argument and resolved this appeal by PCA without a written opinion. Such a result does not comport with the notion of due process guaranteed by the Florida and United States Constitutions. There are colorable claims of misconduct alleged herein which are well documented, and more judges are speaking out about it.

I. There is a Colorable Claim of Fraud to Warrant a Written Opinion that Instructs the Trial Court to Permit Discovery and Conduct an Evidentiary Hearing on Appellant's Rule 1.540(b) Motion

There is a clear right to discovery and an evidentiary hearing to establish that years after Washington Mutual ("WAMU") ceased to legally exist, JP Morgan Chase ("Chase") engaged teams of robo-stampers to affix the dead bank's endorsement onto original notes. Here, the same Cynthia Riley "dead bank robo-stamped" endorsement found on the original promissory note in this case, is found on thousands of notes originated by WAMU and Chase.

Moreover, the assignment of mortgage, assigning *only* the mortgage and not the note, is evidence fabricated to record in the public records and present in support of standing that is a legal nullity under both Federal and Florida law common law. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872) ("[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity"); *Carter v. Bennett*, 4 Fla. 283, 347 (1852) (superceded by statute on other grounds) ("the assignment of the interest of the mortgage in the land without an assignment of the debt is considered to be without meaning or use. . . .").

On December 13, 2017, the Honorable Senior Judge Howard Harrison entered a final judgment in favor of a homeowner defended by Appellant's counsel finding unclean hands because of, *inter alia*, an

identical Cynthia Riley dead bank robostamped endorsement which barred the equitable relief of foreclosure in *Wells Fargo v. Riley*, under Palm Beach County Circuit Court Case Number 50-2016-CA-010759-XXXX-MB. See attached as Appendix A.

Wells Fargo acted as Trustee of a securitized trust and Chase acted as the servicer in the trial where Judge Harrison shamed them for presenting false evidence, false testimony, and violating a court order that would have exposed the unconscionable scheme to rely on a dead bank robostamped Cynthia Riley endorsement and false mortgage assignment to establish standing.

In finding unclean hands throughout the case, Judge Harrison cited the common law rule that "[o]ne who comes into equity must come with clean hands else all relief will be denied him **regardless of merit of his claim**, and it is not essential that act be a crime; it is enough that it be condemned by honest and reasonable men." *Roberts v. Roberts*, 84 So.2d 717 (Fla. 1956) (emphasis added).

Judge Harrison explained "even if Plaintiff had standing to foreclose (a meritorious claim), Plaintiff would be denied the equitable relief of foreclosure upon a finding that Plaintiff took actions in pursuing this foreclosure that reasonable and honest men would condemn."

Judge Harrison found the Florida Supreme Court noted "the principle or policy of the law in withholding relief from a complainant because of 'unclean hands' is

punitive in its nature." *Busch v. Baker*, 83 So. 704 (Fla. 1920). As U. S. Supreme Court Justice Black wrote:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

Chase employed agents to affix the dead bank endorsement knowing WAMU had ceased to exist and Cynthia Riley lacked authority to endorse notes. Appellee should not be allowed to force a judicial sale of Mr. Alexander's home using false evidence. Appellant should be allowed to present evidence and be heard on these allegations of misconduct. Respectfully, it is a departure from the essential elements of law to resolve these allegations of misconduct by a PCA.

Appellant's colorable claim is that senior executives of Chase suborned perjury to backdate dead bank robostamped endorsements to claim it was affixed within days of origination, when WAMU still existed. This misconduct continued in earnest after the Florida Attorney General's PowerPoint presentation entitled "Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases" detailed widespread fraud on the court involving robo-signed mortgage assignments. See attached as Appendix B.

Once the robo-signing scandal broke, and the Office of the Comptroller of the Currency issued a Consent Judgment against JP Morgan Chase, Wells Fargo, Bank of America, and others after finding they had all "litigated cases without properly endorsed notes" in March of 2011. ("The 2011 OCC Consent Judgment). See attached as Appendix C.

Every Florida appellate court, with the exception of this Court has reversed foreclosures obtained where the bank filed a complaint alleging a lost note count and attaching an unendorsed copy of the note, and later produced an endorsed note. The systemic fraud upon the court resulted in dozens of appellate decisions[7] reversing foreclosures without proof the

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[7] See, *Tilus v. AS Michai LLC*, 161 So.3d 1284, (Fla. 4th DCA 2015) (Trial judgment reversed because undated blank endorsement on original note filed after complaint is insufficient to prove standing); *Lloyd v. Bank of New York Mellon*, 160 So.3d 513 (Fla. 4th DCA 2015) (Trial judgment reversed without evidence endorsement occurred before filing the complaint through additional evidence); *Farkas v. U.S. Bank*, ___ So.3d ___, 2015 WL 3396644 (Fla. 4th DCA 2015) (witness only proved standing at trial not at inception of case when complaint lacked any endorsements); *Jelic v. LaSalle Bank, Nat. Ass'n*, 160 So.3d 127 (Fla. 4th DCA 2015) (Trial reversed because no evidence showed when special endorsement was affixed to note, which was in favor of different bank); *Matthews v. Federal Nat. Mortg. Ass'n*, 160 So.3d 131 (Fla. 4th DCA 2015) (Trial judgment reversed where endorsed original note filed months after complaint with undated endorsement and backdate mortgage assignment); *Wright v. Deutsche Bank Nat. Trust Co.*, 152 So.3d 1289 (Fla. 4th DCA 2015) (Trial judgment reversed when undated endorsed note introduced at trial after complaint attached unendorsed note); *Deutsche Bank Nat. Trust Co. v. Boglioli*, 154 So.3d 494 (Fla. 4th DCA 2015) (Affirmed Final Judgment in favor of Borrower when witness could

