Mark J. Malone, Esq.
Attorney-at-Law
Of Counsel – Law Office of James F. Villere', Esq.
441 Main Street, Metuchen, NJ 08840
Tel. 973-267-0787 Fax 973-944-5017

May 22, 2009

Hon. Glenn Berman
Chancery Division, General Equity Part
Chambers 302
56 Paterson Street
PO Box 964
New Brunswick, New Jersey 08903-0964

Re: The Bank of New York as Trustee for Equity One Inc. Mortgage/Pass Through Certificate Series #2006-A v. Brena, et al., Docket # F 27578-08

Dear Judge Berman:

Please accept this letter brief in lieu of a more formal brief in support of an award of attorneys' fees to counsel for Defendants Francisco Brena and Freya Gallegos. An award of fees in the amount of $118,080 pursuant to New Jersey Court Rule 1:4-8 against Plaintiff's counsel, Michael Milstead and Associates ("Milstead Firm"), is appropriate because the law firm initiated a foreclosure complaint in violation of its obligations to undertake a reasonable inquiry into the factual allegations contained in the complaint. When challenged, the Milstead Firm blindly pursued the litigation defending the falsification of mortgage documents and ignoring factual assertions by Defendants that the Plaintiff was a bogus party.

Introduction

After a hard fought and costly legal battle, Defendants prevailed in their effort to dismiss the foreclosure complaint against them when Plaintiff took a voluntary dismissal of the complaint on January 22, 2009 rather than comply with Court orders designed to ferret out fraudulent conduct surrounding the litigation. The dismissal, however, did not come until four months after Defendants' counsel had first sent a frivolous litigation letter to the Milstead Firm on September 26, 2008 setting forth 5 discrete grounds on

which the complaint violated R. 1:4-8 and the frivolous litigation statute, N.J.S.A. 2A:15-59-1 et seq. The letter advised the Milstead Firm:

> 1. The re-recorded mortgage recited in the complaint is a fraudulent document.
>
> > (a) A side-by-side comparison of the recorded and re-recorded mortgage documents shows that the basis for calculating changes in the mortgage note interest rate on the Adjustable Rate Rider to the re-recorded Mortgage has been fraudulently increased.
> >
> > (b) A side-by-side comparison of the recorded and re-recorded mortgage documents shows that the notary's statement is false. Defendants did not personally appear before her on August 10, 2006, subscribe to the re-recorded mortgage instrument, and acknowledge they executed the same.
>
> 2. The mortgage assignment recited in the complaint is bogus. It purports to assign to Plaintiff both the mortgage and mortgage note that are the subject matter of this lawsuit. The assignee, Mortgage Electronic Registration Systems, Inc., has never been in possession of the mortgage note it claims to have assigned.
>
> 3. Plaintiff does not have standing to prosecute this complaint because it is not a holder in due course of the mortgage note that is the subject of this foreclosure action.
>
> 4. Plaintiff "The Bank of New York as Trustee for Equity One Inc. Mortgage/Pass Through Certificate Series #2006-A" does not have standing to prosecute this complaint because it is not a bona fide trustee for the mortgage-backed securities identified in the complaint's caption. In connection with the defective trustee status, we note that the mortgage and mortgage note cited in the complaint are not held by the trust named in the complaint.
>
> > 5. Plaintiff does not have standing to prosecute this complaint because it is not authorized to do business in the State of New Jersey. In connection with the lack of standing, we note that the "principal place of business" listed in the complaint is not a bona fide address for Plaintiff.

Plaintiff's counsel never responded to the frivolous litigation letter. Rather than withdraw the offending complaint, the Milstead Firm chose to ignore the demand, engaged in a protracted and disingenuous campaign to salvage litigation patently grounded in fraud, and only when confronted with Court orders designed to get to the truth about falsified mortgage documents, capitulated with the admission that the party it had named as Plaintiff was not a legitimate party.

Because the "party" named in the complaint is a bogus entity, an award of counsel fees against it pursuant to the frivolous litigation statute is a meaningless gesture. The full brunt of legal fees as a sanction for misconduct should fall on the law firm that initiated and fought to salvage the lawsuit without proper factual and legal support.

