IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, v. BRUCE JACOBS, Respondent.	Case No.: SC20-1602 The Florida Bar File Nos. 2019-70, 188 (11H) 2019-70, 358 (11H) 2020-70, 056 (11H)

THE FLORIDA BAR'S ANSWER/CROSS-REVIEW INITIAL BRIEF

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PRELIMINARY STATEMENT

A. Abbreviated Names

Bruce Jacobs, the Respondent, will be referred to as Mr. Jacobs or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the Report of Referee will be cited as (ROR:**).

References to specific pleadings will be made by Tab number in the Amended Index of Record, and with further information when the document is large. (Tab#-**).

The final hearing on April 22, 23, 26, and May 3, 2021, including the announcement of the recommendation of guilt and will be cited as (T1:**) through (T4:**). The sanction hearing occurred on May 5 and 6, 2021, will be cited as (TS1:**) and (TS2:**).

The Bar's exhibits will be cited as (TFB-Ex.*) with specific reference to the transcript page number when needed.

Mr. Jacobs' exhibits will be cited as (R-Ex.*).

NATURE OF THE CASE

The Referee in this case recommends that this Court find Mr. Jacobs guilty of three violations of Rule 4-8.2(a) because he impugned the qualifications and integrity of multiple judges by many statements in three separate court files. The Referee found that he deliberately and knowingly violated this Rule by making statements with reckless disregard as to their truth or falsity. (ROR:18)(T4:5). The Referee recommends a 90-day, non-rehabilitative sanction. Mr. Jacobs seeks review of the Report of Referee asking that the case be dismissed, and the Bar has filed a cross-review addressing the sufficiency of the sanction.

There is no dispute about the content of the statements or that they were made by Mr. Jacobs. (Tab#-5, 9). In one of the cases, when asked to respond to orders to show cause by the Third District, Mr. Jacobs admitted he "fully underst[oo]d the nature and wrongfulness of his conduct." (TFB-Ex.3). In another, he "humbly apologize[d] to the Court for his inappropriate comments impugning the integrity of the judiciary." (TFB-Ex.7). He claimed his conduct was the result of emotional issues and that he was seeking professional help both for the emotional problems and to assist in correcting his abusive rhetoric.

But over time, as the initial brief demonstrates, Mr. Jacobs has abandoned his theory of emotional problems and has returned to the same abusive rhetorical style. He admits in this review that his comments did impugn the integrity of the judges, but maintains his statements were not dishonest; he claims they were all true. (IB-1). He claims he had a First Amendment right to make all of these statements for clients in court filings. He claims he is being selectively prosecuted.

The Bar maintains that the Referee was correct in determining that Mr. Jacobs failed to present evidence to prove he had a reasonable belief that his statements were true. The Bar maintains that Mr. Jacobs is claiming that judges and courts are committing illegal acts simply because they have refused to accept his legal theories about Article 9 of the UCC and about an "unclean hands" defense based on a theory of national "systemic fraud" on the courts, which he did not demonstrate to be the law of Florida established in any prior appellate decision. Mr. Jacobs is impugning the judges because they will not agree with his version of the law, not because they are disobeying the actual law. The First Amendment does not protect this misconduct. The Bar regularly brings disciplinary actions against other lawyers who impugn judges; this is not a case of selective prosecution.

On cross-review, the Bar maintains that the recommended 90-day suspension is not supported by the Referee's findings following the sanction hearing and that the Standards and case law do not provide a reasonable basis for this non-rehabilitative sanction. Mr. Jacobs' conduct is harmful to his clients, to the public, and to the judicial system. Similar to the recent decision in *The Florida Bar v. Patterson*, 330 So. 3d 519 (Fla. 2021), he needs a rehabilitative suspension. Thus, the Bar requests that the findings of guilt be accepted by this Court, but the recommendation of the non-rehabilitative sanction should be rejected. A two-year rehabilitative suspension should be imposed.

RESPONSE TO MR. JACOBS' STATEMENT OF THE CASE AND FACTS

Mr. Jacobs' statement of the case and facts is mostly an argument rather than a statement of the case and facts. The first nine pages primarily discuss the testimony of witnesses he presented at the sanction hearing – after the Referee made her findings of guilt. He is arguing in his brief that his case should be dismissed; he is not challenging the recommended sanction. These witnesses add nothing to his arguments about the guilt phase.

There are few record cites in his statement, and many of the references to matters occurring in other cases are not supported by the record. Because the presentation is really an argument, the Bar will attempt to address pertinent matters in the argument section of this brief rather than here.

There is one section of the statement, section VI, that addresses the Bar's exhibit 15. It is simpler to address that section now. Following that discussion, the Bar will present a more traditional statement of the case and facts to summarize this case.

Exhibit 15. Exhibit 15 is Mr. Jacobs' "Fourth/Fifth Wave of Verified Motions for Judicial Disqualification of Judge Andrea Gundersen." It was

filed in *Bank of New York Mellon v. 35D Team, LLC* in March 2021. It is not a document that was the basis for any violation charged in this case.

Mr. Jacobs called a family therapist during the *guilt* phase of his trial, allegedly for the therapist to opine that his mental state was such that he did not commit knowing violations. (T1:277). She opined that his behavior stemmed from a dysfunctional family and sexual abuse as a child. (T1:289-292). During her testimony, she opined that he was making tremendous improvement. (T1:296).

The Bar first introduced Exhibit 15 as impeachment evidence to demonstrate that Mr. Jacobs was continuing the same type of behavior in his court filings after her treatment. (T1:305). The therapist answered the questions by explaining that "relapses do happen." (T1:309). The therapist testified again during the sanction phase of the case. (TS1:107)

The therapist's testimony occurred after most of Mr. Jacobs' direct testimony but before he was cross-examined. When he was on the stand in direct, he claimed that the therapist's treatment had made a "night and day" difference. (T1:215). As a result, during cross-examination following the therapist's testimony, the Bar used the content of the motion to establish that the therapy had not made a night and day difference. (T1:85-91).

Later in her report, the Referee found that the mitigating factor of interim rehabilitation was not proven in this case because the therapy had had "no effect" in light of the content of Exhibit 15.

In Exhibit 15, Mr. Jacobs impugned Judge Gundersen in manners similar to the documents that are the basis for the charges in this case. Among the claims, he stated, as fact, that she had "knowingly misused" her position to advantage the bank in the commission of "systemic fraud." (TFB-Ex.15, p.2). The motion demonstrates his method of driving judges to the limit of their patience, requiring Judge Gundersen to adjourn proceedings. Although none of her earlier denials of motions to disqualify had been overturned by the Fourth District, at this point she disqualified herself from his cases. Of course, because she could not comment we do not know why she finally recused herself. To be completely clear, this exhibit is not evidence of any violation in this case; the exhibit was used to challenge the claim that he was rehabilitated and to test his credibility.

Mr. Jacobs is correct that his testimony during this impeachment had an effect on the Referee. It played a role in the Referee finding that his conduct was "deliberate," "knowing," and "intentional." (ROR:19-20). It contributed to her finding that his misconduct had been "employed to manipulate the legal system." (ROR:18).

It is the Bar's position that Mr. Jacobs' testimony and that of his therapist opened the door to this cross-examination and that in this quasi-judicial proceeding the referee is "not bound by the technical rules of evidence." *See The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006). The Referee did not abuse her discretion by admitting this evidence. In her assessment of Mr. Jacobs' credibility, the Referee was free to rely upon his testimony stemming from this document.

STATEMENT OF THE CASE AND FACTS

A. Mr. Jacobs' career leading up to his court filings that impugned judges.

Mr. Jacobs graduated from Fordham University School of Law in 1996 and became a member of the Florida Bar in 1997. (T1:107-08). He worked as an assistant state attorney for "3 years and a day" and then became primarily a civil litigator. (T1:111, 114). He joined a small firm in 2001 that represented Bank United. (T1:116-118). He handled all of the foreclosures for the law firm and handled suits involving promissory notes. (T1:116). He left that firm to start his own firm in 2006. (T1:118).

By 2006 he realized the Great Recession was underway although it did not hit the bottom for another two years. (T1:120-21). He became a foreclosure specialist defending primarily homeowners. (T1:124-125). He began to see himself as David fighting Goliath. (T1:126). He believed there had to be a better solution than putting people out of their homes. (T1:127-28). He started training with a lawyer from North Carolina, Max Gardner, and attending many national seminars. (T1:128-29). Eventually, he was invited to speak at these seminars. (T1:130, 137). He became a member of the National Association of Consumer Advocates and a group known as the JEDTI, Juris Ensuring the Defense of Title Integrity. (T1:136-7). He learned

about mistakes made by the financial industry and developed a strategy where “you can sue them for making these mistakes and eventually they’re going to resolve your case because they’d rather work against somebody who is not going to give them so much heartache.” (T1:129-30). Even at the time of the final hearing in this case, he thought of himself as a “Teddy Roosevelt republican,” because he “believe[d] that JP Morgan is not good for democracy.” (T2:96-97).

He learned the ins and outs of the process of securitization by which promissory notes, secured by mortgages, were pooled so that they could be owned by a group of investors and served by a master servicer. (T1:131-134). He worked with an expert, Kathleen Cully, who could identify flaws in the securitization process that he would then attempt to use as defenses. (T1:135). Thus, in addition to all of the defenses raised by other lawyers representing homeowners, he made a practice of prosecuting what he described as “fraud on the court” based on errors and intentional misconduct surrounding the assignments of the loans after they were obtained by the originating banks. (T1:137-38). Some judges thought he was on to something and would let him pursue this defense, and others would not. (T1:138).

He developed a theory about how Article 9 of the UCC should apply to foreclosure, which he believed would solve issues in foreclosures. (T1:139). But most courts rejected this theory. (TFB-Ex.1). He also developed a theory that was based on a class action settlement by the Florida Attorney General in 2010 involving the "robo signing scandal." (T1:140). The robo signing scandal had resulted in a large number of documents or mortgage assignments that were defective or false, leading to confusion about who owned the note and mortgage.

Mr. Jacobs packaged this defense as a defense of "unclean hands." (T1:143)(R-Ex.1, p. 143). This defense argued that, even though the homeowner had borrowed the money to purchase the home and was in default on payments, the holder of the note or a bank that successfully presented proof to reestablish a lost note could not enforce the note or foreclose on the mortgage due to the faulty assignments that occurred after the closing on the note and mortgage. His argument was that it was not enough to possess the note for standing; that even a bank with standing should not be able to foreclose if the bank had "unclean hands." His special affirmative defenses were also sometimes accompanied by a counterclaim alleging a RICO violation for forgery and perjury. (R-Ex.1, p. 142). Again,

he had some success with these defenses and counterclaims, (T1.171), but these theories were often rejected by the courts.

