IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

MARCUS FRANKLIN and
MELISSA FRANKLIN,

Petitioners,

L.T. Case No. 2009-CA-25963

v.

Case No.: 2D10-

THE BANK OF NEW YORK MELLON f/k/a
The Bank of New York, as Successor to JPMorgan
Chase Bank, N.A., as Trustee for the Benefit of the
Certificateholders of Popular ABS, Inc. Mortgage
Pass-Through Certificates Series 2005-5, Mortgage
Electronic Registration Systems, Inc., as Nominee
For Unimortgage, LLC,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI

Petitioners, MARCUS FRANKLIN and MELISSA FRANKLIN, by and through their undersigned counsel, petition this Court for a Writ of Certiorari, to quash an Order denying their Motion to Disqualify Counsel, and as grounds would show:

BASIS FOR THIS COURT'S JURISDICTION

1. Petitioners moved to disqualify Brandon Mullis, Esquire ("Mullis"), and the law firm of Shapiro & Fishman, LLP (collectively "Shapiro") from representing Respondent, THE BANK OF NEW YORK MELLON f/k/a The Bank of New York, as Successor to JPMorgan Chase Bank, N.A., as Trustee for the

Benefit of the Certificateholders of Popular ABS, Inc. Mortgage Pass-Through Certificates Series 2005-5 ("the Bank"). This Court has original jurisdiction under Fla.R.App.P. 9.030(b)(2) to enter a Writ of Certiorari.

NATURE OF THE RELIEF SOUGHT

2. Petitioner seeks a Writ of Certiorari from this Court, quashing an Order of the lower court denying the Motion to Disqualify Counsel ("Motion to Disqualify"), and directing the lower court to enter an order of disqualification of Shapiro as counsel for the Bank.

3. Alternatively, Petitioner seeks a remand for an evidentiary hearing on the disputed factual issues set forth in the Motion to Disqualify.

FACTS: BACKGROUND

4. On October 12, 2009, the Bank initiated the lower court case, through its counsel, Shapiro, by filing suit against Petitioners as well as Nominal Respondent, Mortgage Electronic Registration Systems, Inc. ("MERS"), as Nominee for Unimortgage, LLC ("Unimortgage"). In the Complaint, the Bank seeks foreclosure of a mortgage; a copy of the Note and Mortgage are attached thereto. See Appendix to Petition, 1.

5. The Note was entered on behalf of Unimortgage, not the Bank. See Appendix to Petition, 1, Exhibit "A." The Mortgage was entered on behalf of MERS, as Nominee for Unimortgage, not the Bank. See Appendix to Petition, 1,

Exhibit "A." As such, it is axiomatic that the Bank's standing to prosecute this lawsuit is predicated on some type of transfer of the Note and Mortgage from Unimortgage and/or MERS to the Bank. See Appendix to Petition, 1, ¶ 7 ("Prior to the filing of this action, Plaintiff acquired the right to enforce the Note and Mortgage from the party entitled to enforce the Note and Mortgage."). Significantly, nowhere in the Complaint did the Bank clarify how it had acquired the right to enforce the Note and Mortgage, i.e. whether there was a valid assignment, proof of purchase of the debt, or some other form of transfer. See Appendix to Petition, 1.

6. After MERS did not respond to the Complaint, the Bank sought and obtained entry of a clerk's default against it. See Appendix to Petition, 2. The Bank's Motion for Default against MERS was executed by Shapiro, and the Affidavit of Service attached thereto reflects that service was effectuated by a process server company called ProVest, LLC. See Appendix to Petition, 2.

7. Respondents timely responded to the Complaint by way of Motion to Dismiss, alleging the Bank failed to plead sufficient ultimate facts showing its ability to foreclose a Note and Mortgage in the name of MERS. See Appendix to Petition, 3. Said motion has yet to be adjudicated, but the pendency of the motion reflects that the Bank's standing, and its ability to prove a valid transfer of the Note and Mortgage, will be significant issues as the case is litigated.

8. In the process of preparing said motion, Petitioners encountered an Assignment of Mortgage in the Official Records of Hillsborough County, Florida ("the Assignment"), which assignment purports to convey the Mortgage from MERS to the Bank. Petitioners then filed their Motion to Disqualify, with the Assignment of Mortgage attached thereto. See Appendix to Petition, 4. Consistent with Florida procedure, Petitioners signed the Motion to Disqualify under oath. See Appendix to Petition, 4.