Fraud permeated Plaintiff's cause of action. Plaintiff's claim was founded on falsified mortgage documents, a false acknowledgment and a bogus mortgage assignment. The tampered mortgage documents evidenced an intent to cheat Defendants by obtaining a judgment for more money than the unaltered note would entitle a holder to receive. There were no factual disputes regarding the re-recorded mortgage, the recorded assignment or the non-existence of the Plaintiff named in the complaint. Ultimately, not one allegation of the Defendants was successfully rebutted.

Statement of Facts and Procedural History

On July 18, 2008, a complaint was filed with the Superior Court of New Jersey captioned "The Bank of New York As Trustee for Equity One Inc. Mortgage/Pass Through Certificate Series #2006-A, Plaintiff, v. Francisco Brena and Freya Gallegos, his wife; Louis Barrood, Sr., Defendants." This complaint relied upon re-recorded fraudulent mortgage documents, a false acknowledgment and a bogus assignment of the mortgage and note. (Complaint, ¶2; October 6, 2008 Malone Certification, ¶¶ 43-81.)

On July 28, 2008, ten days after filing the complaint, Plaintiff's counsel caused the recording of the bogus assignment of the re-recorded mortgage and note from Mortgage Electronic Registration Systems, Inc. ("MERS") to Plaintiff. The mortgage assignment, upon which Plaintiff initially based its standing to sue, relied on the falsified mortgage documents in claiming that Defendants owed principal with interest "computed at the rate of 9.875% per year, …" This claim for interest was based on the fraudulently altered mortgage documents that increased the margin interest from 5% to 6.5%. (October 6, 2008 Malone Certification, ¶¶ 69-71.) The claim represented a blatant attempt to defraud Defendants.

On July 30, 2008, Plaintiff's counsel filed a Notice of Lis Pendens, dated July 18, 2008, referencing the fraudulently altered re-recorded mortgage. (October 6, 2008 Malone Certification, ¶102 and Exh. 13.)

On September 26, 2008, Defendants' counsel sent a letter to Plaintiff's counsel demanding the complaint be withdrawn or sanctions would be sought on the grounds of frivolous and sham litigation. (October 6, 2008 Malone Certification, ¶15 & Exh. 1.) The letter gave comprehensive notice to Plaintiff's counsel and to Plaintiff that the claim was based on the fraudulently altered mortgage documents.

On October 7, 2008, Defendants filed a motion to dismiss the complaint accompanied by a letter brief and supporting certification detailing the factual basis for the claims of fraud. On October 10, 2008, two weeks after Plaintiff's counsel sent the frivolous litigation letter demanding the complaint be withdrawn, the mortgage servicer, Popular Mortgage Servicing, Inc., notified Francisco Brena and Freya Gallegos it was assigning, selling or transferring the mortgage servicing rights to Defendants' mortgage to Litton Loan Servicing, LP effective November 1, 2008. (January 5, 2009 Certification of Mark Malone in response to Plaintiff's supplemental opposition dated December 30, 2008, ¶39 and Exh. 1.)

In response to Defendants motion to dismiss the complaint, on October 29, 2008, Plaintiff's counsel, Nelson Diaz, Esq. ("Diaz"), submitted a certification in opposition to Defendants' motion to dismiss the complaint. Diaz's certification compounded the wrongdoing by falsely claiming the mortgage was re-recorded to correct an error in the margin interest rate used to compute the total interest charged on the loan. Diaz embellished this fabrication by claiming the correction was done pursuant to an errors and omissions/compliance agreement. Defendants successfully refuted Diaz's claim. (Defendants' November 3, 2008 letter brief, pp. 2-3; November 3, 2008 Malone certification, ¶¶3-5 and Exh. 1.)

Presented with Defendants' documentary proof of the altered mortgage and the bogus assignment, on November 21, 2008, the Court ordered Plaintiff's counsel to submit supplemental opposition to the motion to dismiss:

> . . . specifically addressing the allegations that the Adjustable Rate Rider and Mortgage were altered, and if so, by whom, when, and why, also indicating when Plaintiffs were notified of the same (assuming they were). Plaintiff shall also specifically address the allegation of a False Acknowledgement, indicating when the acknowledgement was executed, the relationship (of the Notary to the Plaintiff), whether the signatories (purportedly the Defendants) appeared, and if not, why the

> acknowledgement indicates they did so appear (if that is conceded to be the case); submit supplemental opposition to Defendants' allegations that mortgage documents were falsified.

