IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, CASE NO.: SC20-1602

vs. The Florida Bar File Nos.
2019-70,188 (11H)
2019-70,358 (11H)
BRUCE JACOBS, 2020-70,056 (11H)

Respondent.
_____/

REPLY/ANSWER BRIEF OF RESPONDENT

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I. Jacobs Apologized for Telling His Personal Truth in Strong Arguments that were Obviously Unpersuasive, Beneath His Own Professional Standards, but Not Made with Reckless Disregard for the Truth – The Statements were Jacobs' Truth

This Court should consider the circumstances Jacobs found himself in four years ago, and since the Third DCA first issued a show cause order accusing him of dishonesty, in analyzing his diametrically opposed statements of facts from what The Florida Bar ("TFB") submitted. According to TFB, Jacobs admitted guilt, apologized, and had no good faith basis to suggest the Third DCA or Miami-Dade Circuit Judge Michael Hanzman were not following the law, required to grant disqualification under the judicial canons, or protecting systemic frauds on the court in foreclosures.

When the Third DCA first accused Jacobs of dishonestly criticizing the court in the *Aquasol* case in 2018, his counsel pursued the most likely path to protect his license. Jacobs apologized, admitted wrongdoing, enrolled in counselling with the Florida Lawyers Assistance program, and had board certified counsel review all his pleadings going forward. There was no challenge to the Third DCA refusing to disqualify itself. No First Amendment challenge. No challenge of an objectively reasonable basis in fact for his

statements. There was no challenge on the merits at all. Falling on the sword was seen as the only viable course of action.

By March of 2021, it became clear TFB wanted Jacobs suspended for more than 90 days so he would be out of the Bar and forced to reapply. Jacobs saw his apology was not working and amended his defenses to raise selective prosecution as a defense. R. 18. It seemed reasonable to fear Jacobs would likely not be readmitted to TFB after a lengthy suspension caused by upsetting powerful people and fighting to prove the nation's largest banks were still committing systemic frauds in foreclosures.

TFB even acknowledged that, at the final hearing, Jacobs "had shifted positions and described his motion for rehearing in *Aquasol* as telling 'my truth.'" (AB p. 44). TFB invited this Court to review the full *Aquasol* motion for rehearing (2018 WL 4204477) in its entirety even though neither party admitted the motion into evidence.

Jacobs joins that invitation knowing the full motion in context shows Jacobs' statements were not made with reckless disregard for the truth. They were his truthful arguments and opinions based on his experience. There is no reasonable basis to conclude any of his statements were made without an objectively reasonable basis in fact. The uncontroverted evidence in this record shows the statements were based on documented facts.

II. **The Third DCA Failed to Recuse Itself from Jacobs' Cases Making these Bar Complaints "Fruit of the Poisonous Tree"**

TFB ignores that the Third DCA initiated contempt proceedings by two show cause orders against Jacobs in *Aquasol,* and again in *Atkin*, accusing Jacobs of criticizing the Court dishonestly and with reckless disregard for the truth. The only intent of the show cause proceedings was to punish Jacobs. Accordingly, the Third DCA was obligated to disqualify itself so another court could adjudicate whether Jacobs acted unethically. By failing to disqualify itself, the Third DCA violated Jacobs due process rights under established Florida law and U.S. Supreme Court caselaw. Jacobs should not be punished for acting unethically after the Third DCA violated Judicial Canon 3(e)(1) by failing to disqualify itself as required by law.

This Court instructs "the purpose of criminal contempt ... is to punish. Criminal contempt proceedings are utilized to vindicate the authority of the court." *Parisi v. Broward Cty.*, 769 So. 2d 359, 364 (Fla. 2000). Fla. R. Crim. P. 3.840(e) provides "If the contempt charged involves disrespect to or criticism of a judge, the judge shall disqualify himself or herself from presiding at the hearing. Another judge shall be designated by the chief justice of the supreme court." Fla. R. Crim. P. 3.840(e).

"[T]he purpose of the rule is to assure that a person cited for a contempt of court which involved a criticism of a judge, would not be tried on the contempt charge before the judge who was the subject of the criticism." *Bumgarner v. State*, 245 So. 2d 635, 637 (Fla. 4th DCA 1971). Strict compliance is required. *Fiore v. Athineos*, 9 So.3d 1291, 1293 (Fla. 4th DCA 2009); *Rosenwater v. Deutsche Bank National Trust Co.*, 220 So. 3d 1204 (Fla. 4th DCA 2017); *In re Weiner*, 278 So. 3d 767 (Fla. 2d DCA 2019).

U.S. Supreme Court precedent instructs, "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009). The Fifth Amendment to the U.S. Constitution and Article 1, §9 of the Florida Constitution both state "No person shall be deprived of life, liberty or property without due process of law."

This Court has recognized it could be appropriate to disqualify an entire District Court of Appeal. *5-H Corp. v. Padovano*, 708 So. 2d 244, 244–45 (Fla. 1997). In *Padovano*, "Arslanian filed a motion for rehearing … referring to opposing counsel's arguments, [stating] "what is truly appalling is that ... the panel in the instant appeal would buy such nonsense and give credence to such 'total b [——]–s [——].'" In a footnote, Arslanian referred to opposing counsel's argument as "ridiculous" and "a joke," adding that "the use of the

term ‘total b[——]s [——]’ without the inclusion of at least 2 or 3 intervening expletives is very kind and generous under the circumstances.” *Id.*

This Court rejected Arslanian’s writ of prohibition to disqualify the entire First DCA because the panel referred his comments to TFB for prosecution. *Id.* Strikingly, TFB dismissed its formal complaint against Arslanian on a finding of “no probable cause” while it continues to prosecute Jacobs for statements made in plain English, brought in good faith, deeply seated in fact and law, that correctly state grounds to find the Third DCA is biased, acting unethically, and unconstitutionally. *Id.*

This Court held the First DCA could refer Arslanian to TFB without requiring their disqualification because:

> All Florida judges are, first and foremost, attorneys and members of The Florida Bar. See generally art. V, § 8, Fla. Const. As such, Florida judges, just like every other Florida attorney, have an obligation to maintain the integrity of the legal profession and report to The Florida Bar any professional misconduct of a fellow attorney. See R. Regulating Fla. Bar 4–8.3(a). This obligation is reiterated in the Florida Code of Judicial Conduct, which explicitly provides that “[a] judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.” Fla.Code Jud. Conduct, Canon 3D(2).6 The Florida Code of Judicial Conduct further mandates that judges “should participate in establishing, maintaining, and enforcing high standards of conduct,” “shall require order and decorum in proceedings before the judge,” and shall require lawyers subject to their direction and control to be “patient, dignified, and courteous.” Fla.Code Jud. Conduct, Canons 1, 3B(3), 3B(4). *Id.*

This Court noted, however, "of course, regardless of whether such reports to The Florida Bar or the JQC have been filed, ***disqualification remains available where it can be shown that "the judge has a personal bias or prejudice concerning a party or a party's lawyer***[.]" Fla. Code Jud. Conduct Canon 3E(1)(a)(emphasis added). *Id.* at 248.

Jacobs did not use Arslanian's crude language or have a one-time fight and cross-complaint with the Third DCA. His decade long battle played out over 100 appeals. The Third DCA insists any claim of bias is "frivolous" while Jacobs insists the Third DCA's bar complaints accusing him of dishonesty where banks committed fraud prove his claims of bias are objectively true.

The Third DCA itself expanded on *Padovano* to recognize that disqualification is mandatory after a judge files a bar complaint that alleges dishonesty by the attorney. *Afanasiev v. Alvarez*, No. 3D20-0803, 2021 WL 1201433, at *4 (Fla. 3d DCA Mar. 31, 2021)(disqualification required where judge filed a bar complaint that accused a party's counsel of dishonesty). *See also, Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 257 n.7 (Fla. 1990) (statement by judge that he feels party has lied in case generally indicates bias against party, which requires disqualification where clear implication is that judge will not believe complaining party's testimony in

future); *Molina v. Perez*, 187 So. 3d 909 (Fla. 3d DCA 2016). *S.S. v. Dep't of Child. & Fams.*, 298 So. 3d 1184, 1185 (Fla. 3d DCA 2020).

Respectfully, this all violates U.S. Supreme Court law, Florida Supreme Court law, and Third DCA law. The Third DCA should have disqualified itself under Judicial Canon 3(e)(1) after its first show cause order in *Aquasol*, and certainly after its bar complaints accusing Jacobs of dishonesty in *Aquasol* and *Atkin*. *Mayberry v. Pennsylvania*, 400 U.S. 455, 915 S.Ct. 499, 27 L.Ed.2d 532 (1971); *Taylor v. Hayes*, 418 U.S. 488, 501–02, 94 S. Ct. 2697, 2705, 41 L. Ed. 2d 897 (1974); *Arnett v. Kennedy*, 416 U.S. 134, 198, 94 S. Ct. 1633, 1665–66, 40 L. Ed. 2d 15 (1974); *Mongelli v. Fla. Health Scis. Ctr., Inc.*, 339 So. 3d 480, 481 (Fla. 2nd DCA 2022); *Kline v. JRD Mgmt. Corp*., 165 So. 3d 812, 815 (Fla. 1st DCA 2015).

The Third DCA recently compounded its error initiating four new contempt charges accusing Jacobs of more dishonest criticisms, threatening to "reprimand" him, publicly reprimanding him, and ordering he pay up to $35,000 to attorneys and banks held in contempt and found to be acting in bad faith by the trial judges on appeal. *Azran Miami 2, LLC v. US Bank Tr., N.A.*, No. 3D20-1712, 2022 WL 3051065 (Fla. 3d DCA Aug. 3, 2022).

The Third DCA accused Jacobs "filing frivolous and bad-faith motions and *leveling false, malicious and meritless accusations against adverse*

parties, opposing counsel and judges alike, after a trial court or an appellate court has rejected Mr. Jacobs' claims and arguments." *Id.* (emphasis added). Strikingly, the same order imposing sanctions also stated:

> To be clear, the issue before us is not whether a bank or lender that is a party to these appeals engaged in misconduct, but whether Mr. Jacobs has engaged in misconduct. ***Indeed, it is certainly possible that Mr. Jacobs may at some point be able to prove the claims of misconduct he so vociferously ascribes to the bank or lender in each of these consolidated matters***." *Id.* (emphasis added).

Under *Padovano*, a judge must take action against any party engaged in misconduct, not just foreclosure defense counsel. It should be evident the Third DCA is objectively biased against Jacobs, especially after initiating contempt ***six times*** to punish his criticisms of the court while calling his claims of fraud meritless and acknowledging the claims may be proven true. Due process has required the Third DCA to disqualify itself and allow another court to adjudicate the contempt since the very first contempt charge in *Aquasol*. These proceedings flow from the Third DCA's violation of Fla. Code Jud. Conduct Canon 3E(1)(a). They are all fruit of the poisonous tree that should not result in discipline. A court that violates the judicial canons cannot complain that an attorney filed a motion to disqualify that impugns the integrity of the court. The attorney is obligated to preserve all appellate issues, including bias of the appellate court.

III. **Judge Hanzman Also Failed to Recuse Himself Making His Bar Complaint "Fruit of the Poisonous Tree"**

TFB lacks candor when it argues Jacobs only sought disqualification of Judge Hanzman because "he convinced himself that any judge who did not accept his novel theories had to be dishonest and a traitor to the constitution." (AB p.13). Respectfully, the record reflects Jacobs filed the Motion to Disqualify Judge Hanzman because Mr. Atkin had an objective basis in fact to fear "Judge Hanzman will not be fair and impartial based on his comments in another trial conducted with undersigned counsel involving a fraudulent mortgage assignment prepared by the infamous law offices of David J. Stern, the, quote, King of Robo signing, end quote, who the Florida Bar permanently disbarred for filing documents in foreclosures across Florida." (T1, 93:5-14)

"Judge Hanzman failed to disclose significant personal financial holdings that are heavily invested in the financial sector generally, and BONYM, that's BONYM, the initials for it, specifically, which is an objective reason to fear his rulings ignoring fraud on the court by large financial institutions is to protect its own -- his own personal investments rather than to protect the rule of law." (T1, 94:2-12). It appears that one of the mutual funds Judge Hanzman is personally invested in GLD is managed by BONYM

as trustee. The same trustee for the plaintiff trust in the Atkin foreclosure would be negatively affected in an order to show cause finding felony foreclosure misconduct in violation of the $25 billion national mortgage settlement by BONYM, BANA, and the LGP firm. (T1, 97:2-96-7).

Jacobs swore he filed the Motion to Disqualify Judge Hanzman in good faith as there was a clear refusal to consider that BANA and BONYM had unclean hands and were using fraudulent evidence of standing. (T2, 36:18-39:1). Jacobs testified the facts supported the topic headings which TFB insisted impugned Judge Hanzman's integrity. (T2, 39:17-47:25).

By calling the motion to disqualify "scurrilous," Judge Hanzman created an independent basis to require his disqualification. It is improper for a judge to comment on the truthfulness of a motion to disqualify. (T2, 52:8-53:10). Jacobs testified in no uncertain terms that his motion to disqualify Judge Hanzman did not recklessly disregard the truth. (T2, 123:3-15).