not testify when note was endorsed); *Joseph v. BAC Home Loans Servicing, LP*, 155 So.3d 444 (Fla. 4th DCA 2015) (Trial judgment reversed where no evidence note endorsed at time of filing complaint); *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So.3d 754 (Fla. 4th DCA 2014) (Summary judgment reversed where complaint attached unendorsed note and trial evidence included undated endorsed note filed 3 ½ years later); *Bristol v. Wells Fargo Bank, Nat. Ass'n*, 137 So.3d 1130 (Fla. 4th DCA 2014) (Summary judgment reversed where complaint attached unendorsed note and trial evidence included undated endorsed note filed 2 years later); *Zimmerman v. JPMorgan Chase Bank* No. 134 So.3d 501 (Fla. 4th DCA 2012) (Summary judgment reversed where complaint contained unendorsed note and original note filed months after complaint had undated endorsement without further evidence); *McLean v. JPMorgan Chase Bank*, 79 So. 3d 170 (Fla. 4th DCA 2012) (Summary judgment reversed in lost note count case where original note later produced with undated special endorsement); *Vidal v. Liquidation Properties, Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013)(Summary judgment reversed in lost note case where original note filed months after complaint with undated endorsement and backdated mortgage assignment); *Wells Fargo Bank NA, v. Bohatka*, 112 So. 3d 596 (Fla. 1st DCA 2013) (reversing dismissal with prejudice finding dismissal without prejudice appropriate where trial court found allonge never affixed to note and made formal complaint to the Florida Attorney General); *Focht v. Wells Fargo Bank* 124 So. 3d 308 (Fla. 2d DCA 2013) (Summary judgment reversed in lost note case where endorsed original note filed months after complaint with undated endorsement and backdate mortgage assignment); *Feltus v. U.S. Bank*, 80 So. 3d 375 (Fla. 2d DCA 2012) (Summary Judgment reversed when Bank filed lost note count and attached unendorsed note and never amended its complaint to present original note with endorsements); *Gonzales v. Deutsche Bank National Trust Company*, 95 So. 3d 251 (Fla. 2d DCA 2012) (Summary judgment reversed when undated blank endorsement filed with original note ten weeks after filing case); *Zervas v. Wells Fargo Bank, N.A*, 93 So. 3d 453 (Fla. 2d DCA 2012) (Summary judgment reversed in lost note case where original note filed months after complaint); *Cutler v. U.S. Bank*, 109 So. 3d 224 (Fla. 2d DCA 2012) (Summary judgment reversed in lost note case where original note with undated endorsement filed months

endorsements were affixed before the litigation, which in fact they were not. The unconscionable scheme calculated to interfere with the court's ability to fairly adjudicate foreclosures caused a tremendous strain on judicial resources of the Florida Courts, and undoubtedly, resulted in homeowners that continued to lose their homes based on false, incompetent evidence.

Federal and state court judges have spoken out and written opinions documenting this attack on the integrity of the courts for years. Most recently, Judge Butchko and Judge Harrison both made a finding of unclean hands based on the same general misconduct. Judge Butchko also found misconduct that constituted unclean hands after HSBC and Ocwen presented false testimony, false evidence and violated a court order to produce discovery. See attached as Appendix D. Appellee has continuously engaged in unclean hands since this foreclosure crisis began.

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after complaint); *BAC Funding Consortium, Inc. v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2d DCA 2010) (reversed summary judgment in lost note count case where unendorsed note filed during case); *Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2nd DCA 2010) (reversed summary judgment where original note produced after filing lost note count case with endorsement not payable to Bank of New York); *Gorel v. Bank of New York Mellon*, ___ So.3d ___, 2015 WL 2129505 (Fla. 5th DCA 2015) (Trial judgment reversed when undated specific endorsement to third party not attached to the complaint); *Gee v. U.S. Bank, N.A*, 72 So. 3d 211 (Fla. 5th DCA 2011) (Summary judgment reversed when complaint alleged lost note count and no facts supporting reestablishment claim in record); *Green v. JP Morgan Chase Bank, NA*. 109 So. 3d 1285 (Fla 5th DCA 2013) (reversed summary judgment when undated blank endorsement on note filed one year into case).

Judge Harrison joins Judge Butchko and a growing list of judges who refuse to tolerate banks that use false evidence, present false testimony, and violate court orders. Reasonable people would condemn such practices, which is the standard for unclean hands, and an ultimate defense to foreclosure.

In *Forward Air Sols, Inc.*, this Honorable Court held that under an abuse of discretion standard: "The issue however is not whether any member of this panel would impose the same sanction given the facts of this case. The ultimate question is whether reasonable minds could differ as to the propriety of imposing this sanction." *Cal v. Forward Air Sols., Inc.*, No. 3D15-2800, 2016 WL 3918721, at *2 (Fla. 3rd DCA 2016), *citing Bass v. City of Pembroke Pines*, 991 So.2d 1008, 1011 (Fla. 4th DCA 2008).