9. In the Motion to Disqualify, Petitioners showed:

a. Petitioners never signed a Note and Mortgage with the Bank, so the Bank's standing had to be predicated on some sort of assignment or transfer of the Note and Mortgage, apparently from MERS to the Bank;

b. The Official Records of Hillsborough County, Florida, reflect an Assignment of Mortgage from MERS, as Nominee for Unimortgage, to the Bank, executed on October 12, 2009 (the same date the lawsuit was filed) and recorded on October 19, 2009;

c. The Assignment was "prepared by" and to be "returned to" the Bank's counsel, Shapiro;

d. Instead of identifying the address of MERS, the purported assignor, the Assignment lists Shapiro's name and address in MERS' place;

e. The Notary block on the Assignment indicates the Assignment

was executed in Harris County, Texas, which is where, as the Assignment reflects, the Bank conducts business, not MERS (which conducts business in Ocala, Florida); and

f. The Assignment reflects it was executed by Marti Noriega, purportedly as Vice President of MERS, yet Marti Noriega is actually the Assistant Vice President of the Bank.

See Appendix to Petition, 4.

10. As Petitioners asserted in the Motion to Disqualify, these facts, viewed together, raise serious concerns. For instance, if the Assignment were a legitimate business transaction, and the Bank actually obtained the Assignment from MERS, as Nominee for Unimortgage, then why did Shapiro, the Bank's counsel in this case, prepare the Assignment? On or about the same day the lawsuit was filed? Why was it signed and notarized in Texas, where the Bank conducts business, instead of Ocala, where MERS conducts business? Why is Shapiro's address listed in place of MERS' address? And why was it signed by Marti Noriega, an agent of the Bank, and not an agent of MERS? See Appendix to Petition, 4.

11. The legitimacy of the Assignment is one significant concern; the conduct of Shapiro is another. For example, Shapiro is acting as counsel for the Bank against MERS, yet Shapiro currently represents MERS in other, pending

cases, including Hillsborough County Case No. 2009-CA-6578. Perhaps worse yet, Shapiro is acting as counsel for the Bank against MERS even though Shapiro acted as counsel for MERS in this very dispute (with respect to the Assignment)! As Petitioners asserted in the Motion to Disqualify, there seems to be no other explanation for why Shapiro would prepare the Assignment, insert its name and address in place of MERS' address on the Assignment, cause the Assignment to be executed on or about the date the lawsuit was filed, and cause one of the Bank's agents to execute the Assignment (purportedly on behalf of MERS). See Appendix to Petition, 4.

12. Based on these facts, Petitioners alleged, in the Motion to Disqualify, that Shapiro had a conflict of interest under Rule 4-1.7, R.Reg.Fla.Bar, requiring its disqualification as counsel. As a secondary basis for disqualification, Petitioners argued that Shapiro was not only a witness in the proceeding, but had become such a "central figure" in the lawsuit that its disqualification was required. See Appendix to Petition, 4. Finally, as a tertiary basis for disqualification, Petitioners contended that Shapiro's disqualification was required under Rule 4.1-16(5), R.Reg.Fla.Bar, as the Bank had used Shapiro's services to commit a crime or fraud.

13. Shapiro filed a written Response to the Motion to Disqualify as well as a motion to strike it. See Appendix to Petition, 5 and 6, respectively.

Essentially, Shapiro argued that the Motion to Disqualify was legally insufficient. Also, Shapiro argued, for the first time, that the Bank was not relying on the Assignment as the basis for its standing (and that the legitimacy of the Assignment was hence a moot issue).

14. Meanwhile, a one-hour hearing on the Motion to Disqualify was scheduled for May 27, 2010 at 8:00 a.m.

15. On February 16, 2010, attempting to flesh out the facts, to the extent they were in dispute (both in the case in general and with respect to the Motion to Disqualify), Petitioners served their First Set of Interrogatories and First Request for Production. See Appendix to Petition, 7 and 8, respectively. Additionally, Petitioners filed a Subpoena Duces Tecum on Mullis, requiring his attendance at the May 27 hearing, as well as a Request for Judicial Notice. See Appendix to Petition, 9 and 10, respectively.

16. The subpoena on Mullis was intended to obtain his testimony on issues pertinent to the Motion to Disqualify Counsel, particularly to the extent Shapiro was disagreeing with the facts set forth in the motion. For instance, the subpoena required production of fee agreements between Shapiro and MERS, which would clarify any attorney-client relationship between Shapiro and MERS. Also, Mullis' testimony would shed light on whether ProVest, LLC (the process server that served MERS) was actually an in-house process server for Shapiro.

17. Unfortunately, and despite the fact that the Motion to Disqualify was evidentiary in nature, Petitioners' attempts to obtain evidence or discovery were met with nothing but opposition. On February 23, 2010, the Bank moved for an extension of time to respond to the discovery, then never responded, necessitating a Motion to Compel. See Appendix to Petition 11 and 12, respectively.

18. Incredibly, despite not responding to this discovery, Shapiro argued Petitioners had never sought discovery (which, of course, was plainly false), then used the absence of any such discovery in support of their position that there was no evidence "in the record" to support disqualification.[1] See Appendix to Petition, 5 and 6.