Judge Hanzman testified he received a "blistering" disqualification motion that "completely fabricated" the claim he continued to rule on the case which was in another division. Judge Hanzman acknowledged the motion alleged he "routinely prevents review of fraud on the part of banks" and "was looking away from fraud, refusing to hear evidence and abdicating his judicial responsibility." (SH1, 25:18-27:12).

Judge Hanzman testified he denied another Motion to Disqualify Jacobs filed in *Bank of New York v. Jakubow* that cited "the fact that I had referred him to the Bar,… my refusal to enforce fraud against banks, my repeated refusal to honor my oath and adjudicate claims involving banks fairly, and … my alleged financial interests showing I have millions of dollars invested in the financial sector in March of 2021." (SH1, 28:19-32:23).

Judge Hanzman testified he referred Jacobs to TFB because he "repeatedly, without foundation, accuses judges, litigants and their lawyers of criminal conduct, fraud….." Judge Hanzman swore "there's no question in my mind that [Jacobs] should not be entrusted to practice law and represent people in matters involving their life and their property." (SH1, 28:19-32:23).

Judge Hanzman admitted he filed another bar complaint with TFB against Jacobs after he appeared in *Jakubow*, but had still not recused himself in *Jakubow*. (SH1, 35:23-36:9). Judge Hanzman admitted he refused to consider Jacobs argument the David J. Stern robo-signed mortgage assignment was fraud finding it "irrelevant" whether David Stern or Howard Stern created false evidence. On redirect, Judge Hanzman again accused Jacobs of accusing lawyers of fraud "without any evidence and without any basis" (SH1, 73:15-78:22).

In *Jakubow*, Jacobs filed an affidavit in support of the motion to explain how BANA and BONYM acted in concert to present forged endorsements and false assignments in Countrywide originated loans. There was evidence of fraud on the court, forgery, perjury, and obstruction of justice.

The *Jakubow* Motion set forth this was an emergency because BANA, BONYM, and their counsel, the LGP firm, were depriving homeowners of their property without due process in violation of the Fifth Amendment to the U.S. Constitution and Article 1, §9 of the Florida Constitution. It was also an emergency as TFB was prosecuting Jacobs for his conduct challenging these fraudulent foreclosures in bad faith. The Jakubow Motion noted TFB had either disbarred or suspended other prominent foreclosure defense lawyers such as Mark Stopa, Kenneth Trent, Kelly Bosecker, Charles Gallagher, and Darin Letner. (R Ex. 56:2).

In *Jakubow*, Jacobs asked for an expedited hearing to adjudicate whether "the Countrywide endorsement in this case is a forgery, supported by perjury, and covered up by obstruction of justice by defiance of multiple subpoenas by the destruction of nearly 2 billion records, backdated records, defiance of court orders, and intentional misrepresentations of fact and law by counsel" for BANA and BONYM. (R Ex. 56:3).

The Motion set forth evidence showing BANA gave contradictory statements under oath (a felony) and created a clandestine “delinquent note endorsement process” in defiance of federal regulators and the U.S. Department of Justice investigating the "robo-signing scandal” to forge Countrywide endorsements (another felony). (R Ex. 56:6-7).

The *Jakubow* Motion set forth that a Pasco County foreclosure defense attorney is presently disbarred and serving 9 years in prison for forgery of endorsements in BANA foreclosures. This Court instructs resorting to forgery to defraud a court is “completely contrary to the most basic ideals of the legal profession.” *The Florida Bar v. Salnik*, 599 So.2d 101, 103 (Fla. 1992).

The Jakubow Motion set forth that the Second DCA, the Fourth DCA, the Hawaii Supreme Court, U.S. District Court Judge for the Southern District of Florida Ursula Ungaro, and U.S. District Court Judge for the Southern District of New York Kevan Karas all enters orders supporting Jacobs’ theory of fraud on the court. (R. Ex. 56:9-11).

The *Jakubow* Motion set forth that BONYM demanded Jacobs be held in contempt insisting his fraud arguments were frivolous and only raised to “delay these foreclosures and line his own pocket.” BONYM also asked for “absolute immunity” claiming a litigation privilege to commit RICO acts. The Motion argued the Third DCA instructs even if a case is dismissed, this Court

holds there is jurisdiction and authority to consider a motion for sanctions. *BANA v. Morales*, 2020 WL 7233359 (Fla. 3d DCA 2020).

The Motion also disclosed the Third DCA dismissed a RICO counterclaim alleging this fraud citing the litigation privilege but provided no analysis of the facts or the issue of law. *Bank of New York v. Abadia*, 202 WL 7635978. The Third DCA denied a motion for contempt while granting a litigation privilege which is based on the rationale that a Court will punish misconduct under its inherent contempt powers. (R. Ex. 56:12-13).

In response, TFB suggests without any support in the record that Atkin's Verified Motion for Disqualification was untimely and insufficient because it was unknown how long the information had been known Judge Hanzman had substantial financial entanglements with the Bank of New York Mellon specifically, and financial institutions generally. (AB p. 29). Jacobs respectfully insists his Motion to Disqualify was timely and legally sufficient.

It is true the Referee found Jacobs filed the motion to disqualify as a "deliberate and knowing litigation tactic" to "manipulate the system" when he does not get the relief sought in his motions. Respectfully, TFB presented this false narrative to the Referee that Jacobs files disparaging and inflammatory motions to disqualify to revenge unfavorable rulings when the motions to disqualify "serve no other purpose than to allow respondent to

'express the bottomless depth of the displeasure that one might feel" for having lost his appeal. (ROR 18).

However, the record reflects Judge Hanzman did refuse to take action against a David J. Stern "robo-signed" and fictitious mortgage assignment introduced into evidence at trial. Judge Hanzman did refuse to hear evidence BONYM engaged in forgery and perjury in Atkin's case (both felonies). Judge Hanzman also conceded Jacobs could properly ask for sanctions against a bank engaged in fraud, even after a voluntary dismissal. (SH1, 44:3-48:9).

Judge Hanzman's ruling violated the same authority of this Court and other district courts which the Third DCA held gave jurisdiction to consider sanctions after dismissal. *Bank of Am., N.A. v. De Morales*, 314 So. 3d 528, 531 (Fla. 3d DCA 2020)("The mortgagor is correct that the trial court had inherent authority to consider her motion for sanctions even after a dismissal, such as would have resulted from a favorable ruling on the bank's motion, as part of its jurisdiction over ancillary matters. *See, e.g., Cutler v. Cutler*, 84 So. 3d 1172, 1173 (Fla. 3d DCA 2012) (*citing Tobkin v. State*, 777 So. 2d 1160, 1163-64 (Fla. 4th DCA 2001)); *see also Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007) ("[T]he justification behind immunizing defamatory statements applies equally to 'other misconduct occurring during the course of a judicial proceeding' ...

[and] adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power.")(*quoting Levin, Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. U.S. Fire Ins. Co*., 639 So. 2d 606, 608-09 (Fla. 1994)).

Jacobs respectfully submits Judge Hanzman should have disqualified himself from Jacobs cases under Fla. Code Jud. Conduct Canon 3E(1)(a) rather than initiated his bar complaint against Jacobs. There was an objective basis in fact to seek disqualification of Judge Hanzman. He did take no action against HSBC for introducing a David J. Stern false assignment in *Aquasol* or against BONYM for the felonies of forgery and perjury in *Atkin.*

Judge Hanzman did have significant personal investments tied to BONYM and the financial sector. He did call the motion to disqualify "scurrilous" which is commenting on the truthfulness of the motion. He admitted telling Jacobs he would be disbarred if he continued to accuse bank attorneys of fraud on the court. He did file a second bar complaint before Jacobs filed the motion to disqualify in *Jakubow.* He did refuse to grant disqualification in Jacobs cases, including Jakubow, even as he testified that Jacobs should be disbarred for his criticisms of himself and the Third DCA.

Respectfully, Judge Hanzman had an ethical obligation under the judicial canons to protect the constitutional rights of all that appear before

him. TFB should not discipline Jacobs for impugning the integrity of a court that refuses to grant disqualification as required by the judicial canons.

IV. Jacobs Has a First Amendment Right to Truthfully Criticize Judges and Expose Valid Problems in the Judicial System

TFB and Jacobs agree that this Court instructs "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." *The Fla. Bar v. Ray*, 797 So. 2d 556, 560 (Fla. 2001).

In *Ray*, the referee and this Court listened to the tape recording and reviewed the transcript from the hearing to find no evidence supported Ray's statements impugning the integrity of the judge and that "nothing transpired in that hearing that would justify such outrageously false accusations. *Id.* at 559. TFB correctly notes footnote 3 sees no error in shifting the burden to Ray to prove a factual basis for his statements that concerned the integrity of the judge. *Id.*

TFB insists "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." (AB p.69).

TFB sets up the issue that there is no support for Jacobs' "novel" theories of unclean hands and systemic frauds so "Jacobs is impugning the judges because they will not agree with his version of the law, not because they are disobeying the actual law." (AB p.3). Jacobs respectfully submits there is objective reasons in fact to say the Third DCA is refusing to recuse themselves as required by law, and disobeying the law of unclean hands.

The ultimate issue for this Court to decide is whether Jacobs' commentary about the Third DCA and Judge Hanzman warrant protection under the First Amendment to the U.S. Constitution and Article 1, §9 of the Florida Constitution. TFB dismisses controlling U.S. Supreme Court law that instructs attorneys cannot be disciplined for truthful statements protected by free speech as only addressing extrajudicial statements to the press at trial. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). (AB p. 50).

TFB ignores that *Gentile* held "cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment … First Amendment Protections survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. *Id. Gentile* rejected the theory that the practice of law brings

with it comprehensive restrictions professional bodies may impose "when those restrictions impinge upon First Amendment freedoms." There is no justification to abandon normal First Amendment principles in cases of speech by attorneys regarding pending cases. *Id.*

Gentile also holds "on cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 2726.

The U.S. Supreme Court instructs to determine if an attorney's speech critical of the judiciary is privileged under the First Amendment, courts examine "the statements in issue and the circumstances under which they were made to see ***whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts*** or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Id.; citing Pennekamp v. Fla.*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

The U.S. Supreme Court recognizes "***the vehemence of the language used is not alone the measure of the power to punish for contempt***. The fires which it kindles ***must constitute an imminent, not***

merely a likely, threat to the administration of justice. The danger must not be remote or even probable; ***it must immediately imperil***.… (T)he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.' *Craig v. Harney*, 331 U.S. 367, 376, 67 S. Ct. 1249, 1255, 91 L. Ed. 1546 (1947). 'Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.' *Brown v. U.S.*, 356 U.S. 148, 153, 78 S. Ct. 622, 626, 2 L.Ed.2d 589 (1958) (emphasis added); *In re Little*, 404 U.S. 553, 555, 92 S. Ct. 659, 660, 30 L. Ed. 2d 708 (1972).

TFB recently presented almost the same accusations of misconduct to this Court as an emergency petition asking for Jacobs to be suspended from the practice law for causing great public harm. The Court voted overwhelmingly (5-2) to disapprove of the emergency suspension.[1] *Fla. Bar v. Jacobs*, No. SC22-559, 2022 WL 1423181 (Fla. May 5, 2022).

Respectfully, if Jacobs presented a "clear and present danger" or "imminent, not merely a likely threat" that would "immediately imperil" either

[1] A search on Westlaw shows this Court has never "disapproved" of an emergency petition to suspend an attorney from the practice of law.

"the impartiality and good order of the courts" or "the administration of justice" the Court would have immediately suspended him from the practice of law.

Under *Gentile*, and its progeny, TFB cannot prosecute Jacobs for conduct alleged herein because his statements are not an imminent threat to the impartiality of the courts, the good order of the courts, or the administration of justice. To the contrary, his truthful statements tried to protect the impartiality and good order of the courts. Under *Gentile*, they are "of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Id.*

Jacobs respectfully submits this Court allowed him to continue practicing law because his conduct does not pose an imminent, immediate threat or clear and present danger to the impartiality and good order of the courts and the administration of justice, which means Jacobs is squarely protected by the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035–36, 111 S. Ct. 2720, 2725,115 L. Ed. 2d 888 (1991).

V. **Jacobs Has Proven His Defense of Selective Prosecution**

Jacobs and TFB agree selective prosecution may be raised as a defense to bar discipline under *Thompson v. The Florida Bar*, 526 F. Supp. 2d 1264 (S.D. Fla. 2007). TFB correctly states selective prosecution "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) the court stated to establish the 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.

Although TFB claims there is no case in Florida where the defense has been successful, Jacobs would direct this Court to *State v. Parrish*, 567 So.2d 461 (Fla. 1st DCA 1990). In *Parrish*, the First DCA broke down the test for selective prosecution stating "the first part of the test requires a showing that the defendant was prosecuted while others similarly situated were not." *Id.* at 465. "[t]he similarly situated group is the control group. The control group and the defendant are the same in all relevant respects, except that defendant was for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination." *Id.*

"To establish the second part of her selective prosecution defense, it was incumbent upon Patricia Parrish to show that the decision to prosecute was based on a desire to prevent her exercise of constitutional rights, i.e.,

the right to run for public office." *Id.* at 467. The First DCA ultimately concluded "based on our examination of the record and the legal principles applicable to a claim of selective prosecution, we conclude the trial court could lawfully determine that the Parrishes were singled out for prosecution for political reasons. Accordingly, the appealed order is affirmed." *Id.*

TFB insists "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." (AB p. 63). In full candor, starting at page 13 of his Initial Brief, Jacobs appealed the Referee's denial of his request to reopen the bar trial to present new evidence of selective prosecution. TFB ignores that Miami-Dade Judge Beatrice Butchko initiated criminal contempt proceedings against BANA, BONYM, and Nathaniel Callahan in *BONYM v. Julie Nicolas* for offering perjury. This is a clear violation of Rule 4-3.3 (lack of candor) which assisted BANA and BONYM in systemic criminal frauds on the court in foreclosures.