In 2016, in a case in which Mr. Jacobs' client had purchased property subject to foreclosure in order to have the opportunity to present Mr. Jacobs' theories, Judge Hanzman wrote a lengthy order rejecting the theories and criticizing Mr. Jacobs' approach to litigating these theories. *See EMC Mortg. LLC v. BJJP Holdings, LLC*, No. 13-21851 CA 01 (22), 2016 WL 5547998, at *1 (Fla. Cir. Ct., Miami-Dade Cnty. Sept. 29, 2016). There is no record of an appeal in that case, although during this period Mr. Jacobs appealed many cases with little success.[1] No appellate court ever held that his defenses of unclean hands and fraud on the court could prevent a foreclosure on a proven note in default.

Mr. Jacobs wanted the public to understand these legal problems better, so beginning in 2010 he programmed and produced a radio show

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[1] *See, e.g. Bernardo v. PNC Mortgage*., 141 So. 3d 568 (Fla. 3d DCA 2012) (table) (PCA); *BAC Home Loans Serv., Inc. v. Headley,* 130 So. 3d 703 (Fla. 3d DCA 2013)(describing false statements by Mr. Jacobs and rejecting his theories); *Rodriguez v. Bank of N.Y. Mellon*, 127 So. 3d 518 (Fla. 3d DCA 2013) (table) (PCA); *Rodriguez v. Wells Fargo Bank, N.A*., 149 So. 3d 21 (Fla. 3d DCA 2014) (table) (dismissing appeal because Jacobs failed to timely file an initial brief); *Bank of New York Mellon v. Simpson*, 227 So. 3d 669, 670 (Fla. 3d DCA 2017) (reinstating judgment against Mr. Jacobs' client).

called “Debt Warriors with Bruce Jacobs,” and later “Jacobs v. Goliath” that focused on “protecting consumers from the financial giants and corporations whose avaricious greed was directed at unsuspecting consumers.” (R-Ex. 1, p. 84).

To be clear, the Bar has not and is not arguing in this case that any of the preceding conduct was a violation of any of the Florida Rules of Professional Conduct. His efforts to learn foreclosure law and to represent his clients competently and zealously is a positive thing. But in this process, Mr. Jacobs obviously became a true believer in his own creative legal theories. He became increasingly frustrated and angry when the courts rejected his legal theories and permitted foreclosures to proceed against homeowners when the plaintiffs proved that they held the notes that were in default. In the three counts of the Bar’s complaint in this case, Mr. Jacobs crossed the line of zealous advocacy and attacked judges and the judicial system because he had convinced himself that any judge who did not accept his novel legal theories had to be dishonest and a traitor to the constitution, and at a minimum, should be disqualified from presiding in the cases where he presented these arguments.

B. The three court filings involved in this Bar complaint.

1. *HSBC Bank, USA v. Aquasol Condominium Association, Inc*.

Count I of the Bar's Complaint concerned Mr. Jacobs' conduct in an appeal to the Third District in the *Aquasol* case. (Tab#-1). As the opinion by Judge Emas in that case explained, Mr. Jacobs represented a homeowners association that had itself foreclosed on the home. (TFB-Ex. 1, p. 2). It was undisputed that the Bank was the holder of the original note, secured by the mortgage. The note was in default. Judge Hanzman entered a judgment of foreclosure and Mr. Jacobs appealed.

On appeal, Mr. Jacobs argued that Judge Hanzman should have recused himself and that the Bank needed to prove it was the owner of the mortgage, and not merely the possessor of the note, in order to foreclose. The Third District wrote a lengthy opinion explaining why it was affirming the judgment of foreclosure. (TFB-Ex.1).[2]

[2] The opinion that is the Bar's Exhibit 1 was modified on rehearing solely to explain that the *Buset* decision came out later than the Third District had originally understood. *Aquasol Condo. Ass'n, Inc. v. HSBC Bank USA, Nat'l Ass'n,* 312 So. 3d 105, 106 (Fla. 3d DCA 2018). That change affects only the alleged violation of Rule 4-3.3(a), which the Referee rejected, and which the Bar is not challenging in this review.

Mr. Jacobs filed a motion for rehearing and for rehearing en banc on August 30, 2018.[3] The Third District's opinion ordering Mr. Jacobs to show cause why it should not impose sanction quotes many sections of his motion. (TFB-Ex.2). *Aquasol Condominium Association, Inc. v. HSBC Bank USA,* No. 3D17-352, 2018 WL 4609002 (Fla. 3d DCA Sept. 26, 2018). The following are just examples of the statements that the Third District quoted as statements impugning judges:

- This Court's insistence on ignoring established Florida Supreme Court law to benefit bad corporate citizens is certain to cause chaos.
- Fla. Stat. § 673.3011 controls enforcement of negotiable instruments, not mortgages. Ownership controls the right to enforce the mortgage. This Court is acting illegally by instructing the law is otherwise.
- This foreclosure crisis was such an interesting phenomenon. Courts kept covering up for Banks that were intentionally doing it wrong.
- The judges decide the rule of law, and whether any rule of law exists. Maybe the rule of law only applies to the rest of us.
- This Court is sworn to protect and defend the constitution of the United States of America, not the foreclosure fraud of Bank of America or HSBC.

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[3] That motion was not introduced as an exhibit by either party because the relevant content was not in dispute. The full motion, however, is available at 2018 WL 4204477.

- Why would anyone sworn to protect and defend the constitution stay silent while domestic enemies destroy our democracy from within? Is this really the world Americans should live in where those in power do not do what is right?
- I'm fighting the modern-day monopoly. I am calling all the patriots who swore the oath to protect and defend the Constitution to join me. Any court that protects the monopoly over the rule of law is a traitor to the constitution and should be tried for treason.

These statements were made in a motion that was supposed to be filed in good faith and for the purpose of achieving the objectives of Mr. Jacobs' client. Indeed, the motion for rehearing en banc was required to be filed with a statement that Mr. Jacobs had a reasoned and studied professional judgment that the panel's decision conflicted with an earlier panel's decision or that the issue was of exceptional importance. Fla. R. App. P. 9.331(d).

Mr. Jacobs filed a verified response to the order to show cause apologizing for impugning the integrity of the judiciary and stating that he "fully understands the nature and wrongfulness of his conduct." (TFB-Ex.3). He explained his emotional state and that he was seeking professional help to solve his problem.

The Third District issued a final decision finding that Mr. Jacobs violated Rule 4-8.2(a). (TFB-Ex.4); *Aquasol Condo. Ass'n, Inc. v. HSBC*

Bank USA, Nat'l Ass'n, 2018 WL 6344710 (Fla. 3d DCA Dec. 5, 2018). It explained that the issue was not whether the statements were false, but rather whether Mr. Jacobs had an objectively reasonable factual basis for his statements. It correctly noted that his verified response did not claim that such a basis existed.

In footnote 4, the Court explained that his motion was more egregious than past conduct, but that for eighteen months he had been filing similar documents. The Court referred the matter to the Bar and ordered Mr. Jacobs to pay a $5000 attorney's fee to opposing counsel. Judge Lagoa dissented, not because she did not believe a violation had occurred, but because she accepted as true Mr. Jacobs' representation that he was pursuing corrective measures.

2. Count II - *Bank of America v. Atkin*

In the *Atkin* case, the Third District issued an opinion granting a petition for writ of prohibition filed by the Bank. (TFB-Ex.5). *Bank of Am., N.A. v. Atkin*, 303 So. 3d 583 (Fla. 3d DCA 2018). The Bank had unsuccessfully sought to disqualify the trial judge, who had been one of the judges that had ruled favorably for Mr. Jacobs. The Third District's twelve-page opinion written by Judge Logue explained in detail why the Bank was entitled to disqualify the trial judge due to matters on the face of the record.

In addition to responding to the petition for prohibition, Mr. Jacobs argued that the Third District en banc should recuse itself. The Court's opinion explains that this was the fourth such request that the Court recuse itself. It cited the three prior cases and once again rejected the argument.

At the same time that it issued its opinion granting the petition for writ of prohibition, the Third District issued a second order to show cause to Mr. Jacobs. (TFB-Ex.6). *Bank of Am., N.A. v. Atkin*, 305 So. 3d 305 (Fla. 3d DCA 2018). The order to show cause explains that, when Mr. Jacobs responded to the writ and moved to disqualify the Third District on behalf of Mr. Atkin, Mr. Jacobs had made numerous statements impugning the integrity of judges. The following are the statements that the Third District quoted as statement impugning judges in the response itself:

- "In Simpson [sic], this Court violated the standard of review, ignored Florida Supreme Court precedent, and falsified the facts in contradiction to the record."
- "The impartiality of this Court is objectively questioned and it cannot issue a ruling with integrity in this case."
- A named circuit court judge acted with "blatant disregard for the rule of law and the client's constitutional rights" in an unrelated case and was upheld by this Court.
- The same circuit court judge has "recently escalated her illegal conduct."

- A different, unnamed circuit court judge changed a favorable ruling because opposing counsel "threw a fundraiser for the new judge who rotated into the division."

The Order to Show Cause then explained that Mr. Jacobs' response had included, as an exhibit, a brief he had filed in another case in the U.S. Supreme Court. In that brief, he had told the U.S. Supreme Court that:

- "The opinion [of the Third District] mispresented facts, ignored Florida Supreme Court law, and disregarded evidence showing fraud. The Florida Supreme Court declined jurisdiction to address this factually and intellectually dishonest result."

- "[I]n virtually every appeal where the trial judge ruled in favor of undersigned counsel's client, including Simpson, the Third DCA reversed with intellectually and factually dishonest opinions."

- This Court "attempt[ed] to cover up, protect, and ignore well-documented fraud on the court in foreclosures. All to ensure a pre-determined result – foreclosure."

- "The Third DCA's Opinion is pretextual and arbitrary."

The Third District explained that Mr. Jacobs had even attacked this Court in his brief in the U.S. Supreme Court:

- "The Florida Supreme Court has repeatedly declined to protect the constitutional rights of foreclosure defendants."[4]

- "This Court is called on to act because the Florida Supreme Court has taken no action to prevent the Third DCA from improperly ignoring fraudulent conduct in foreclosures."

- "It is objectively reasonable to fear the Third DCA acted to reach a predetermined outcome that favors banks over homeowners – foreclosure. If the Florida Supreme Court will not act, this Court must."

