IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

WELLS FARGO BANK, N.A., AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2007-OPT1, ASSET-BACKED CERTIFICATES, SERIES 2007-OPT1,

Plaintiff,

Case No. 10-CA-056503

v.

VELTON CORBETT, *et. al.*

Defendants,
_____/

MOTION TO DISQUALIFY TRIAL JUDGE

Defendant, VELTON CORBETT, by and through his undersigned counsel and pursuant to Fla.R.Jud.Admin. 2.330, moves this Court for an Order disqualifying the Honorable John S. Carlin ("the Judge") from presiding as judge in this cause, and would show:

1. On August 26, 2010, Defendants served their Motion to Dismiss in this cause. That motion remains pending. It has not been set for hearing.

2. On October 4, 2010, the Judge, acting *sua sponte*, entered an Order Setting Case for Docket Sounding, to take place on December 8, 2010 at 1:00 p.m. In this Order, the Judge directed that all attorneys be personally present (in person, not via phone). In this Order, the Judge ruled:

> THE COURT ON ITS OWN MOTION DETERMINES THIS CAUSE IS AT ISSUE AND READY TO BE SET FOR TRIAL. …
> **If this case is appropriate for a Motion for Summary Judgment, either party may Notice the Summary Judgment to be heard at the Docket Sounding.** Otherwise, the day and time certain for the start of trial will be determined at docket sounding. …
>
> All discovery shall be completed prior to the docket sounding. The conduct of discovery subsequent to the docket sounding shall be permitted only on the order

of the Court for good cause shown and which will not delay the trial of this cause. (capitalization and boldface in original).

3. The Judge's conduct in entering this Order causes Defendant a well-reasoned fear that he is not neutral and detached, necessitating the instant motion.

4. First off, this case is clearly not "at issue" as defined by Fla.R.Civ.P. 1.440, as Defendants' Motion to Dismiss has yet to be heard and Defendants have yet to file an Answer. See Precision Constructors, Inc. v. Valtec Constr. Corp., 825 So. 2d 1062 (Fla. 3d DCA 2002) ("Failure to adhere strictly to the mandates of Rule 1.440 is reversible error. Accordingly, the judgment is vacated and the cause is remanded for a new trial."); Bennett v. Continental Chemicals, Inc., 492 So. 2d 724 (Fla. 1st DCA 1986) (*en banc*). Unfortunately, the Judge makes it his routine practice to systematically set foreclosure cases for docket sounding, immediately after they are filed, with an Order that says summary judgment will be entered or trial will be set, regardless of whether those cases are actually "at issue" or ready for trial. Worse yet, he does so *sua sponte*, without allowing the parties to be heard, and regardless of whether the case is actually "at issue."

5. The Judge has a lot of experience, both as an attorney and a judge. Undoubtedly, he knows when a case is "at issue" under Rule 1.440. The principle of law set forth in Valtec and Bennett is not a surprise to him. In fact, the undersigned has argued this line of cases before the Judge in other cases. Hence, one of two things happened here: (i) either the Judge intentionally ignored the law, found this case was at issue when he knew it was not, and grossly accelerated a docket sounding and discovery deadline because of his obvious dislike for foreclosure cases; or (ii) he never even bothered to look at the file before setting the Order (and presumed this case was like many of the uncontested foreclosure cases before him). As the

undersigned has received Orders from the Judge in other, similar cases, the undersigned strongly suspects it is the latter. In either event, though, it really doesn't matter - the Judge's prejudice is obvious.

6. Several specific things concern Defendant about the Order, creating the obvious concern of impartiality.

7. First, the Judge has essentially bent over backwards to provide a hearing date for a motion for summary judgment for Plaintiff. Respectfully, if Plaintiff wishes to prosecute this case, that is Plaintiff's obligation, not the Judge's. This is why, for instance, the Florida Supreme Court has a rule about lack of prosecution. By putting his own desires to prosecute this case above all else, essentially injecting himself as a participant in the proceedings by causing the case to be prosecuted, the Judge has shown he is not neutral and detached.

8. Second, the Judge predetermined that he will set a trial date at docket sounding, even without letting Defendants be heard. Predetermining a legal ruling without letting the parties be heard is the epitome of unfairness and requires disqualification. See Marvin v. State, 804 So. 2d 360 (Fla. 4th DCA 2001); Barnett v. Barnett, 727 So. 2d 311 (Fla. 2d DCA 1999); Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996). For instance, because Defendants' Motion to Dismiss is pending, it is entirely plausible that the Complaint does not state a cause of action and that Plaintiff cannot state a cause of action even upon amendment. By saying he "will" set trial at the docket sounding on December 8, the Judge is obviously disregarding these possibilities, reflecting his obvious predetermination to deny the Motion to Dismiss. This may sound harsh, but if the Judge were open-minded about the possibility of granting the Motion to Dismiss, there is no way he would be setting a trial at a docket sounding on December 8, 2010 (or imposing a discovery cutoff of that same date).