This Honorable Court recently reversed Judge Butchko's ruling finding she abused her discretion in finding unclean hands without addressing Judge Harrison's order in *Riley* which also found unclean hands for presenting false evidence, false testimony and violating the Court's discovery order.

This Court has repeatedly issued a PCA after cancelling oral argument rather than enforce the well-established doctrine of unclean hands. The question is not whether a valid claim exists, but rather whether reasonable people would condemn the conduct in prosecuting that valid claim. There is no well settled law on the point that could justify a PCA after cancelling oral argument.

Respectfully, neither Judge Butchko nor Judge Harrison could have abused their discretion by finding unclean hands because both reached the same conclusion, meaning reasonable minds could agree. Moreover, there is a growing list of judges who have addressed these arguments and reached the same conclusion as Judge Butchko and Judge Harrison. The question to each individual judge is whether they will remain intellectually honest to the law or whether they will ignore the truth to preserve a foreclosure system built on false evidence, false testimony, and false legal arguments. The emperor has no clothes. The truth must be told.

The misconduct raised herein is very similar to the finding by the Honorable U.S. District Court Judge Ursula Ungaro who upheld a False Claims Act claims finding that "[u]sing rubber-stamped endorsements on promissory notes or relying on MERS transfers to foreclose on properties or obtain orders of sales falls within the scope of actions barred by the Consent Judgment Servicing Standards. . . ." *U.S. ex rel. Bruce Jacobs v. Bank of America Corp., et. al.*, U.S. Dist. Ct. Case No. 1:15-cv-24585-UU at pgs 19-20. See attached as Appendix E.

This is also similar to the findings by U.S. Bankruptcy Judge Robert N. Drain who wrote an extensive ruling finding Wells Fargo was "improving its own position by creating new documents and indorsements from third parties to itself to ensure that it could enforce its claims." *In re: Cythia* [sic] *Carssow-Franklin*

Case Number 15- CV-1701 (KMK). See attached as Appendix F.

In *Franklin*, Judge Drain applied the same law found in Fla. Stat. §673.3081, noting Wells Fargo systematically created "after-the-fact" documentation "on behalf of third parties" by in-house "assignment and indorsement teams" which Wells Fargo tried to cover-up with an invalid assignment by Mortgage Electronic Registration System, Inc ("MERS").

Judge Karas affirmed Judge Drain's finding that the Wells Fargo Witness' testimony showed "the general indorsement and assignment practices of Wells Fargo endorsement and assignment teams, . . . showed 'a general willingness and practice on Wells Fargo's part to create documentary evidence, after the fact, when enforcing its claims. Id. *14. Judge Karas also noted:

> the fact that Wells Fargo had assignment and indorsement teams that, as the bankruptcy court found, would act to improve the record with respect to various notes and deeds of trust in Wells Fargo's possession, makes the fact that the indorsement at issue here was added after-the- fact to improve Wells Fargo's standing more probable "than it would be without the evidence. Id.

Judge Karas also wrote: "In the wake of the recent foreclosure crisis, and the dubiousness of the common robo-signing practices of various banks and other foreclosing entities . . . it may be time to reconsider

whether "forged or unauthorized signatures" remain "very uncommon." Id. at fn.

The Chief Judge of the Second DCA recently issued a concurring opinion noting, "[i]t appears that many foreclosure judgments are entered based on dubious proof by the banks due to an understandable lack of sympathy for defendants who are years behind on payments . . . " and that there is need to "alleviate the temptation to excuse strict compliance with the laws of evidence." *Shaffer v. Deutsche Bank Nat. Trust.*, 2017 WL 1400592 *at *8* (Fla. 2nd DCA) filed April 19, 2017.

Similarly, on June 10, 2017, the Honorable Judge William W. Haury, Jr. wrote in a foreclosure action:

> It is ironic that our evidentiary rules are being relaxed in the one area of practice that our Supreme Court has been most concerned with. This is one of the few instances in the history of Florida jurisprudence where the Florida Supreme Court has deemed it necessary to subject an entire industry to special rule due to the industry's documented illegal behavior. The amendment of Fla. R. Civ. P. 1.110(b) was a direct result of the robosigning scandal . . . Notwithstanding this, some of our courts appear to be conforming to the business practices of this industry rather than requiring the business practices to conform to the law. *Wells Fargo Bank N.A., as Trustee for the Structured Asset Mortgage Investments II Inc. Bear Stearns Mortgage Funding Trust 2007-AR1, Mortgage Pass Through Certificates Series 2007-AR1. v. Jerry Warren*, Broward

> County Case No. 13-010112(11), fn. 4. See attached as Appendix G.

The Fourth DCA certified a question to the Florida Supreme Court of great public importance finding "many, many mortgage foreclosures appear tainted with suspect documents . . . [which] may dramatically affect the mortgage foreclosure crisis in State." *Pino v. Bank of New York, Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011). The majority opinion in *Pino* held that:

> "'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."

Only the honorable former Chief Judge Polen dissented in a powerful opinion supporting sanctions against BONYM's bad faith conduct that argued:

> Decision-making in our courts depends on genuine, reliable evidence. The system cannot tolerate even an attempted use of fraudulent documents and false evidence in our courts. The judicial branch long ago recognized its responsibility to deal with, and punish, the attempted use of false and fraudulent evidence. When such an attempt has been colorably raised by a party, courts must be most vigilant to address the issue and pursue it to a

> resolution. *Pino v. Bank of New York, Mellon*, 57 So. 3d 950, 959 (Fla. 4th DCA 2011).

