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Comment on the Emergency Rule and Form Proposals of the Supreme Court Task
Force on Residential Mortgage Foreclosure Cases

SC09-1460

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I thank this Honorable Court for giving consideration to my MOTION TO ACCEPT COMMENT AS TIMELY and for the opportunity to offer comment on the EMERGENCY RULE AND FORM PROPOSALS OF THE SUPREME COURT TASK ON RESIDENTIAL MORTGAGE FORECLOSURE CASES.

INTRODUCTION

I am a full-time working mother who, without any formal legal, financial, or business education, is representing herself *Pro Se* in a Palm Beach County foreclosure action initiated on February 17, 2009. Through my efforts to defend my own case and understand securitization, I have become a source of information, support, and guidance to many other Floridians in foreclosure. I spend my limited free time at the courthouse hours each week; in the file room studying case folders, in courtrooms of foreclosure judges observing, in the law library, and at home talking with and emailing hundreds of foreclosure Defendants. I search foreclosure case dockets and research mortgage assignments in the official public records. I attend foreclosure hearings, listen to proceedings - mostly uncontested - and am deeply aggrieved by 'rocket dockets' where hundreds of families rendered homeless are instantly dispossessed of their storehouse of wealth, sometimes built over a lifetime of hard work - their fate mechanically rubber-stamped in flybys lasting on average 15 to 30 seconds each case. Then weeks later, I follow up with a review of a select few files, in an effort to understand how thousands of notes, claimed 'lost' suddenly reappear as if pulled like rabbits magically from out the counsel's hat in the Plaintiff's twelfth hour *coup d'etat* - the Motion for Summary

Judgment hearing. Many, if not most, of these actions were initiated and supported on documents either not produced at all or, if they were, of dubious authenticity. Because of my vantage point, I offer an underrepresented perspective in these proceedings, one that is largely representative of the fate of millions of similarly embattled homeowners across our proclaimed nation of laws.

IMMEDIATE IMPACT

The Supreme Court Task Force on Residential Mortgage Foreclosure Cases ("Task Force") proposes an amendment to *Florida Rule of Civil Procedure 1.110* to require verification of residential mortgage foreclosure complaints. This is a much needed amendment that will yield an immediate and positive fourfold effect:

1. accountability placed firmly where it belongs - on the shoulders of the filing Plaintiff lenders' counsel, all officers of the court answerable to the court
2. substantial reduction in the total number of foreclosure actions filed
3. reduction of the gridlock in our Florida courts by deterring Plaintiffs who are not legally entitled to enforce the underlying obligations from bringing foreclosure actions, and
4. profound relief to countless Defendant homeowners who, like myself, are targets tracked in the gun sights of huge foreclosure mill attorneys retained by giant well-heeled banks whose cases were often filed without a single shred of evidence documenting the Plaintiffs' legal right to bring foreclosure action

STATUS QUO

Existing laws, attorneys for lenders and bankers will and do argue, already substantively protect against unauthorized foreclosure actions, but the reality is these are wholly ineffective against the onslaught of Florida daily court filings. Daily, judges, clerks, and other court employees are swamped with an influx of new cases, and dockets with up to 250 foreclosure actions. These are buried in the workload of the few remaining employees left after massive layoffs in the wake of

plummeting property values (another unfortunate result of Florida's unconscionably high foreclosure rate). The understaffed and overworked judges and remaining court employees, only able to give each docket and file a brief cursory glance, if that, are without the time and resources required to examine each foreclosure case to determine the existence, sufficiency and integrity of the paperwork claimed to be accurate, true, complete, and attached to foreclosure complaints. By my own file reviews and audits, I find large numbers of these foreclosures, mostly uncontested, occur without the Plaintiff ever showing a lawful claim, ever producing a competent affidavit or original note, despite attesting and signing entirely to the contrary.

Given that the loss of a home has enormous financial and psychological impact, and far reaching rippling effects on the fabric of a surrounding community, a state as well a nation, and as we now see, even the globe - it seems incumbent on us all together to require great care be taken before courts allow foreclosures to proceed. Katherine Porter, an Iowa law professor, found in her study of 1,700 bankruptcy cases that "*a majority of mortgage claims are missing one or more of the required pieces of documentation*". These findings clearly mirror Florida's foreclosure crisis.¹

CURRENT LACK OF PROTECTION FOR MORTGAGOR/DEFENDANTS

In legal theory, *Florida Statute §673.3091* provides that the process for re-establishment of a lost or destroyed instrument by law impose a strict burden of proof and instruct the court to protect the obligor from multiple suits on the same instrument. *Section 673.3091*, Florida Statutes, clearly and unambiguously sets forth the elements a plaintiff must prove in order to enforce an obligation for which it does not have the original instrument.