Mr. Callahan, represented by his partners at Akerman, attacked Judge Butchko's integrity insisting she be "urgently held accountable" and baselessly accused her of an "improper" professional relationship where Jacobs had a "special influence" over her. (R. 65). This is a clear violation of

Rule 4-8.2. TFB had uncontroverted evidence Mr. Callahan and his partners lacked candor, committed fraud on the court, and impugned Judge Butchko's integrity dishonestly and with reckless disregard for the truth. TFB conceded it never even opened a grievance investigation into the Akerman attorneys. (R. 73.) TFB abdicated its duty to hold all lawyers to the same rules.

While TFB does acknowledge Jacobs filed four bar complaints against opposing counsel engaged in fraud, TFB insists Jacobs "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." (AB p. 64).

In full candor, the letter Jacobs' counsel sent in response to the attempt to weaponize the Bar by JP Morgan Chase's counsel gave extensive and case specific examples of the many orders and admissions to prosecute his opponents for violations of Fla. Bar Rule 4-3.3 (Lack of Candor). (Exh. 1 pgs. 75-104). The Referee noted Jacobs filed bar complaints with TFB against bank attorneys for systemic frauds, forgery, and fabricating evidence. (ROR. 20-21). The Referee also noted Circuit judges, including Judge Miller, issued sanctions orders against banks and their counsel for "stonewalling discovery, bad faith litigation tactics and unclean hands." (ROR. 21-23).

Jacobs respectfully submits, under *Thompson*, TFB cannot prosecute Jacobs for weak cases under charges of violating Fla. Bar Rule 4-3.3 (lack of candor) and Fla. Bar Rule 4-8.2 (impugning the integrity of a judge dishonestly or with reckless disregard for the truth) while refusing to prosecute much stronger cases against his opposing counsel who engaged in the same rule violations. The Referee did acknowledge attorneys privileged to practice law "must agree to follow the Rules Regulating TFB which 'has a duty to investigate and prosecute alleged violations of the rules.'" (ROR 21-23). This holds true for both sides of the foreclosure bar.

The fact that Jacobs was prosecuted relentlessly for a 2 year suspension, when the Referee noted her "mindfulness of the Supreme Court's trend in favor of imposing stronger sanctions against attorneys in bar disciplinary proceedings, a more severe sanction is warranted in this case. (ROR 29). By more severe, the Referee recommended only a non-rehabilitative suspension of 90 days with other conditions. Yet, TFB insists this sanction is not harsh enough and asks for Jacobs to be removed from the Bar and forced to reapply after a 2 year suspension.

Jacobs respectfully submits TFB just wants to silence Jacobs, in violation of his First Amendment rights. TFB seeks to prevent Jacobs from exposing valid problems within the judicial system" and "publicize problems

that legitimately deserve attention" as permitted in *Ray.* TFB should join Jacobs in ensuring Courts honor the judicial canons and attorneys obey TFB rules and not deprive his clients of their property without due process.

As set forth in the *Jakubow* Motion to Disqualify Judge Hanzman, TFB had either disbarred or suspended prominent foreclosure defense lawyers such as Mark Stopa, Kenneth Trent, Kelly Bosecker, Charles Gallagher, and Darin Letner. (R Ex. 56:2). Attorneys on both sides of Jacobs' cases about bound by the same ethical obligations under TFB rules. TFB cannot silence Jacobs for his foreclosure defense work by prosecuting him for weak cases while ignoring substantial evidence attorneys like Nathanial Callahan are engaged in the exact same rule violations (i.e. Fla. Bar Rule 4-3.3 (lack of candor) and Fla. Bar Rule 4-8.2 (impugning the integrity of a judge dishonestly or with reckless disregard for the truth)).

The Referee is simply wrong on the law. Selective prosecution does not require TFB never prosecute anyone for violating Rule 4-3.3 or Rule 4-8.2. Selective prosecution is akin to an equal protection violation. If foreclosure plaintiffs are clearly violating Rule 4-3.3 and Rule 4-8.2, but TFB is only prosecuting Jacobs for weak cases on the same rules, Jacobs has met the requirements under prong 1 of the selective prosecution defense.

Jacobs has shown TFB is selectively prosecuting him to violate his First Amendment rights and silence his prosecution of fraud claims against banks.

To the point, on June 6, 2022, the Honorable U.S. Magistrate Judge for the District Court of Hawaii, Wes Reber Porter, denied Jacobs' Motion to Appear Pro Hac Vice on behalf of his client, Brandon Makaawaawa, the president of Na Poe Kokua ("NPK"), a grass roots non-profit organization from Hawaii fighting to hold BANA accountable for a $150 Million commitment to provide affordable housing for native Hawaiians. Mr. Makaawaawa testified NPK spent decades looking for a lawyer with integrity willing to take on their fight against BANA until they found Jacobs. (SH1, 200:25-208:1). Jacobs filed suit for the native Hawaiian non-profit group against BANA for violations of the RICO Act and KKK Act of 1871. ***After BANA objected*** by citing this Amended Referee Report from this case, Jacobs was denied the ability to make his arguments in Hawaii. See order in *Nā Poʻe Kōkua v. Bank of America Corporation;* Civil No. 22-00238 JMS-WRP attached as App I. BANA's own counsel stands accused of fraud on the court in that litigation but has blocked Jacobs from appearing in Hawaii because of the allegations Jacobs is unethical here in Florida.

Moreover, on September 2, 2022, the Honorable U.S. Magistrate Judge for the District Court of Hawaii Rom A. Trader, also denied Jacobs

permission to appear pro hac vice on behalf of three women of color from Miami and five Hawaiian class representatives all suing BANA in an historic national RICO/FHA class action Jacobs alleging the same systemic frauds of forgery, perjury and obstruction of justice filed styled *Nathan Earl Aiwohi, et al. vs. Bank of America, N.A., the Bank of New York Mellon.* Civ. No. 22-00312 JAO-RT. See order attached as App II.

If this were purely a legal matter, Jacobs, Callahan, and the other attorneys representing BANA, BONYM, and JP Morgan Chase would all be investigated and prosecuted for violating at least Fla. Bar Rule 4-3.3 and/or Rule 4-8.2. However, this is political. Only Jacobs is being prosecuted to stop him from exposing valid problems in the justice system that deserve legitimate attention.

Attorneys assisting in criminal foreclosure frauds involving forgery, perjury, racketeering, and obstruction of justice are disbarred under Florida's Standard for Attorney Discipline 5.1(a)(2) and (a)(6) (Failure to Maintain Personal Integrity). This violates "one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity." FL ST LWYR SANCTIONS Standard 5.1 (comment 1).

Jacobs has an ethical obligation to report attorneys and judges who violate TFB rules or the Judicial Canons. Those judges with actual

knowledge Jacobs established that unethical conduct are required to take appropriate action. Respectfully, Jacobs' "call to action" was to those Judges in positions of authority who patriotically swore to protect the constitutional rights of Jacobs and his clients. It was not a call for violence. It was a call to uphold our self-reporting system and admit the Emperor has no clothes.

V. The Uncontroverted Record Evidence Shows an Objectively Reasonable Basis in Fact for Jacobs to Say What he Said

As TFB notes, the Massachusetts Supreme Judicial Court discussed many cases adopting the same objective approach as Florida and explained:

> 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.

Jacobs has met his burden to prove he had an objectively reasonable basis in fact to make the statements at issue herein. TFB presented the statements from his pleadings, out of context, with no other evidence to show if there was an objectively reasonable basis in fact or not. Jacobs presented his own sworn testimony, the testimony of four foreclosure defense

attorneys, and the testimony of five Miami-Dade Circuit Court judges. This all establishes an objectively reasonable basis for Jacobs to impugn courts who refused to grant disqualification as required, failed to address false evidence, and deprived his clients of their property without due process.

TFB acknowledged Jacobs' uncontroverted testimony is that 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). Jacobs 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). (AB p. 20). The TFB acknowledged Jacobs apologized, but swore he did not write his motion with reckless disregard for the truth. (AB p. 27).

Jacobs conceded the motion expressed the argument too strongly and was unprofessional. However, Jacobs is charged with impugning the integrity of a judge with reckless disregard for the truth, not filing an unprofessional pleading. TFB acknowledged Jacobs apologized and "fully understands the nature and wrongfulness of his conduct." (AB p. 16). However, the apology was not for violating Fla. Bar Rule 4-8(2)(a) or making false statements to impugn the integrity of the court. The apology was for

breaking character and lowering his own standards of practice to tell his personal truth in an argument he agrees was less than professional. (AB 28).

TFB correctly notes Jacobs essentially abandoned the emotional and personal issues presented by his lawyers who has since withdrawn and instead argues he has an affirmative ethical duty to report lawyers engaged in fraud and judges who violate the judicial canons, refuse to grant disqualification, ignore fraud, and deprive his clients of property without due process." (AB p.44-45). Once he reports misconduct of lawyers and judges to other judges, those judges have their own ethical obligation to take appropriate action under Judicial Canons 3(d)(1) and 3(d)(2).

Jacobs respectfully submits he has met his burden to prove a factual basis for his statements that exposed valid problems in the judicial system that legitimately deserve attention. His uncontroverted testimony is that he believed his statements, when taken in context, are demonstrably true. This Court should review the totality of Jacobs motion to see he is making good faith arguments documenting his extensive experience over 15 years in foreclosure defense. There are systemic frauds in foreclosures and certain courts are depriving borrowers of their property without due process. At all times, Jacobs is not causing harm to the impartiality and good order of the courts. He's trying to protect the impartiality and good order of the courts.

A. *The Uncontroverted Testimony of Four Experienced Foreclosure Defense Lawyers Corroborated Jacobs's Testimony He Had an Objectively Good Faith Basis in Fact for the Statements He Made*

Jacobs also presented corroborating testimony of Court Keeley, Esq., Margery Golant, Esq., David Winker, Esq., and Ricardo Corona. These four experienced foreclosure defense attorneys all corroborated his testimony foreclosures are being prosecuted with false evidence and without due process. These witnesses support Jacobs belief there were objective reasons to find Jacobs' statements are truthful, even though they impugned the integrity of the Third DCA and Judge Hanzman.

TFB neglected to mention any of this testimony in its answer brief. At best, TFB referenced Mr. Winker, but only to suggest he gave opinions, (despite not being an expert) that Jacobs is a bare knuckle brawler in a world of bare knuckle brawlers, and that he and his opposition are both vehement advocates for their clients. (AB p. 32). TFB cited no evidence to contradict the testimony of Jacobs and his four colleagues who all support a finding that Jacobs had an objectively reasonable basis in fact for his statements.

Mr. Keeley testified as a former Miami prosecutor like Jacobs, "it was shocking to me" after trying foreclosure cases "the lack of due process afforded to people." (SH2, 48:20-39:25). Mr. Keeley testified Jacobs became a "scholar" of constitutional rights under the Fifth Amendment. Mr. Keeley

noted it is “shocking” how “the rules of evidence are bent” in foreclosures. Mr. Keeley explained “this whole situation” with TFB arose from the “constant lack of due process, the constant being shut down…, documents being submitted into evidence in trials that are just blatantly false and provably false.” Yet, “they’re letting them in and let slide by.” Mr. Keeley swore Jacobs “absolutely, absolutely” has a good faith basis to raise his arguments of fraud on the court and Article 9 of the UCC. (SH2, 48:20-55:24).

Mr. Keeley testified “since this whole mess” started, Jacobs became much more careful about his pleadings but he “just has very strong beliefs, I think, that what he’s doing is right. Back on to the constitutional grounds, upholding due process, not depriving people of their property without due process of law, I think he has very strong personal beliefs of what he would say is fighting the good fight.” (SH2, 57:11-18).

Ms. Golant testified Jacobs’ unclean hands for forgery of endorsements defense had merit. Ms. Golant presented the same defenses after the “robo-signing scandal” but some judges “refuse to allow it” and even proffer the evidence. Those judges become angry, impatient and have said in open court they “don’t want to hear it” which is “extremely frustrating” to her ethical duty to her clients. She testified these bar issues come from

Jacobs' frustrations from being denied a meaningful opportunity to be heard. (SH2, 13:2-16:25).

Mr. Winker swore Jacobs is "a bulldog" about fighting false evidence in equitable actions. (T2, 213:22-217:23). Mr. Winker is sympathetic to Jacobs because in his own cases he's seen "documents so obviously false" he believed he would be sanctioned if he offered them into evidence. He saw evidence a Countrywide endorsement added after the fact and believed it would be "a failure in advocacy" to not raise the defense, even if the judge refused to hear it. Mr. Winker feels this all comes down to one basic truth: "Either Bruce is out of line or the judge is out of line." (T2, 222:11-232:6).

Mr. Corona is another foreclosure defense attorney who raised the same fraud arguments and swore some judges were more receptive than others. Mr. Corona testified few lawyers actually litigate foreclosures ethically or pro bono, as Jacobs routinely does. Mr. Corona swore if Jacobs was disbarred it would be a loss to homeowners and the foreclosure defense bar. Homeowners would find it more difficult to find quality representation if Jacobs was removed from the practice of law. (SH1, 143:23-146:6).

