In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted] *

[redacted] and [redacted] et al.,

Petitioners,

v.

WELLS FARGO BANK, N.A., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
OR WRIT OF MANDAMUS

Respectfully submitted,

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*Additional Case Numbers and Parties listed on the following page.

PARTIES

Petitioner(s)	Respondent(s)	Case Numbers
[redacted] and [redacted]	Wells Fargo Bank, N.A.; Isles Of Boca Association, Inc.; [redacted], Trustee; Unknown Spouse Of [redacted] Unknown Tenant(s); In Possession Of The Subject Property	50 2010 CA 023143XXXXMB (PBC)
[redacted]	Green Tree Servicing, LLC.; United States of America - United States Attorney's Office For Southern District Of Mississippi; USAA Federal Savings Bank; Unknown Tenant #1; Any And All Unknown Parties Claiming By, Through, Under And Against The Named Individual Defendant(s) Who Are Not Known To Be Dead Or Alive, Whether Unknown Parties May Claim An Interest As Spouses. Heirs, Devisees, Grantees, Or Other Claimants	50 2013 CA 016477XXXX MB (PBC)
[redacted]	Federal National Mortgage Association; Mortgage Electronic Registration Systems, Inc. As Nominee For Citibank Federal Savings Bank; Lakefield North At Wellington Homeowners Association, Inc.; Unknown Parties In Possession # 1, If Living, And All Unknown Parties Claiming By, Through, Under And Against	50 2013 CA 006425XXXX MB (PBC)

Petitioner(s)	Respondent(s)	Case Numbers
	The Above Named Defendant(s) Who Are Not Known To Be Dead Or Alive, Whether Said Unknown Parties May Claim An Interest As Spouse, Heirs, Devisees, Grantees, Or Other Claimants; Unknown Parties In Possession #2, If Living, And All Unknown Parties Claiming By, Through, Under And Against The Above Named Defendant(s) Who Are Not Known To Be Dead Or Alive, Whether Said Unknown Parties May Claim An Interest As Spouse, Heirs, Devisees, Grantees, Or Other Claimants	
[redacted]	JPMorgan Chase Bank, National Association, Successor In Interest By Purchase From The FDIC, As Receiver For Washington Mutual Bank F/K/A Washington Mutual Bank, FA [as Plaintiff]; Farmington Estates Homeowners Association, Inc.; JPMorgan Chase Bank, National Association, Successor In Interest By Purchase From The FDIC, As Receiver For Washington Mutual Bank, F/K/A Washington Mutual Bank, FA [as Defendant]; Unknown Tenant In Possession Of The Subject Property	50 2013 CA 007981XXXX MB (PBC)

Petitioner(s)	Respondent(s)	Case Numbers
[redacted]	Wells Fargo Bank, N.A.; Unknown Spouse of [redacted]; Lakefield West Homeowners Association Inc.; the State of Florida Department of Revenue; Palm Beach County Florida; Palm Beach County, Florida, Palm Beach County Administrative Complex; the State of Florida, Florida Department of Financial Services; Any and All Unknown Parties Claiming by, Through, Under and Against the Herein Named Individual Defendant(s) Who Are Not Known to Be Dead or Alive, Whether Said Unknown Parties May Claim an Interest as Spouses, Heirs, Devisees, Grantees, or Other Claimants; Unknown Tenant #1,Unknown Tenant #2, Unknown Tenant #3, Unknown Tenant #4, the Names Being Fictitious to Account For Parties in Possession	50 2012 CA 012709XXXX MB (PBC)
[redacted]	Deutsche Bank National Trust Company, As Trustee Of The IndyMac INDX Mortgage Loan Trust 2005-Ario, Mortgage Pass-Through Certificates, Series 2005-AR10 Under The Pooling And Servicing Agreement Dated May 1, 2005; JPMorgan Chase Bank, N. A.,	50 2012 CA 018975XXXX MB (PBC)