In practice, Plaintiffs offer "lost note affidavits" signed by employees of the servicer of the mortgage, who sign as representatives of multiple financial institutions, in a variety of roles. Alternatively, as in my own case, Plaintiffs offer "*true and correct copies of the original note*" with subtle alterations and/or changes to the copy previously submitted to the court. Additionally, these "*copies*

¹ Katherine Porter <http://www.utexas.edu/law/journals/tlr/assets/archive/v87/issue1/porter.pdf>

of the original notes” are often endorsed to and by parties neither of whom (or often both of whom) are the Plaintiff, bringing up a whole host of conflict-of-interest, chain-of-title, and property rights issues, largely unaddressed in today’s rapid-fire, uncontested foreclosure cases. There are even cottage industries such as Nationwide Title Clearing (See Attached) which specialize in what they call ‘due diligence.’ These firms, staffed by former risk managers, provide or create affidavits or near credible documentation needed to fill gaps in the chain of custody, assignments, or endorsements.

Regarding the protections offered by *Florida Statute §90.953*, the Florida Bankers Association asserts in their comments submitted to this Foreclosure Task Force, that protections against financial double jeopardy are fully in place and “*commonly takes the form of a provision in the final judgment stating that to the extent any obligation of the note is later deemed not to have been extinguished by merger into the final judgment, the plaintiff has by law accepted assignment of those obligations. In other words, the plaintiff who enforces a lost or destroyed instrument assumes the risk that a third party in lawful possession of the original note or with a superior interest therein will assert that claim. The original obligor has no liability.*” Personally, I have yet to read this provision or to have seen it incorporated into any final judgments.

MY CASE AND FLORIDA DEFAULT LAW GROUP

In my own case, the Plaintiff’s Counsel is Florida Default Law Group (FDLG). There have been two “copies of the note” *produced* by my Plaintiff. Each differs from the other, both were purported to be “true and correct copies” of the same original. Two Affidavits of Amounts Due and Owing were filed by affiants who, lacking legal competence, sign as representatives of many different financial institutions, holding many different high level job titles. The still unrecorded mortgage assignment - created 3 months after the action was initiated as evidence of transfer of the mortgage - was signed by similarly incompetent signors, notarized in a state far from the assignor MERS’ address. A few hours of searching online for similar public mortgage assignments reveal the pervasive use of the

same few signors, notaries, and witnesses, usually employees of the mortgage servicer, signing notarized documents over and over for a wide variety of institutions that are located all across the nation.

EXAMPLE OF HOW CURRENT LAW AND SANCTIONS ARE INEFFECTIVE

Earlier this year, FDLG was sanctioned with their client, “jointly and severally, to pay a monetary fine in the amount of \$95,130.45”, to pay for Negligent Practice and False Representations for filing false affidavits, by Judge John K. Olson, Judge US Bankruptcy Court Southern District of Florida Ft Lauderdale Division, Case No. 08-14257-BKR-JKO Doc #58 (See Attached). In that order, attorney for FDLG admitted to “*less than 50*” false stay relief affidavits were filed, and furthermore asserted that “*at no point in State Court*” would affidavits with egregious falsifications be filed because an “*attorney would review the state of the case*” prior to filing. Judge Olson’s opinion offers a scathing condemnation of FDLG practice of “*filing any old pleading without undertaking any investigation into its accuracy.*” Judge Olson continues, “*FLDG parties have engage in the systemic process of churning out unrefined and unexamined form pleadings, instead of producing and filing carefully considered legal papers. This has resulted in an abuse of the system and sanctions to deter continued recklessness are warranted.*” Revealed from even the briefest of investigations, FDLG continues this practice unchecked, and despite their protestations otherwise, State Court is ground zero for the filing of these false documents.

Although, *Section 673.3091, Florida Statutes*, establishes stringent proof standards when the original note is not available, and requires the court to protect the mortgagor against possible additional foreclosure actions, simply promulgating unambiguous legal rules does not ensure that a judicial system will actually function to secure the rights of the adversarial parties. The courts, due to staffing limitations and highly overburdened dockets, are logistically unable to do the detective work necessary to sleuth out improper foreclosure claims. Despite having ample authority to sanction lawyers and lenders asserting improper foreclosure claims, the reality of the current state of Florida’s foreclosure crisis does not provide for these protections and deterrents to be utilized in the manner in which

they were intended to work, especially in uncontested foreclosures relished by both Plaintiffs and their law mills as effortless asset and revenue procurement.