Respectfully, there is a need to vindicate the integrity of the judiciary. Two appellate courts have noted the dubious proof presented to Florida courts by financial institutions that understand there is no sympathy for delinquent borrowers. The integrity of due process should have no sympathy for dubious evidence in equitable actions. This Honorable Court must vindicate the integrity of the judiciary when dubious proof is presented in this equitable action.

In 2005, when this foreclosure crisis was just getting started, the Honorable Judge Jon Gordon struck that first wave of foreclosures as sham pleadings because they all falsely claimed MERS owns and holds the notes and mortgages. See Order attached as Appendix H. Judge Gordon cited the Florida Supreme Court:

> "Busy judges managing overloaded motion calendars often depend on the attorneys appearing before them to provide them with accurate information about the issues involved, the facts relevant to those issues, and the law applicable to those facts. The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. It is an exacting duty with an imposing burden. Unlike many provisions of the disciplinary rules, which rely on the court or an opposing lawyer for their invocation, the duty of candor depends on self-regulation; every lawyer must spontaneously disclose contrary authority to a tribunal. . . . We do not accept the

> notion that outcomes should depend on who is the most powerful, most eloquent, best dressed, most devious and most persistent with the last word-or, for that matter, who is able to misdirect a judge. American civil justice is so designed that established rules of law will be applied and enforced to insure that justice be rightly done. Such a system is surely defective, however, if it is acceptable for lawyers to "suggest" a trial judge into applying a "rule" or a "discretion" that they know-or should know-is contrary to existing law. Even if it hurts the strategy and tactics of a party's counsel, even if it prepares the way for an adverse ruling, even though the adversary has himself failed to cite the correct law, the lawyer is required to disclose law favoring his adversary when the court is obviously under an erroneous impression as to the law's requirements." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 573 (Fla. 2005), as revised on denial of reh'g (Sept. 29, 2005).

In 2006, the New York Times published a report by Baker Hostetler to Fannie Mae which investigated the "Florida MERS embarrassment" and concluded that Judge Gordon was correct: Florida attorneys had routinely presented false testimony, false evidence, and misleading legal arguments to Florida Courts. Fannie Mae's lawyers warned: "We conclude that foreclosure attorneys in Florida are routinely filing false pleadings . . . The practice could be occurring elsewhere. It is axiomatic that the practice is improper and

should be stopped." See Baker Hostetler Report, p. 35, attached as Appendix I.

On October 31, 2007, the Honorable Christopher A. Boyko, U.S. District Court Judge for the Eastern Division of the Northern District of Ohio dismissed over a dozen foreclosure cases with false mortgage assignments from his court in one opinion. *In re Foreclosure Cases*, No. 07CV2532, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007). See attached as Appendix J. Judge Boyko rejected banks that backlog his docket with robo-signed, incompetent evidence, writing in footnote 3:

> "Plaintiff's, 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. . . . There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. . . ." *Id*. at 5-6, fn. 3.

Almost ten years later, on March 23, 2017, the Honorable U. S. Bankruptcy Judge Christopher M. Klein of the Eastern District of California sanctioned BOA $45 Billion for foreclosure misconduct involving BOA's Senior Management. *Sundquist v. Bank of America*, ___ B.R. ___, 2017 WL 1102964 *46 (U.S. Bkrptcy. E.D. Cal. issued March 23, 2017). See attached as Appendix K.

The Court directed the $45 Million to benefit the public good by being donated to five (5) California Law

Schools with active consumer protection law programs. This ensured the borrower did not receive an undue windfall. The opinion "tells a story that smacks of cynical disregard for the law." *Id.* at *47. The Court noted:

> "The high degree of reprehensibility, coupled with the significant involvement by the office of the Chief Executive Officer, calls for of [sic] an amount sufficient to have a deterrent effect on Bank of America and not be laughed off in the boardroom as petty cash or "chump change. . . . It happens that Bank of America has a long rap sheet of fines and penalties in cases relating to its mortgage business. In March 2012, Bank of America agreed to pay $11.82 billion to settle litigation prosecuted by federal and state regulators regarding its foreclosure and mortgage servicing practices. In June 2013, Bank of America agreed to pay $100 million to settle litigation regarding mortgage loan origination issues. In December 2013, Bank of America agreed to pay $131.8 million to settle litigation with the Securities Exchange Commission regarding the structuring and sale of mortgage securities to institutional investors. In March 2014, Bank of America was fined $9.5 billion by the Federal Housing Finance Agency for defrauding Fannie Mae and Freddie Mac regarding mortgage-backed securities. In an environment in which Bank of America has been settling, i.e. terminating exposure to higher sums, for billions and hundreds of millions of dollars, a few million dollars awarded as § 362(k)(1) punitive damages award in a real case involving

> real people, in which the human element of the consequences of Bank of America's behavior comes to the fore for the first time is appropriate and proportional." *39-40.

This federal judge questioned "why should Bank of America be permitted to evade the appropriate measure of punitive damages for its conduct? Not being brought to book for bad behavior offensive to societal norms merely incentivizes future bad behavior." This federal judge noted BOA's "attitude of impunity" citing a failed governmental regulatory system.