Once again Mr. Jacobs filed a verified response to the order to show cause "humbly" apologizing for impugning the integrity of the judiciary. (TFB-Ex.7). In the verified response "[h]e acknowledges that his commentary

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[4] While it is true that this Court has never accepted review of Mr. Jacobs' many attempts to obtain jurisdiction, he does not seem to understand the limits of this Court's jurisdiction. He has sought review: (1) by all writs petitions in *Jacobs v. BAC Home Loans Servicing, Inc.,* 145 So. 3d 825 (Fla. 2014), SC14-543, *Carlisle v. U.S. Bank National Association,* 2017 WL 5167540*,* SC17-1873; (2) by mandamus in *Marin v. Bank of New York, etc.,* 2017 WL 1398651, SC17-705, *Oberman v. Bank of America,* 2017 WL 4546074, SC17-1829, *Alexander v. Bayview Loan Servicing, LLC,* 2018 WL 2069311, SC18-624, *Rodriguez v. Bank of America, N.A.,* 2018 WL 3853539, SC18-1288; and (3) by discretionary review of per curiam affirmance in *Bryan v. Citibank,* 2017 WL 4324955, SC17-1748, *Marin v. Bank of New York*, 2018 WL 3655258 (Fla. 2018). Other proceedings were dismissed for failure to obey the rules or because they were untimely. *Carlisle v U.S. Bank Nat'l Ass'n, etc.,* 2017 WL 6418853, SC17-1719, *Buset v. HSBC Bank USA, Nat'l Ass'n,* 2018 WL 3650261, SC18-1099, *Aquasol Condo. Assoc. v. HSBC Bank USA Nat'l Ass'n*, 2019 WL 354561, SC18-2009.

referenced in the Order to Show Cause was unprofessional and unwarranted." He explained in even greater detail his emotional issues and the professionals he had contacted to help to solve his problem.

The Third District then issued an opinion explaining that Mr. Jacobs had assured the Court in this response that all unprofessional conduct had stopped once he received the prior order to show cause. (TFB-Ex.8). It did not further sanction Mr. Jacobs, but it reported the matter to the Bar because "this latest explanation is inconsistent with the previous one." The Court explained that it was not in a position to "ascertain the veracity" of the latest explanation.

3. Count III – *Bank of New York Mellon v. Atkin*

This is the same foreclosure action as Count II, but it concerns conduct on remand to the circuit court following the Third District's grant of the writ of prohibition, which had resulted in the disqualification of the trial judge. Bank of America was named in the appeal involved in Count II because it was the servicing agent for Bank of New York Mellon. (TFB-Ex.5, p.2).

On remand from the Third District, Judge Rodney Smith was assigned to the case. According to Mr. Jacobs' motions to disqualify Judge Hanzman, Judge Smith was planning to allow the case to proceed on Mr. Jacobs' motion to show cause why the banks and their attorneys should not be

sanctioned for forgery, perjury, and RICO violations. (TFB-Ex.9, p. 2). But Bank of New York Mellon filed a voluntary dismissal of the case. Mr. Jacobs still wished to proceed with a hearing on his motion for sanctions.

When Judge Smith was elevated to the federal bench and his division was in the process of transfer, Judge Hanzman covered two hearings. At the first hearing on June 25, 2019, Judge Hanzman ruled that the motions for sanctions could not go forward. *See Bank of New York Mellon v. Atkin,* 27 Fla. L. Weekly Supp. 531a (Fla. 11th Cir. Ct. June 27, 2019); *Pino v. Bank of New York*, 121 So. 3d 23 (Fla. 2013)(a trial court has jurisdiction to reinstate only when any fraud resulted in affirmative relief to defendant's detriment). Mr. Jacobs thought that ruling was legally incorrect and in conflict with a decision of the Second District. (TFB-Ex.9, p. 3).[5] In his motion to disqualify Judge Hanzman, Mr. Jacobs describes this ruling as giving the bank and its lawyers "a pass for forgery, perjury and violations of Florida's RICO Statute." (TFB-Ex. 9, p. 2).

[5] That Second District decision, *Sorenson v. Bank of New York Mellon as Trustee for Certificate Holders CWALT, Inc*., 261 So. 3d 660, 663 (Fla. 2d DCA 2018), merely held the trial court should have allowed Mr. Jacobs to amend his pleading; it did not reach the merits of any of his arguments. *See Bank of New York Mellon v. Bontoux*, No. 3D21-1869, 2022 WL 790435, at *2 (Fla. 3d DCA Mar. 16, 2022).

Judge Hanzman entered an order denying rehearing on his earlier ruling and setting a motion to determine entitlement to fees for a second hearing. (TFB-EX.9, p.4). Mr. Jacobs did not believe that Judge Hanzman had the power to do this if he had not been formally assigned to replace Judge Smith. He also believed the hearing should not be heard because he had advised the court of a conflict involving his son's bar mitzvah.

At the second hearing, on July 30, 2019, Judge Hanzman ruled that a request for fees had not been pleaded, and the request for fees in the motion for sanctions did not serve to allow for an award of fees. (TFB-Ex.11).

But prior to that hearing, on July 26, 2019, Mr. Jacobs filed a motion for disqualification of Judge Hanzman that was verified by his client. (TFB-Ex.9). The motion is based largely on the adverse rulings that Mr. Jacobs had received, and on his belief that Judge Hanzman's judgment would be improperly influenced by the mutual funds he owned that had investments in the financial sector, including one where the managing trustee of the fund was allegedly the Bank of New York Mellon. (TFB-Ex. 9, p. 7). The motion also relied on claims that Judge Hanzman had repeatedly "ignored obvious fraud" in the earlier *Aquasol* case.

In the motion to disqualify, Mr. Jacobs had his client verify statements including:

- Judge Hanzman Has Repeatedly Ignored Obvious Fraud on the Court by Large Financial Institutions in Foreclosures While Abusing His Power to Chill Defense Counsel's Zealous Advocacy Against Those Financial Institutions.

- Judge Hanzman has made repeated statements on the record and off the record that reflect his indifference to large financial institutions presenting false evidence to the court to obtain the equitable relief of foreclosure.

- Here, this Honorable Court has allowed the most rich and powerful segment of our society, the financial sector in which he is personally heavily invested in, to engage in felony misconduct and walk away without any punishment in violation of the Judicial Canons and the rule of law. The Court was "unimpressed" with these allegations of felony misconduct based on a prior foreclosure trial that involved entirely different misconduct which the Court similarly excused.

Mr. Jacobs even had his client verify the factual allegations in the earlier motion to disqualify he had filed in *Aquasol* where Mr. Atkin was not a party.

Judge Hanzman denied the motion to disqualify on July 29, 2019. (TFB-Ex.10). He denied it as untimely, presumably because it was filed beyond the then 10-day time period to file such a motion and also as facially insufficient because the claim relating to his mutual funds did not disclose how long that information had been known. Mr. Jacobs sought review of this order in the Third District, but later voluntarily dismissed that proceeding. (T2:52-53).

C. The proceedings in this case through the recommendations of guilt.

Following the Bar's receipt of the judicial inquiries from the Third District and Judge Hanzman, a grievance committee found probable cause to file a complaint against Mr. Jacobs. The Bar filed the Complaint on November 3, 2020. (Tab #-1).

The Complaint contains three counts as explained in the preceding section. It alleged a violation of Rule 4-3.3(a)(3) concerning Mr. Jacobs' duty to disclose controlling case law to the Third District and to Judge Hanzman. That violation concerned the failure of Mr. Jacobs to cite a decision issued by the Third District on February 7, 2018, in which he had been counsel for the appellee. *See HSBC Bank USA, Nat'l Ass'n v. Buset*, 241 So. 3d 882 (Fla. 3d DCA 2018). The Referee recommends that this Court find Mr. Jacobs not guilty of that violation, and the Bar is not challenging that recommendation.

The Complaint also alleged that Mr. Jacobs violated Rule 4-8.2(a) in each count because he impugned the qualifications and integrity of judges by making statements that he either knew to be false or that he made with reckless disregard as to their truth or falsity. (Tab#-1, p.12).

Mr. Jacobs' answer admitted that he had filed the relevant documents and admitted the accuracy of the quoted content. Although he denied the content was reckless or made to disparage the judiciary, he alleged that he had "apologized and expressed sincere remorse for his comments on many occasions." (Tab#-5, ¶9). He alleged that he had retained board certified appellate counsel to review his pleadings, presumably to prevent a continuation of the conduct. (Tab#-5, ¶20). He did not allege evidence to support a reasonable basis for making the statements, although he did explain his affirmative defense of unclean hands and his theory that proof of holding and owning a note and mortgage was required for foreclosure. (Tab#-5, pp.5-9).

Mr. Jacobs was allowed to amend his answer in March 2021 to allege as a defense that he was being selectively prosecuted. (Tab#-18). That answer further explained his abusive childhood and the emotional issues that he claimed at that time to have resulted in his conduct. (Tab#-18, p.7).

At the final hearing, because of the content of Mr. Jacobs' answer and his answers to requests for admission, the Bar introduced its exhibits 1 through 14. Those exhibits include the decisions from the Third District, Mr. Jacobs' responses to the orders to show cause, the verified motion to disqualify Judge Hanzman, and Mr. Jacobs' answer to the complaint and to

the requests for admission. (T1:40-43)(TFB-Ex.1-14). After discussing the content of those documents, the Bar rested. (T1:77). It is helpful to know that once the apparently impugning statements are placed into evidence, the burden of proof shifts to the respondent in a case under Rule 4-8.2(a) to provide a factual basis in support his or her reasonable belief that the statements are in fact true. *See The Florida Bar v. Ray,* 797 So. 2d 556, 558 n.3 (Fla. 2001).

Mr. Jacobs' called himself as his first witness. He discussed the facts presented in the opening section of this brief. (T1:105-73). The testimony is somewhat rambling. He discusses at length what he claims he did in the various lawsuits without introducing any of the pleadings or motions to corroborate that testimony.

As to Count I and the statements in his motions for rehearing in *Aquasol*, he claimed he wrote "everything straight and clean as persuasively as I could before the conclusion. And then the conclusion was really me sitting down to tell my truth." (T1:220-21). He denied that he "in any way, shape or form tr[ied] to attack the judges and say with false statements thinking that I was going to lie and impugn their integrity." (T1:221). He was referring to the statements quoted on pages 15 through 17 of this brief.

As to Count II, which addresses his response to a successful petition for writ of prohibition to recuse the judge he preferred in the foreclosure case, he provided a long explanation of the underlying case, and then testified that it was not his intention to make reckless or false statements or to impugn the integrity of judges when he made the statements described on pages 18 to 20 of this brief, including the claim that a judge "recently escalated her illegal conduct." (T1:239-40). He explained he is learning that "I have to monitor myself more and be ever vigilant about of how strong do I express the argument" because he sees the primary problems with his impugning statements is that they were not persuasive or effective. (T1:241). Later he repeats that he did not act with reckless disregard for the truth when he wrote these statements; he believes they were merely "unprofessional." (T1:254-55).

