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

BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P.,

Petitioner,

vs.

DCA Case No. 2D11-_______
L.T. Case No. 51-2009-CA-7656-ES

BILL R. STENTZ AKA WILLIAM R. STENTZ, *et al.*,

Respondents.

______________________________________/

PETITION FOR WRIT OF *CERTIORARI* FROM A NON-FINAL ORDER OF THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FLORIDA

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BASIS FOR JURISDICTION

Petitioner/plaintiff BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P. ("**BAC**") seeks a writ of *certiorari* quashing the trial court's December 1, 2010 order [A5-8][1] granting in part and denying in part respondents/defendants Bill R. Stentz and Jacklyn L. Stentz's (the "**Stentzes**") "Motions Directed to Complaint and Notice of Intent to Dismiss under Florida Statutes Section 57.011" [A9-13]. FLA. R. APP. PROC. 9.030(b)(2)(A); 9.100(c)(1).

The order dismisses BAC's foreclosure complaint with leave to amend mandating that the amended pleading include allegations that are not required under Florida law. [A6-8.] The order also directs that the amended complaint be verified but compels verification language contrary to the foreclosure complaint verification requirements of Florida Rule of Civil Procedure 1.110(b). [*See* A8.] The order consequently departs from the essential requirements of law and will cause material injury to BAC for which no adequate remedy on appeal exists.

This petition impacts much more than one foreclosure action. Hundreds of thousands of foreclosure cases are pending across Florida—thousands in the Sixth Judicial Circuit and this Court alone—with a significant number of these cases being heard by the trial judge below.

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[1] All Petition Appendix references are by page (*e.g.*, [A1.] is Appendix page 1).

In this foreclosure crisis, even orders on motions to dismiss have a snow ball effect. One trial judge misapplies the law in favor of a borrower, and, within days, the one non-final order becomes the bases for hundreds of pleadings filed by borrowers across Florida. The order, by itself, has the potential to significantly delay—for several months even—resolution of thousand of foreclosure cases in Florida. This will cause irreparable harm to BAC, hamper the orderly foreclosure process, and unnecessarily waste judicial resources.

As a fundamental matter, Article V, Section 4(b)(4) of the Florida Constitution vests district courts of appeal with the discretionary jurisdiction to issue writs of *certiorari*. In particular, Florida Rule of Appellate Procedure 9.030(b)(2)(A) authorizes district courts to issue and use writs of *certiorari* to review non-final orders of lower courts that are not directly appealable under Florida Rule of Appellate Procedure 9.130. *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214 (Fla. 1998). *Certiorari* is the proper method for challenging a non-final order dismissing a complaint with leave to amend. *Bridges v. Williamson*, 449 So. 2d 400, 401 (Fla. 2d DCA 1984) (granting the petition for writ of *certiorari* and quashing a non-final order dismissing the complaint with leave to amend).

STATEMENT OF FACTS

BAC filed the foreclosure complaint on August 12, 2009. [A14-38.] The complaint alleges that, on November 29, 2005, the Stentzes gave a note in the

amount $193,529.00 to Countrywide KB Home Loans, secured by a mortgage on property located at 19820 Timberbluff Drive, Land O Lakes, Florida 34638. [A15, 23.] The complaint also alleges the Stentzes ceased making their monthly mortgage payments on April 1, 2009. [A15.] Copies of the note and mortgage were attached as exhibits to the complaint. [A21-38.] BAC filed the original note indorsed in blank on September 23, 2009, and also filed a copy of the recorded assignment of mortgage reflecting a transfer of the mortgage from MERS, as nominee for originating lender, to BAC. [A39-47.] The assignment was executed and recorded prior to the initiation of the foreclosure action. [A46.]

In response to the foreclosure complaint, the Stentzes filed a motion to dismiss entitled "Motions Directed to Complaint and Notice of Intent to Dismiss Under F.S. § 57.011". [A9-13.] The motion to dismiss was premised on the erroneous contention that BAC was required to allege it both "owns and holds the note and mortgage." [*See id.*] BAC filed a response in opposition to the motion to dismiss on December 17, 2009, arguing that the foreclosure complaint alleged BAC held the note and this was sufficient at the pleading stage to establish its standing to maintain the foreclosure action. [*See* A48-52.]