Instead of answering the Court's inquiries, Plaintiff's counsel advised the Court that the mortgage servicer at the time the fraudulent documents were created and filed, Popular Mortgage Servicing, Inc., "had no information and could not advise this office why or by whom the Adjustable Rate Rider and Mortgage were altered and whether the Defendants were notified that there was an error in the original Adjustable Rate Rider to the mortgage, which needed to be corrected." (December 30, 2008 Diaz letter brief submitting supplemental opposition, p. 2.) Moreover, the mortgage servicer was "unable to provide any information" as the personnel involved were no longer employed and the Departments that handled the transaction were no longer operating." Id. Diaz made no attempt to prove that he had made a diligent inquiry into the allegations and did not support his statements with a certification. In fact, none of Diaz's representations were in the form of admissible evidence. Yet, even at this point Plaintiff did not elect to dismiss the complaint.

Plaintiff conceded the mortgage documents were altered. Id. Yet Plaintiff claimed it had no knowledge about who altered the documents, when it was done and why. Similarly, Diaz pleaded ignorance as to whether Defendants were ever notified of the alterations. Id. These professions of ignorance were especially damning to Plaintiff's counsel. In essence, they showed Diaz fabricated his earlier account that pursuant to an errors and omissions/compliance agreement the mortgage was re-recorded to correct an error in the margin interest rate.

Diaz's December 30, 2008 letter brief culminated a pattern of conduct evidencing bad faith and obstruction of justice. Plaintiff's counsel ignored the Court's orders, lied to the Court, and aided and abetted an attempt to provide Diaz's real client, the mortgage servicer, with plausible denial that it no longer has access to relevant information about the creation of false documents.

On January 12, 2009, the Court entered a second order directing Plaintiff's counsel to provide proof that the named Plaintiff is a bona fide trustee for the mortgage-backed securities identified in the caption of the complaint. Further, Plaintiff was to

provide the names of people with relevant knowledge of issues raised in the November 21, 2008 order that sought to get to the bottom of Defendants' fraud allegations.

Despite the explicit language of the order, Plaintiff failed to produce the trust agreement and other documents showing it is the bona fide owner of the mortgage and note at issue in this case. Plaintiff failed to provide an explanation for the fraudulent re-recorded mortgage and the bogus assignment. Plaintiff failed to show it is the real party in interest. Plaintiff failed to refute Defendants' long-standing claim that Plaintiff is a fictitious trust. Plaintiff failed to provide the names of persons who could provide evidence of wrongdoing in this case and potentially in many other cases brought under the name of this plaintiff.

Finally, many months after receipt of the frivolous litigation letter informing counsel that Plaintiff did not have standing, Plaintiff's counsel voluntarily dismissed the complaint, and then admitted to filing a complaint naming the wrong party as Plaintiff. (Diaz letter brief dated February 11, 2009).

In a motion returnable on February 20, 2009, Defense counsel unsuccessfully sought to have the complaint dismissed with prejudice. On March 10, 2009, the Court denied Defendants' motion to dismiss the complaint with prejudice. The Order continued:

> . . . implying nothing, the Court does not comment on any right of the Defendants to seek counsel fees and costs arising from Defendant's Notice of Motion to Dismiss the Complaint in Foreclosure, which resulted in the Order of January 12, 2009 (ordering Plaintiff to supply Defendant proof that Plaintiff had standing and the names of people with relevant knowledge of issues raised in the November 21, 2008 Order;) . . .

No one claiming an interest in Defendants' note and mortgage has since sought to file a new foreclosure complaint. Efforts by Defense counsel to contact the new mortgage loan servicer, Litton Loan Servicing, LP produced a May 1, 2009 email response saying that as of May 1, 2009 "the loan is not reflecting a foreclosure status." (May 22, 2009 Certification of Mark J. Malone, ¶¶28-31.)