In describing the Independent Foreclosure Review ordered by Office of the Comptroller of the Currency ("the OCC") which regulates Bank of America, Wells Fargo and Chase, Judge Klein noted "that turned out to be a chimera." *Id.* at *43. Even investigations by the Consumer Financial Protection Bureau ("The CFPB"), were "thwarted" with a "bald-faced lie" and a refusal to turn over documents.

It appears the big banks have all engaged in widespread fraud upon the court, supported by Senior Executives who suborned perjury and refused to turn over court ordered documents to cover up fraud upon the OCC, the HUD/OIG, the DOJ, the CFPB, the Federal Courts, the State Courts, the trial court, and this Honorable Court.

This Court has held: "when analyzing a party's intent to defraud the trial court, the trial court may consider all the circumstances surrounding the alleged violations, including a party's misconduct in related

cases. . . . The ultimate question remains whether the party's misconduct was intended to defraud the trial court considering the sanctions." *Empire World Towers, LLC v. CDR Creances, S.A.S.*, 89 So. 3d 1034, 1042 (Fla. 3rd DCA 2012).

Long before the foreclosure crisis wreaked havoc on Florida's Courts, this Court addressed a nearly identical situation where an Appellant asserted the Appellee procured the final judgment by manufactured, fraudulent evidence. *Pelekis v. Florida Keys Boys Club*, 302 So.2d 447 (Fla. 3rd DCA 1974).

In *Pelekis*, the Third DCA noted that fabrication of evidence allegations are "a serious charge which requires a complete explanation of the circumstances of the alleged wrong and, therefore, merits a full opportunity to present all the available facts to the court." *Id*. at 448.

This Honorable Court has held it is error to summarily deny a Rule 1.540(b) Motion that specifically alleges fraud that affects the outcome of the case with particularity. *U.S. Bank Nat. Ass'n v. Paiz*, 68 So.3d 940, 944 (Fla. 3rd DCA, 2011). In *Paiz*, this Honorable Court held:

> "To entitle a movant to an evidentiary hearing on a motion for relief from judgment, a rule 1.540(b)(3) motion must specify the fraud with particularity and explain why the fraud, if it exists, would entitle the movant to have the judgment set aside. *Flemenbaum v. Flemenbaum*, 636 So.2d 579, 580 (Fla. 4th DCA

> 1994). . . . The matter alleged must affect the outcome of the case and not merely be "de minimis." Id. Thus, to obtain a hearing on a rule 1. 540(b)(3) motion, the law requires a movant "to demonstrate a prima facie case of fraud, not just nibble at the edges of the concept." *Hembd v. Dauria*, 859 So.2d 1238, 1240 (Fla. 4th DCA 2003). Id.

When a motion raises a colorable allegation of fraud in its motion for relief from judgment, the trial court is required to permit discovery and provide a formal evidentiary hearing on the motion. *Teasa Wolff a/k/a Teasa Wolfe v. Star Realty Trust No. 12549, Corp.*, 80 So.3d 345, 3D10-1508, slip op. at 4, 36 Fla. L. Weekly D2475a (Fla. 3rd DCA 2011). To be entitled to an evidentiary hearing the motion must (i) "specify with particularity," and (ii) "explain why the fraud, if it exists, would entitle the movant to have the final judgment set aside." Id.

Here, there is a clear, specific and detailed explanation that shows the judgment is based on a dead bank robostamped endorsement which is unauthorized under Fla. Stat. §673.3081, backdated by perjured testimony, and would entitle Appellant to set aside the judgment. The PCA herein calls into question whether this Court is fairly adjudicating the issues presented, especially in light of the seriousness of the allegations raised and the recent Daily Business Review articles which report an institutional bias that favors and protects large financial institutions engaged in misconduct rather than holds them accountable to the law.

II. There is a Fundamental Breakdown in Due Process to Resolve Allegations of Fraud on the Court by a PCA and Block Further Review

The evidence shows these parties sentiently set in motion an unconscionable scheme to defraud the courts since this foreclosure crisis began in 2005, and has continued unabated, even after the $25 Billion National Mortgage Settlement ("the $25 Billion NMS) to this appeal. The issuance of a PCA to resolve this case is a departure from the essential elements of law.

A District Court may refuse to issue a written opinion for any reason or for no reason at all. However, it is "fundamental black letter law" that a District Court should write an opinion unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot*, 648 So. 2d 137, 138 (Fla. 4th DCA 1994).

Arthur J. England Jr., Former Chief Justice of the Florida Supreme Court wrote: "[W]e expect judges, like no other public official, to justify their decisions with reason." Arthur J. England Jr., Asking For a Written Opinion From a Court That Has Chosen Not To Write One, 78-Mar Fla. B. J. 10, 14 (March 2004). Before his passing, Justice England concluded this amendment to Rule 9.330 is conceptually flawed and should be repealed, recognizing a procedural infirmity in that "asking a District Court to provide an opinion that will expose their rationale to Supreme Court review puts expressly in the hands of District Court judges the discretion to allow or not allow review." Id. at 15.