19. On the afternoon of May 25, 2010, less than two days before the scheduled hearing, Shapiro filed a Motion to Quash the Subpoena Duces Tecum of Mullis and attempted to set that motion for hearing. See Appendix to Petition, 13. Despite the undersigned's unavailability, Shapiro noticed the hearing for the following day, May 26, 2010 at 11:00 a.m.

20. Candidly, the undersigned believed that the hearing would not proceed, given the incredibly short notice, his unavailability, and the lack of any

[1] Oddly, Shapiro seemed to believe that evidence supporting disqualification had to be fleshed out in discovery and that the presentation of evidence at the duly-noticed, evidentiary hearing was not permitted. Suffice it to say that this position was non-sensical and contrary to law. See analysis, infra.

emergency. After all, even if, *arguendo*, the subpoena were somehow improper, there was nothing stopping the lower court from quashing it at the start of the hearing on May 27, 2010 (before Mullis' testimony and before anything objectionable was produced). Nonetheless, on May 26, 2010 at approximately 11:05 a.m., as the undersigned was in chambers for a different hearing, in a different case, in a different county, the lower court telephoned that judge's chambers and, over objection, ordered the undersigned to argue the hearing via phone.[2] See Appendix to Petition, 14. The lower court then quashed the subpoena of Mullis, ruling "If Judge Levens thinks that testimony is necessary, then he can have that taken or have the hearing continued for that testimony at a later time." See Appendix to Petition, 14, p. 9. A written Order quashing the subpoena ensued. See Appendix to Petition, 15.

21. On May 27, 2010, the lower court conducted a hearing on the Motion to Disqualify Counsel. The motion was verified, but except for the facts verified in the motion, neither side presented any evidence. See Appendix to Petition, 16. Of course, Petitioners had been precluded from presenting evidence, by way of testimony and documentation from Mullis, because the court had quashed the subpoena. See Appendix to Petition, 14, 15.

[2] The judge presiding over that hearing, Judge Pendino, was not even the judge presiding over the case. See Appendix to Petition, 16.

22. The Bank presented absolutely no evidence to contradict the sworn assertions in the Motion to Disqualify Counsel, either at the hearing or otherwise. See Appendix to Petition, 16. Oddly, even though the hearing had been set for an hour, at the Court's instruction, and the Court told the Bank beforehand "that we needed to have an evidentiary hearing," Appendix to Petition, 16, p. 30, the Bank took the position that "we were never advised by the Court that we needed to have testimony."[3] See Appendix to Petition, 16, p. 30. Hence, the Bank had no witnesses or other evidence to contravene the facts set forth in the Motion to Disqualify Counsel. See Appendix to Petition, 9.

23. As the hearing proceeded, it became clear that Shapiro and the Bank wanted to deny the facts set forth in the Motion to Disqualify Counsel but had no evidentiary basis in which to do so. See Appendix to Petition, 16. As a result, instead of just presenting legal argument, Barbara Couture, Esquire (the attorney who attended the hearing for the Bank), wound up making various factual assertions, contrary to those set forth in the Motion to Disqualify Counsel, without being under oath and without being subjected to cross-examination.

24. For instance, after Ms. Couture argued that the Bank was not relying on the Assignment of Mortgage (upon which the Motion to Disqualify Counsel

[3] Shapiro did not explain how an evidentiary hearing could take place without testimony.

was largely predicated), purportedly because the Bank's standing was predicated on a transfer of the Note, the following exchange took place:

> The Court: When did the commercial transaction vest the ownership of the note to the plaintiff in this case?
>
> Ms. Couture: 2005.
>
> Mr. Stopa: I feel like I have to object. Is she testifying?
>
> The Court: Well, I am asking her not to testify. I am asking her what evidence – well, I guess I am looking ahead. I am trying to figure out where this is headed.

Appendix to Petition, 16, pp. 35-36.

25. As the hearing continued, the lower court seemed to grasp the issue, i.e. Shapiro's conflict of interest under Rule 4-1.7 due to its simultaneous representation of the Bank and MERS, and asked:

> The Court: Let me focus you back on what, to me, was the lead issue raised in the Motion for Disqualification, and that is that you can't have two masters, so to speak, or something to that effect. That is a simplification, but, basically, the idea of how you can represent both, the plaintiff and one of the defendants, in a foreclosure case.

In response to that question, and throughout the rest of the hearing, Ms. Couture made numerous, unsworn factual assertions:

> Ms. Couture: We are not representing MERS. …
>
> Pro Vest is not an in-house – under any stretch, it is not an in-house company.
>
> Brandon Mullis does not prepare assignments of mortgage.