After a hearing held on November 8, 2010 [A53-55], at which BAC was unrepresented, the court entered an order on December 1, 2010 dismissing the complaint and holding that "[i]t is not enough for Plaintiff to only plead that it

holds the note and mortgage[.]" [A5-8.] The order directed BAC to file an amended complaint, requiring, among other things, that BAC "plead and identify both the owner and holder of the note and mortgage." [A7.] Additionally, the order mandates that the amended complaint must: (1) "deraign the chain of ownership/holdership [of the note and mortgage] since the loan's inception"; (2) "[a]llege ultimate facts why the note is indorsed in blank and specifically deny . . . that it or an interest in [it] has been pledged or given to another"; and (3) "[i]f Plaintiff is not the owner of the note it must specifically plead ultimate facts identifying the owner and Plaintiff's authority to act as representative for same attaching such proof of said representative authority . . .." [A7-8.] Finally, the order requires that the amended complaint "be verified per F.S. § 92.525(2) . . . and that any allegation in the verification containing 'best knowledge and belief' language is insufficient." [A8.]

A day prior to issuance of the order, BAC filed an amended complaint. [A56-82.] The order addresses the original complaint and not the amended complaint, but the amended complaint contains allegations similar to the original complaint. [*Compare* A14-16 to A56-58.] BAC would proceed with the case on the amended complaint if this Court quashes the order.

NATURE OF RELIEF SOUGHT

BAC seeks a writ of *certiorari* quashing the order. BAC should be permitted to proceed on the amended complaint filed on November 30, 2010, which properly alleges BAC holds the note. The order violates the essential requirements of Florida law and causes BAC material injury that cannot be remedied on plenary appeal. The order constitutes a departure from the essential requirements of law because it dismisses a complaint that is legally sufficient in that it alleges that BAC holds the note. The order then mandates that the amended pleading contain numerous allegations which are not required in a foreclosure complaint. And, the order mandates complaint verification language contrary to the foreclosure complaint verification requirements of Florida Rule of Civil Procedure 1.110(b).

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW.

This Court is to determine whether the order departs from the essential requirements of law and results in material injury that cannot be remedied on plenary appeal. *Bridges*, 449 So. 2d at 401.

II. THE ORDER IS CONTRARY TO LAW BECAUSE IT DISMISSES A LEGALLY SUFFICIENT COMPLAINT AND MANDATES THAT ANY AMENDED COMPLAINT INCLUDE ALLEGATIONS THAT ARE NOT REQUIRED UNDER ESTABLISHED FLORIDA LAW.

The trial court's dismissal of the original foreclosure complaint was improper. The trial court blatantly ignored the Florida Uniform Commercial Code (the "**UCC**") and case law in dismissing the complaint because BAC did not allege that it owned and held both the note and mortgage. For purposes of surviving a motion to dismiss, BAC is only required to allege it holds the note—not that it both owns and holds the note and mortgage. As this allegation was made in the original foreclosure complaint (as well as in the amended complaint), dismissal of the complaint departed from the essential requirements of law.

A promissory note is a negotiable instrument subject to the UCC. *See Am. Bank of the South v. Rothenberg*, 598 So. 2d 289, 291 (Fla. 5th DCA 1992). The "person entitled to enforce" a negotiable instrument under the UCC is the "holder of the instrument." FLA. STAT. § 673.3011(1). A "holder" is someone who is "in possession of a negotiable instrument that is payable . . . to bearer . . . ." FLA.

STAT. § 671.201(21)(a); *see also Rothenberg*, 598 So. 2d at 291 ("It is elementary that to be a holder, one must be in possession of the instrument."). The "bearer" is a person "in possession of a negotiable instrument . . . that is payable to bearer or indorsed in blank." FLA. STAT. § 671.201(5). As a holder, the bearer is entitled to the presumption that it may receive payment under section 673.3081.