As to Count III addressing the motion to disqualify Judge Hanzman, Mr. Jacobs testified at length about why he thought Judge Hanzman committed error in holding the hearings and ruling against him. (T2: 11-30). He claimed that he did not intend to impugn Judge Hanzman's integrity by claiming he repeatedly ignored obvious fraud while abusing his power to chill Mr. Jacobs' zealous advocacy against financial institutions. He explained

that he was just "trying to state facts." (T2:42). He did not believe that there is anything false in his motion. (T2:54).

Under questioning by his attorney, he explained only in very general terms that he knew a judge should disclose an investment if the outcome of the case would affect his investment. (T2:45). He claimed he understood that, if a bank named in a residential foreclosure action were the trustee of a mutual fund in which the judge was invested, and the mutual fund had investments in the financial sector in its portfolio, then "such a relationship was not permitted by the canons." (T2:46). In other words, he believed that Judge Hanzman had a duty to disclose his ownership of such a mutual fund and, if requested recuse himself, in any case where he raised his claim for unclean hands sanctions.

The Code of Judicial Conduct actually states in Canon 3E(1)(d)(iii) that a judge should recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned where the judge knows he or she has "more than a de minimis interest that could be substantially affected by the proceeding." *In re Code of Jud. Conduct*, 643 So. 2d 1037, 1047 (Fla. 1994). Mr. Jacobs never explained why factually his investigation had caused him to have a reasonable belief that the outcome of Mr. Atkin's foreclosure action or his motion for sanctions would substantially affect

Judge Hanzman's investment in any mutual fund. He also did not explain when he obtained Judge Hanzman's public disclosures to demonstrate that his motion to disqualify was timely.

As his next witness in this guilt phase hearing, Mr. Jacobs called Maria Jacques, who is a licensed marriage and family therapist.[6] (T1: 286). Over the objection of the Bar that her testimony would go to mitigation in the sanction phrase, Mr. Jacobs' lawyer explained that her testimony would go to "intent" and his "consciousness of guilt." (T1:276). Essentially, Mr. Jacobs was attempting to raise a quasi-insanity defense that he lacked the capacity at the time to impugn the integrity of judges. But Ms. Jacques only testified that Mr. Jacobs suffered from dysthymia, which is a low-grade of depression. She did not think he even needed to see a psychiatrist for a medical consult. (T1:301).

Mr. Jacobs called his client, Ryan Atkin. (T2:161-81). Mr. Atkin had verified the motion to disqualify Judge Hanzman. This testimony may warrant reading in its entirety. It explains what Mr. Jacobs told Mr. Atkin when he verified the motion to disqualify. Mr. Atkin explained that Mr. Jacobs

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[6] Such therapists are licensed under Chapter 491, Florida Statutes. They are only required to have "[a] minimum of a master's degree with a major emphasis in marriage and family therapy or a closely related field." §491.005(3)(b), Fla. Stat.

told him that Mr. Jacobs had done some investigation to determine that Judge Hanzman "had a significant amount of mutual funds in Bank of New York Mellon, which, obviously, raised an eyebrow." (T2:168-69). Mr. Atkin also explained that Mr. Jacobs "kept going back to the, you know, financial loss that, you know, Judge Hanzman would potentially face if the, you know, the ruling was in Bank of New York's favor." (T2:176). Mr. Jacobs had discussions with him about Judge Hanzman's rulings in other cases and that Judge Hanzman was "ignoring the arguments at hand." (T2:178). Mr. Jacobs explained to him that Judge Hanzman was ruling in favor of the bank and against Mr. Atkin because: "[t]he main source of that was the fact that he – I mean, again, it's –the mutual funds that he had, you know, a large financial interest in." (T2:178). Following his discussions with Mr. Jacobs, he believed 100% that Judge Hanzman was biased against him. (T2:180).

Mr. Jacobs then called Ian Chan Hodges from Hawaii. (T2:182). Mr. Hodges testified to events in Hawaii. He had been involved in a challenge to Bank of America in Hawaii beginning in 1994. (T2:184). Mr. Jacobs was not counsel in that matter, and the Bar objected to the relevancy of Mr. Hodges' testimony. (T2:192, 198). Apparently, Bank of America in 2018 presented some information about Mr. Jacobs at a hearing in Hawaii, and thereafter he was not considered to be retained as special counsel for a legal

matter in Hawaii. (T2:194-95, 199-200). Although the Referee allowed the introduction of this evidence, it does not appear to have played any role in her decision.

Finally, Mr. Jacobs called David Winker as a witness. (T2:211). Later, in March 2022, Mr. Winker appeared as counsel of record for Mr. Jacobs in this proceeding. Mr. Winker was not called as an expert witness, but some of his testimony involved his opinions. The Referee sustained objections to some of the questions asked of Mr. Winker. (T2:227-29).

Mr. Winker testified that Mr. Jacobs had a reputation as "a very vehement advocate for his clients," and that "he's a bare knuckle brawler in this world of bare knuckle brawlers." (T2:215). In his personal opinion, the lawyers for the bank are similarly vehement advocates. (T2:291-20).

Mr. Jacobs rested his case following Mr. Winker's testimony and the admission of his exhibits. (T2:235, 242).

On May 3, 2021, the Referee conducted a short hearing at which she announced that she would recommend that Mr. Jacobs be found guilty of the violations of Rule 4-8.2(a) for each of the three counts. Although the written Report is somewhat ambiguous on the issue, her oral pronouncement was based on a finding that Mr. Jacobs made the offending statements with reckless disregard. (T3:3-6).

D. The sanction hearing and the recommended 90-day suspension.

The Sanction Hearing was held on May 5 and 6, 2021. At the hearing, the Bar presented Judge Hanzman as its only witness, and Mr. Jacobs presented fourteen witnesses.

Judge Hanzman testified that he had ruled against Mr. Jacobs' arguments about non-negotiability of notes, standing, Article 9 of the UCC, and fraud by both lawyers and lender in the "*EMC Mortgage*" case in 2016. (TS1:20). *See EMC Mortgage LLC v. BJJP Holdings, LLC*, 24 Fla. Weekly Supp. 604a (Fla. 11th Cir. Ct. Sept. 29, 2016). At that time he had "pretty much called him out" about making claims of fraud without the evidence to support the claims. (TS1:20). He believes that commenced a five-year attack on him by Mr. Jacobs. (TS1:20). He complained that Mr. Jacobs repeatedly did not cite to controlling cases and was disruptive. (TS1:22).

He explained that, after the Third District referrals, Mr. Jacobs initiated a private meeting with him at which the judge told him he did not know if he was a true believer or just trying to make a reputation, but that he needed to stop the conduct. (TS1:23-25). Mr. Jacobs told him he would change his ways. (TS1:25). But after the meeting he did not change his way in the least. (TS1:25).

On cross-examination, over the Bar's objection, some of the extensive questioning concerned the guilt phase issues. (TS1:40). The cross-examination became quite confrontational between Mr. Kuehne and Judge Hanzman. (TS1:47-55). For purposes of a review of the sanctions, the Bar does not believe that this extensive cross-examination is important for the Bar's position that a longer suspension is needed for rehabilitation. It should not affect the recommendation of guilt for the violation in Count III, which the Referee had resolved earlier.

Mr. Jacobs' witnesses. Mr. Jacobs presented 14 witnesses. This brief will not summarize all of their testimony. The Bar is not challenging the Referee's finding that character and reputation is a mitigating factor. There are judges and lawyers who respect him. (TS1:83-104, 119-46, 165-78). His Rabbi testified as to his faith. (TS1:155-165). He has done pro bono work and is very active in his son's boy scout troop. (TS2:32-45).

The family therapist, Maria Jacques, returned to testify at the sanction hearing. The Referee initially sustained objections to her efforts to testify as an expert on the Bar mitigation rules. (TS1:108-109). But then allowed testimony about matters such as Mr. Jacobs lack of any prior disciplinary proceedings. (TS1:113-114). Over objection, she testified that Mr. Jacobs has not refused to acknowledge the wrongful nature of his conduct.

(TS1:111). She opined that judges are not vulnerable victims. (TS1:113). She confirmed her opinion that his behavior is the result of emotional problems. (TS1:114). She believed he was making progress in therapy and was very remorseful. (TS1:117). The impeachment of her testimony is discussed earlier in this brief. *supra* at pp. 5-8.

The Referee's report as to sanctions will be addressed in greater detail in the argument section. However, it is significant that she declined to find the mitigating factor of remorse and concluded that counseling "seems to have had no effect." (ROR:31). She further found that Mr. Jacobs' mental health was not a defense in the guilt phase and that he had not proven his defense of selective enforcement. (ROR:20-24).

SUMMARY OF THE ARGUMENT

Mr. Jacobs now admits that he impugned the integrity of judges in the matters alleged in the three counts charging violations of Rule 4-8.2(a). But he claims that the First Amendment protects his speech on behalf of his clients because the statements he made are all true.

In presenting this argument, he does not adequately discuss the burden of proof placed on him by *The Florida Bar v. Ray*, 797 So. 2d 556 (Fla. 2001), which requires that he provide evidence that he had an objectively reasonably basis to make each of these claims. The Referee found that he did not meet this burden. As explained in this brief, he did not come close to meeting that burden on some of his most egregious "truths."

Mr. Jacobs has become a true believer in his own legal theories. He will not acknowledge that the appellate courts have rejected the role he believes that Article 9 of the UCC should play. He will not accept that the appellate courts have rejected his arguments that possession of the actual promissory note is not sufficient to allow a plaintiff to foreclose on a mortgage that "follows" the note. Instead, he simply claims that judges and courts are acting illegally when they obey this law. He has created his own versions of an "unclean hands" defense and a "fraud upon the court" defense that have not been adopted by any Florida appellate court. But he maintains that any

judge who finds no merit in these defenses when he persists on arguing them must be disqualified. He maintains those judges are engaged in fraudulent conduct depriving homeowners of their constitutional rights.

He also argues that Rule 4-8.2(a) is being selectively enforced against him. But he simply ignores the Referee's examples of other lawyers similarly situated who have been prosecuted for this violation. (ROR:22-23). He relies solely on the four complaints that he filed against his opponents in pending cases. In those complaints he suggested the Bar should prosecute opposing counsel for other violations of the Florida Rules of Professional Conduct, not for impugning judges.

The Referee's recommendations of guilt for these three violations are amply supported by the record and this Court should adopt those recommendations.

By contrast, the Referee's recommendation of a 90-day, nonrehabilitative suspension is inconsistent with her own finding of fact that Mr. Jacobs' conduct was a deliberate tactic to manipulate the legal system. It is not supported by the Referee's finding that his efforts at interim rehabilitation have been completely unsuccessful. Given that the case law supports a substantial rehabilitative suspension and the Referee concluded that the aggravating factors outweighed the mitigating factors, her

recommendation does not have a reasonable basis in the existing case law or in the Standards.