B. *Of the Five Circuit Judges that Testified on Jacobs' Behalf, Miami-Dade Circuit Judge David Miller Clearly Corroborated Jacobs Testimony that He Had an Objectively Good Faith Basis in Fact for the Statements He Made*

Five Circuit Court judges also testified on Jacobs' behalf including the Honorable Miami-Dade Circuit Judge David Miller who swore he "knows Jacobs to be 'at the top of his game' and 'always well-informed of his clients' facts and the legal position relating to those facts." Judge Miller testified to his own order finding bad faith discovery tactics and awarding sanctions under the Inequitable Conduct Doctrine in *Bank of America, N.A. v. Genny Rodriguez* in Circuit Case Number 203-30447 dated December 12, 2014. Judge Miller swore "I certainly haven't been convinced otherwise since then.

Judge Miller testified to his order finding bad faith discovery tactics and awarding sanctions under the inequitable conduct doctrine. R Exh 30. The order described that the Liebler, Gonzalez, and Portuondo law firm ("the LGP firm") appeared in Jacobs' cases with Bank of America, N.A. ("BANA") and Bank of New York Mellon ("BONYM") after he deposed a senior BANA executive about forged endorsements and false assignments presented in foreclosures. When asked to differentiate between zealous advocacy and attacking the integrity of the court, Judge Miller replied "there a fuzzy line that if you're from the school of Irving Younger, you know that the effectiveness comes when you're dancing on that line…."(SH2, 142:19-159:14).

Judge Miller's order noted the Fourth DCA had previously certified a question of great public importance to this Court finding "many, many

foreclosures appear tainted with suspect documents" in *BONYM v. Pino*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011). Judge Miller noted the Honorable former Fourth DCA Chief Judge Barry M. Stone and the Honorable Miami-Dade Circuit Judge Darryl Trawick both entered orders finding similar misconduct by BANA and the LGP firm. Judge Miller noted the LGP firm defied an order to coordinate a corporate representative deposition for over two years.

Judge Miller found the LGP firm's objections were "filed in **bad faith**." (emphasis in original). Judge Miller found "It is **outrageous** that Plaintiff and the LGP firm would force Defense Counsel to jump through so many hoops clearly intended to deliberately block discovery ordered by several Circuit Court judges." (emphasis in original). Judge Miller made "an express finding of bad faith and outrageous conduct by the Plaintiff and the LGP firm" and awarded sanctions under the Inequitable Conduct Doctrine. (R Ex. 30:3).

This all establishes beyond a preponderance of the evidence that Jacobs had an objectively reasonable basis in fact to make the statements he made. The statements are either documenting his personal experience in foreclosures or giving his honest opinions to be drawn from his experiences. Other attorneys and judges had the same experience. This is demonstrably different from *Ray* who fabricated statements that never happened,

attributed them to the judge, and then was exposed after the audio tape and transcript of the hearing showed nothing *Ray* represented in his statements ever happened at all.

Jacobs again submits he meets the exception carved out by this Court in *Ray* that acknowledged "attorneys play an important role in exposing valid problems within the judicial system" and should assist "to publicize problems that legitimately deserve attention" so long as their statements are not made with reckless disregard to their truth or falsity.

C. *There is an Objective Basis in Fact for the Statement that This Court Repeatedly Declined to Protect the Constitutional Rights of Foreclosure Defendants*

TFB insists claims that Jacobs had no evidence to suggest this Court "repeatedly declined to protect the constitutional rights of foreclosure defendants." (AB p. 44). However, also TFB noted some of the cases where this Court declined to accept jurisdiction of his appeals where he was arguing biased courts had allowed fraud on the court to deprive his clients of their property without due process. (AB p. 20, fn. 4).

Respectfully, this Court should take judicial notice of its own online docket now showing 25 different cases where Jacobs seeks or sought to invoke jurisdiction of the court through conflict jurisdiction, mandamus, all writs, and any other possible basis. Jacobs does "understand the limits of

this Court's jurisdiction" but the only path for these arguments to be made this Court is discretionary jurisdiction, or these bar proceedings. There is an objectively reasonable basis in fact for Jacobs to say this Court has repeatedly declined to exercise jurisdiction so far.

A silver lining to these bar proceedings is that Jacobs is finally able to present his arguments on the law in foreclosure to this Court. As the next wave of foreclosures looms over the courts, now is the perfect time for this Court to take appropriate action to ensure Florida follows the law, upholds the constitutional rights of its citizens, holds banks and their counsel engaged in systemic frauds in foreclosures accountable.

III. **There is Authority to Support the Defense of Unclean Hands**

TFB insists "no authority 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." (AB p. 70).

In full candor, Jacobs testified to Palm Beach County Circuit Judge Howard Harrison's findings of unclean hands by JP Morgan Chase acting as servicer for a securitized which ultimately ended with a settlement that satisfied the mortgage with a confidential payment. (T1, 170:6-25). Judge

Harrison's order set forth controlling law of this Court that "One who comes into equity must come with clean hands else all relief will be denied him *regardless of merit of his claim*, and it is not essential that act be a crime; it is enough that it be condemned by honest and reasonable men." *Roberts v. Roberts*, 84 So.2d 717 (Fla. 1956). See Riley Order attached as App III.

As set forth in the Riley Order, "even if Plaintiff had standing to foreclose (a meritorious claim), Plaintiff would be denied the equitable relief of foreclosure upon a finding that Plaintiff took actions in pursuing this foreclosure that reasonable and honest men would condemn." In *Riley*, Judge Harrison found unclean hands in that JP Morgan Chase introduced into evidence a false mortgage assignment, a false mortgage loan schedule, perjured testimony, and violated a discovery order to turn over evidence that would show whether the rubberstamped endorsement was a forgery.

Over 166 years ago, the United States Supreme Court pronounced: "equitable powers can never be exerted in behalf of one who has acted fraudulently, or who, by deceit or any unfair means, has gained an advantage." *Bein v. Heath*, 47 U.S. 228, 6 How. 228, 1848 WL 6464 (U.S.La.), 12 L.Ed. 416 (1848). This Court noted "the principle or policy of the law in withholding relief from a complainant because of 'unclean hands" is punitive in its nature." *Busch v. Baker*, 83 So. 704 (Fla. 1920).

The unclean hands defense applies to bar an equitable claim regardless of the claim's merits where the plaintiff has engaged in some manner of unscrupulous conduct, overreaching, or trickery that would be "condemned by honest and reasonable men." *Shahar v. Green Tree Servicing, LLC*, 125 So. 3d 251, 253 (Fla. 4th DCA 2013).

"The application of unclean hands is reserved for those who act unlawfully and attempt to trick and deceive others." *MTGLQ Inv'rs., L.P. v. Moore*, 293 So. 3d 610, 617 (Fla. 1st DCA 2020). Where criminal fraudulent conduct is directed to the court the Doctrine of Unclean Hands applies because there is a clear connection to the matter in litigation. *Marin v. Seven of Five Ltd.,* 921 So.2d 699, 700 (Fla. 4th DCA 2006) ("Generally, conduct constituting unclean hands must be connected with the matter in litigation").

"Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation." *Quality Roof Servs., Inc. v. Intervest Nat'l Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009); *See, Yost v. Rieve Enters., Inc.*, 461 So.2d 178 (Fla. 1st DCA 1984) ("There is no bar to applying the doctrine of unclean hands to a case in which both the plaintiff and the defendant are parties to a fraudulent transaction perpetrated on a third party"); *see also Hauer v. Thum,* 67 So.2d 643, 645 (Fla.1953) ("It would matter not that the [defendants] were

parties to the fraudulent transaction nor that the fraud was perpetrated upon a third party"). The Third DCA instructs deceitful misconduct undermines the integrity of the courts creates a "mockery of the principles of justice." Cabrerizo v. Fortune Int'l Realty, 760 So. 2d 228, 230 (Fla. 3rd DCA 2000).

The Third DCA instructs: "when analyzing a party's intent to defraud the trial court, the trial court "may consider all the circumstances surrounding the alleged violations, including a party's misconduct in related cases… The ultimate question remains whether the party's misconduct was intended to defraud the trial court considering sanctions." *Empire World Towers, LLC v. CDR Creances, S.A.S.*, 89 So. 3d 1034, 1042 (Fla. 3d DCA 2012).

Florida Statute §831.06 defines forgery as when a "fictitious or pretended signature, purporting to be the signature of an officer or agent of a corporation, is fraudulently affixed to …a note, … issued by such corporation, with intent to pass the same as true." Florida Statute §831.06. Forgery is a third degree felony. Fla. Stat. §831.01. Perjury by contradictory statements is also a third degree felony. Fla. Stat. §837.021. Forgery and perjury are felonies and predicate acts that violate Florida's RICO statute. Fla. Stat. §895.02(8)(38) and (41). Respectfully, there is ample support for Jacobs' unclean hands defenses arising from systemic forgery and perjury.

D. Judge Hanzman, the Third DCA, and TFB Never Addressed the Evidence of Systemic Frauds in Foreclosures

TFB suggests the infamous "robo-signing" scandal where banks engaged in systemic frauds on the court in foreclosures was just "massive confusion" resulting from securitization of home loans. (AB p. 45). TFB attempts to whitewash the robo-signing scandal by admitting only that notes and mortgages were "altered by banks, sometimes with the help of lawyers." In full candor, the robo-signing scandal involved banks and their lawyers used fabricated assignments and forged endorsements as false evidence of standing in millions of foreclosures across the nation. (AB p. 45).

These "systemic frauds" of forgery, perjury, and obstruction of justice by BANA, BONYM, JP Morgan Chase ("Chase"), and their counsel are still ongoing and should result in disbarment of bank counsel, not Jacobs. Jacobs presented testimony from Ian Chan Hodges that the Hawaii Supreme Court issued rulings in *BANA v. Reyes-Toledo* that dealt with these same fraudulent foreclosure issues Jacobs was exposing the same year he saw an article in CNBC describing how BANA purged nearly 2 billion records in Jacobs' cases. Mr. Chan Hodges connected to Jacobs and joined forces to hold BANA accountable for its fraudulent practices. (T2, 184:12-187:23).

The uncontroverted evidence in the record is these systemic frauds are documented by orders of state and federal trial judges. The frauds are now the basis of a class action lawsuit Jacobs filed in Hawaii federal district court against BANA and BONYM for violating the RICO and Fair Housing Acts. *Aiwohi, et al. v. Bank of America, N. A. and Bank of New York Mellon*, 1:22-cv-00312-JAO-RT.

BANA and BONYM are accused of defying a consent order with the U.S. Department of the Treasury and Comptroller of the Currency that found both banks were litigating cases "without properly endorsed notes" during the robo-signing scandal in 2011.[2] The Class Action lawsuit also accuses BANA of defying the $25 Billion National Mortgage Settlement.

On March 29, 2011, the Office of the Comptroller of the Currency ("the OCC") forced BANA Bank into a Consent Order which created the "Independent Foreclosure Review" to investigate a myriad of foreclosure related misconduct. *In the Matter of: Bank of America, N.A. Charlotte, NC*, 2011 WL 6941540, at *2 (O.C.C.). Pursuant to page 3 of the Consent Order, the OCC found that, *inter alia*, BANA "litigated foreclosure proceedings …

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[2] *In the Matter of: Bank of America, N.A. Charlotte, NC*, 2011 WL 6941540, at *2 (O.C.C.).

without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time."

The OCC Consent Order described at pages 14 and 15 that for any foreclosure action pending between January 1, 2009 and December 31, 2010, one purpose of the Independent Foreclosure Review ("IFR") was "to determine, at a minimum: … whether at the time the foreclosure action was initiated … the foreclosing party or agent of the party had properly documented ownership of the promissory note … under relevant state law."

In 2016, the Honorable U.S. District Court Judge Kenneth M. Karas affirmed the Honorable Robert N. Drain, U.S. Bankruptcy Court Judge for the Southern District of New York, who found that Wells Fargo also employed a process of "improving its own position by creating new documents and indorsements from third parties to itself to ensure that it could enforce its claims." *In re Carssow-Franklin (Wells Fargo Bank, N.A. v. Carssow-Franklin)*, --- F. Supp. 3d ---, --- [2016 WL 5660325, *6-10] (S.D.N.Y. 2016).

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

assignment by Mortgage Electronic Registration System, Inc ("MERS"). That assignment is dated two months after Wells Fargo signed the $25 Billion National Mortgage Settlement.[3] *Id.*

Jacobs was the Whistleblower/Relator in a false claims act case *United States of America, ex. rel. Bruce Jacobs v. Bank of America, N.A.* in Southern District of Florida case number 1:15-cv-24585-UU. As set forth in the RICO/FHA case, Jacobs exposed that BANA submitted false claims to the government by knowingly committing fraud using forged and false evidence in foreclosures, committing perjury to cover it up, and ordering the destruction of nearly 2 billion records in defiance of subpoenas for those records to cover up the cover up.