> Marti Noriega is not in-house. …
>
> There is no conflict of interest because, as I explained, MERS was merely added in her for the purpose of unclouding the title. …
>
> Mr. Mullis did not put this together, did not have anything to do with this. It was done in-house, it has a slash down there.

Appendix to Petition, 16, pp. 36-41.

26. Throughout the hearing, Petitioners objected to Shapiro's repeated attempts to disagree with the facts set forth in the Motion to Disqualify Counsel without any evidence, merely by the unsworn assertions of counsel. To illustrate, in rebuttal, the undersigned argued:

> Where I thought that the argument really – of counsel really fell apart was when Your Honor asked the question of – you made the biblical reference, and counsel responded by saying "We are not representing MERS." "We are not representing MERS."
>
> That's testimony. And then there was lots of other testimony after that. … That's exactly why I subpoenaed Brandon Mullis to come here. They can't get away with statements like that. You can't come into court as a lawyer purporting to present testimony when you are not under oath and not giving me a chance to get documents.

Appendix to Petition, 9, pp. 46-47. Then, when it appeared the lower court was going to rule on the Motion to Disqualify Counsel (without allowing testimony from Mullis or other evidence), Petitioners requested a continuance "to the extent Your Honor is relying on the unsworn statements of counsel." Appendix to Petition, 9, p. 52. The lower court then denied the Motion to Disqualify Counsel, as well as the continuance, without explanation. See Appendix to Petition, 16, pp.

52-53. A written Order followed, see Appendix to Petition, 17, and this timely Petition ensued.

ARGUMENT

27. Rule 4-1.7, R.Reg.Fla.Bar (Conflict of Interest, Current Clients), provides:

> (a) **Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer shall not represent a client if:
>
> 1. the representation of 1 client will be directly adverse to another client; or
>
> 2. there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) **Notwithstanding** the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> 1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> 2. The representation is not prohibited by law;
>
> 3. The representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
>
> 4. Each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

28. In the present case, Petitioners showed that Shapiro represented the

Bank (the plaintiff), adverse to MERS (the defendant), even though Shapiro represented MERS in other, pending cases (e.g. Hillsborough County Case No. 2009-CA-6578). See Appendix to Petition, 4, pp. 4-5. In fact, Petitioners showed that Shapiro represented the Bank, adverse to MERS, even though Shapiro represented MERS *vis a vis* the Assignment of Mortgage at issue in this case. See Appendix to Petition, 4. On these facts, there can be no doubt that Shapiro's representation of the Bank (the plaintiff) was "directly adverse" to MERS (the defendant) under 4-1.7(a)(1).

29. Neither Shapiro nor the Bank made any attempt to satisfy the four subparts of subsection (b) of Rule 4-1.7. For instance, neither MERS nor the Bank gave informed consent, confirmed in writing or clearly stated on the record at a hearing. See Appendix to Petition, 16. As such, there was and is no way around the prohibition in Rule 4-1.7(a)(1). The conflict of interest is readily apparent, requiring disqualification. See HSBC Bank USA, N.A. v. Vasquez, 2009 N.Y. Slip Op. 51814 (N.Y. 2009) ("plaintiff's counsel has to address the conflict of interest that exists with his representation of both the assignor of the instant mortgage, MERS and nominee for HSBC Mortgage, and the assignee of the instant mortgage.").[4]

[4] There are no Florida cases on the conflict of interest that arises when the same law firm simultaneously represents multiple entities in foreclosure cases (mostly

30. Meanwhile, Rule 4-1.16 (Declining or Terminating Representation) provides:

> (a) **When Lawyer Must Decline or Terminate Representation**. … a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation if:
>
> > (5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

31. Here, the undisputed evidence showed the Bank used Shapiro's services to prepare an Assignment of Mortgage, purportedly to assign a Mortgage from MERS, as Nominee for Unimortgage, to the Bank, but then caused its own employee, Marti Noriega, to execute that assignment on the same day the Bank filed suit (and record that assignment in the official records just one week later). See Appendix to Petition, 4, 16. The fraudulent and self-dealing nature of this conduct is, respectfully, appalling.[5] See HSBC Bank USA, N.A. v. Vazquez, 2009 N.Y. Slip Op. 51814 (N.Y. 2009); Bank of New York v. Mulligan, 2008 N.Y. Slip. Op 31501 (N.Y. 2008) ("The Court is concerned that Mr. Harless might be

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because this has just become an issue in recent years, after the real estate crash and the advent of MERS). The absence of such case law, coupled with the volume of cases where this has become an issue, accentuates the need for a written opinion from this Court.