When this case is compared to the two most recent cases imposing sanctions for such violations, the Bar submits that a two-year suspension is appropriate. This suspension period will be needed to achieve actual rehabilitation in this case.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. "Standards of review" used to evaluate a trial court's final judgment do not apply here.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented in a disciplinary proceeding.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Credibility

In reaching its findings of fact, the Referee has a heightened role in determining issues of credibility, which are important in this particular review. This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)); *See also The Florida Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018).

In this case Mr. Jacobs' credibility played a significant role in the Referee's decision.

3. Recommendation of Discipline

The Referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's

> recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward harsher sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). In *Rosenberg*, this Court explained that since the decision in *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994), the Court has moved toward imposing stricter sanctions for unethical and unprofessional conduct. *See also Altman* at 847. As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

4. Consideration of Mitigating and Aggravating Factors – Both as Findings of Fact and as a Mixed Question of Law and Fact during the Decision to Select the Appropriate Sanction.

A Referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's

> findings of mitigation and aggravation. *See, e.g., The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings). *The Florida Bar v. Marcellus*, 249 So. 3d 538, 544 (Fla. 2018).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a reduction in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a).* This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

ARGUMENT

I. The First Amendment does not prohibit this Court from sanctioning Mr. Jacobs for his conduct impugning the integrity of judges and the judiciary in pleadings filed for his clients.

Mr. Jacobs is not directly challenging the Report of Referee by arguing that the recommendations of guilt for violations of Rule 4-8.2(a) are unsupported by competent substantial evidence. Thus, despite the fact that the Referee found that his conduct was "a deliberate and knowing litigation tactic, employed to manipulate the legal system," (ROR:18) and that this conduct violated Rule 4-8.2(a), (ROR:20), Mr. Jacobs barely references Rule 4-8.2 in this brief. (IB-13, 56). His argument is based on the premise that he had the right to *truthfully* criticize judges even though the Referee found as a matter of fact that he made statements with reckless regard to whether they were true or not. (IB-41).

When the Third District issued orders to show cause to Mr. Jacobs in *Aquasol* and *Atkin,* it gave Mr. Jacobs an opportunity to demonstrate that he had an objectively reasonable belief that his statements were truthful. He did not respond with any argument that he had objectively reasonable evidence supporting his statements or that they were protected by the First Amendment. Instead, he admitted the wrongful nature of his conduct and claimed to "humbly" apologize, advising the Court that he was seeking

professional help with emotional issues and that he had stopped the offensive conduct in his court filings. (TFB-Ex. 3, 7).

At the final hearing, he was still arguing that his conduct was caused by emotional problems, but he had shifted positions and described his motion for rehearing in *Aquasol* as telling "my truth." (T1:220). But he did not attempt to establish that he had a reasonable belief that any of the following statements, for example, were factually true:

- The Florida Supreme Court has repeatedly declined to protect the constitutional rights of foreclosure defendants.
- Fla. Stat. § 673.3011 controls enforcement of negotiable instruments, not mortgages. Ownership controls the right to enforce the mortgage. [The Third District] is acting illegally by instructing the law is otherwise.
- In Simpson [sic], [The Third District] violated the standard of review, ignored Florida Supreme Court precedent, and falsified the facts in contradiction to the record."
- Judge Hanzman has repeatedly ignored obvious fraud on the court by large financial institutions in foreclosures.

Now, in his brief, Mr. Jacobs attributes none of his conduct to the emotional and personal issues presented by the lawyers who have withdrawn following the final hearing. Instead, from the opening page, he is aggressively arguing that he has "an affirmative ethical duty" to "report" lawyers who engage in "systemic fraud" and to "report" judges who violate

canons, refuse to grant disqualification, ignore fraud, and deprive his clients of their property without due process." (IB-1). This case, of course, does not involve his reports to the Bar or to the JQC; it involves statements he made in court filings on behalf of clients.

As explained in the statement of facts, Mr. Jacobs' repeated references to "systemic fraud" in his arguments reveal the primary problem. No one denies that the securitization of home loans resulted in massive confusion at the beginning of the foreclosure crisis. No one denies that notes and mortgages were altered by banks, sometimes with the help of lawyers.

But by the time that Judge Hanzman wrote his order in *EMC Mortgage LLC* in 2016, the district courts had sorted out the law to address these problems. By 2016 it was established law that actual possession of a promissory note provided standing to foreclose and the mortgage followed the note. Thus, older law prior to Article 3 of the UCC is no longer applicable. *See, e.g.*, *Wells Fargo Bank, N.A. v. Morcom*, 125 So. 3d 320, 322 (Fla. 5th DCA 2013). Article 9 of the UCC does not apply to transfers of interests in real property. *See HSBC Bank USA, N.A. v. Perez*, 165 So. 3d 696, 699 (Fla. 4th DCA 2015). A bank can reestablish a lost note with proper proof, and that determination is subject to review in the district courts. *See Home Outlet, LLC v. U.S. Bank Nat'l Ass'n,* 194 So. 3d 1075, 1078 (Fla. 5th DCA

2016). A bank that cannot prove standing under these rules cannot foreclose on a home even if the homeowner failed to make a single payment.

Mr. Jacobs disagrees with the appellate courts' resolution of the issue of standing and of the application of Article 9. He thinks earlier law is still applicable unless and until this Court expressly states otherwise. He thinks that courts should never allow banks that may have engaged in fraud in the past to foreclose any home. He believes that lawyers and judges are committing systemic fraud when they obey the current law. In *Aquasol,* despite the fact that there was no dispute that the bank possessed the original note and that his client was in default, Mr. Jacobs was arguing his right to raise "unclean hands" and "fraud on the court," – not based on the original note in the record – but on the "systemic" fraud he had witnessed around the country in earlier cases.

His "truth" is that any judge who obeys the current law is committing illegal acts. That any judge who loses patience with his persistent claims of an "unclean hands" defense must be disqualified. And that any judge who will not grant his unending motions for sanctions is biased for the banks and committing acts tantamount to treason. It is his position that he is duty bound, for his clients, to make these false accusations against judges and the judiciary in his pleadings as part of his version of the "truth."

A. The actual law addressing First Amendment concerns in the context of Rule 4-8.2(a).

Rule 4-8.2(a) provides:

> **Impugning Qualifications and Integrity of Judges or Other Officers.** A lawyer shall not make a statement that the lawyers knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

This rule was written to balance the lawyer's obligations as an officer of the court to his or her clients, the public, and the judicial system against his or her own individual First Amendment rights under the U.S. Constitution, as well as the freedom of speech rights recognized under Section 4 of Article I of the Florida Constitution. The Florida Constitution in Section 4 expressly states what the case law under the First Amendment also explains: "Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right."

This Court in *The Florida Bar v. Ray,* 797 So. 2d 556 (Fla. 2001) addressed Rule 4-8.2(a) and explained that the test in *New York Times Co. v. Sullivan,* 376 U.S. 254 (U.S. 1964), did not apply in this context. This Court followed the lead of other courts in establishing a different, objective test:

> Because members of the Bar are viewed by the public as having unique insights into the judicial system, the state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases. For this reason, we, like many other courts, conclude that **in attorney disciplinary proceedings under rule 4–8.2(a), the standard to be applied is whether the attorney had an objectively reasonable factual basis for making the statements.** *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864, n. 13 (9th Cir.1993) (rejecting purely subjective defamation standard and applying objective standard, requiring court to determine whether the attorney had a reasonable factual basis for making the statements);

Id. at 559. (emphasis supplied).

The Court further explained in footnote 3 that once the Bar establishes that the statements at issue in a disciplinary proceeding concern the qualifications or integrity of a judge, the burden shifts to the respondent to provide a factual basis in support of the statements. *Id.* at 558.

Since the decision in *Ray,* this test has been used in many other states. *See, e.g.*, *Mississippi Bar v. Lumumba,* 912 So. 2d 871, 885 (Miss. 2005); *In re Disciplinary Proceedings Against Riordan*, 824 N.W.2d 441, 448 (Wis. 2012)(lawyer's subjective belief that his statements about judge were

appropriate and necessary based upon his religious beliefs and spiritual experiences does not relieve him of the obligation to demonstrate a factual basis for his comments to the court); *Lawyer Disciplinary Bd. v. Hall*, 765 S.E.2d 187, 197 (W.Va. 2014).

Perhaps the best discussion of this standard is found in *In re Cobb*, 838 N.E.2d 1197, 1203 (Mass. 2005). Similar to this case, the lawyer in *Cobb* accused a judge and a lawyer of criminal conduct to prevent the testimony of a witness. The Massachusetts Supreme Judicial Court discusses the many cases adopting the same objective approach as Florida. The opinion explains:

> Judges are not above criticism or immune from review of their court room conduct. See, e.g., *Commonwealth v. Sylvester*, 388 Mass. 749, 750–752, 448 N.E.2d 1106 (1983); *Matter of Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973). Under the objective knowledge standard, an attorney does not lose his right to free speech. He may make statements critical of a judge in a pending case in which the attorney is a participant. He may even be mistaken. What is required by the rules of professional conduct is that he have a reasonable factual basis for making such statements before he makes them. See *Office of Disciplinary Counsel v. Gardner*, supra at 423, 793 N.E.2d 425.

Id. at 1214.

In the twenty years since this objective test was created, neither *Ray* nor *Cobb* reflect any negative treatment in other cases. Mr. Jacobs does not claim that *Ray* was incorrectly decided and oddly cites it only for the proposition that lawyers play an important role in "exposing valid problems within the judicial system." (IB-43). This partial quote from Ray should not be read in isolation, but rather in the context of the more specific issue addressed by this Court concerning statements impugning the integrity of a judge:

> Although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention.

Ray, 797 So. 2d at 560.

Instead of discussing the correct standard, Mr. Jacobs cites to *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which addresses the separate issue of limitations on lawyers to make extrajudicial statements to the press prior to trial. He also cites to *In re Primus*, 436 U.S. 412, 412 (1978), which involved a letter informing women of their legal rights to sue because they

had been sterilized without informed consent. He cites to *Garrison v. State of La*., 379 U.S. 64, 64 (1964), in which the famous prosecutor was found guilty of the statutory crime of criminal defamation for statements outside court blaming a backlog of cases on judicial laziness and blaming the judges for refusing to fund undercover investigations. The Court held the Louisiana statute unconstitutional as punishing false statements against public officials because it did not contain a requirement to prove the statements were knowingly false or made with reckless disregard of whether they were true or false. These cases are perhaps marginally helpful in this case, but Mr. Jacobs needed to establish that the Referee erred in her application of *Ray.*

Considering the three examples of false statements at the beginning of this section, for this Court to have "repeatedly declined to protect the constitutional rights of foreclosure defendants," it would first have needed to have had the constitutional authority to take jurisdiction of such a case. Mr. Jacobs did not present proof of a single case where this court had jurisdiction and refused to take the case. Certainly his own efforts to obtain this Court's jurisdiction with "all writs" petitions and notices seeking to review per curiam affirmances would not be such evidence. He presents no evidence of any case where this Court took jurisdiction and then declined to protect the constitutional rights of homeowners.