Legal Argument

Attorneys for defendants request an award of fees from Plaintiff's counsel. Counsel fees are allowable against attorneys filing frivolous suits or defenses pursuant to

Rule 1:4-8. This rule was significantly amended in 1996 to include a frivolous-pleading penalty against attorneys generally patterned after Fed. R. Civ. P. 11. Pressler, Current N.J. Court Rules, Comment R. 1:4-8. Rule 1:4-8 provides that by signing, filing or "advocating" a pleading, written motion or other paper, an attorney certifies that to the best of his or her knowledge, information, and belief, "formed after an inquiry reasonable under the circumstances" the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; that the legal contentions are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law; and that the factual contentions or denials have evidentiary support.

Both Rule 1:4-8 and Fed. R. Civ. P. 11 require that attorneys undertake a reasonable inquiry prior to signing pleadings or otherwise advancing an argument. The evidence shows that such reasonable inquiry was patently lacking at several stages of the litigation. First, when the complaint was filed it named a bogus plaintiff. The complaint also relied upon re-recorded fraudulent mortgage documents that increased the loan's margin interest from 5% to 6.5%, and a false acknowledgment accompanied the re-recorded mortgage documents. A bogus assignment of the mortgage and note relied on the falsified mortgage documents in claiming that Defendants owed principal with interest "computed at the rate of 9.875% per year, …" The claim for interest was based on the fraudulently altered mortgage documents. In this case the law firm for Plaintiff not only failed to conduct a reasonable inquiry into the factual basis for its allegations before bringing the action, it deliberately ignored the facts when they were detailed by Defendants' counsel in the frivolous litigation letter.

Monetary sanctions, including attorneys' fees and costs, may be imposed on a law firm as well as an individual attorney who is a member of that firm. Under R. 1:4-8(b), sanctions may be imposed on motion by the adversary. Sanctions shift the cost of a proceeding to the party who acted in bad faith. An award of counsel fees is governed by an abuse of discretion standard. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Sanctions are designed to deter future misconduct, and the amount of the sanction should be limited to a sum sufficient to deter repetition of such conduct. R. 1:4-8(d).

Here the total amount of the fees incurred by Defendants' counsel is an appropriate sanction to deter repetition of the egregious conduct evidenced in Plaintiff's counsel's conduct of the litigation. The full measure of deterrence is especially appropriate given the circumstance that this is not Diaz's first encounter with sanctions imposed for improper litigation conduct. In the bankruptcy case of In re Rivera, Case No. 01-42625, Judge Morris Stern, U.S.B.J., entered an Order imposing sanctions of $125,000 against Diaz's former firm, Shapiro and Diaz, in connection with that law firm's use over an extended period of time of a pre-signed certification paragraph and signature that was affixed to certifications that had never been reviewed by the person whose signature was affixed to the certification. (A copy of Judge Stern's May 25, 2006 Order is attached as Exhibit 1 to this brief.) Given the high volume of foreclosure filings and the high percentage of cases that are uncontested, the sound exercise of discretion justifies the court awarding the full amount of attorney's fees to deter repetition of such conduct by the plaintiff's counsel and other foreclosure attorneys.

An award of the total amount of the fees incurred by Defendants' counsel is also a necessary sanction to deter repetition of Plaintiff's counsel's deliberately pursuing a foreclosure action in the name of a non-existent plaintiff. This strategic decision by Plaintiff's counsel robbed Defense counsel of any opportunity to recover attorney's fees against an offending party pursuant to the frivolous litigation statute, N.J.S.A. 2A:15-59-1 et seq.

No final judgment has been entered in this case. Although R. 1:4-8 says a motion for sanctions shall be filed with the court no later than 20 days following entry of final judgment, the absence of a final judgment is not a bar to an award of attorneys fees. Just as the filing of a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(i) does not divest a federal district court of jurisdiction to consider a Rule 11 sanctions application, a similar voluntary dismissal in state court should not divest the court of authority to apply sanctions.

In Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490, 496 (3d Cir. 1989), the court said a rule precluding sanctions in such circumstances would "emasculate Rule 11 in those cases where wily Plaintiffs file baseless complaints, unnecessarily sapping the precious resources of their adversaries and the courts, only to

insulate themselves from sanctions by promptly filing a notice of dismissal." Accord, General Development Corp. v. Binstein, 743 F. Supp. 1115, 1140 (D.N.J. 1990). See In Matter of Estate of Fay Horowitz, 220 N.J. Super. 300, 302 (Law Div. 1987), where the court refused to allow a party to take a voluntary dismissal because the matter had been duly presented and taken under advisement by the court. Matter of Estate of Horowitz was cited approvingly by the Court in Greely v. Greely, 194 N.J. 168 (2008).