VERIFICATION AS A DETERRENT AGAINST FILING UNFOUNDED CASES

This rule change is recommended because of the new economic reality dealing with mortgage foreclosure cases in an era of securitization. Frequently, the note has been transferred on multiple occasions prior to the default and filing of the foreclosure. Plaintiff's status as owner and holder of the note at the time of filing has become a significant issue in these cases, particularly because many firms file lost note counts as a standard alternative pleading in the complaint. There have even been situations where two different plaintiffs have filed suit on the same note at the same time. Many cases I see weekly purport to have the mortgage (public record) and the note attached, but often there is no note attached, although an incomplete note, the Adjustable Rate Rider (public record) might be attached.

Requiring the plaintiff to verify its ownership of the note at the time of filing provides incentive to review the actions, ensures that the filing is accurate, ensures that investigation has been made, and that the plaintiff is the owner and holder of the note. This requirement will give the trial judges greater confidence in their authority to sanction those who file foreclosure actions without assuring themselves, the Defendant(s) and the court of their authority to do so.

WHAT I HAVE WITNESSED

Each month, I review hundreds of foreclosure cases in Palm Beach County 15th Judicial Circuit Court, which reveal flaws in almost every single case.

The requirement for verification by Plaintiff's attorney would be an effective deterrent to stop illegal foreclosure actions from being filed, clogging up Florida courts, and subsequently leading to the devastating result of granting illegal and unfounded foreclosures. I personally witness in case after case after case:

- False statements purporting the attachment of a copy of the note to the complaint when a cursory glance reveals no note attached or only an Adjustable Rate Rider, which is an incomplete Note
- Statements that a true and correct copy of the Note is attached to the complaint, when a different “true and correct copy” with a previously lacking endorsement appears in a later pleading
- Lost Note Affidavits with a later “found” note of questionable authenticity
- Mortgage Assignments, often unrecorded, without the assignor’s corporate seal, completed months after the initiation of the foreclosure action, signed by incompetent signors who illegally represent both the assignor and assignee
- Attorneys attesting to completed paperwork in case after case during Summary Judgment time blocks, yet a later review of many of these same case files show no Notes
- Service processing companies owned by and providing service for Plaintiffs leading to clear and egregious conflict of interest
- Title Companies owned by Plaintiff’s attorneys, adding Title Fees and Title Examination Fees (example: Florida Default Law Group, P.L. owns New House Title, L.L.C.)
- ‘Attorney-in-Fact for’ alluded to with asterisks and typed small font footnotes that never fully explain or clarify the authority granted and/or the parties’ relationship
- Affiants signing as representatives of multiple financial institutions
- Affiants signing on affidavits attesting to knowledge of facts as of a date months well into the future of the date the document was notarized
- And, most baffling, Plaintiffs listing themselves as a co-Defendant

ORIGINAL NOTES

In actual practice, confusion over who owns and holds the note stems from the fact that the Plaintiff was assigned the Mortgage (often unrecorded) months after the initiation of the foreclosure action by MERS or some other unknown name, is not

on the Mortgage by either name or endorsement, has seemingly no relation to the Defendant whatsoever, is often an unrecognizable name to the Defendant who took out a Mortgage with a different company, who remits monthly payments to yet another company, who may (or may not) have received modification assistance, acceleration and impending foreclosure action notices from another company. Furthermore, confusion over who owns the note stems from the complex securitization process which buries the owner in a grave papered over by layers of financial institutions and legal protections which are, unfortunately, not extended to the Borrower. Lastly, confusion over who owns and holds the note stems from Plaintiffs' refusals to answer simple Discovery questions to this point, citing "*Defendant seeks confidential, proprietary, or trade secret information.*"

In rebuttal to the comment submitted by the representative of the Florida Bankers Association, if the notes were all deliberately eliminated immediately upon conversion to an electronic file, then it is quite the conundrum how these destroyed original notes are invariably produced when required by the Judiciary, Defendants' counsel, or a compelled Motion to Produce. Original notes are somehow found, at some point in the case, despite having been "*deliberately eliminated*". While this may seem impossible, this conjuring up of previously "*deliberately eliminated*" items is routine and usual practice in today's foreclosure cases. In my own foreclosure case an altered likeness of a copy of my Note was produced and purported to be a copy of the original note.

Which scenario is true: A or B?

- A. All original notes were deliberately eliminated and the "original notes" that are being produced by the thousands in current foreclosure actions are fraudulent; OR
- B. All original notes were NOT deliberately eliminated and the original notes are available to be produced in court; thereby invalidating the Florida Bankers Association's objections to the proposed amendment to *Florida Rule of Civil Procedure 1.110* to require verification of residential mortgage foreclosure complaints.

The information reviewed to verify the Plaintiff's authority to commence the mortgage foreclosure action will be attached to the complaint. The verification

made “to the best of the [signing record custodian’s] knowledge and belief” possibly may not reestablish a lost note, but may in fact reestablish the court system’s integrity and provide significant substantive protections afforded by judicial insistence of establishing a valid claim by the party bringing a foreclosure action.