For the Third District to act illegally by explaining that a note is negotiable under section 673.3011 and that the mortgage follows the note, there would need to be clear law that the mortgage was actually independent of the note. But the Third District carefully explained in *HSBC Bank USA, National Association v. Buset*, 241 So. 3d 882 (Fla. 3d DCA 2018):

> Moreover, the assignment of the mortgage was superfluous. It was unnecessary because Florida law has always held that the mortgage follows the note. *See, e.g., First Nat. Bank of Quincy v. Guyton*, 72 Fla. 43, 72 So. 460, 460 (1916) (noting that "when a note secured by mortgage is transferred, the mortgage follows the note as an incident thereto"); *US Bank, NA v. Glicken*, 228 So. 3d 1194, 1196 (Fla. 5th DCA 2017) ("Indeed, the mortgage follows the note."). Thus, even if this assignment were void or voidable, which it is not, the Bank, as holder of the note, would have the authority to foreclosure the mortgage.

Id. at 891.

There are other cases with the same ruling. But the *Buset* case is significant because Mr. Jacobs was the lawyer for whom this was an adverse ruling. If the Third District was actually acting "illegally" in this case by announcing this rule of law, then the rule would necessarily have expressly and directly conflicted with the law that made the Third District's acts illegal. He could have taken the case to this Court to resolve the conflict. But he

filed an untimely notice to invoke this Court's jurisdiction. *See Buset v. HSBC Bank USA, Nat'l Ass'n*, 2018 WL 3650261, at *1 (Fla. 2018). Even now he is unable to point to any conflicting case to suggest that the Third District was incorrect in its ruling – much less that it was acting illegally.

If the Third District violated the standard of review, ignored this Court's precedent, and falsified the facts in contradiction to the record in "Simpson," Mr. Jacobs never established this was true or even why he had an objectively reasonable belief that it was true. Mr. Jacobs is referring to *Bank of New York Mellon v. Simpson,* 227 So. 3d 669 (Fla. 3d DCA 2017), in which the court held that vacation of a consent final judgment was not warranted based on inadvertence, mistake, or fraud. The Court explained:

> Simpson's motion to vacate the Final Judgment was based on allegations made by his current attorney that have no specific relation to the facts of this case, during a time when Simpson was not represented by that attorney, and are merely generalized complaints about the mortgage banking industry.

Id. at 671.

Since the attorney who filed Simpson's motion to vacate was Mr. Jacobs, one would think he would have ready access to everything he needed to establish that the Third District falsified facts in contradiction of the record and ignored this Court's precedent. But no such evidence is in

this record. The word “Simpson” only appears in his Exhibit 1 at pages 93-94, which is a letter written to the Bar by Mr. Jacobs’ lawyer responding to another lawyers’ bar complaint about Mr. Jacobs. That complaint is not the subject of this proceeding.

Finally, if Judge Hanzman “repeatedly ignored obvious fraud on the court by large financial institutions in foreclosures,” one would think that Mr. Jacobs could produce very specific evidence of the documents introduced by a bank that were fraudulent and the fact that Judge Hanzman ignored that evidence in at least one case. Given that this serious allegation of fact might justify Judge Hanzman’s removal from the bench, one might reasonably think that Mr. Jacobs would have put another lawyer on the stand to explain how this happened in a case in which that lawyer represented a homeowner. But all that exists in this record is Mr. Jacobs’ frustration that Judge Hanzman will no longer hear the “unclean hands” and “fraud on the court” defenses that Judge Hanzman took the time to resolve in a lengthy order in *EMC.*

The Referee had ample evidence that Mr. Jacobs had impugned numerous judges, and Mr. Jacobs did little of substance to demonstrate that he had a reasonable basis to believe any of the statements he made. The Referee had ample evidence that this was not the product of some mental confusion that rendered Mr. Jacobs incompetent to make knowing decisions.

She was free to assess his credibility and determine that Mr. Jacobs was engaged in deliberate and knowing litigation tactics employed to manipulate the legal system. (ROR:18).

B. The complaint in this case never sought to disbar Mr. Jacobs over the definition of "treason."

Mr. Jacobs claims that the Bar is trying to disbar him for using the same "definition" of "treason" used by the U.S. Supreme Court in a case in 1821. (IB-46). The Bar has never sought to disbar Mr. Jacobs in this case, and the sentence in the early case is neither a definition nor relevant to this proceeding.

In *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821), in discussing its power to exercise jurisdiction over a state under a jurisdictional statute in effect at that time, the Court explained that it was obligated to take jurisdiction under the applicable law. It explained that violating this law "would be treason to the constitution." While this colorful phrase has been repeated often, Article 3, section 3 of the U.S. Constitution actually explains the elements of the crime as: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them

Aid and Comfort." So presumably it would be "treason against the constitution" to define "treason" in another way.

What the Bar claims is that Mr. Jacobs impugned the members of the Third District by a series of accusations in a motion for rehearing that began by stating:

> **This Court's insistence on ignoring established Florida Supreme Court law to benefit bad corporate citizens is certain to cause chaos.**

After directly accusing the court of ignoring the law to benefit bad corporations, the argument reaches its crescendo with a call to action:

> ***I'm fighting the modern-day monopoly. I am calling all the patriots who swore the oath to protect and defend the Constitution to join me. Any court that protects the monopoly over the rule of law is a traitor to the constitution and should be tried for treason.***

Now is perhaps the point when it should be remembered that practicing law is a privilege. This privilege is given to men and women who are dedicated to the rule of law and to the peaceful resolution of disputes through the rule of law. The Third District followed the law in *Aquasol.* Mr. Jacobs could not obtain review of that decision because his petition for review was untimely. *Aquasol Condo. Ass'n, Inc. v. HSBC Bank USA*, *Nat'l Ass'n*, SC18-

2009, 2018 WL 6326238, at *1 (Fla. Dec. 4, 2018). The Third District repeated its explanation for Mr. Jacobs in his case of *78D Team, LLC v. U.S. Bank, N.A.,* 305 So. 3d 319 (Fla. 3d DCA 2020), and again in the denial of his motion for rehearing. *78D Team, LLC v. U.S. Bank, N.A.,* No. 3D19-1708, 2020 WL 6600989, at *2 (Fla. 3d DCA Nov. 12, 2020). But with this second opportunity to file a timely petition for review to explain why or how the Third District was ignoring established law in these written decisions, Mr. Jacobs sought no review.

Mr. Jacobs would rather accuse the entire Third District of treason than actually prepare a legal record sufficient to obtain a legal ruling from this Court. He would rather ask people to join his "fight" rather than seek to use the judicial process as an orderly way to achieve justice peacefully. He explains that this Court should dismiss this proceeding because:

> Without an experienced lawyer of Jacobs' stature speaking out about his reasonable criticism of the judicial foreclosure system and the penchant for some judges to blindly accept the self-serving assertions of financial institutions, the public will be deprived of its right to receive information about the workings of its judicial representatives. . . . Moreover, Jacobs' clients will be left without counsel to challenge fraud in their cases and protect their constitutional rights. (IB-47).

But after the appellate courts finally resolved the issue that standing could be achieved by possession of the note and that lost notes could still be reestablished despite the mess created by the problems surrounding the securitization of mortgages, Mr. Jacobs is not challenging "fraud in their cases." He is wanting to override the established law by alleging "unclean hands" and "fraud on the court" for frauds that do not materially affect the actual lawsuit.

To be clear, the Bar is not saying that Mr. Jacobs necessarily violates the Florida Rules of Professional Conduct by attempting to create a record for appeal and seeking to make his novel theories the law of Florida. He violates Rule 4-8.2(a) when he claims, as fact, that judges are intentionally disobeying the law to favor one party over the other merely because they refuse to adopt his theories when they are not currently recognized by any appellate decision in Florida.

C. <u>The complaint in this case did not seek to sanction Mr. Jacobs for filing a motion to disqualify a judge.</u>

The Bar did not charge Mr. Jacobs with filing a frivolous motion to disqualify. Despite Mr. Jacobs unusually frequent practice of filing such motions, and despite his apparent failure to study Canon 3E(1)(d)(iii) or to obtain information that would actually create a reasonable basis to believe

that Judge Hanzman's mutual funds would be likely to be substantially affected by a ruling in favor of Mr. Atkin, the Grievance Committee did not find probable cause to file a complaint charging that violation.

The Complaint only alleges that he impugned the integrity of Judge Hanzman by statements made inside a motion to disqualify. Although motions to disqualify must allege information sufficient to state grounds to disqualify, that pleading requirement does not give lawyers the right to file false information in such a motion. *See, e.g. The Florida Bar v. Saldivar, SC*22-691. In this case, Mr. Jacobs not only filed a document in the court file containing false information, he had his client verify those facts.

Thus, Mr. Jacobs claimed as fact that Judge Hanzman had "repeatedly ignored obvious fraud on the court by large financial institutions." He further claimed that Judge Hanzman allowed the banks "to engage in felony misconduct and walk away without any punishment in violation of the Judicial Canons and the rule of law." (TFB-Ex.9). In truth, Judge Hanzman had simply denied Mr. Jacobs efforts to raise his "unclean hands" and "fraud on the court" defenses after his ruling in *EMC Mortgage.* If Judge Hanzman made an incorrect legal ruling in that regard, Mr. Jacobs needed to prepare an adequate record and appeal the issue. He was not free to transform his

own unsuccessful advocacy into factual claims of criminal conduct and violations of the Code of Judicial Conduct by Judge Hanzman.

D. Mr. Jacobs had no "due process" right to disqualify any judge, and even if he did, that issue was not the basis for the Bar's complaint.

In a demonstration of his inability to analyze the actual content of the Report of Referee, Mr. Jacobs seeks relief in the wrong court for the wrong party. (IB51-52). If Judge Hanzman violated Mr. Atkin's due process rights, then Mr. Jacobs, as Mr. Atkin's lawyer, needed to prepare an adequate record and seek the appropriate relief from the Third District. If the judges of the Third District violated his client's due process rights by refusing to disqualify themselves, then he needed to seek relief for his client in this Court by filing a petition for prohibition. Mr. Jacobs was not the party with due process rights in those courts; he was the lawyer who was supposed to protect his client's due process rights.