If the court concludes a final judgment is necessary for an imposition of sanctions pursuant to R. 1:4-8, then the passage of time and inaction on any further foreclosure proceeding by Plaintiff makes it appropriate for this court to consider converting Plaintiff's voluntary dismissal into a dismissal with prejudice. See Bank of New York, Trustee for Equicredit Corporation Trust 2001-2 v. Williams, slip opinion (Fla. 1st Dist. Ct. Appeal 2008) (copy attached as Exhibit 2 to this brief,) where initially the Bank of New York Trustee's complaint and amended complaint were dismissed without prejudice on standing grounds. When the Bank Trustee declined to file a second amended complaint, the trial court dismissed the amended complaint with prejudice. (Slip op. at 2.)

Procedure for Fee Calculation

R. 1:4-8(b)(1) provides that an application for sanctions under the rule shall be by motion describing the specific conduct alleged to have violated the rule. The motion must include a certification that the applicant served a written notice and demand stating the reasons for withdrawal of the offending paper believed to violate R. 1:4-8. (A copy of the requisite written demand is attached as Exhibit A to the May 22, 2009 Certification of Mark J. Malone, ¶16.)

Rule 4:42-9(b) sets forth the procedure for calculating counsel fees: "all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a)." RPC 1.5(a), in turn, prescribes that "[a] lawyer's fee shall be reasonable." Among the factors to be considered in determining the reasonableness of a fee are the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.
[RPC 1.5(a)(1)-(8).]

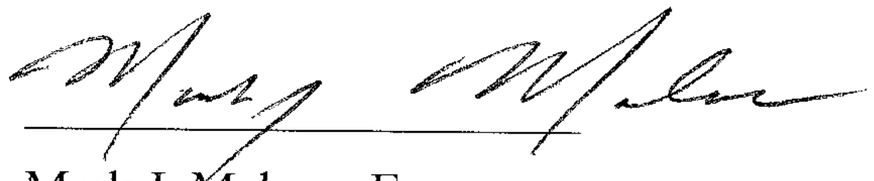
Above all, the fees must be reasonable. Defense counsel undertook representation of family of 6 facing eviction from their home. The family faced almost certain foreclosure if volunteer representation through Legal Services of New Jersey had not been forthcoming. Their counsel's investigation revealed they were victims of a predatory lending, bait and switch scheme that included falsification of mortgage loan documents. Defense counsel's corroborative in-depth investigation exposed the Plaintiff as a bogus securitized trust, and traced the fraud into the security documents filed with the Securities and Exchange Commission. (May 22, 2009 Malone certification, ¶15.) Defense counsel's diligence enabled them to expose the falsity of Diaz's claim that the mortgage documents had been altered to correct a mistake. (May 22, 2009 Malone certification, ¶15.)

This effort took considerable time, over 400 hours and in large part reflects the time-consuming nature of proving a negative - - the non-existence of Plaintiff - - in the face of Plaintiff's attorney's obstinate refusal to admit the errors in its factual allegations. The effort was necessitated by the complexities of securitized mortgage financing, the volume of documents involved in a mortgage loan, Plaintiff's counsel's litigation tactics, and the need to expose the deceit committed by the mortgage lender's still unidentified representatives. At oral argument on January 9, 2009 on Defendants' motion to dismiss, Plaintiff's counsel acknowledged that counsel for Defendants had probably spent months working on the case. (May 22, 2009 Malone certification, ¶19.)

Conclusion

Defendants respectfully request the Court to award counsel fees against Plaintiff's counsel in the amount of $118,080.

Respectfully submitted,



Mark J. Malone, Esq.

cc: Michael Milstead, Esq.
Nelson Diaz, Esq.