BANA eventually settled and paid a substantial penalty to U.S. taxpayers[4] after the Honorable U.S. District Court Judge Ursula Ungaro denied a motion to dismiss finding that "[u]sing rubber-stamped endorsements on promissory notes or relying on MERS transfers to foreclose on properties or obtain orders of sales falls within the scope of actions barred by the [$25 Billion National Mortgage Settlement] Servicing

[3] https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_WellsFargo-4-11-12.pdf

[4] https://news.bloomberglaw.com/business-and-practice/bank-of-america-reaches-5-million-false-claims-act-accord

Standards…." *Jacobs v. Bank of Am. Corp*., No. 1:15-CV-24585-UU, 2017 WL 2361943, at *10 (S.D. Fla. Mar. 21, 2017).

The Hawaii Supreme Court has twice found the exact same fraud Jacobs alleges in the RICO/FHA lawsuit and the false claims act case involving forged endorsements and false assignments would be wrongful, deceptive, and unfair. ¶17. *Bank of Am., N.A. v. Reyes-Toledo*, 139 Hawai'i 361, 390 P.3d 1248 (2017); *Bank of Am., N.A. v. Reyes-Toledo II*, 143 Hawai'i 249, 428 P.3d 761 (2018), as corrected (Oct. 15, 2018).

E. *Judge Hanzman and TFB "Whiffed" on the Article 9 Argument*

TFB insists Judge Hanzman "pretty much called [Jacobs] out" when he ruled against Jacobs' arguments on "Article 9 of the UCC and fraud by both lawyers and lender in the 'EMC Mortgage' case in 2016." (AB p. 33). Jacobs respectfully submits there is an objectively reasonable basis to disagree.

TFB represents to this Court, without citation, that 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 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)." (AB p.45).

Jacobs respectfully submits as a former Miami prosecutor who spent the last 15 years of his otherwise unblemished 25 year career studying and practicing the law of foreclosures, this is argument stunningly lacks candor to the court and misrepresents Florida law. A party in mere possession of an original note cannot enforce the note under Article 3 unless that party is the named payee, there is a proper endorsement, or the party proves it is the owner entitled to enforce the note. Forgery does not give a party "holder" status. *Ederer v. Fisher*, 183 So. 2d 39, 41–42 (Fla. 2nd DCA 1965) citing, *VanSyckel v. Egg Harbor Coal & Lumber Co.*, 1932, 109 N.J.L. 604, 162 A. 627, 85 A.L.R. 300; *Lieberman v. S. D. Warren Co.*, 1926, 125 Me. 392, 134 A. 449; *Britton, Bills and Notes*, Sec. 102 (2d ed. 1961). *Bennett v. Deutsche Bank Nat. Tr. Co*., 124 So. 3d 320, 323 (Fla. 4th DCA 2013).

TFB claims Article 9 does not apply to transfers of interests in real property. Judge Hanzman's order in *EMC* quotes only part of Fla. Stat. §679.1091(4)(k) to reach a similar, clearly erroneous, conclusion writing:

F. Article 9 of the UCC

> Finally, the Court also rejects Defendant's claim that enforcement of the Note governed by Chapter 679 as this Article of the UCC does not apply to transfers of an interest or lien on real property. *See* § 679.1091(4)(k), Fla. Stat. (2005). *See OneWest Bank, FSB v. Jasinski*, 173 So. 3d 1009 (Fla. 2d DCA 2015); *U.S. Bank Nat. Ass'n v. Degen*, 2016 WL 4249466 (Fla.Cir.Ct.)(Rebull, J). Pg. 25.

This is clearly not the law. It is true Fla. Stat. §679.1091(4)(k) states that Article 9 does not apply to "**the creation or transfer of an interest in or lien on real property."** However, subsection (4)(k) as amended in 2001, also goes on to state: "**except to the extent that provision is made for: 1. Liens on real property in ss. 679.2031**…." Fla. Stat. Ann. § 679.1091 (West). Judge Hanzman supports his position with citation to the Second DCA decision in *OneWest Bank, FSB v. Jasinski*. However, this is also error as *Jasinski* makes no reference to Article 9 at all.

This Court instructs: "[t]o allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973). Both the First, Third and Fourth DCA have found the enactment of Article 3 of the UCC dealing with negotiable instruments changed the common-law rule requiring proof of ownership. *Tilus v. AS Michai LLC*, 2015 WL 1545223 (Fla. 4th DCA 2015); citing, *Wells Fargo Bank, N.A. v. Morcom*, --- So.3d ----, 2013 WL 5575634 (Fla. 1st DCA 2013). Fla. Stat. §673.3011 provides:

> a person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. §673.3011, Fla. Stat. (2010)…." Id.

The Third DCA cited *Morcom, Tilus*, and a number of district court level cases all decided after 2010 which follow the same theory in its decision affirming Judge Hanzman's same conclusion that Article 9 did not apply in *Aquasol Condo. Ass'n, Inc. v. HSBC Bank USA, Nat'l Ass'n*, No. 3D17-352, 2018 WL 5733627, at *5 (Fla. 3rd DCA 2018).

G. *Morcom and Aquasol are Wrongly Decided and Violate this Court's Common Law Rule on Standing to Foreclose*

Jacobs has an objectively reasonable basis to argue "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." (AB p. 44). Under *Morcom*, *Tilius*, and *Aquasol,* any party in possession of the note with a blank endorsement, even a thief, has the right to foreclose. Yet an admitted thief cannot obtain the equitable relief of foreclosure with unclean hands.

In the late 1800's, this Court established the common law rule that a party must own and hold the note and mortgage to have standing to foreclose. *Tilus v. AS Michai LLC*, 2015 WL 1545223 (Fla. 4th DCA 2015); *citing, Wells Fargo Bank, N.A. v. Morcom*, 2013 WL 5575634 (Fla. 1st DCA 2013); *See also, Smith v. Kleiser*, 107 So. 262 (Fla. 1926); *Edason v. Central Farmers Trust Co*., 129 So. 698 (Fla. 1930); *Mazine v. M & I Bank*, 67 So.3d

1129 (Fla. 1st DCA 2011); *Servidio v. U.S. Bank N.A.*, 46 So. 3d 1105 (Fla. 4th DCA 2010); *Lizio v. McCullom*, 36 So. 3d 927 (Fla. 4th DCA 2010).

Another common-law rule in Florida foreclosures is that a party "would be entitled to foreclose in equity ***upon proof of his purchase of the debt***." *Johns v. Gillian*, 134 Fla. 575, 184 So. 140, 144 (Fla. 1938) (emphasis added). In *Johns*, "the mortgage follows the note" despite a defectively executed assignment of mortgage. *Id*. Johns did not involve a party claiming to be the holder of a negotiable instrument. Respectfully, the modern-day foreclosure law conflicts with the common law.

This Court similarly instructs, "statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced." *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977).

Under *Carlile*, no reading of Fla. Stat. §673.3011 remotely suggests an intention to change the common-law rule that a party must prove it owns and holds the note and mortgage to have standing to foreclose. Fla. Stat. §673.3011 deals with to negotiable instruments. There is no reference to

"standing" or "mortgage" or "foreclosure" at all and no statement of intent to abrogate the common law rule.

There are many examples statutes that unequivocally change the common law. See, Fla. Stat. Ann. § 741.23 (West) ("The common-law rule whereby a husband is liable for the torts of his wife is hereby abrogated); See also, §794.02, Fla. Stat. and §689.225, Fla. Stat. Under *Carlile*, Fla. Stat. §673.3011 did not change the common-law rule that the plaintiff must plead it "owns and holds the note and mortgage" to establish standing to foreclose. Respectfully, this means Jacobs has an objectively reasonable basis to argue "Fla. Stat. §673.3011 controls enforcement of negotiable instruments, not mortgages. Ownership controls the right to enforce the mortgage." Under the Florida Constitution, District Courts must follow the Florida Supreme Court and the common law. They cannot "reject" the law.

Conclusive evidence that the common-law rule did not change in 1967, with the enactment of Fla. Stat. §673.3011, is that this Court promulgated Fla. R. Civ. P. 1.110, and its accompanying Form 1.944. Twenty-five (25) years later, in 1992, and again in 2000, the promulgated form effectively codified the common-law rule by requiring all mortgage foreclosure complaints allege that: "Plaintiff owns and holds the note and mortgage." *In re Amendments to the Florida Rules of Civil Procedure*, 604 So. 2d 1110,

1182 (Fla. 1992); *In re Amendments to the Florida Rules of Civil Procedure*, 773 So. 2d 1098, 1144 (Fla. 2000).

The 1967 codification of Fla. Stat. §673.3011 did not speak in clear, unequivocal terms that the legislature intended to change the common law rule that a party must both own and hold the note and mortgage to establish standing to foreclose. There is no support for that in the statute or the Florida Supreme Court form 9.144 issued in 1992 or in 2000.

H. *Miami-Dade Circuit Judge Jon Gordon Embarrassed Foreclosure Plaintiffs Engaged in Systemic Frauds in Foreclosures after the 2001 Amendments to Article 9*

To understand where the conflict between the common law rule set forth by this Court and the present decisions of the District Courts of Appeal that only require holder status to prove standing to foreclose, this Court should look to the earliest foreclosure cases filed in 2005 in the name of MERS. Across the nation, banks filed foreclosures that all alleged MERS owns and holds the note and mortgage and lost the original note. The Honorable Miami-Dade Circuit Court Judge Jon Gordon summarily dismissed those cases as sham, after a Show Cause hearing where MERS conceded it never "owns and holds" the notes or mortgages. See Judge Gordon's Order attached as App. IV.

Judge Gordon relied on the common law rule that a party must own and hold the note and mortgage in order to foreclose. *Smith v. Kleiser*, 107 So. 262 (Fla. 1926); *Edason v. Central Farmers Trust Co.*, 129 So. 698 (Fla. 1930). Judge Gordon also noted Fla. R. Civ. P. 1.110 and its accompanying Form 1.944 in 1992 and again in 2000 support his reliance on the common law rule. *In re Amendments to the Florida Rules of Civil Procedure*, 604 So. 2d 1110, 1182 (Fla. 1992); *In re Amendments to the Florida Rules of Civil Procedure*, 773 So. 2d 1098, 1144 (Fla. 2000).

Judge Gordon notes MERS admitted it did not own the notes or mortgages when he struck all the early MERS foreclosure complaints as sham pleadings in his courtroom. Judge Gordon noted this Court's admonition that:

> We do not accept the notion that outcomes should depend on who is the most powerful, most eloquent, best dressed, most devious and most persistent with the last word-or, for that matter, who is able to misdirect a judge. American civil justice … is surely defective, however, if it is acceptable for lawyers to "suggest" a trial judge into applying a "rule" or a "discretion" that they know-or should know-is contrary to existing law." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 573 (Fla. 2005), as revised on denial of reh'g (Sept. 29, 2005).

I. *The Baker Hostetler Report to Fannie Mae re: the "MERS Florida Embarrassment"*

In 2006, the Washington DC law firm of Baker Hostetler conducted an investigation into the "MERS Florida Embarrassment" for the Federal National Mortgage Association, ("Fannie Mae") and issued a report published by the New York Times in 2012.[5] See "BH Report" attached as App V. Fannie Mae's lawyers wrote: "We conclude that foreclosure attorneys in Florida are routinely filing false pleadings … regarding the plaintiffs - MERS or servicers - interest in the proceedings …. The practice could be occurring elsewhere. It is axiomatic that the practice is improper and should be stopped." pg 35.

At page 38, the BH Report included a section entitled "Effects of Note Endorsed in Blank" which is strikingly different from present Florida law. The BH Report explained: "the sale of promissory notes is also now covered under Revised UCC Article 9," and cites the official comment stating UCC Revised §9-203(g) that "codifies the common-law rule" that the mortgage follows the note. Id. at 39, fn. 129. Strikingly, the BH Report describes an October of 2005, interview with the Fannie Mae Deputy General Counsel, Daniel C. Smith, who stated:

> **Fannie Mae's position is that it does not need to appear in the land records in order to have the benefit of the security**

[5] http://www.nytimes.com/interactive/2012/02/05/business/05fannie-doc.html?action=click&contentCollection=Business%20Day&module=RelatedCoverage&pgtype=article&region=Marginalia&_r=0

> **provided by the mortgage.** UCC§9-203(g) and its accompanying comment state the transfer of an obligation secured by a security interest also transfers the security interest. Thus, the transfer of the promissory note, which is the obligation, also transfers the mortgage, which is the security interest. Once the note is sold to Fannie Mae, the mortgage also transfers, despite the fact that the servicer, lender or MERS' name appears in the land records. Borrowers thus cannot determine the chain of owners from the public records.

The BH Report further explained Article 9 of the UCC now codified the common law rule that the "mortgage follows the note" upon proof of purchase of the debt. This comports with Fla. Stat. §679.2031(2) and Fla. Stat. §679.2031(7) which codified that the sale of right to payment secured by mortgage is also sale of mortgage. Thus, as early as 2006, the foreclosure plaintiff industry *knew* it had to present the note and the contracts proving its purchase of the debt under Article 9 to establish standing to foreclose. The foreclosure plaintiff industry also knew their attorneys were making false statements to Florida Courts. Specifically, the assignments of mortgage were not proof of purchase of the debt. They were fraud upon the court.

Yet, in 2007, the Third DCA overturned Judge Gordon's ruling from 2005, without discussing this Court's common law rule that MERS had to prove it *owns and* holds the notes and mortgages in order to foreclose. Instead, the Third DCA concluded "we simply don't think that this makes any difference." *MERS v. Revoredo*, 955 So. 2d 33, 34 (Fla. 3rd DCA 2007).