Instead, Mr. Jacobs had Mr. Atkin swear under oath to the accuracy of the false statements, and then filed no petition for prohibition in this Court to challenge the ruling when his motion was denied. Indeed, in all of the many cases that Mr. Jacobs has sought to bring to this Court, none of those efforts have involved a petition for writ of prohibition.

Mr. Jacobs claims the judges of the Third District have a "direct, personal and substantial interest" in seeing him sanctioned in this case "for his personal abuse and criticism of them." (IB52). While it is interesting that Mr. Jacobs admits his conduct has been "personal abuse," the reason that the Bar rules are structured to require a probable cause determination by a grievance committee prior to the filing of a complaint is to thoroughly screen cases prior to their filing and to prevent unjustified vendettas.

This issue simply does not address any error in the Report of Referee.

II. The Referee correctly determined that Mr. Jacobs did not prove his defense of selective enforcement.

Mr. Jacobs relies on the correct body of law in arguing this issue, but he fails to explain how his proof met the elements of the affirmative defense of selective enforcement or why the Referee's findings on this issue are incorrect. The four bar complaints that Mr. Jacobs filed against other attorneys, which are his primary evidence on this affirmative defense, failed to prove either of the two elements of this defense.

Selective enforcement is an affirmative defense in the nature of an equal protection violation. In *State v. A.R.S.*, 684 So. 2d 1383 (Fla. 1st DCA 1996), which was a delinquency proceeding and not a bar proceeding, the First District explained that to establish this defense:

> a defendant bears the heavy burden of establishing at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Id. at 1385.

This defense has not been extensively discussed in relation to bar discipline proceedings, but the Bar does not contest that the defense may be raised. It was discussed in *Thompson v. The Florida Bar*, 526 F. Supp. 2d 1264 (S.D. Fla. 2007), but that case simply dismissed a federal action under *Younger/Middlesex* abstention. Other cases discuss this affirmative defense, but no case has been found where the defense was successful. *See, e.g., In Matter of Aulakh*, 3 Cal. State Bar Ct. Rptr. 690, 695, 1997 WL 412515, at *4 (Rev. Dep't State Bar Ct. Cal. June 30, 1997); *Livingston v. North Carolina State Bar,* 364 F. Supp. 3d 587 (E.D.N.C. 2019)(*Rooker-Feldman* doctrine applied); *Louisiana State Bar Ass'n v. Edwards*, 322 So. 2d 123, 126 (La. 1975)(rejecting defense); *Matter of Tady*, 2 Cal. State Bar Ct. Rptr. 121, 125, 1992 WL 162617, at *3 (Rev. Dep't State Bar Ct. Cal.

July 6, 1992)("The court cannot dismiss the proceeding prior to hearing unless a case for selective prosecution is established which has not been done here."); *In re Thomas*, 740 A.2d 538, 545 (D.C. 1999)(no credible evidence bar counsel was biased against him).

Considering the first element of this defense, Mr. Jacobs was not singled out for prosecution while others similarly situated were not prosecuted. Mr. Jacobs did not even attempt to establish that other lawyers who have violated Rule 4-8.2(a) by impugning the integrity of the judiciary have not been prosecuted. The Referee cited five such cases in the Report. (ROR:22-23). *The Florida Bar v. Ray*, 797 So. 2d 556 (Fla. 2001)(three letters to a chief judge); *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013); *The Florida Bar v. Patterson,* 257 So. 3d 56 (Fla. 2018)(one-year suspension); *The Florida Bar v. Lynum*, SC19-745, 2020 WL 1061266, (Fla. 2020); *The Florida Bar v. Sutton*, SC15-499, 2018 WL 542324, (Fla. 2018).

In addition to those cases, this Court recently sanctioned a lawyer for impugning a judge while a candidate running against that judge in an election. *The Florida Bar v. Aven*, 317 So. 3d 1095, 1096 (Fla. 2021). This Court sanctioned a lawyer in 2013 for impugning a judge in motions to disqualify. *The Florida Bar v. Tropp*, 112 So. 3d 101 (Fla. 2013). It sanctioned a former judge for such conduct in a JQC proceeding. *The*

Florida Bar v. Graham, 679 So. 2d 1181 (Fla. 1996). This Court sanctioned Mr. Patterson again in 2021. *The Florida Bar v. Patterson*, 330 So. 3d 519 (Fla. 2021). Especially with this Court's emphasis on imposing sanctions for professionalism issues in the last decade, Mr. Jacobs was clearly on notice that this misconduct would be subject to bar discipline.

Mr. Jacobs based his claim on the fact that he had filed four bar complaints against his opposing counsel in other pending foreclosure proceedings. But those complaints were essentially an effort by Mr. Jacobs to have the Bar investigate and prosecute, as bar disciplinary cases, the same motions for sanctions that he had filed in the trial courts attempting to have those courts sanction his opponents for the conduct that he claimed constituted "unclean hands" and "fraud on the court." (R-Ex1 p. 75-103). He did not send the Bar copies of orders finding that his opponents had violated the Florida Rules of Professional Conduct or indicating that the Bar should investigate. He was simply trying to get the Bar to prosecute the opposing counsel in his clients' cases when those cases were still pending and unresolved.

But even if those complaints had been worthy of prosecution, he was arguing that his opposing counsel should be charged with violations of Rule 4-3.3(a), Rule 4-4.4(a), Rule 4-8.4(c) and Rule 4-8.4(d). (R-Ex1 p. 95-96,

101,103,112). He was not claiming they should be charged with impugning the judiciary under Rule 4-8.2(a). Perhaps recognizing this deficiency in the selective prosecution defense, Mr. Jacobs' counsel attempted at trial to recharacterize these bar complaints as evidence of bank lawyers "impugning the integrity of the court system by ruling on evidence that is false, fraudulent and fictitious." (T2:295). However, the plain language of the complaints and correspondence Mr. Jacobs submitted to the Bar and entered into evidence at trial demonstrate that he never asserted that a lawyer named in one of his complaints violated Rule 4-8.2(a). Thus, he failed to establish that those unprosecuted cases involved "conduct of the type forming the basis of the charge against him."

Because the Referee was correct that he failed to prove this first element of the defense of selective prosecution, it is not actually necessary to reach the second element, which is that the action was filed for discriminatory reasons. Mr. Jacobs is not claiming discrimination based on race or religion; he is claiming it was filed to prevent his exercise of his constitutional rights. The only right involved is his First Amendment right. As discussed in the prior section of this brief, the First Amendment does not prevent this Court from enforcing Rule 4-8.2(a). The Bar is assigned the task of prosecuting such violations. It does not file such charges until a grievance

committee has reviewed the lawyer's conduct and found probable cause to charge the lawyer. There simply is no evidence in this file that the Bar filed this complaint to deny Mr. Jacobs his constitutional rights.

Finally, Mr. Jacobs argues that the complaint filed against him is a "sham." (IB-58). He bases this argument on a document he filed with this Court on June 24, 2022, to "supplement" the record. The document is a "supplemental memorandum on investigation" prepared by the investigating member of Florida Bar Grievance Committee 11-H. That memorandum discusses whether Mr. Jacobs filed a motion that was frivolous or in bad faith. The memorandum does not take a firm position on that issue but notes the difficulty in proving such a charge.

But Mr. Jacobs overlooks that the Bar did not charge him with filing a frivolous motion. The Bar filed no charge for a violation of Rule 4-3.1. Thus, even if this factual issue had been raised and argued to the Referee, there is nothing in the memorandum that supports an argument that the complaint in this case is a sham.

Mr. Jacobs' review should be denied in its entirety and this Court should adopt the Referee's findings of guilt.

ARGUMENT ON CROSS-REVIEW

I. The findings in the Report of Referee support a rehabilitative suspension; not a short suspension to deter future similar conduct.

The Referee is recommending a 90-day suspension, followed by two years' probation, along with a public reprimand and educational programs. She is not recommending mental health counseling. Notwithstanding this recommendation, the Referee made findings that one would normally expect to result in a recommendation of a rehabilitative suspension. The Referee found violations of Rule 4-8.2(a) for all three counts. (ROR:26-27). She found that he engaged in reckless disregard of the truth concerning statements he made in motions filed in public court files impugning individual judges, the entire Third District, and this Court.

She found that Standard 7.1(b) recommended a suspension. (ROR:28). She further found that the aggravating factors in this case outweigh the mitigating factors. (ROR:30). She expressly rejected Mr. Jacobs' request that "remorse" should be a mitigating factor. (ROR:31). While finding that his emotional problems were a mitigating factor, she expressly rejected his claim that interim rehabilitation should be a mitigating factor because his counseling had "had no effect." (ROR:31-32).

She relied on cases like *The Florida Bar v. Patterson,* 257 So. 3d 56 (Fla. 2018), in which a one-year suspension was found appropriate. But then decided to recommend to this Court that he did not need rehabilitation and instead should receive a 90-suspension with automatic reinstatement.

Given her own findings in this case, her recommended sanction is not supported by a reasonable basis in existing case law and the standards.

Standard 1.3 explains the purpose and nature of sanctions. It explains:

> The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

These purposes have not changed since 1970. *See The Florida Bar v. Pahules*, 233 So. 2d 130, 132 (Fla. 1970).

In this case, the Bar is not arguing that the public should be deprived of Mr. Jacobs' services for a long period of punishment if Mr. Jacobs is otherwise capable of providing legal services. But to be fair to society and to the administration of justice, the Bar submits that Mr. Jacobs needs a period of true rehabilitation. Because, as the Referee acknowledges, his efforts to rehabilitate have been unsuccessful, and because Mr. Jacobs continues to see nothing wrong in his unsubstantiated attacks on the

judiciary, claiming he has a First Amendment right as a crusader for his own vision of justice to attack all judges who disagree with him – the Bar submits that a two-year suspension is warranted to address the circumstances underlying Mr. Jacobs' conduct.

II. Standard 7.1(b) supports a suspension as a sanction.

The Referee correctly found that Standard 7.1(b) is applicable in this case. It provides that "[s]uspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

It is harmful to the legal system when Mr. Jacobs persists in filing unsubstantiated accusations that, not merely one judge, but several circuit court judges, the entire Third District, and even this Court are engaging in dishonest or illegal conduct and fraud. He seems to be doing this because the courts have repeatedly rejected his novel theories about fraud on the courts and unclean hands. If his legal positions were so clearly correct, he has had the ability to present those arguments to numerous circuit court judges in three or more districts. He has had ample opportunity to appeal those issues. He has been a participant and even a trainer in a national program that could have presented these issues throughout the United States for appeals to numerous courts.

But he has cited no authority that supports his theory that a defense of unclean hands for the conduct of lenders in handling assignments or transfers of notes pooled for securitization can successfully avoid a foreclosure judgment when the borrower is in default and the plaintiff is in lawful possession of the note that is secured by a recorded mortgage.