The UCC does not require a foreclosure plaintiff to <u>own</u> the note to achieve standing. It only requires a foreclosure plaintiff to <u>hold</u> the note at the time the foreclosure complaint is filed. Whether another person or entity previously owned or held the note is irrelevant. All that matters is whether the foreclosure plaintiff holds the note, as that term is defined in the UCC, on the date the complaint is filed. *See Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010) (per curiam) ("Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial code to establish that it was the lawful holder of the note, entitled to enforce its terms.")

The allegation in the complaint that BAC holds the note was legally sufficient. BAC does not have to plead that it owns <u>and</u> holds the note or "deraign the chain of ownership/holdership" of the note, as mandated by the order. Florida law does not require this.

Further, although BAC must merely allege its status as holder of the note at the initial pleading stage, it filed the original note indorsed in blank with the trial

court. Filing the original note indorsed in blank conclusively established that BAC holds the note and proved its standing to maintain this action.

A written or recorded mortgage assignment is not necessary for foreclosure standing and BAC does not have to reference or attach an assignment within the complaint. This is because the mortgage follows the note—regardless of the mortgage assignment. *See Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004) ("A mortgage is the security for the payment of the negotiable promissory note, 'and is a mere incident of and ancillary to such note.'"); *Mortgage Elec. Registration Sys., Inc. v. Revoredo*, 955 So. 2d 33, 34 n.2 (Fla. 3d DCA 2007) (mortgage security follows the note) (citing 37 Fla. Jur. 2d Mortgages § 519 (2007)); *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300, 300-01 (Fla. 1st DCA 1998) ("Because the lien follows the debt, there was no requirement of attachment of a written and recorded assignment of the mortgage . . . to maintain the foreclosure action."); *Margiewicz v. Terco Props.*, 441 So. 2d 1124, 1125 (Fla. 3d DCA 1983) ("When a note secured by a mortgage is assigned, the mortgage follows the note into the hands of the assignee."); *Vance v. Fields*, 172 So. 2d 613, 614 (Fla. 1st DCA 1965) ("An assignment of the mortgage without an assignment of the debt creates no right in the assignee.").

Finally, the trial court's finding that BAC must allege it owns and holds the note and mortgage simply because Florida Rules of Civil Procedure Form 1.944

contains that allegation is misplaced. [*See* A6.] While the "forms are sufficient for the matters that are covered by them[,]" it does not follow that failure to quote the forms verbatim renders a complaint dismissible. FLA. R. CIV. PROC. 1.900(b) ("So long as the substance is expressed without prolixity, the forms may be varied to meet the facts of a particular case."); *see Thrasher v. First Natl. Bank of Miami*, 288 So. 2d 288, 289 (Fla. 3d DCA 1974) (the fact that the complaint did not include a monetary value as required by the form did not warrant dismissal of the complaint). Rather, the law is clear that ownership of a note and mortgage is not a prerequisite to enforcement.

The trial court's order contravenes established Florida law. The original foreclosure complaint (and the amended complaint) allege BAC is the holder of the note, and it should not have been dismissed. BAC should not be required to amend its foreclosure complaint to include allegations that are not required by Florida law to establish its standing to foreclose.

III. THE ORDER IS CONTRARY TO LAW BECAUSE IT PROHIBITS VERIFICATION OF THE AMENDED COMPLAINT ON "BEST KNOWLEDGE AND BELIEF."

The order requires that the amended complaint "be verified per F.S. § 92.525(2) . . . and that any allegation in the verification containing 'best knowledge and belief' language is insufficient." [A8.] This requirement stands in stark

contrast to the newly enacted rule adopted by the Florida Supreme Court governing the filing of foreclosure complaints.

Revised Rule 1.110(b), effective February 11, 2010, directs that foreclosure complaints must be verified. It states: "When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified." It then provides that verification of a document **shall** be in the following form: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief." *Id.* (emphasis added). The trial court mandated BAC file a verified amended complaint that prohibits the verification to be based on to "the best of my knowledge and belief," in direct contravention of the rule.