This Court instructs: "[t]o allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973). Respectfully, these district court decisions following the robo-signing scandal and systemic frauds in foreclosures created record profits for banks, an unconscionable affordable housing crisis for the nation, and chaos and uncertainty for borrowers who were deprived of their property without due process of law.

The 2001 Amendments to Article 9 of the Florida UCC, which expanded its scope to include the sale of promissory notes and codified the common law rule that the mortgage follows the note. Foreclosure plaintiffs should be forced to comply with Article 9 of the Florida UCC, specifically Fla. Stat. 679.2031(2) to show proof of purchase of the debt. Thereafter, the mortgage follows the note under Fla. Stat. 679.2031(7). The 2001 amendments enacted a clear legislative intent to expand the scope of Article 9 such that proof of the sale of a promissory note under Fla. Stat. §679.2031(2) triggers Fla. Stat. §679.2031(7) which codified the common law rule that the mortgage follows the note upon proof of purchase of the debt. As official comment 7 for Fla. Stat. §679.1091 states:

> **It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.** Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. *Id. at Off. Cmt. 7.*

TFB and Judge Hanzman's incomplete reading of Fla. Stat. 679.1091(4)(k) underpins the true problem with finding a MERS assignment alone, recorded by the servicer's counsel during or just before foreclosure, can effectuate a transfer of this loan from the originator into the trust years after the originator went bankrupt and the trust closed. Official Comment 7 to Fla. Stat. §679.1091 instructs the MERS assignment it would be "ineffective" to cause the Trust to obtain or perfect a security interest in this secured transaction "by complying with non-Article 9 law, as by an assignment of record of a real property mortgage."

The UCC is extraordinarily complex and, due to its reliance on counterintuitive definitions and cross-reference, sometimes extraordinarily impenetrable. Nevertheless, after parsing its various provisions, with due care, Chapter 679 does in fact explicitly apply to certain transfers of an interest or lien on real property, including liens on real property under §679.2031. Fla Stat. Ann. 679.1091(4)(k).1 & U.C.C. § 9-101, Official

Comment 4.a, Supporting obligations and property securing rights to payment ("This Article also addresses explicitly . . . any property (including real property) that secures a right to payment or performance"). Consequently, Article 9 applies not only to the sale of mortgage notes under § 679.2031(2), but also to the transfer of the related mortgages under §679.2031(6) and (7).

First, the only way to sell promissory notes such as mortgage notes is by complying with § 679.2031(2). Because, as compelled by the word "solely," this provision is the exclusive way to sell promissory notes, a mortgage note simply cannot be sold by selling or assigning the related mortgage. As the staff analysis report for the related 2005 amendments to Fla. Stat. 701.02 which enacted Fla. Stat. 701.02(4) provides:

> Notwithstanding subsections (1), (2), and (3) governing the assignment of mortgages, chapters 670-680 [including chapter 679] of the Uniform Commercial Code of this state govern the attachment and perfection of a security interest in a mortgage upon real property and in a promissory note or other right to payment or performance secured by that mortgage. The assignment of such a mortgage need not be recorded under this section for purposes of attachment or perfection of a security interest in the mortgage under the Uniform Commercial Code. Fla. Stat. Ann. § 701.02 (West)

The staff analysis report further provides a compelling explanation regarding the need to amend Fla. Stat. 701.02. The legislative intent was clearly to

obviate the need to record assignments after the 2001 amendments to chapter 679 of the Florida UCC. The report states:

> **Assignment of Mortgages**
> Mortgage warehousing is a process in which a warehousing bank provides financing to mortgage lenders to issue mortgage loans. The financing from the warehousing bank to the mortgage lender is secured by a security interest in the underlying mortgages. The funds are advanced to the mortgage lender for a temporary period of time to allow the mortgage to be sold to a permanent investor. Because warehousing banks deal in large volumes of mortgages, they wish to be secure in the underlying mortgages without having to record the assignment of the security interest and incur the costs of recording.
>
> In *Rucker v. State Exchange Bank*, 355 So. 2d 171, 174 (Fla. 1st DCA 1978), the court held that "the assignment of a real estate mortgage securing a promissory note as collateral for a bank loan is not a secured transaction under Article 9 of the Uniform Commercial Code." An interest in a real estate mortgage was protected by recording the assignment as required by s. 701.02, F.S
>
> **Article 9 of the Uniform Commercial Code (UCC), which is codified as ch. 679, F.S., was revised since Rucker to clearly indicate that the assignment of a mortgage securing a promissory note is a secured transaction…. [citing Fla. Stat. 679.1091(4)(k)].** Nevertheless, some in the mortgage-servicing industry believe that Rucker stands for the proposition that the assignment of a security interest in a mortgage or the assignment of a mortgage must be recorded in order to perfect the security interest in the mortgage. **The act of recording an interest in a mortgage is costly to the mortgage lending industry in terms of time and money.** As a result, many assignments of an interest in Florida mortgages are not recorded. These unrecorded mortgage assignments are viewed by warehousing banks as having more risk than recorded assignments. Florida

> borrowers may pay for the increased risk borne by warehousing banks though higher borrowing costs.

Respectfully, Judge Hanzman and TFB fails to give meaning to the statutory scheme enacted by the Florida legislature in the 2001 amendments to Article 9 and the 2005 amendments to Fla. Stat. 701.02. Chapter 673 specifically sets forth that "[i]f there is a conflict between [Article 3] and … [Article 9]" that Article 9 governs. Florida Statute §679.1021(l)(ccc) expressly defines the term "mortgage" which appears 33 times throughout Chapter 679. §679.1021(l)(ccc), Florida Statutes (2001).

Chapter 673 of the Florida Statutes applies only to negotiable instruments, The entire statute does not mention mortgages once. See F.S. §673.1021. Accordingly, Jacobs respectfully submits he has an objectively reasonable basis to argue "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." (AB p. 44). The law has always been ownership is proven under Article 9 by the plaintiff producing the original note (irrespective of Article 3 endorsements) and the contracts proving its purchase of the debt.

J. **The Fourth DCA Conducts the Correct Statutory Analysis of the Article 9 Argument in HSBC v. Perez**

The Fourth DCA never held "Article 9 of the UCC does not apply to transfers in real property" as TFB represents. (AB. P. 44). Jacobs respectfully submits that after the 2001 amendments to Article 9, compliance with Article 9 became the exclusive means for effectuating a sale of promissory notes such as mortgage notes. *See* Fla. Stat. 679.2031(2) (sale enforceable against seller and third parties *only* if specified conditions satisfied) (emphasis added); Fla. Stat. 679.1091(1)(c) (scope of Article 9); Fla. Stat. 671.201(38) (definition of "security interest"); *see also* Uniform Law Commission, UCC Article 9, Secured Transactions (1998) Summary;[6] *see generally,* Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes (Nov. 14, 2011).[7] The Florida legislature adopted these changes in its 2001 amendments to Article 9. See, Fla. H.R. Comm. on Jud. Oversight, HB 579 (March 2001), Staff Analysis & Economic Impact Statement, *3 ("the SAR").

This the Staff Analysis Report for Fla. Stat. §702.01 expressly states an assignment of mortgage *is a secured transaction*. See, Fla. Sen. Justice

[6] available at http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209, %20Secured%20Transactions%20(1998).

[7] Available at http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf).

Approp. Comm., SB 370 (April 2005), Staff Analysis & Economic Impact Statement, *3 and *HSBC Bank USA, N.A., v. Perez,* 165 So. 3d 696, 707 (Fla. 4th DCA 2015), reh'g denied (June 9, 2015).

To date, only the *Perez* decision has analyzed the 2001 Amendments to Article 9 of the UCC, albeit from a limited perspective of competing lenders attempting to foreclose upon the same mortgage loan. In *Perez*, the Fourth DCA sought to determine "whether HSBC or LaSalle is the owner and holder of the FGMC Note and Mortgage which both parties seek to enforce." *Id.* at 698. After confirming HSBC closed on a pooling and servicing agreement ("PSA") and obtained an original note before LaSalle, the Fourth DCA determined HSBC was the owner and holder with the right to foreclose even though LaSalle was first to record an assignment of mortgage in the public records. *Id. at 707.*

In *Perez,* the Fourth DCA noted in *Perez* that the Florida Legislature made it clear in the 2005 amendments to Florida Statute §702.01 that: "**Article 9 of the UCC … was revised since Rucker to clearly indicate that the assignment of a mortgage securing a promissory note *is* a secured transaction.** (citing Fla. Stat. §679.1091(4)(k)1). See, Fla. Sen. Justice Approp. Comm., SB 370 (April 2005), Staff Analysis & Economic Impact Statement, *3. *Perez* at 707 (emphasis added).

As HSBC proved its purchase of the debt before LaSalle under Fla. Stat. §679.2031(2), HSBC was deemed the **owner *and* holder** of the note and mortgage with standing to foreclose. Even though LaSalle recorded its assignment of mortgage before HSBC, the assignment was totally ineffective to convey standing to foreclose. Proof of purchase of the debt controlled, not after the fact assignments prepared by the Plaintiff on behalf of third parties and recorded in the public records. *Perez* explains:

> Legislative history of the 2005 amendment supports the notion that it is the Uniform Commercial Code that determines priority of mortgage assignments and not section 701.02. The staff analysis explained its purpose as deriving from the concerns of warehousing banks dealing in large volumes of mortgages that they would not "be secure in the underlying mortgages without having to record the assignment of the security interest and incur the costs of recording." Fla. S. Justice Approp. Comm., S.B. 370 (2005) Staff Analysis 4 (Apr. 4, 2005).
>
> The source of the banks' uneasiness derived from *Rucker v. State Exchange Bank*, 355 So.2d 171, 174 (Fla. 1st DCA 1978), which held that "the assignment of a real estate mortgage securing a promissory note as collateral for a bank loan is not a secured transaction under Article 9" of the UCC. Some in the mortgage-servicing industry interpreted Rucker as potentially standing "for the proposition that the assignment of a security interest in a mortgage or the assignment of a mortgage must be recorded in order to perfect the security interest in the mortgage." Id. at 5.
>
> The staff analysis explained the bill sought to debunk this myth, stating: ***Article 9 of the [UCC], which is codified as ch. 679, F.S., was revised since Rucker to clearly indicate that the assignment of a mortgage securing a promissory note is a secured transaction.*** Under s. 679.3131, F.S., one perfects a security interest in a real estate mortgage by possession of the promissory note. Alternatively the

> secured party can be perfected through filing under s. 679.3121, F.S. ... The act of recording an interest in a mortgage is costly to the mortgage lending industry in terms of time and money. As a result, many assignments of an interest in Florida mortgages are not recorded. These unrecorded mortgage assignments are viewed by warehousing banks as having more risk than recorded assignments. Florida borrowers may pay for the increased risk borne by warehousing banks through higher borrowing costs.

Finally, *Perez* makes the correct conclusions that "In general the rules in Article 9 are not designed to deal with the transaction in which there are two 'originals'...." Id. The Provident Bank approach recognizes that perfection by possession of a note will not be problematic in the vast majority of cases and avoids the cost of imposing a recording procedure disruptive to the lending industry based on difficult facts." Essentially, *Perez* acknowledges Article 9 is designed for the vast majority of foreclosures, now that assignments of mortgages, Article 3 endorsements, and any other means of compliance with non-Article 9 law would be ineffective.

K. <u>There is an Objectively Reasonable Basis In Fact that Judge Hanzman "Has Repeatedly Ignored Obvious Fraud on the Court by Large Financial Institutions"</u>

TFB insists Jacobs failed to 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. (AB p. 54). Yet, Jacobs testified that in *HSBC v. Aquasol*, Judge Hanzman threatened him with jail

and contempt for asking questions about a "David J. Stern" robo-signed assignment introduced into evidence. Judge Hanzman said he didn't care if "David Stern or Howard Stern" prepared the false evidence. He prejudged the case, refused to consider the unclean hands defense, and refused to hear evidence of fraud. (T. 204:4-205:3).

TFB ignores that Judge Hanzman himself admitted foreclosure defense lawyers often accuse lenders of obtaining standing by fraud in cases before him and other courts." (SH1, 63:24-66:11). Judge Hanzman admitted he refused to consider Jacobs argument the David J. Stern robo-signed mortgage assignment was fraud finding it "irrelevant" whether David Stern or Howard Stern created false evidence. On redirect, Judge Hanzman again accused Jacobs of accusing lawyers of fraud "without any evidence and without any basis" (SH1, 73:15-78:22).

In *BONYM v. Atkins*, Jacobs again swore he filed the motion to disqualify Judge Hanzman in good faith as there was a clear refusal to consider that BANA and BONYM had unclean hands and were using fraudulent evidence of standing. (T2, 36:18-39:1). Judge Hanzman testified he "entered a reasoned order as to why I had no jurisdiction to entertain his claims of fraud." (SH1, 27:18-28:6). There is an objectively reasonable basis

in fact that Judge Hanzman repeatedly ignored obvious fraud on the court by large financial institutions in *Aquasol* and *Atkin.*

L. The Objectively Reasonable Basis in Fact for Jacobs Statements on the Third DCA's Handling of *Simpson*

TFB accuses Jacobs of failing to provide an objectively reasonable basis for his statements that "the Third DCA violated the standard of review, ignored Florida Supreme Court precedent, and falsified the facts in contradiction to the record." TFB acknowledged the letter Jacobs' counsel wrote in response to JP Morgan Chase's counsel attempting to weaponize TFB while it engaged in the same systemic frauds of forgery, perjury, and obstruction of justice. Respondents Exhibit 1, pgs 94-95. The letter sets for part of his objectively reasonable basis for those statements about Simpson.