[5] It appears the Bank would have the court justify this self-dealing by arguing, without record evidence, that MERS authorized the Bank's own employees, including Marti Noriega, to sign on its behalf. Even if that were true, however, where MERS is to sign as Nominee for Unimortgage, as in this case, and Mr. Noriega is acting on behalf of the Bank, not Unimortgage, the problem persists.

engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Harless describing his employment history for the past three years."); Bank of New York v. Orosco, 2007 N.Y. Slip Op 33818 (N.Y. 2007); Deutsche Bank Nat'l Trust Co. v. Castellanos, 2008 N.Y. Slip. Op. 50033 (N.Y. 2008) ("Did Mr. Rivas somehow change employers on July 21, 2006 or is he concurrently a Vice President of both assignor Argent Mortgage Company, LLC and assignee Deutsche Bank? If he is a Vice President of both the assignor and the assignee, this would create a conflict of interest and render the July 21, 2006 assignment void. … The court is concerned that there may be fraud on the part of Deutsche Bank, Argent Mortgage Company, LLC, and/or MTGLQ Investors, L.P., or at least malfeasance."). Disqualification was required under 4-1.16, R.Reg.Fla.Bar.

I. PETITIONERS HAVE STANDING TO RAISE THIS ISSUE, AS IT IMPLICATES THE FAIR ADMINISTRATION OF JUSTICE.

32. At the hearing, and in its written filings, Shapiro argued that Petitioners lacked standing to seek its disqualification as counsel. See Appendix to Petition, 5-6, 16. The lower court rejected this argument, see Appendix to Petition, 16, p. 29 ("I am not really in doubt that you have standing to raise that issue"), but before addressing this Petition on the merits, Petitioners deem it important for this Court to take stock of this issue.

33. The Comment to Rule 4-1.7, R.Reg.Fla.Bar, provides:

> Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question.

34. Here, the fair administration of justice is seriously in question. After all, the Bank would have the court presume it is the proper plaintiff, even though it was not the original mortgagee and was not the original Note holder, without any explanation in the Complaint as to its standing to sue, see Appendix to Petition, 1, and without any evidence. See Appendix to Petition, 16. Clearly, the Bank just wants to "push through" another foreclosure case.

35. But what if the Bank is wrong? What if it's not the entity entitled to foreclosure?[6] Worse yet, what happens when a bank obtains a foreclosure judgment, the clerk conducts a foreclosure sale, the property is purchased by a bona-fide purchaser, a title insurance company issues a title insurance policy, and the actual holder of the Note and Mortgage then comes forward?

36. The consequences of such a series of events would be disastrous for all involved – the bona fide purchaser would lose the property, the title insurance company would be liable under the policy, and the original homeowner would be

[6] These may sound like hypothetical concerns to some, but any attorney or judge who has any experience with foreclosure cases has seen instances where two different banks were bringing claims on the same Note, a bank foreclosed on the wrong house, or where the entity that filed a foreclosure suit clearly lacked the standing to proceed.

facing another lawsuit (by the correct bank), even after being foreclosed. That's three innocent parties who would have suffered tremendous harm to no fault of their own. Suffice it to say that, with thousands of foreclosure cases being "pushed through" the court system on a regular basis, situations like this will happen if Florida courts do not invoke adequate safeguards.[7]

37. In this case, for instance, the issue being litigated is whether the Bank is the proper entity to be bringing this foreclosure action. As the Bank was not the original mortgagee or Note holder, that question hinges on the propriety of the alleged transfer/assignment of the Note and Mortgage to it. That is where Petitioners have developed significant concerns about Shapiro's conflict of interest, the Bank's commission of a fraud, and the appearance of impropriety to the public. See argument, infra. Suffice it to say that, as the lower court concluded, Petitioners have standing to address these concerns. See Comment to Rule 4-1.7.

[7] Many intelligent people with whom the undersigned has spoken believe the real estate market in Florida will collapse even further than it already has once title insurance companies have to pay claims where the actual holder of a Note emerges after a different bank has already foreclosed. It's not hard to foresee, once that happens, title insurance companies will stop issuing policies altogether, as they'd have no way to do so with any confidence that the foreclosure sales provided clear title to the purchaser. Respectfully, this is a problem that must be avoided.

II. THE LOWER COURT'S FAILURE TO CONDUCT AN EVIDENTIARY HEARING, IN THE FACE OF DISPUTED FACTS, REQUIRES CERTIORARI RELIEF.

38. Where the facts set forth in a motion to disqualify counsel are disputed, an evidentiary hearing is required. With respect to the lower court, Florida law is clear on this point. To illustrate, in Hicks v. Payless Shoesource, Inc., this Court held:

> Hicks and Payless contend that Fowler White has a conflict of interest based on its representation of Payless in other matters. Because there are disputed factual issues, we grant the petition, quash the order under review, and remand for an evidentiary hearing. See Dawson v. Bram, 491 So. 2d 1275, 1276 (Fla. 2d DCA 1986) ("If the affidavits filed by the parties did not agree on the issue presented, the court should have conducted an evidentiary hearing" before deciding motion to disqualify counsel); see also Holland v. Tenenbaum, 360 So. 2d 493 (Fla. 4th DCA 1978) (granting certiorari, quashing order that disqualified petitioner's counsel, and remanding for evidentiary hearing due to conflicting affidavits filed by the parties).