In amending rule 1.110(b), the Florida Supreme Court made clear that the amendment applied only to verification of foreclosure complaints. *See In re: Amend. to the Fla. R. of Civ. P.*, 44 So. 3d 555 (Fla. 2010). It stated:

> Upon consideration of the Task Force's petition, the comments filed and responses thereto, and the presentations of the parties at oral argument, we adopt the Task Force's proposals with minor modifications as discussed below. First, rule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the **complaint** are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded "lost note" counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm

> to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

Id. at 566 (emphasis added). The verification requirement does not apply to other documents filed in foreclosure cases. An argument that the explicit language for the verification set forth in the rule applies only to verification of other documents filed in a foreclosure action, and not to verification of the foreclosure complaint itself, has no merit in light of the express purpose of the rule revision enunciated by the Supreme Court.

Further, section 92.525, Florida Statutes, the verification statute referenced in the order, states that verification of a document can be on information and belief when that language is permitted by law. FLA. STAT. § 92.525(2) ("A written declaration means the following statement: 'Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,' followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words 'to the best of my knowledge and belief' may be added.") Clearly, rule 1.100(b) permits foreclosure complaints to be verified "to the best of my knowledge and belief." The trial court does not have authority under section 92.525 to mandate different language. This would render section 92.525 unconstitutional to the extent it conflicts with the rule 1.110(b) procedures governing foreclosure complaints.

See Haven Fed. Savs. & Loan v. Kirian, 579 So. 2d 730, 732 (Fla. 1991) ("Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.").

It was improper for the trial court to prohibit verification of the amended complaint on "best information and belief" when this language is required by rule. On this point alone, the order departs from the essential requirements of law.

IV. THE ORDER CAUSES IRREPARABLE HARM THAT CANNOT BE REMEDIED ON PLENARY APPEAL.

The trial court's order causes irreparable harm that cannot be adequately remedied on appeal. Hundreds of thousands of foreclosure cases are pending across Florida[2]—hundreds in the Sixth Judicial Circuit and this Court alone—with a significant number of these cases being heard by the trial judge below. BAC obviously has a direct interest in thousands of pending foreclosure cases in Florida. The trial court plainly misapplied Florida law and will continue to do so until it is corrected. This will cause irreparable harm to BAC, hamper the orderly

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[2] *See, e.g., In re Final Report and Recommendations on Residential Mort. Foreclosure Cases*, No. AOSC09-54, 2009 WL 5227471 (Fla. Dec. 28, 2009) (In ordering mediation in residential foreclosure cases, the Florida Supreme Court explained that "[f]oreclosure case filings in Florida trial courts stood at nearly 369,000 in December 2008 . . . Florida has the third highest mortgage delinquency rate, the worst foreclosure inventory, and the most foreclosure starts in the nation. At the close of 2009, it is estimated there will be an inventory of approximately 456,000 pending foreclosure cases statewide.").

foreclosure process, and unnecessarily waste judicial resources.

As the Florida Supreme Court has explained, "the judicial policy in favor of limited *certiorari* review is based on the notion that piecemeal review of non-final trial court orders will impede the orderly administration of justice and serve only to delay and harass." *Jaye*, 720 So. 2d at 215. Applied here, this Court's acceptance of *certiorari* would significantly *advance*—rather than inhibit—the orderly administration of justice.

Review of the trial court's order is warranted under these circumstances. This is not a case where a litigant simply seeks to resolve an important issue before final hearing in a particular case. This case involves a critical issue of Florida law that impacts both this case as well as thousands of other pending foreclosure cases. In this foreclosure crisis, even orders on motions to dismiss have a snow ball effect. One trial judge misapplies the law in favor of a borrower, and, within days, the one non-final order becomes the bases for hundreds of pleadings filed by borrowers across Florida. The order in the case at hand, by itself, has the potential to significantly delay—for several months even—resolution of thousand of foreclosure cases in Florida.

Failure to correct and resolve the trial court's misapplication of Florida foreclosure law could cause a large number of similar cases to be litigated on two separate tracks (one under a correct application of Florida law and another under

the trial court's interpretation), lead to contrary foreclosure processes and requirements imposed by different courts and different judges (including within the Second District), and cause tremendous expense for the parties involved in those cases. In addition, the failure to resolve this issue will result in an extreme and unwarranted waste of judicial resources in the trial court, in this Court, and in the many other courts in which these cases are heard. Because accepting jurisdiction in this case would further the orderly administration of justice, this Court should accept jurisdiction to review the trial court's order.