This Court instructs "a consent judgment …may only be attacked in cases alleging fraud on the court." *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184, 1186 (Fla. 1989). As set forth in the letter, even Chase' counsel, in full candor, conceded "you can bring a 1.540 motion after a consent judge, yes, your Honor.… Arrieta-Gimenez … says you can do it." R. 847." The letter noted Leon Cosgrove's initial brief lacks candor by failing to mention this controlling Florida Supreme Court adverse authority in violation of Fla.

Bar. R. 4-3.3(a)(3) requiring disclosure of adverse law…. In this appeal, JPMC files its own appeal with a record of nearly 3,000 pages.

In the letter, Jacobs noted the express conflict between *Arrieta-Gimenez* and the Third DCA's holding in Simpson. Arrieta-Gimenez treats a consent judgment the same as a contested judgment under Fla. R. Civ. P. Rule 1.540(b). Under *Simpson*, the Third District's treats a consent judgment differently from a regular judgment and does not cite *Arrieta-Jimenez*.

Moreover, the Third DCA decision overruling the decision of the Third DCA Judge Eric Hendon as a trial judge, in footnote 2 said: "Simpson …***had full access to discovery (in fact, the record reveals that he made full use of his discovery rights*** until deciding to enter into the SRA), ***and*** he ***had every right to reject the settlement offer until*** he ***could adequately explore*** his defenses." *Bank of New York Mellon v. Simpson*, 227 So. 3d 669, 671 (Fla. 3d DCA 2017) (emphasis added).

Strikingly, in *Arrieta-Gimenez,* this Court found "Appellant ***had full access to discovery (in fact, the record reveals that appellant made full use of her discovery rights), and*** she ***had every right to reject the settlement offer until*** she ***could adequately explore*** the extent of her father's holdings in Puerto Rico." *Id.* (emphasis added).

Respectfully, there is an objectively reasonable basis to impugn the integrity of the Third DCA by citing its *Simpson* decision which conflicts with *Arrieta-Gimenez*. The Third DCA copied the facts of *Arrieta-Gimenez* into *Simpson* almost verbatim, without discussing the *Arrieta-Gimenez* holding.

M. Jacobs is Protecting the Constitutional Rights of His Clients the Public, and the Integrity of the Judicial System

Jacobs respectfully submits answer brief filed by TFB insists his conduct is "harmful to his clients, to the public, and to the judicial system" (p.4) but paints a picture that does not comport with the record. TFB insists Jacobs "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."

TFB argues "[Jacobs'] 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." (p. 11).

TFB insists Jacobs is injuring his clients by raising defenses of systemic frauds in foreclosure "which can only add to the fees imposed as a

lien against their homes and as damages in subsequent deficiency judgments." (p.70). There is no evidence a single client faced a deficiency judgment from Jacobs' work in this record (because none ever did).

To the contrary, Ana Lazara Rodriguez, a former political prison who endured 19 years of torture in a Cuban prison for women testified Jacobs represented her *pro bono* after she was "trapped" in a Countrywide loan. "He's the only one that has been fighting for me." Ms. Rodriguez testified "I have been fighting my whole life for freedom, for integrity, for justice, for decency. So I know when a human being has integrity. I want justice. I want freedom. He's a good fighter for all those things." (SH2, 41:3-46:1).

Another client, Rabbi Yochanon Klein testified fell into foreclosure after his 16 month old daughter was diagnosed with liver cancer. Jacobs' *pro bono* efforts helped his family get through a difficult time. (SH1, 156-1-159:22).

Another client who testified for Jacobs, Maria Williams James, swore she was "up against bank lawyers" that lacked candor and lied to the court "a lot" and reported them to TFB several times. TFB took no action to discipline any bank layer engaged in fraud or lack of candor in her case. "They left me hanging." (T2, 208:14-209:11).

From the outset of its statement of facts, TFB leads off highlighting Jacobs' personal childhood abuse, insisting his therapist's testimony suggesting he's made meaningful efforts to improve his mental health opened the door to present uncharged bar violations that never went through a grievance process involving Broward Circuit Judge Andrea Gundersen.

TFB insists Jacobs only filed his fourth/fifth motion to disqualify Judge Gundersen as part of a bad faith effort and intentional "method of driving judges to the limit of their patience." TFB ignores the record which shows, as set forth in the *Jakubow* motion, ***Jacobs only filed the first motion to disqualify Judge Gundersen after she recused herself in two of the cases Judge Stone had consolidated with this same fraud fact pattern years before***. Judge Gundersen became openly frustrated after the LGP firm lawyer misrepresented facts and law without consequence in a bad faith effort to undue years of orders from Judge Stone. (R. Ex. 56:13-15).

Judge Gundersen allowed the Akerman attorney, Mr. Callahan, to falsely argue "fraud on the court is not a defense to foreclosure" and then hit Jacobs' client with attorney's fees for filing the RICO counterclaim claim "without substantial fact or legal support." Judge Gundersen denied sanctions against Jacobs noting the Honorable Miami-Dade Circuit Judge

Spencer Eig allowed his RICO claims to proceed in the *Abadia* case. (R. Ex. 56:13-15). She was clearly not fair or impartial.

TFB used the Gundersen disqualification motion to cross examine Jacobs over objection. (T2, 86:2-9). TFB asked Jacobs if he said "No Court should accept the materially false argument that there is some privilege or absolute immunity to commit fraud upon the court in foreclosures." Jacobs responded that Judge Gundersen entered an order stating BANA had a privilege to commit fraud and felonies in foreclosure which is unconstitutional, not Florida law. His motion spoke truth.

Jacobs testified as a former prosecutor with 25 years of experience, anyone presenting false evidence should be prosecuted and disbarred. He explained how he was a "Teddy Roosevelt" Republican and believed attorneys swear an oath to fight JP Morgan Chase from becoming more powerful than the government, which is the death knell of democracy. Jacobs insisted TFB should prosecute bank lawyers who lied to Judge Gundersen and committed fraud. "No person shall be deprived of their property without due process" by fraud in their case. (T2, 94:13-100:8).

ARGUMENTS ON CROSS-REVIEW

TFB insists the Referee's recommendation of a 90 day suspension plus conditions, which the Referee expressly stated already accounted for

this Courts admonition to expect harsher bar discipline, is too lenient. TFB asks for a 2 year suspension. The main difference is Jacobs will be automatically reinstated after a 90 day suspension and will need to reapply to the Bar if the suspension is for 91 days or longer. Jacobs respectfully maintains any suspension, certainly one for 2 years, will have the same effect of disbarment. Jacobs will lose his foreclosure defense practice which is his sole source of support for his wife and four children.

Jacobs believes the political impact of these Bar proceedings and the Referee's rejection of his claims of remorse and rehabilitation due to the uncharged bar complaint from Judge Andrea Gundersen will ensure he is never accepted back into TFB. Jacobs again submits no testimony opened the door to additional bar complaints that still have no probable cause determination and no bar grievance committee meeting to this day. Its introduction was highly prejudicial. (T2, 5:4-6:25).

Judge Gundersen has her own ethical obligation to "be faithful to the law" under Canon 3(b)(2); to "perform judicial duties without bias" under Canon 3(b)(5); to "accord to every person… or that person's lawyer, the right to be heard according to law" under Canon 3(b)(7); to "dispose of all judicial matters promptly, efficiently, and fairly" under Canon 3(b)(8); to "take appropriate action" after receiving information a substantial likelihood exists

another judge has committed a violation of the judicial canons or a lawyer has violated TFB rules under Canon 3(D)(1) and 3(D)(2); and to "disqualify himself or herself in a proceedings where the judge's impartiality might be reasonably questioned, including … where the judge has a personal bias or prejudice concerning a party or a party's lawyer" under Canon 3(e)(1)(a).

TFB leads its Answer Brief with a very brief analysis of the Motion to Disqualify Judge Gundersen that apparently destroyed Jacobs' credibility during the guilt phase to impeach his therapist's testimony that Jacobs took therapy seriously and had taken steps to improve his mental health. (AB p.6). TFB insists Jacobs impugned Judge Gundersen's integrity by stating she had "knowingly misused" her position to advantage the bank in the commission of "systemic fraud." (TFB-Ex.15, p.2).

This language is from the Florida's Standard for Attorney Discipline 5.2 (Failure to Maintain the Public Trust) which states any judge who "knowingly misuses the position… with the intent to cause potentially serious injury to a party or the integrity of the judicial process" is to be disbarred.

TFB ignores that Jacobs filed a series of motions to disqualify before and after she entered an order summarily striking all defenses and RICO counterclaims alleging fraud, unclean hands, and forgery "with prejudice under the litigation privilege." TFB Ex. 15. TFB ignores that the attorney who

obtained that order striking all defenses (not just the fraud) was none other than Nathaniel Callahan, Esq. -- the same Akerman attorney Judge Butchko later hit with criminal contempt charges for making the same bad faith arguments to cover up the exact same systemic fraud.

As set forth in the *Jakubow* motion, ***Jacobs only filed the first motion to disqualify Judge Gundersen after she recused herself in two of the cases Judge Stone had consolidated with this same fraud fact pattern years before***. Judge Gundersen became openly frustrated after the LGP firm lawyer misrepresented facts and law without consequence in a bad faith effort to undue years of orders from Judge Stone. (R. Ex. 56:13-15).

As set forth in the motion to disqualify, Judge Gundersen initially ***recused herself*** after the second hearing and then commented on motions to disqualify her insisting those cases "**WAS NOT**" (emphasis in original) consolidated with the other pending foreclosures (they were). (R. Exh. 55). Judge Gundersen allowed Mr. Callahan to argue "fraud on the court is not a defense to foreclosure" citing a case that said submitting forged evidence with the intent to defraud is fraud on the court. (R. Exh. 55).

Judge Gundersen allowed Mr. Callahan to falsely argue "fraud on the court is not a defense to foreclosure" and then hit Jacobs' client with attorney's fees for filing the RICO counterclaim claim "without substantial fact

or legal support." Judge Gundersen denied sanctions against Jacobs noting the Honorable Miami-Dade Circuit Judge Spencer Eig allowed his RICO claims to proceed in the *Abadia* case. (R. Ex. 56:13-15).

TFB used the Gundersen disqualification motion to cross examine Jacobs over objection. (T2, 86:2-9). TFB asked Jacobs if he said "No Honorable Court should accept the materially false argument that there is some privilege or absolute immunity to commit fraud upon the court in 22 foreclosures." Jacobs responded that Judge Gundersen entered an order stating BANA had a privilege to commit fraud and felonies in foreclosure which is unconstitutional, not Florida law. His motion spoke truth.

Jacobs' clients repeatedly sought Judge Gundersen's disqualification and finally reported her to the Judicial Qualifications Commission before she relented, honored the judicial canons, and granted her disqualification. (R. Ex. 5; 55). In her report, the Referee made a finding by clear and convincing evidence "that respondent used reckless and disparaging language in his various pleadings to malign and impugn the qualifications and/or integrity of the judiciary." (ROR 17). Again, the Referee made no finding whether any statements were actually false. (ROR).

The Referee found the motions to disqualify Judge Gundersen "conclusive" evidence to negate testimony Jacobs acted in good faith in

seeking disqualification of judges. The Referee noted Jacobs filed a series of motions to disqualify Judge Gundersen without "derogatory or inflammatory language" but the motions were legally insufficient and only intended to "force the recusal that he could not otherwise legally obtain."

The Referee never explained why it was legally insufficient to require Judge Gundersen's disqualification by raising her *sua sponte* recusals from multiple cases involving the same fraud, her comments on the truthfulness of subsequent motions to disqualify, her failure to take appropriate action to confront fraud, and her forcing a client to pay attorney's fees after striking his RICO counterclaims citing a litigation privilege. ROR. 19-20.

Mr. Winker testified the Gundersen Motions to Disqualify showed an escalation over time and swore it was a "disservice" to present only the last motion to disqualify" as TFB did over objection. The motions escalated and the judge disqualified herself because this was "the process working, not Bruce doing something wrong." (T2, 222:11-232:6).

Jacobs fears he will never practice law in Florida again should TFB get its way. His research shows he is the only attorney ever in Florida to face an emergency suspension petition for the type of conduct described herein. His research shows his emergency petition for suspension is the only one this Court has ever disapproved.

Generally, “Lawyers are disbarred only in cases where they commit extreme violations involving moral turpitude, corruption, defalcations, theft, larceny or other serious or reprehensible offenses. *Inquiry Concerning Davey*, 645 So. 2d 398, 407–08 (Fla. 1994). The repercussions of disbarment are enormous, as explained by Chief Judge Major of the Seventh Circuit Court of Appeals in *In re Fisher*, 179 F. 2d 361, 370 (1950), quoting earlier Illinois State Court Opinions:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. **** A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers. In the meantime, his income and livelihood have ceased to exist. * * * * * The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

Jacobs believes TFB insists on a suspension beyond 91 days only to “backdoor” him into a disbarment and silence his zealous advocacy in foreclosure defense, in contravention of the purpose of attorney discipline. Normally, “the purposes of attorney discipline are: (1) to protect the public from unethical conduct without undue harshness towards the attorney; (2) to

punish misconduct while encouraging reformation and rehabilitation; and (3) to deter other lawyers from engaging in similar misconduct." *Fla. Bar v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015), *citing Fla. Bar v. Maynard*, 672 So.2d 530, 540 (Fla.1996); *Fla. Bar v. Neu*, 597 So.2d 266, 269 (Fla.1992); *Fla. Bar v. Lord*, 433 So.2d 983, 986 (Fla.1983).