862 So. 2d 905 (Fla. 2d DCA 2003). Similarly, in School Board of Broward County v. Polera Building Corp., the Fourth District ruled:

> Disqualification cases under Rule 4-1.10 require the trial court to make a factual determination of the issues specified in subsections (b) and (c). … The affidavits filed in this case conflict as to whether Weinstein learned of confidential matters during his tenure at Becker & Poliakoff. The affidavits present very different versions of the nature and scope of Weinstein's work on school board cases at Becker, Poliakoff. The general contractor cites to cases in which the disqualification issue was decided without an evidentiary hearing; however, where material facts are in dispute, an evidentiary hearing is required.

722 So. 2d 971, 973-74 (Fla. 4th DCA 1999) (citing cases).

39. During the hearing, Shapiro and the Bank presented no evidence whatsoever – no affidavits, exhibits, or testimony. See Appendix to Petition, 16. As the hearing progressed, however, the only way Shapiro could take the position that it lacked a conflict of interest, requiring its disqualification, was for Ms. Couture (the only person present for the Bank or Shapiro) to deny the facts set forth in the verified Motion to Disqualify Counsel. Ms. Couture's unsworn assertion that Shapiro was not representing MERS is the most egregious example, but there are many others, including:

> Pro Vest is not an in-house – under any stretch, it is not an in-house company.
>
> Brandon Mullis does not prepare assignments of mortgage.
>
> Marti Noriega is not in-house. …
>
> There is no conflict of interest because, as I explained, MERS was merely added in her for the purpose of unclouding the title. …
>
> Mr. Mullis did not put this together, did not have anything to do with this. It was done in-house, it has a slash down there.

Appendix to Petition, 16, pp. 36-41.

40. As soon as Shapiro started denying the facts set forth in the Motion to Disqualify, an evidentiary hearing was required. To illustrate, how was the court supposed to adjudicate the disputed factual issues, e.g. whether Shapiro represents

MERS (and hence has a conflict under 4.1.7) unless it took evidence and made findings of fact? Clearly, the court could not accept Ms. Couture's unsworn assertions as true and prevent Petitioners from putting on evidence to the contrary (e.g. through the testimony of Mullis). See Hicks and Polera, supra. Unfortunately, that is precisely what the court did.

41. By accepting Ms. Couture's unsworn statements, quashing the subpoena of Mullis, refusing to continue the hearing to allow the presentation of evidence, and denying the Motion to Disqualify Counsel without any evidence or fact-findings, the lower court erred.[8]

42. Significantly, it's not as if Petitioners had no evidence on which to base its contention that Shapiro was counsel. The public records of Hillsborough County reflect that Shapiro is counsel for MERS in Case No. 2009-CA-6578. See Appendix to Petition, 4, pp. 4-5. Additionally, the Assignment of Mortgage (executed by MERS) reflects that it was prepared by Mullis, an attorney with

[8] In fairness to Judge Levens, the presiding judge at the hearing, Judge Pendino quashed the subpoena of Mullis the day prior, before the hearing on the Motion to Disqualify Counsel even started, so there was no way testimony of Mullis could have happened at that hearing (absence his voluntary attendance, the absence of which is telling). That said, when Judge Pendino ruled, he noted "if Judge Levens thinks that testimony is necessary, then he can have that taken or have the hearing continued for that testimony at a later time." See Appendix to Petition, 8, p. 9. Respectfully, once the facts were in dispute, it was incumbent upon Judge Levens to grant Petitioners' request to continue the hearing to enable the presentation of evidence, as Judge Pendino had obviously contemplated.

Shapiro, and Shapiro's name and address appears on the assignment in place of MERS. See Appendix to Petition, 4. On these facts, it is difficult to see how anyone could possibly assert that Shapiro was *not* representing MERS.

43. Notably, these were not the only facts in dispute. For instance, Petitioners asserted, in the verified Motion to Disqualify Counsel, that Mullis prepared the Assignment of Mortgage. At the hearing, however, Ms. Couture denied that Mullis prepared the assignment and the court did not allow evidence on this key issue. See Appendix to Petition, 16.

44. Likewise, Petitioners contended that ProVest, the process server company that served MERS with process in this case, was an in-house process company of Shapiro.[9] See Appendix to Petition, 4. Shapiro never presented evidence to the contrary, yet Ms. Couture contended otherwise in her unsworn arguments. See Appendix to Petition, 16. Again, the court erred by not taking evidence on this critical issue.