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-2(c)

FILED
JAMES J. WALDRON

MAY 25 2006

U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY _____ DEPUTY

In Re:	Case No.:	01-42625 (MS)
JENNY RIVERA,	Chapter:	13
Debtor.	Hearing Date:	n/a
	Judge:	Morris Stern

ORDER REGARDING RULE 9011 PENALTIES
AND PERMANENTLY ENJOINING CERTAIN PRACTICES

The relief set forth on the following pages, numbered two (2) through four (4) is hereby **ORDERED**.

Date: 5/25/06

MORRIS STERN, U.S.B.J.

EXH. 1

This matter having been initiated by the Court *sua sponte*, and the Court having issued its Orders to Show Cause of September 12, 2005 and October 24, 2005, as well as supplementary Orders of November 9, 2005 and November 14, 2005, and hearings having been held on October 18, 2005 and December 14, 2005 (as well as an on-the-record prehearing conference of November 30, 2005), and the Court having, *inter alia*, scrutinized a certain practice of Shapiro & Diaz, LLP (hereinafter "S&D"), to wit: that law firm's filing throughout this District, over an extended period, of certifications in support of stay relief motions and *ex parte* applications for stay relief (so as to permit foreclosure proceedings to be initiated and/or continued against debtors whose bankruptcy cases were pending in this District), *those certifications having affixed to them a certifying statement and signature page which was on file with S&D in advance of the preparation of the substance of the certification, where the substance of the certification and the final form of the certification were not contemporaneously reviewed by the purported signatory at the time of the purported signing, and, indeed, it appearing that the final form of certification was never reviewed by the purported signatory prior to its filing with the Court* (the italicized foregoing description being hereinafter referred to as "the S&D Certification Practice"), and, in addition, as catalogued by S&D in its submission at the October 18, 2005 hearing (Hearing Exhibit "R, S&D" #1), at least since a date in July 2004, the on-file certifying paragraph and signature of one "Amirah Shahied" was so affixed to more than 250 certifications filed with the Bankruptcy Court in this District pursuant to the S&D Certification Practice, when, in fact, that person was no longer employed in any capacity by any party in any possible chain of authorization emanating from a mortgage owner or servicer which might be described as an S&D "client," and, in addition, EverHome Mortgage Company ("EverHome"), the secured party and purported

client of S&D in the immediate captioned matter having submitted to this Court on October 14, 2005 a response to the Order to Show Cause specifically denying the authorization of "Amirah Shahied" to execute documents on its behalf,

And the Court having identified parties-respondents to this proceeding as including (among others), S&D; S&D attorneys, Rhondi L. Schwartz, Esq. and Nelson L. Diaz, Esq.; S&D principals, Gerald M. Shapiro, Esq. and David Kreisman, Esq.; EverHome; and EverHome's default servicer, First American National Default Outsourcing, Inc. ("FANDO"),

And the Court having considered all testimony and written submissions and issued its Opinion of even date,

And, for the reasons set forth in the Court's Opinion of even date, as to violations of Federal Rule of Bankruptcy Procedure 9011 certain monetary penalties are assessed, an injunction shall issue, and a disciplinary referral is made, it is

ORDERED, that Rhondi L. Schwartz, Esq. shall pay to the Clerk of the Court the penalty amount of $500 for her violation of *Fed. R. Bankr. P.* 9011, and that for her conduct as described in the Court's Opinion of even date, Ms. Schwartz shall be referred to the Chief Judge of this District pursuant to L. Civ. R. 104.1(e)(2) for review of that conduct for purposes of disciplinary investigation and/or referral; and it is further

ORDERED, that S&D shall pay to the Clerk of the Court the penalty amount of $125,000 for its violation of *Fed. R. Bankr. P.* 9011, and that, for its conduct as described in the Court's Opinion of even date, it shall be referred to the Chief Judge of this District pursuant to L. Civ. R. 104.1(e)(2) for review of that conduct for purposes of disciplinary investigation and/or referral; and it is further

ORDERED, that Nelson Diaz, Esq. shall, for his conduct as described in the Court's Opinion of even date, be referred to the Chief Judge of this District pursuant to L. Civ. R. 104.1(e)(2) for review of that conduct for purposes of disciplinary investigation and/or referral; and it is further