STATE COURTS HAVE BEEN RELUCTANT TO INVOKE STATUTORY AUTHORITY TO SANCTION PLAINTIFFS ASSERTING CLAIMS UNSUPPORTED BY LAW OR EVIDENCE

Any party seeking to foreclose a mortgage without a good faith belief - based on investigation reasonable under the circumstances -in the facts giving rise to the asserted claim may be sanctioned *"upon the court's initiative."* § 57.105(1), *Fla. Stat.* The Florida Bankers Association Representative, in a spectacular understatement, comments, *"This statute, though somewhat underused by our courts, affords judges the authority to immediately impose significant penalties for bringing unfounded litigation. Perhaps more significant is this Court's recent (and appropriate) reaffirmation of a trial court's inherent authority to sanction litigants-specifically attorneys-who engage in bad faith and abusive practice. See Moakely v. Smallwood, 826 So. 2d 221, 223 (Fla. 2002), citing United States Savings Bank v. Pittman, 80 Fla. 423, 86 So. 567, 572 (1920) (sanctioning attorney for acting in bad faith in a mortgage foreclosure sale)"*; by citing two cases, one from 7 years ago and the other from 90 years ago, the Court’s authority to impose sanctions against attorneys who engage in repeated misconduct is underutilized to the point of being entirely disregarded. Refusing to recognize and impose sanctions against attorney misconduct effectively creates a permissive and laissez-faire attitude that has encouraged the *"foreclose first, ask questions later"* strategy, which provides no relief or protections to defendants in foreclosure actions, especially those uncontested. Judges need be zealous in their critical role of safeguarding justice and assuring equal protection under the Fourteenth Amendment of the U.S. Constitution.

REQUIRING VERIFICATION OF RESIDENTIAL MORTGAGE FORECLOSURE COMPLAINTS WILL EFFECTUATE ATTORNEY ACCOUNTABILITY

The Task Force Report giving rise to the proposed amendment clearly speaks to the procedural concerns of the courts. By drastically reducing or totally eliminating the number of unsubstantiated foreclosure actions initiated, the relief will be felt immediately in the court system and in homes across Florida where hiring competent legal counsel is an unaffordable luxury. Additionally, consideration and attention must be given to the fact that many of the large foreclosure law firms own service processing companies and/or title research companies, which allows them the nice neat package of keeping every aspect of the foreclosure action in-house. Tempting opportunities abound thereby for bypassing protections meant for defendants.

The stated purpose - to prevent the filing of residential foreclosure cases without cause - is clearly a matter of court procedure. Requiring verification of a residential mortgage foreclosure complaint imposes a threshold requirement prior to pursuing an action. This protects Floridians, forced to choose between defending against an unfounded, frivolous foreclosure action or letting the house simply go into foreclosure due to lack of funds for legal representation, ignorance of one's rights under Florida law, abject fear in the face of sure homelessness, or powerlessness to compel a formidable opponent to adhere to existing laws.

With the passing of this amendment, all Florida actions for foreclosure of mortgages on residential real property will require that the complaints be verified by the inclusion of an oath, affirmation, or the following statement:

"Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

This removes from the Defendant the onus to vigorously defend against an unfounded residential foreclosure, and places the burden of verification onto the Plaintiff initiating the action. The immediate effects will be multifold: a decrease in the total number of newly filed residential foreclosure cases, a cessation in

filings of foreclosure actions without basis in fact, and a holding of counsel accountable to the basic professional standards of the Florida Bar, namely that counsel has knowledge of the facts and veracity of the claims purported to be true in the action.

CONCLUSION

I am grateful for the hard work, creativity, and dedicated efforts of the Supreme Court Task Force on Residential Mortgage Foreclosure Cases.

Verification will provide greater protection to the citizens of Florida, especially those at risk of becoming Defendants in one of the 80-90% uncontested foreclosure actions. Those actions that are unable to be verified would no longer be filed in the highly over-burdened court system. Realistically, this will significantly and dramatically diminish the burden on the courts and Defendants.

The amendment is critical in putting the brakes on many of the tens of thousands of newly filed, unfounded, uncontested Florida Civil Court foreclosures each month and interceding on behalf of Floridians who are losing their homes to these illegal foreclosures.

Respectfully submitted,

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Attachments:

Martin, Susan Taylor (2009, May 1). So, who owns your home loan? *St. Petersburg Times*. Retrieved from <http://www.tampabay.com/news/business/realestate/article997375.ece>

Olson, John K (2008, Oct. 28). Order Granting Wells Fargo Bank, N.A.'s Motion for Relief From Stay and Imposing Sanctions for Negligent Practice and False Representations. United States Bankruptcy Court Southern District Of Florida Fort Lauderdale Division. Case 08-14257 BKC-JKO