9. Third, the Judge set the docket sounding *sua sponte*, without clearing the date with the undersigned, refuses to allow phone appearances, and threatens sanctions for non-attendance. This is highly irregular and grossly prejudicial, particularly since a cursory review of the file shows the undersigned to be an out of town attorney.

10. Fla.R.Jud.Admin. 2.530 requires that phone appearances be granted for hearings of 15 minutes or less absent "good cause." Here, Defendants and the undersigned were not even permitted to request a phone appearance (an option they would like to avail themselves of, if they so choose, because the undersigned practices out of town). At minimum, the undersigned should have been permitted to argue the absence of "good cause" to preclude a phone appearance, a basic violation of due process. Clearly, the Judge has prejudged the merits of this issue in an attempt to "push through" this foreclosure case.

11. To the extent it is this Court's procedure to not allow phone appearances in foreclosure cases, that does not fix this problem. Almost every other judge in the state allows phone appearances. They are required by Fla.R.Jud.Admin. 2.530 absent "good cause." To systematically conclude that there is always "good cause" to prevent phone appearances in foreclosure cases (if that is what has happened) shows the bias of which Defendants complain.

12. Fourth, the Judge has set a hearing to adjudicate summary judgment motions even though Plaintiff has not even filed such a motion. It seems the Judge is suggesting to Plaintiff's counsel to file such a motion in this case. Perhaps Plaintiff would not have filed such a motion in this case. Perhaps Plaintiff does not believe this to be a case where summary judgment is appropriate. By suggesting otherwise, and encouraging Plaintiff to set a hearing on a yet-to-be-filed summary judgment motion, the judge has given "tips" or "suggestions" to Plaintiff which are legally impermissible and mandate disqualification. See Shore Mariner Condo. Ass'n, Inc. v.

Antonious, 722 So. 2d 247 (Fla. 2d DCA 1998) ("Trial judges must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle."); Blackpool Associates, Ltd. v. SM-106, Ltd., 839 So. 2d 837 (Fla. 4th DCA 2003) ("We grant relief in connection with the trial court's order that denied disqualification as the trial court provided Blackpool/Kevin Murphy with legal advice and suggestions."); Cammarata v. Jones, 763 So. 2d 552 (Fla. 4th DCA 2000) ("we conclude the trial judge's suggestions to Respondent's counsel caused the Petitioners to have a well-rounded fear that they would not receive a fair trial"); Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

13. Fifth, the Judge set a discovery cutoff of December 8, giving Defendants grossly inadequate time to conduct discovery. Viewing this ruling in the context of the Order and the case, it seems clear the Judge is not permitting Defendants to conduct discovery because he believes there is no discovery they could take that would change the outcome. Respectfully, that is a woefully misguided opinion. Defendants are entitled to a fair chance to conduct discovery. Giving Defendants less than two months to complete discovery is grossly unfair and reflects the extent of the Judge's bias. It's as if the Judge is saying "this is just another foreclosure case – there's nothing Defendants can say that will matter; there's nothing they can find in discovery that will matter." Respectfully, these Defendants are facing a foreclosure on their home. They deserve better. They are entitled to a fair chance to defend, just like any other party.

14. In nearly ten years of practice, the undersigned has never seen anything like this – the judge *sua sponte* setting a docket sounding in a case that the plaintiff was not prosecuting (at a time when the Motion to Dismiss was still outstanding), refusing to let out-of-town counsel appear by phone, giving two months for Defendants to complete discovery, and announcing

summary judgment would be entered or trial set without giving the Defendants a chance to be heard. Under the circumstances, it seems clear the Judge has an agenda (perhaps the perceived backlog of foreclosure cases). The fact that the Judge does this on a systematic basis, in every foreclosure case, heightens these concerns. Whatever the reason, where a judge's personal agenda regarding a case is such that he engages in these actions, he is no longer a neutral and detached judge. Disqualification is required.

WHEREFORE Defendant respectfully request that the Honorable John S. Carlin enter an Order disqualifying himself as judge in this cause.

CERTIFICATE OF GOOD FAITH

Defendant's counsel, Mark P. Stopa, Esquire, hereby certifies that the instant motion and the statements set forth herein are made in good faith.

_____
Mark P. Stopa

VERIFICATION

Under penalty of perjury, I declare that I have read the foregoing document and that the facts stated in it are true.

_____
Velton Corbett

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable John S. Carlin, Lee County Justice Center, 1700 Monroe Street, Ft. Myers, FL 33901 and Craig T. Smith, Esq., Shapiro & Fishman, LLP, 10004 N. Dale Mabry Highway, Suite 112, Tampa, Florida 33618 on this ____ day of October, 2010.

Mark P. Stopa, Esquire - FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd. Suite 200
Tampa, FL 33607
Telephone: (727) 667-3413
ATTORNEY FOR DEFENDANTS