It is at least potentially harmful to his clients when he files such claims, which can only add to the fees imposed as a lien against their homes and as damages in subsequent deficiency judgments. It is harmful to the public when the courts' time is taken on these matters rather than on their lawsuits.

Mr. Jacobs' tactics intentionally delay finality in litigation. He is David fighting for the rights of his clients' ability to stay in their homes without regard to the property rights of those who lent money to his clients to buy those homes. His claims of dishonesty and illegality against judges and courts who are simply trying to obey and apply the established law of foreclosure are not zealous advocacy; they are a violation of his duties as a licensed lawyer to the judicial system and to the public.

III. As recognized by the Referee the aggravating factors clearly outweigh the mitigating factors.

The Referee found three aggravating factors:

(1) A pattern of misconduct. Standard 3.2(b)(3);

(2) Multiple offenses. Standard 3.2(b)(4); and

(3) Substantial experience in the practice of law. Standard 3.2(b)(9).

The Referee found three mitigating factors:

(1) Absence of prior disciplinary record. Standard 3.3(b)(1)

(2) Personal or emotional problems. Standard 3.3(b)(3); and

(3) Character or Reputation. Standard 3.3(b)(7).

The Bar is not challenging the first and third mitigating factors, but it submits that, if long-term emotional problems are really the cause of this conduct, that factor is not a basis for mitigation. The Bar is also not challenging the Referee's decision that the mitigating factors are outweighed by the aggravating factors. The Bar agrees with the Referee that Mr. Jacobs has not shown remorse and that his efforts at interim rehabilitation "have had no significant effect on his present-day conduct." (ROR:31). There is no competent substantial evidence of a personal or emotional problem that qualifies as a mitigating factor.

Mr. Jacobs chose to seek help from a family therapist rather than a more highly trained psychiatrist or psychologist. She did not think his

condition warranted treatment by someone with more training. But she claimed his low-grade of depression was brought on by childhood trauma, and not by any acute condition.

Despite her hope that he was merely "relapsing" it is obvious from this record that he is still David fighting Goliath and Teddy Roosevelt charging up San Juan Hill in a battle where precedent and the rule of law are no impediment to the rights of his clients. There is no evidentiary basis to conclude that the therapist was wrong in her diagnosis, but her theories do not explain nonstop strategies that manipulate the legal system.

Under Standard 3.3(a), the definition of "mitigation" is "any factor that justifies a reduction in the degree of discipline to be imposed." For a finding of an emotional problem that "justifies a reduction in the degree of discipline to be imposed," the Bar submits that something more is required than just the existence of evidence of some emotional problem.

There is no evidence of a short-term problem in this case that caused the misconduct and has already resolved. There is no evidence of a problem that is currently subject to successful treatment. There is lots of evidence of a chronic problem that will continue and will reoccur unless Mr. Jacobs fully addresses the problem. Thus, the Bar submits that there is no competent substantial evidence of an emotional problem that justifies a reduction in the

degree of discipline. There is only evidence of some sort of problem that requires rehabilitation. It is the type of problem that Mr. Jacobs will need to demonstrate he has sufficiently resolved when he petitions for reinstatement.

A. Standard 3.2(b)(7) – refusal to acknowledge the wrongful nature of his conduct.

The Bar argued to the Referee that she should find an additional aggravating factor, Standard 3.2(b)(7), refusal to acknowledge the wrongful nature of the conduct. (TS2:85-88). Although the Referee expressly refused to find remorse, finding instead that his "ongoing pattern of misconduct continuing through to the present day refutes any suggestion of remorse," she oddly did not find Standard 3.2(b)(7) as an aggravating factor. The Referee did not state that she was rejecting this factor, and logically her findings about remorse are also findings establishing this aggravating factor. His refusal to acknowledge the wrongful nature of the conduct continues to this day and is evident in his initial brief – despite his original verified responses to the Third District to the contrary.

While Mr. Jacobs talks frequently about his remorse, he also frequently explains that his problem is that he just needs better writing skills. He is convinced that he is right, but that he is saying it wrong. He needs to learn to be more persuasive. Respectfully, Mr. Jacobs' problems cannot be

resolved in a writing class. This Court should find that Mr. Jacobs has not acknowledged the wrongful nature of his conduct.

B. The overall balance of the factors does not eliminate the need for a rehabilitative suspension.

Even if we give Mr. Jacobs the benefit of the doubt that his conduct is not an intentional manipulation of the legal system, then the only other option is that he has simply lost the ability to make coherent legal arguments because he cannot see past his vision of "systemic fraud on the court" that justified an "unclean hands" defense to take down J.P. Morgan and save democracy. One way or the other, Mr. Jacobs clearly needs to be rehabilitated. He simply cannot continue to practice law effectively for his clients, the public, and the judicial system if he continues with this conduct. A 90-day respite is not a solution for the behavior at issue in this case.

The Bar recognizes that there are people who admire Mr. Jacobs and who have spoken on his behalf. The Bar is not suggesting that Mr. Jacobs deserves disbarment or that those people are wrong to see the good that clearly does exist inside Mr. Jacobs. The Bar believes that his faith can be a source of the solution for him. His involvement with his son in scouting is good for him and for his son; scouting can be a healthy outlet to give him a

fresh perspective on life and the values it teaches both to the scouts and the adult scouters.

While the sanction in this case should be sufficient to deter other lawyers who will attack judges for clearly dishonest motives, this sanction has far more to do with Mr. Jacobs' rehabilitation. When measuring the length of the suspension needed for rehabilitation, given that the aggravating factors outweigh the mitigating factors in this case primarily because of his extreme obsession with the perceived justice of his own novel arguments, and given that the conduct is not limited to one case but is reflected in how he approaches all of his foreclosure cases, the Bar submits that the balance of these factors warrants a two-year suspension rather than a 90-day suspension.

IV. The case law, including two recent cases not available to the Referee, support a suspension of a year or longer.

The Referee relied upon two similar cases, and this Court's case law establishing a policy of imposing harsher sanctions today than in the past. The two cases, while not identical, do provide guidance as to an appropriate sanction in this case. This Court imposed a one-year sanction in one of these cases and a two-year sanction in the other.

Despite finding that the aggravating factors outweighed the mitigating factors, the Referee recommended a non-rehabilitative 90-day sanction based on these cases. It is difficult to understand how the Referee reduced the sanction from that supported by the case law in this context.

The Referee relied on *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013). Mr. Norkin's misconduct occurred in a civil case and primarily involved written communications and outbursts in court. A senior circuit court judge, who was appointed to serve as a provisional director of a deadlocked corporation, along with the judges in the lawsuit, were the subject of his ire. The Referee recommended a 90-day suspension with 18-months' probation and mental health counseling. This Court rejected that recommendation, imposing a 2-year suspension, followed by the period of probation and counseling.

In addition to Rule 4-8.2(a), Mr. Norkin was found guilty of misconduct under Rule 4-8.4(a) and (d), and of disrupting a tribunal under Rule 4-3.5(c). He had previously received a public reprimand for rude behavior. Thus,

there are more violations and somewhat additional aggravating factors in *Norkin.*[7]

However, Mr. Jacobs' case involved impugning a much wider array of judges with claims of systemic misbehavior. The evidence of the need for rehabilitation prior to Mr. Jacobs' return to practice is very clear.

The Referee also relied on *The Florida Bar v. Patterson*, 257 So. 3d 56 (Fla. 2018). This case involved Mr. Patterson's conduct in a case that was a civil rights action against the City of Homestead. Like Mr. Norkin, Mr. Patterson was found guilty of a Rule 4-8.2(a) violation along with several other violations including misconduct under Rule 4-8.4(d) and conflict of interest under Rule 4-1.7. This Court rejected the Referee's recommendation of an admonishment and imposed a 1-year suspension. In *Patterson*, the respondent had no prior disciplinary record and a long list of mitigating factors.

After the Referee made her recommendation of a 90-day suspension followed by 2-years' probation, this Court issued two more decisions. Mr. Patterson returned to this Court again and received a two-year suspension.

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[7] Mr. Norkin was later permanently disbarred for his conduct during the period of suspension. *The Florida Bar v. Norkin*, 183 So. 3d 1018 (Fla. 2015).

The Florida Bar v. Patterson, 330 So. 3d 519 (Fla. 2021). In this second case, the primary violations involved unfounded claims of bias against a federal district court judge in the case of *Bussey-Morice v. Kennedy*. His attacks on that judge claimed racial bias in a civil rights case. Mr. Patterson was found guilty of seven violations including impugning the judge under Rule 4-8.2(a).

Although the other violations clearly played a role in this Court's decision in this second case against Mr. Patterson, this Court emphasized

> Patterson's repeated, unfounded allegations of racial bias were particularly egregious. And they were especially damaging—not just to the individuals whose character he unjustly impugned, but more broadly to the public's confidence in our judicial system. Patterson's behavior was diametrically opposed to the civility and professionalism that our Bar Rules and the Oath of Admission demand.

Id. at 527–28.

The same is true in this case. If anything, repeatedly claiming that many judges are intentionally disobeying the law, writing false opinions, protecting the monopoly over the people, and denying the constitutional rights of homeowners in foreclosure may be even more destructive to public

confidence than alleging racial bias against a single judge in one civil rights case.

Mr. Patterson had co-counsel in the *Bussey-Morice* case, Wendell Locke. Although the opinion is unpublished, this Court overrode the 90-day suspension recommended by the Referee and imposed a 1-year suspension. *The Florida Bar v. Locke*, Case No. SC19-1913, 2022 WL 601123, at *1 (Fla. 2022). Like Mr. Patterson's case there were multiple violations found against Mr. Locke, but impugning the federal judge was a major component.

Mr. Patterson and Mr. Locke were damaging the reputation of a single judge and thereby at least marginally damaging the overall legitimacy of the judiciary. But Mr. Jacobs' conduct has a much broader impact, not only on the reputation of the many judges he has impugned, but on his clients who face possible deficiency judgments measured by the unnecessary attorneys' fees of plaintiff's counsel generated by his manipulation of the system. In the end there is a far greater risk of damage to the overall legitimacy of the judiciary by his conduct than by Mr. Patterson's and Mr. Locke's combined.

The Bar argued for a suspension of two years at the sanction hearing. As this case has evolved since that time, it is increasingly clear that a two-year suspension is needed for rehabilitation.

CONCLUSION

The Bar asks this Court to accept the Referee's three findings of guilt. It asks that the Court reject the recommendation of the Referee for a non-rehabilitative, 90-day suspension and impose a two-year rehabilitative suspension. The Court should impose the costs recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 5th day of August, 2022 to:

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