Judge Cope argues this requirement is unsound as its [sic] permits review by the United States Supreme Court while depriving the Florida Supreme Court jurisdiction to review the same matter. Cope at 80. Judge Cope also notes the practice of issuing a PCA is entirely unregulated and inconsistently applied throughout the District Courts. Id. Moreover, Judge Cope observes that PCAs are routinely issued improperly to resolve cases that present debatable legal issues as evidenced by the dissenting and concurring opinions that often follow. Id.

The Daily Business Review wrote an article celebrating the integrity of a Fourth DCA appellate panel that granted rehearing after a PCA and reversed.[8] *See*, *U.S. Bank v. Sharlene Lewis*, 2016 WL 899912 (Fla. 4th DCA 2016). The primary factor that compelled the panel to reconsider and reverse their ruling was each individual judge's personal ethos. Each panel judge paused, took stock of their decision, and decided whether their ruling followed established Florida law.

Since the Magna Carta, the Due Process Clause has limited the powers of all branches of government, including the judiciary. *Truax v. Corrigan*, 257, U.S. 312,333, 42 S.Ct. 124, 129 (1921). "The vague contours of the Due Process Clause do not leave judges at large." *Rochin v. People of California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209 (1952). Judges have long been required

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[8] http://www.dailybusinessreview.com/id=1202752251066/Foreclosure-Shifts-From-Summary-Denial-to-Reversal-With-Opinion?slreturn=20160320115614.

to publicly give a reasoned opinion from the bench in support of their judgment. *Id.* at fn. 4.

Respectfully, this result which affirms without comment, a final judgment granting the equitable relief of foreclosure in the face of unclean hands, appears arbitrary, capricious, and in conflict with fundamental principles protecting private rights. *American Ry. Express Co. v. Commonwealth of Kentucky*, 273 U.S. 269, 273, 47 S.Ct. 353, 355 (1927). In the context of substantive due process, the reason given to support state action, which deprives property may not be so inadequate that it may be characterized as arbitrary. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974). State action is "arbitrary" when taken without reason or for merely pre-textual reasons. *Decarion v. Monroe County*, 853 F. Supp 1415, 1421 (S.D. Fla. 1994).

The "arbitrary and capricious" standard requires a State examine the relevant data and articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) *citing Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). As the Florida Supreme Court noted, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida Parole and Probation Commission*, 444 So. 2d 917, 921 (Fla. 1983).

Any appellate court concerned about the public's perception of its ability to render meaningful justice should correct a lower court ruling that relies upon a fraudulent piece of evidence prepared by the party in anticipation of litigation. This appeal raises unsettled questions regarding the integrity of the foreclosure process itself. Particularly, whether Appellee violated the $25 Billion NMS in this case by the continued use of a materially false mortgage assignment and surrogate signed endorsement created after the fact on behalf of third parties that did not legally exist to establish standing.

As this Honorable Court's decision does not speak to any of the issues raised below and on appeal, there is a due process violation. It would be fundamentally improper to issue a PCA on unsettled issues to avoid further appellate review or reach a result contrary to Florida law.

The Daily Business Review has published a series of front page articles over the past few months celebrating judges who granted Appellant's counsel's motions for contempt and sanctions against large financial institutions for their relentless foreclosure abuses which shockingly still continue to this day.[9]

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[9] https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2018/01/25/miami-judgesanctions-law-firm-treasury-secretary-mnuchins-former-bank-for-frivolous-foreclosure/

https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2017/12/08/loan-servicersattorneys-face-criminal-contempt-arraignment-in-miami/

The Daily Business Review published an article noting this Honorable Court's silence on standing in foreclosure cases.[10] On December 1, 2013, the Daily Business Review published another article accusing this Honorable Court of "targeting" Appellant's counsel.[11] Certainly, the public's perception of the judiciary's ability to render meaningful justice would be denigrated if Federal Judges and other appellate courts addressed these issues when this Honorable Court chose to remain silent.

On Friday, February 9, 2018, the Daily Business Review published an article entitled, Miami Court Wipes Ruling That Found HSBC Forged Mortgage Documents by Samantha Joseph.[12] This Court "wiped" the Honorable Judge Beatrice Butchko's ruling that Ocwen and HSBC had unclean hands because they relied on false evidence, false testimony, violated a discovery order, and lied about violating that discovery order, which she found reasonable people would condemn.

On Monday, February 12, 2018, the Daily Business Review published an article entitled, Can He Say That? Frustrated Attorney Asks 'what's wrong with

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[10] http://www.dailybusinessreview.com/id=1202752360518/Defense-Questions-Courts-Silenceon-Standing-in-Foreclosure-Cases#ixzz4362cxF6z

[11] http://www.jakelegal.com/files/daily_business_review_justice_watch_foreclosure_attorneys_targeted_in_3rd_dca_ruling.pdf

[12] https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2018/02/08/miami-courtwipes-ruling-that-found-hsbc-forged-mortgage-documents/

the Third DCA, also by Samantha Joseph,[13] which stated "there is no question that the Third District is pro-business and couldn't care less about homeowners."

The article further charged that the Third DCA "abuses per curiam affirmances, or PCAs, to avoid explaining their rulings on lender standing, . . . [and] misuses the tool to strategically sidestep writing opinions that could provide grounds for rehearing. Instead, they say it uses the decisions to wipe out options for further review and avoid conflicts with other district courts."

The article laid out statistical, empirical evidence that this Honorable Court reversed on standing in favor of the banks 87% of the time, while over the same time period, the 1st, 2nd, 4th and 5th DCA's all reversed on standing in favor of the borrowers 73%-84% of the time.