[9] Shapiro took the position that MERS was not adverse to the Bank, even though the latter was the plaintiff and the former the defendant, because MERS had consented to the relief requested, as reflected by the clerk's default against MERS. This argument misses the point, as a conflict of interest under 4-1.7 must be addressed prior to filing suit, not after. Also, it's not the obligation of the party to "call out" their own attorney on a conflict of interest post-filing – that is the attorney's responsibility under 4-1.7. In any event, even to the extent the clerk's default was relevant (as it tended to show that MERS, despite being a defendant, was consenting to the relief requested), that relevance was tempered if Shapiro's own process server was the one that purportedly effectuated service. The appearance of impropriety on such facts is high. See discussion, infra.

45. Petitioners could go on and on with examples of unsworn assertions made by Ms. Couture that contravened those in the Motion to Disqualify Counsel, but the point has (hopefully) been made. The lower court erred in denying the Motion to Disqualify Counsel by accepting unsworn assertions of counsel, the veracity of which were very much in dispute, without conducting an evidentiary hearing. This Court should grant certiorari, quash the Order on review, and remand for an evidentiary hearing.

III. THE UNDISPUTED EVIDENCE BEFORE THE COURT REQUIRED SHAPIRO'S DISQUALIFICATION.

46. Just as Florida law plainly requires an evidentiary hearing in the face of disputed factual issues, see Hicks and Polera, supra, the law is equally clear that when the evidence is not disputed, no evidentiary hearing is required. In Sears, Roebuck & Co. v. Stansbury, for instance, the Fifth District ruled:

> In the instant case, no affidavits have apparently been offered on behalf of respondents in rebuttal of the facts sworn to in the appellants' affidavits. Thus, absent a conflict on material issues of fact raised by opposing affidavits, there is no requirement that further testimony be offered in support of the motion to disqualify counsel.

374 So. 2d 1051, 1054 (Fla. 5th DCA 1979); see also Estright v. Bay Point Improvement Ass'n, Inc., 921 So. 2d 810 (Fla. 1st DCA 2006); Trautman v. General Motors Corp., 426 So. 2d 1183 (Fla. 5th DCA 1983).

47. Sears, Estright, and Trautman are all cases where a district court

denied certiorari relief in the face of an order *granting* a motion to disqualify counsel. In all three cases, the evidence of the attorney's conflict was uncontroverted in light of the absence of any opposing affidavits, so the courts required disqualification. That is precisely the situation here and, respectfully, that is how the lower court should have ruled.

48. The facts set forth in Petitioners' Motion to Disqualify Counsel, which were verified under penalty of perjury, went unrebutted. Shapiro and the Bank presented no evidence whatsoever in opposition to those facts. See Appendix to Petition, 16. Although Ms. Couture made various, unsworn assertions in opposition, those contentions were inadmissible and of no weight. See Daughtry v. Daughtry, 944 So. 2d 1145, 1148 (Fla. 2d DCA 2006) ("unsworn representations by counsel about factual matters do not have any evidentiary weight in the absence of a stipulation"). Hence, the lower court should have accepted the facts set forth in the Motion to Disqualify Counsel and granted the relief requested.

49. Petitioners realize that disqualification of counsel is a high standard. However, the facts here require that remedy. As the First District explained earlier this year:

> Rule Regulating The Florida Bar 4-1.7 forbids a lawyer from representing two clients in the same matter unless the lawyer reasonably believes the representation will not adversely affect the

> responsibilities to each client and each client consents in writing or on the record. To disqualify a law firm from concurrently representing a party whose interests are adverse, a client need only show that an attorney/client relationship exists. The concurrent representation of two parties in the same action 'gives rise to an irrefutable presumption that confidences [are] disclosed during the course of that relationship.' …
>
> Here, the JCC erred in find that the conflict had to be material. Rule 4-1.7 leaves no room for a "materiality" analysis. When Miller Kagan failed to prove it had the written consent from each client, and failed to prove that the representation of both clients would not adversely affect the responsibilities to each client, the JCC should have granted the motion to disqualify. As explained by the Fifth District Court of Appeal, 4-1.7 is based on the ethical-concept requirement that a lawyer should act with undivided loyalty for his client and not place himself or herself in a position where a conflicting interest may affect the obligations of an ongoing professional relationship. Such unseemly conduct, if permitted, would further erod the public's regard for the legal profession.

26 So. 3d 638, 639 (Fla. 1st CA 2010).

50. The record evidence establishing Shapiro's conflict of interest was undisputed. So, too, was the facts establishing the Bank's use of Shapiro to commit a fraud. This Court should grant certiorari, quash the Order on review, and remand with directions to enter an order disqualifying Shapiro as counsel.