ORDERED, that S&D, Rhondi L. Schwartz, Esq., Nelson Diaz, Esq., Gerald M. Shapiro, Esq., David Kreisman, Esq., any law firms or other enterprises controlled by Gerald M. Shapiro, Esq. and/or David Keisman, Esq., EverHome, and FANDO shall be permanently enjoined from engaging in this District in the S&D Certification Practice (that is, to revert to that prior practice of using a presigned certifying paragraph, and of not having the signatory to the supporting certification both review the full and final form of certification and execute that certification contemporaneously with that review, all prior to the filing of such certification with the Court), and further, from submitting supporting documentation to the Bankruptcy Court in this District for purposes of obtaining relief from the stay so that foreclosure proceedings might be initiated and/or continued, which violate the Federal Rules of Bankruptcy Procedure, and the Local Rules, Administrative and General Orders of the Bankruptcy Court of this District.

EXHIBIT 2

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

THE BANK OF NEW YORK, acting solely in its capacity as trustee for EQUICREDIT CORPORATION TRUST 2001-2,

Appellant,

v.

CASE NO.: 1D07-2626

PAULETTE WILLIAMS, et al.,

Appellees.

/

Opinion filed April 10, 2008.

An appeal from the Circuit Court for Duval County.
Lance Day, Judge.

Mitchell B. Rothman of Echevarria, Codilis & Stawiarski, Tampa; and John H. Dannecker, Eric C. Reed, David J. Markese, and Temple Fett Kearns of Shutts & Bowen, Orlando, for Appellant.

James A. Kowalski, Jr., Jacksonville, for Appellees.

PER CURIAM.

The Bank of New York, acting solely in its capacity as trustee for Equicredit Corporation Trust 2001-2, appeals an order awarding Paulette Williams, appellee, attorney's fees and costs following the dismissal with prejudice of the Bank's

EXH. 2

residential mortgage foreclosure complaint against Williams and others. The Bank argues that Williams was not entitled to an award of attorney's fees because she was not a prevailing party under section 57.105(7). Florida Statutes (2006); and that, even if Williams was entitled to attorney's fees. the trial court erred in using a multiplier in setting the fee award. We affirm.

The Bank's complaint and amended complaint were dismissed without prejudice on the ground that. because the Bank failed to show that it owned the mortgage and associated promissory note. the Bank lacked standing to institute the foreclosure action. When the Bank declined to file a second amended complaint. the trial court dismissed the amended complaint with prejudice. The Bank did not appeal this order. but instituted a new foreclosure action against Williams. The Bank argues that because the same factual and legal issues raised in the dismissed action are also the subject of the new litigation. Williams cannot be the prevailing party under section 57.105(7).[1] We have expressly rejected the Bank's argument in the context of a

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[1]Section 57.105(7). Florida Statutes (2006) provides in pertinent part:

> (7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract. the court may also allow reasonable attorney's fees to the other party when that party prevails in any action. whether as plaintiff or defendant. with respect to the contract.

plaintiff's voluntary dismissal without prejudice. State ex rel. Marsh v. Doran, 958 So. 2d 1082 (Fla. 1st DCA 2007). There we explained:

> We hold that a defendant is entitled to recover attorney's fees under section 68.086(3), which awards fees to the prevailing party, after the plaintiff takes a voluntary dismissal without prejudice. The refiling of the same suit after the voluntary dismissal does not alter the appellees' right to recover prevailing party attorney's fees incurred in defense of the first suit. Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002); Alhambra Homeowners Ass'n, Inc. v. Asad, 943 So. 2d 316 (Fla. 4th DCA 2006).

Id. Here, since the complaint was dismissed with prejudice, it is clear that Williams was the prevailing party. Rule 1.420(b), Florida Rule of Civil Procedure, provides that, in the case of an involuntary dismissal:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.

Further, we find no abuse of discretion in the trial court's use of a multiplier of 2.5 in establishing the attorney's fees. In its order setting the attorney's fees, the trial court fully analyzed the factors under rule 4-1.5, Florida Rules of Professional Conduct, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), and Standard Guarantee Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); and made

detailed findings of fact which are supported by competent substantial evidence in the unrebutted testimony of both Williams' counsel and her expert witness.

AFFIRMED.

WOLF, KAHN, AND VAN NORTWICK, JJ., CONCUR.