This Court has issued a PCA in multiple appeals filed by Appellant's counsel where the briefs argued unclean hands, unconstitutionality of the foreclosure process, inadmissible hearsay, and failure to prove the note was endorsed at the time of filing. This Court repeatedly then denied similar motions asking for a written opinion, for rehearing and rehearing *en banc* without comment.

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[13] https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2018/02/09/can-he-saythat-frustrated-attorney-asks-whats-wrong-with-the-third-dca/

The Daily Business Review article reports that this Court has misused the PCA and authored opinions calculated to reach a result favorable for banks while avoiding conflict with other district courts. There is no good explanation for why this Court has ruled for banks on standing 87% of the time when the other DCAs are all dealing with the same pleadings by the same foreclosure firms. There was a robo-signing scandal. There is evidence of unclean hands. The PCA is a violation of due process as it takes the homes from borrowers and gives them to banks without any findings of facts or conclusions of law in an area of law that remains unsettled.

III. Rehearing En Banc is Necessary to Preserve the Public's Perception of the Court's Ability to Render Meaningful Justice

The Honorable Judge Sheppard instructs that a case is of exceptional importance to be considered *en banc* if the result "may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice." *University of Miami v. Wilson*, 948 So.2d 774, 791 (Fla. 3rd DCA 2006).

Any institutional bias that unfairly favors the wealthy and powerful over the poor is unconstitutional, unethical, and unacceptable to those entrusted to guard our democracy at the level of an appellate court judge. Sanctions serve a societal need as a specific and general deterrent to greater misconduct.

When greater misconduct occurs even after those sanctions, even greater sanctions must be imposed.

Here, Appellee "has mindfully undermined the integrity of the courts by creating a mockery of the principles of justice through [its] deceitful misconduct. Such underhanded tactics in full derogation of our legal processes should be met with swift measures. Total expulsion from the category of persons who may avail themselves of the benefits of our court system should not be an afterthought, but should instead be the direct result of such egregious misconduct. *Cabrerizo v. Fortune Int'l Realty*, 760 So. 2d 228, 230 (Fla. 3rd DCA 2000)

The United States Supreme Court has recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). It preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123,

> 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The Florida Supreme Court has made it clear a judge should disqualify themselves, even if not subjectively unfair, because the integrity of the judicial system requires the objective appearance of neutrality:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that

> he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this. *Crosby v. State*, 97 So. 2d 181, 184 (Fla. 1957).

Respectfully, the Code of Judicial Conduct, Canon 3 E(1) states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . "

There is objectively reason to question whether this Honorable Court has an institutional bias against homeowners, and Appellant's counsel, for zealously advocating on behalf of homeowners, as evidenced by the Daily Business Review articles and Appellant's counsel's body of appellate work.

Appellant's counsel has taken approximately 36 foreclosure appeals before this Honorable Court since 2010. On every appeal taken of a final judgment in favor of the bank, the Court issued a PCA and repeatedly denied a motion for written opinion, rehearing, or for rehearing *en banc*, on these issues. At some point, this Honorable Court must stop silently tolerating misconduct by the largest financial institutions in the world and hold them accountable to the law.

Most recently, Judge Christopher Klein issued an order refusing to dismiss and vitiate a final judgment setting forth legal ground to support his punitive damages award finding:

> "this motion to dismiss began as a hostage standoff. Bank of America, with a gun to the

> Sundquists' heads, said it would pay them several million dollars more than the $6,074,581.50 awarded to them, but only if this court first dismisses the adversary proceeding so as to vitiate the opinion in *Sundquist v. Bank of America* (*In re Sundquist*), 566 B.R. 563 (Bankr. E.D. Cal. 2017). There being no legal obstacle to Bank of America paying the Sundquists without any judicial action, this was a naked effort to coerce this court to erase the record. No chance. No dice." See attached as Appendix L.

Judge Klein refused to vitiate his order, ruling "to name and to shame Bank of America on the public record in an opinion that stays on the books serves a valuable purpose casting sunlight on practices that affect ordinary consumers. Other persons dealing with Bank of America will be able to gauge their experiences against what has been revealed in this case."

Any appellate court concerned about the public's perception of its ability to render meaningful justice should make findings of fact and conclusions of law when the Appellant sets forth reasonable grounds of fraud of the court. There is a growing chorus of respected jurists who refuse to tolerate mortgage servicers who dare present false evidence, false testimony or violate court orders that would expose their unclean hands in foreclosure actions, even after the National Mortgage Settlement.

Each judge has their own independent obligation to uphold the integrity of the court and jealously guard

the rights of all litigants, especially when there is a great disparity between the parties. Each judge takes an oath to "administer justice without respect to persons, **and do equal right to the poor and to the rich**, and . . . faithfully and impartially discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States. So help me God." 28 U.S.C. §453 (1948). There is no justification for any judge to favor the rich over the poor.

IV. <u>This Court Should Grant Relief to Prevent the Public from Perceiving an Institutional Bias By Refusing to Address these Misconduct Issues</u>

This Honorable Court should grant rehearing or write an opinion that would permit Appellant to seek further review by the Florida Supreme Court. Article V of the Florida Constitution, as amended in 1980, the Florida Supreme Court lacks jurisdiction to review a District Court decision that issues a PCA without a written opinion. There are no standards in Florida that require a District Court to write an opinion or certify a matter to be of great public importance. Appellant's due process rights are violated if this Honorable Court denies Rehearing *En Banc* or refuses to issue a written opinion.