Timing is critical, which is an important, additional factor in support of jurisdiction and review of the trial court's order. There is a critical state and national interest in the orderly administration of the foreclosure process in Florida—to appropriately resolve pending foreclosure cases consistent with the law, provide certainty for courts and litigants involved in foreclosure cases, and to prevent harm to the economy through unnecessary confusion or delay in the foreclosure process. Unfortunately, the trial court's order could cause these precise impacts unless these critical issues are resolved by this Court.

The nature and scope of this injury cannot be meaningfully or adequately corrected on plenary appeal. *See, e.g.*, *Batavia, Ltd. v. U.S.*, 393 So. 2d 1207, 1208-9 (Fla. 1st DCA 1980) (reversing and remanding trial court order staying prosecution of foreign company's mortgage foreclosure action unless company

obtained authority to transact business in Florida because appeal from eventual final order would not provide entity "complete and adequate remedy"). Granting *certiorari* is the only effective means to prevent this harm from occurring. In the time between the trial court's order and a resolution of a plenary appeal—which could be more than a year—the injury will be compounded in the pending case and spill over into hundreds of cases under a plainly incorrect application of law. *Jaye*, 720 So. 2d at 215 (explaining that a "petitioning party must establish that it has suffered irreparable harm that cannot be remedied on direct appeal").

Under these extraordinary circumstances, this one nonfinal order will cause irreparable harm spreading far beyond this case. The irreparable harm will snowball until this Court quashes the order and gives clear direction to the trial court's in the Second District as to the pleading requirements in foreclosure actions and proper foreclosure complaint verification language.

CONCLUSION

This Court should: **(1)** grant this petition; **(2)** hold that the dismissal of the complaint was improper because the complaint's allegation that BAC was the holder of the note was legally sufficient to establish standing to foreclose; **(3)** hold that it was improper for the trial court to mandate complaint verification language contravening rule 1.100(b); and **(4)** issue a writ of *certiorari* quashing the trial court's order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and the appendix to this Petition have been furnished by United States Mail to Bill R. Stentz, aka William R. Stentz, c/o Gregory D. Clark, Esq., 1201 S. Highland Ave., Ste. 9, Clearwater, FL 33756; Jacklyn L. Stentz, c/o Gregory D. Clark, Esq., 1201 S. Highland Ave., Ste. 9, Clearwater, FL 33756 (Counsel for Respondents); Tierra Del Sol Homeowner's Association, Inc. c/o Rizzetta & Company, Inc., R.A., 5844 Old Pasco Rd., Ste. 100, Wesley Chapel, FL 33544; and, Lindsey D. Lamb, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622 (Trial Counsel) and the Honorable Lynn Tepper, 38053 Live Oak Ave., Room 106B, Dade City, FL 33523 (circuit judge who entered the order at issue), this 3rd day of January, 2011.

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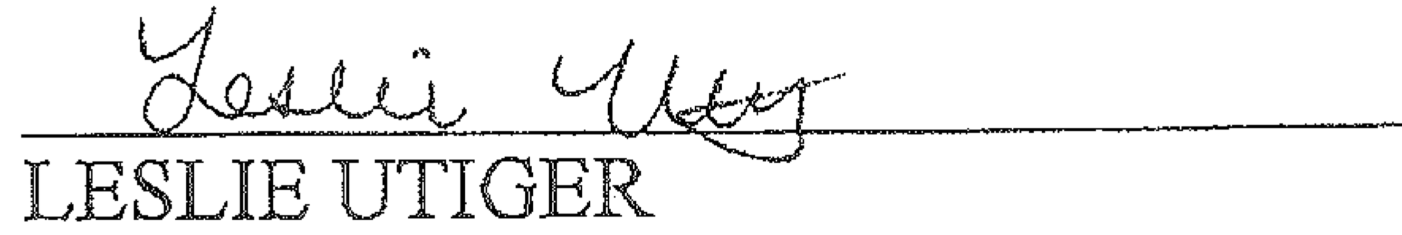
CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2) .



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