On August 18, 2022, a U.S. District Court Judge for the Northern District of Florida, the Honorable Mark E. Walker, enjoined Governor Ron De Santis' Stop Woke Act in an order that began:

> In the popular television series Stranger Things, the "upside down" describes a parallel dimension containing a distorted version of our world. See Stranger Things (Netflix 2022). Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely. Now, like the heroine in Stranger Things, this Court is once again asked to pull Florida back from the upside down." *Honeyfund.com, Inc. v. DeSantis*, No. 4:22CV227-MW/MAF, 2022 WL 3486962, at *1 (N.D. Fla. Aug. 18, 2022)(citations omitted).

Respectfully, this Court is called to pull TFB back from the upside down and protect Jacobs from being unfairly disciplined. Jacobs has already suffered from public reprimands and monetary sanctions, ordering the indignity of paying up to $40,000 attorney's fees to the banks and their counsel who impugned Judge Butchko's integrity and committed criminal

frauds on the court in *Aquasol* and *Azran*. Respectfully, Jacobs believes his has been punished enough. Any suspension will have the same effect of disbarment. The Court should impose no punishment if it accepts that Jacobs had objective reasons in fact to impugn the integrity of the courts at issue.

I. Jacobs has a Right to Speak on the Loss of an Independent, Impartial and Fair Judiciary as it is a Matter of Public Interest that Warrants First Amendment Protection

In December of 2021, a former Florida Supreme Court Justice, Peggy A. Quince authored a Miami Herald op-ed entitled ***Florida is Dangerously Close to Losing its Independent, Impartial and Fair Judiciary.***[8] Justice Quince warned that our courts are right now being captured by special interests in Florida. Justice Quince explained those of certain ideologies and campaign donors spent heavily to capture the courts.

Justice Quince warned this "perversion ... threatens to turn our higher courts and to some extent our trial courts into little more than of an extension of the executive branch. The rule of law is in imminent danger." Justice Quince warned of the potential for repeats of scandals that rocked this Court decades ago involving bribery, malfeasance, and misfeasance. Justice

[8]https://news.yahoo.com/florida-dangerously-close-losing-independent-215531969.html?soc_src=community&soc_trk=fb

Quince reminded that "Operation Courtbroom" happens when Judges' decisions are guided by ideology and campaign donors rather than federal and state constitutions and Florida law. The justice system has integrity or it does not.

On June 8, 2022, the Sun Sentinel Editorial Board published its own editorial entitled **A Loss of Independence in Florida's High Courts**.[9] warning "One of Florida's greatest reforms has degenerated into one of its greatest failures. Florida's highest courts are now effectively the judicial arm of the Republican Party. Not so long ago, they were esteemed for their independence. Most lawyers see no future there for themselves."

The Sun Sentinel and Justice Quince agree "the debasement of the Florida judiciary is the result of a 2001 law that gave governors total control of the 26 formerly independent judicial nominating commissions."

Recently, the Honorable Florida Supreme Court Justice John D. Couriel spoke at the South Florida Council Eagle Scout recognition dinner and then at a Chabad of Downtown Coral Gables Judicial Luncheon on the topic ***"Is It a Legal Obligation to Be a Mensch?"*** At the Eagle Scout dinner, Justice Couriel spoke of how the Scout law is all about the obligation to serve

[9] https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-judicial-nominating-commission-reform-florida-supreme-court-20220608-z42ggm2qangk3mhhih3d4xoqhi-story.html

others. At the judicial luncheon, Justice Couriel spoke of the difference between secular law, which protects the rights of others, and Gd's natural law, that states always do the right and just thing, and yes, be a Mensch.

In many respects, TFB Rules and the Judicial Canons are Florida's codification of Gd's natural law. They protect the rule of law ensuring lawyers and judges always do the right and just thing. As the Old Testament instructs:

> You shall appoint for yourself judges and officers in all your towns which the Lord your God is giving you, according to your tribes, and they shall judge the people with righteous judgment. You shall not distort justice; you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the wise and perverts the word of the righteous. Justice, and only justice, you shall pursue, that you may live and possess the land which the Lord your God is giving you" (Deut. 16:18-20).

The Judeo-Christian law governing judges as set forth by Maimonides in the laws of the Sanhedrin chapter 23, §8-9[10], states:

> A judge should always see himself as if a sword is drawn on his neck and Hell is open before him. He should know Who he is judging, before Whom he is judging, and Who will ultimately exact retribution from him if he deviates from the path of truth, as indicated by Psalms 82:1: 'God stands among the congregation of the Almighty.' And II Chronicles 19:6 states: 'See what you are doing. For you are not judging for man's sake, but for God's.'

[10] As researched by Yaakov Friedman, a 17 year old rabbinical student who is the son of Jacobs' rabbi and the great-grandson of Rabbi Yehuda Krinsky, chairman of Chabad-Lubavitch and secretary of Chabad Rebbe Menachem Mendel Schneerson, upon request by Jacobs.

> Whenever a judge does not render a genuinely true judgment, he causes the Divine presence to depart from Israel…. When a judge adjudicates a case in a genuinely true manner for even one moment, it is as if he has corrected the entire world and he causes the Divine Presence to rest within Israel."

Jacobs respectfully submits it is reasonable to infer TFB Rules and the Judicial Canons of Florida codify Gd's natural law to ensures secular laws are protected under our constitution. The obligation to act with integrity in the judiciary is paramount to protect the rule of law. As the New Testament warns

> Beware of the scribes, who like to walk around in long robes, and love respectful greetings in the market places, and chief seats in the synagogues, and places of honor at banquets, ***who devour widows' houses***, and for appearance's sake offer long prayers; these will receive greater condemnation" (Luke 20:46-47)."[11]

Justice Quince and the Sun Sentinel both raised the fairness and independence of Florida's judiciary to be a matter of public interest. As an attorney, Mr. Jacobs has the same free speech rights as former Justice Quince to speak out on the issue. Both are members of TFB.

Jacobs has a First Amendment right to say objective evidence shows banks have captured our appellate courts and some trial judges as Justice Quince warns. Mr. Jacobs did not publish his warning in an op-ed in the Miami Herald. He filed verified motions to disqualify that raised his clients'

[11] https://bible.org/seriespage/7-psalm-82-judgment-gods (emphasis added)

objective reasons to question whether the court would fairly and impartially protect their constitutional rights.

Only by remaining fair and impartial can courts protect against the threat of capture, as the Florida Supreme Court instructs:

> Paradoxical as it may seem, to the extent that judges are seen as political rather than judicial, to that extent they lose their authority and the power they now have to induce obedience to their orders. If judges are stripped of the robes of the law-or if, in the foolish pursuit of political power, they strip themselves of the robes of the law-the people will cease to accept the authority of court decisions, law enforcement officers will be less ready to enforce court orders, legislators will be more ready to curb judicial powers, and the judges will wonder where their power went.
>
> Any judge will have more power by seeming to be completely judicial and not at all political. A judge who would be truly powerful, who would be a significant force and influence for good in the American polity, must not only seem but actually be wholly judicial. This has always been the secret of politically successful American judges.
>
> In *In re LaMotte*, 341 So.2d 513, 517 (Fla.1977), this Court removed a judge from office and stated: "Judges should be held to even stricter ethical standards [than attorneys] because in the nature of things even more rectitude and uprightness is expected of them."
>
> The canons impose high standards and a heavy burden on those persons who accept judicial office. They are standards measuring fitness for judicial office and include tests of behavior relating to integrity and propriety that preclude judges from taking actions that the general public can engage in without consequence. In re Code of Jud. Conduct (Canons 1, 2, & 7A(1)(b)), 603 So. 2d 494, 498-9 (Fla. 1992).

The basis for judicial power, referenced in Article V, Section 1 of the Florida Constitution, is found in Federalist Number 78, written by Alexander Hamilton and warns that[12]:

> Impartiality is not only an individual duty but a systemic ideal to which the judiciary is institutionally committed by explicit constitutional commands. The Constitution's promise of due process of law is, among other things, a promise of impartial adjudication in the courts—a promise that people challenging assertions of government power will have access to a neutral tribunal that is not only free from actual bias but free even from the appearance of bias. To the extent that private citizens cannot reasonably be confident that they will receive justice through litigation, they will be tempted to seek extra-legal recourse.

The Third DCA cannot constitutionally impose bar discipline on Jacobs for criticizing the Court. This Court instructs "Article V, section 15 of the Florida Constitution vests this Court with the 'exclusive jurisdiction to regulate … the discipline of persons admitted [to the Florida Bar]." *State ex rel. Chiles v. Public Employees Relations Com'n*, 630 So.2d 1093, 1094-1095, (Fla. 1994)(*citing Fla. Senate v. Graham*, 412 So.2d 360 (Fla.1982)). Regulating conduct of members of TFB is absolutely and exclusively within the jurisdiction of the Florida Supreme Court, not the Third DCA. This is further reflected in Rule 3–3.1, Rules Regulating the Florida Bar, which

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12 http://www.fed-soc.org/blog/detail/judicial-impartialitymust-not-be-a-mere-facade-on-the-dangers-of-individual-andsystematic-judicial-bias.

describes the “exclusive jurisdiction of the Supreme Court of Florida over the discipline of persons admitted to the practice of law.”

This Court instructs “these rules contemplate that an attorney who has run the gauntlet of the grievance process and a trial by referee, and has emerged with only a private reprimand as recommended discipline, is entitled to be admonished for his errant conduct without the severe reputational damage which accompanies a public revelation of acts violative of his professional code. *The Florida Bar v. Rubin*, 362 So. 2d 12, 15 (Fla. 1978). The Third DCA said it would reprimand Jacobs, and did publicly reprimand Jacobs, without addressing his calls for its disqualification, his factual defenses, or his due process arguments.

It is without question that “an attorney’s most valuable asset is [his/her] professional reputation. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 413, 110 S. Ct. 2447, 2464 (1990)(Stevens, J., concurring in part). The United States Supreme Court has held the reputational harm done by a judicial sanction implicates the Due Process Clause of the Constitution. See *In Re Ruffalo*, 390 U.S. 544 (1968)(“absences of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [attorney] of procedural due process”).

Accordingly, many courts have held than an order rising to the level of a public reprimand is a sanction." *Bowers v. National Collegiate Athletic Association*, 475 F.3d 524, 543 (3rd Cir. 2007)(and cases cited); *cf*. *Holt v. Sheehan,* 122 So. 3d 970, 974 (Fla. 2nd DCA 2013)("appellate judges have authority to criticize attorneys in a published opinion for conduct that falls below the high standards of conduct and professionalism expected from professionals.").

This Court instructs "Appellate courts, therefore, should impose sanctions against an appellee only in rare circumstances. Moreover, because a district court of appeal is, in the vast majority of cases, the court of last resort, it should exercise great restraint in imposing appellate sanctions." *Boca Burger v. Forum*, 912 So. 2d 561, 570-571 (Fla. 2005). In *Boca Burger,* this Court reversed the Fourth DCA's attempt to impose 57.105 sanctions on counsel, after notice and opportunity to be heard, for defending a trial court's clearly erroneous order on appeal. *Id.*

TFB cannot fairly compare Jacobs and his zealous advocacy in the face of courts that refuse to grant disqualification even after initiated contempt accusing him of dishonesty with any case that has come before the court. It is an unfair to suggest punishment consistent with *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013); *The Florida Bar v. Patterson*, 257

So. 3d 56 (Fla. 2018). Respectfully, any comparison to suggest Jacobs is anything like *Norkin* or *Patterson* is just dishonest.. Norkin and Patterson both had prior discipline and were convicted of more that Rule 4-8.2.

Jacobs respectfully submits under a totality of the circumstances, he has been unduly and harshly punished by the TFB and the Third DCA and Judge Hanzman who refused to grant disqualification as required by the judicial canons. These bar proceedings are preventing Jacobs from speaking about systemic frauds in his RICO lawsuits filed against BANA in Hawaii. He should not be punished further. He should be protected from this prosecution for speaking truth to power and protecting his clients' constitutional rights.

CONCLUSION

WHEREFORE, in the interests of justice, Jacobs respectfully requests this Court overrule the Referee's report, find Jacobs' conduct was ethical, zealous advocacy, and protected by the First Amendment, and grant any further relief deemed mete and just.

Although Jacobs is represented by Mr. Winker and Mr. Greenberg, out of an abundance of caution, Jacobs is the only attorney signing this motion. Jacobs wants to protect his attorneys so TFB cannot prosecute them for Jacobs speaking his truth and having his fight.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by e-Filing with the Clerk of Court and via Florida e-Filing Portal to the following, this 13th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Brief complies with the applicable font and word count limitations pursuant to Florida Rule of Appellate Procedure 9.045(e), as this Brief was prepared using Arial 14-point font, and contains 21, 945 words, excluding the parts of the Brief exempted by Rule 9.045(e).