There is no question any Judge or law-abiding citizen could reasonably insist that homeowners pay their mortgage or lose their homes. Unlike the law-abiding citizen, this Honorable Court has a constitutional

obligation to the integrity of the process. Appellant respectfully submits the *per curiam* affirmance of the trial court's final judgment of foreclosure is arbitrary, capricious, and a denial of Appellant's constitutional right to due process protected by the Florida and United States Constitutions. This Honorable Court's ruling conflicts with decisions of the Florida Supreme Court, Florida Statutes, this Honorable Court, and other District Courts of Appeal, that all require a party have the opportunity to plead and prove defenses after reasonable discovery before a fair and impartial tribunal.

The Honorable Retired Judge Alan Schwartz once wrote, "the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served." *Spencer v. EMC Mortg. Corp*., 97 So.3d 257, 262 (Fla. 3rd DCA 2012). The last time Appellant's counsel cited that quote to this Honorable Court, it resulted in Appellant's Counsel responding to an Order to Show Cause Why He Should Not Be Sanctioned. See attached as Appendix M.

If a tree falls in the woods and no one is around to hear it, does it make a sound? If an industry with trillions in assets, already punished with billions in sanctions, continues an unconscionable scheme calculated to interfere with the Court's ability to properly adjudicate foreclosure cases, and the Appellate Court says nothing, is it still a fraud on the court? Why not name and shame large financial institutions that engage in misconduct in equitable proceedings?

Why not impose a more severe sanction than $25 Billion and direct the money to a judicial integrity fund? The fund could provide resources to eradicate homelessness, drug addiction, mental health issues, and sea level rise. The Fund could also support early childhood education programs, higher education, and address a myriad of other problems Miami has faced since this industry destroyed the economy, leaving Miami an epicenter of both the housing crisis and the robosigning scandal that followed. Why not issue orders to show cause and prosecute those senior executives responsible for setting this unconscionable scheme in motion? The public would herald judges responsible for such a program as heroes. There is no reason why a Bank is allowed to fabricate evidence, suborn perjury, and violate court orders to avoid exposing their egregious misconduct with impunity. The entire industry engaged in a national [sic] wide fraud on the Court. The bank agreed in the $25 Billion National Mortgage Settlement to only use competent evidence in foreclosures going forward. Before the ink dried, the Bank started this dead bank robostamped endorsement process and then suborned perjury to cover it up. It was not just one bank, it was an entire industry. How is that ok? Does Mr. Alexander deserve a thoughtful response to these questions before losing his home? Counsel for Appellant expresses a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the decisions of this Honorable Court and would negatively impact the public's perception of this Honorable Court's ability to render meaningful justice. A consideration by the full court is

necessary to maintain uniformity of decisions in this court and protect the integrity of the public's perception. These points of law raised are so well settled in Florida. The law favors the Appellant, not the Appellee.

Here, the Court should join those respected jurists who are sounding the alarm that there is a problem with the evidence presented in foreclosures, again. It may be wildly unpopular to reach a decision that favors a homeowner and undermines Plaintiffs who are seeking equitable relief without complying with Florida law. If the Court is convinced the law requires that unpopular result, that is the result the Court must reach. But seriously, who would find this result unpopular except those responsible for this misconduct in the first place?

The Florida Supreme Court has held "a large word like justice . . . compels an appellate court to concern itself not alone with a particular result but also with the very integrity of the judicial process." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1257 (Fla. 2014). The latin phrase "Sat Sito Si Recte" found on the seal of the Florida Supreme Court Seal and the Florida District Courts of Appeal means, "soon enough if done correctly." Respectfully, it is not done correctly to issue a PCA after cancelling oral argument where a trial court disposed of a colorable claim of fraud on the court without taking evidence.

WHEREFORE, Appellants request this Honorable Court issue a written opinion, grant rehearing, or grant rehearing *En Banc to* reverse with instructions

to permit Appellant to take discovery and present evidence at an evidentiary hearing on the Rule 1.540(b) Motion, or any relief deemed mete and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was emailed to jonathan.blackmore@ phelanhallinan.com fl.service@phelanhallinan.com; Jonathan Lee Blackmore, Esq., Phelan Hallinan, PLC, 2727 W Cypress Creek Rd, Ft, Lauderdale, FL 33309-1721 this 22nd day of February, 2018.

/s/ Bruce Jacobs
Bruce Jacobs

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

MARCH 21, 2018

DANIEL H. ALEXANDER and JACQUELINE P. ALEXANDER,

Appellant(s)/Petitioner(s),

vs.

BAYVIEW LOAN SERVICING, LLC,

Appellee(s)/Respondent(s).

CASE No. 3D16-2228

LT No. 14-019290

Upon consideration, appellants' motion for rehearing and request for a written opinion is hereby denied. SUAREZ, LAGOA and SALTER, JJ., concur. Appellants' motion for rehearing en banc is denied.

[SEAL]

cc: Bruce Jacobs
Jonathan L. Blackmore
Amida Umesh Frey
Court E. Keeley
John D. Cusick
Anna C. Morales