IV. DISQUALIFICATION IS REQUIRED TO AVOID THE APPEARANCE OF IMPROPRIETY AND TO UPHOLD THE PUBLIC'S PERCEPTION OF THE LEGAL SYSTEM.

51. Many of the cases that require disqualification in the context of a conflict of interest discuss the appearance of impropriety and the public's perception of the lawyers. In Wentworth, for instance, the First District explained

that the conflict of interest under 4-1.7, "if permitted, would further erode the public's regard for the legal profession." Id.

52. Similarly, in Campbell v. American Pioneer Savings Bank, the litigation "involved foreclosure of a mortgage on a parcel of real estate." 565 So. 2d 417 (Fla. 4th DCA 1990). The movant contended that counsel "represented her in prior matters concerning the same property and involving a certain conveyance thereof, which is relevant and related to the issue in litigation." Id. In granting certiorari and requiring disqualification, the Fourth District ruled:

> Since the Ethics Code's protection of a client's confidences is broader than the evidentiary attorney-client privilege protecting privileged communications, disqualification is indicated here to avoid the appearance of impropriety.

Id. at 417-418.

53. Likewise, in Andrews v. Allstate Ins. Co., the record revealed "no actual evidence of any impropriety on the part of petitioner's counsel." 366 So. 2d 462, 463 (Fla. 4th DCA 1978). Nonetheless, the Fourth District granted certiorari and required disqualification of counsel, ruling:

> The professional responsibility of a lawyer goes further; it encompasses even the appearance of professional impropriety. … We recognize that it is a matter of no small consequence to require a lawyer to withdraw from a case, but with the climate existing today *vis-à-vis* the Bar's image in the public eye, appearances should be more closely guarded than ever.

Id. at 463-464.

54. Respectfully, it would be hard to imagine a circumstance where the appearance of impropriety required disqualification of counsel more than the present case. Here, the evidence shows that Shapiro prepared an Assignment of Mortgage, purporting to convey a mortgage from MERS, as Nominee for Unimortgage to the Bank. The Assignment was executed on October 12, 2009, the same day the bank filed suit, by Marti Noriega, purportedly as an agent of MERS, yet Mr. Noriega is actually the Assistant Vice President of the Bank. Hence, the Bank's own agent signed a document that purported to convey a mortgage to itself, then recorded that assignment in the Official Records for all to see. See Appendix to Petition, 4. Meanwhile, Shapiro is representing the Bank, the plaintiff in this case, even as it simultaneously represents MERS, a defendant in this case, both in this case and other, pending cases. See Appendix to Petition, 4.

55. At worst, this conduct is fraud; at best, it's self-dealing. However you want to label it, the public's perception of this conduct, and the judiciary's apparent lack of a response thereto, is clearly not good. To illustrate, websites such as www.4closurefraud.com contain databases of fraudulent assignments of mortgage (wherein the same persons have signed assignments for many different banks) and documented instances where different law firms submitted "original"

notes on the same property.[10] Perhaps more troubling, it is clear that these "fraudulent assignments" are being mass-produced, by the thousands, and being used in foreclosure cases throughout the state, every day. If there was ever a time for Florida courts to uphold the integrity of the system, that time is now.

56. When evidence is being manufactured in this way (and there's really no other way to put it, when you realize that foreclosure plaintiffs are signing assignments purporting to convey mortgages to themselves to facilitate a foreclosure lawsuit instead of causing the mortgagor to sign the assignment in the ordinary course of business), it is only a matter of time before it all comes crashing down. No matter how bad the foreclosure crisis may be now, it is incumbent upon everyone – judges and lawyers in particular – to prevent it from reaching the point where the wrong bank gets to foreclose. Once that happens, and the "right bank" emerges, post-foreclosure, it will have drastic consequences for everyone involved. See discussion, supra. The instant petition is hence an excellent opportunity to head these problems off at the pass, while restoring the public's perception of the legal system, at a time when this issue is impacting thousands of pending cases.

[10] The undersigned acknowledges that this is not in the record and is not trying to suggest otherwise. If the Court chooses to ignore this information, the undersigned would certainly understand. That said, it would be difficult to gauge the public's perception about these situations without visiting websites such as this. The public is catching on to the manner in which these assignments of mortgage are being conveyed, and the perception is not good.

CONCLUSION

57. In light of the foregoing, this Court should grant certiorari, quash the Order on review, and remand with instructions to disqualify Shapiro as counsel for the Bank. Alternatively, this Court should grant certiorari, quash the Order on review, and remand with instructions to conduct an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Brandon K. Mullis, Esq., 10004 N. Dale Mabry Highway, Suite 112, Tampa, FL 33618 on this 14th day of July, 2010.

_____

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Petition complies with the font requirements of Fla.R.App.P. 9.100(l).

_____

Mark P. Stopa, Esquire