Petitioner(s)	Respondent(s)	Case Numbers
	Any And All Unknown Parties Claiming By, Through, Under, And Against The Herein Named Individual Defendant(s) Who Are Not Known To Be Dead Or Alive, Whether Said Unknown Parties May Claim An Interest As Spouses, Heirs, Devisees, Grantees, Or Other Claimants, Tenant# 1 And Tenant# 2	
[redacted]	HSBC Bank USA, National Association as Trustee for Opteum Mortgage Acceptance Corporation, Asset Backed Pass Through Certificates Series 2005-4; Unknown Spouse of [redacted]; Unknown Spouse of Dianne C. Kelley a/K/a Dianne Kelley; If Living, Including Any Unknown Spouse of Aid Defendant(s), If Remarried, and If Deceased, the Respective Unknown Heirs, Devisees, Grantees, Assignees, Creditors, Lienors, and Trustees, and All Other Persons Claiming by, Through, Under or Against He Named Defendant(s); Fox 1 Financial; The Payment Corp.; Whether Dissolved or Presently Existing, Together with Any Grantees, Assignees, Creditors, Lienors, or Trustees of Said	50 2012CA 013171XXXX MB (PBC)

Petitioner(s)	Respondent(s)	Case Numbers
	Defendant(s) and All Other Persons Claiming by, Through, Under, or Against Defendant(s); Unknown Tenant #1; Unknown Tenant #2	
[redacted] and [redacted]	Wells Fargo Bank, N.A.; First Wellington, Inc.; Any and all Unknown Parties Claiming by, Through, Under and Against the Herein Named Individual Defendant(s) Who Are Not Known To Be Dead Or Alive, Whether Said Unknown Parties May Claim an Interest as Spouses, Heirs, Devisees, Grantees, or Other Claimants; Unknown Tenant #1, Unknown Tenant #2, Unknown Tenant #3, Unknown Tenant #4, The Being Fictitious to Account for Parties in Possession	50 2012 CA 020556XXXX MB (PBC)
[redacted]	BAC Home Loans Servicing, L.P. FKA Countrywide Home Loans Servicing, L.P.; Unknown Tenant I; Unknown Tenant II, and Any Unknown Heirs, Devisees, Grantees, Creditors, And Other Unknown Persons Or Unknown Spouses Claiming By, Through And Under Any of The Above Named Defendants	50 2009 CA 019546XXXX MB (PBC)
[redacted] and [redacted]	Bank Of America, N.A.[as Plaintiff]; Any and All Unknown Parties Claiming By, Through, Under, and Against	50 2009 CA 037201XXXX MB (PBC)

Petitioner(s)	Respondent(s)	Case Numbers
	The Heirs Named Individual Defendant(s) who are Not Known To Be Dead Or Alive, Whether Said Unknown Parties May Claim An Interest As Spouse, Heirs, Devisees, Grantees, Or Other Claimants; Bank of America, N.A [as Defendant]; Wachovia Bank, National Association; Countryside Estates Association, Inc.; Tenant #1, Tenant #2, Tenant #3, And Tenant #4 The Names Being Fictitious To Account For Parties In Possession	
	Judge Jeffrey Colbath Chief Judge of the Fifteenth Circuit Palm Beach County Courthouse 205 North Dixie Highway West Palm Beach, FL, 33401	All listed above
	Judge Richard L. Oftedal "AW" Division Judge Palm Beach County Courthouse 205 North Dixie Highway West Palm Beach, FL, 33401	All listed above

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INTRODUCTION

This petition challenges the propriety and authority of an Administrative Order issued by the Fifteenth Circuit Chief Judge and a related Standing Order issued by the Judge for Division "AW"—the Foreclosure Division (collectively, "the Orders"). The Administrative Order advises and encourages judges in foreclosure cases to automatically deny motions (primarily pre-answer motions of the defendant homeowners) that have not been heard within ninety days of the filing of the motion.[1] The Standing Order relies upon this Administrative Order to deny, with a single stroke of the pen, all motions directed to the pleadings that have been pending for more than ninety days, in any of the more than 16,000 foreclosure cases in the Division.[2]

Each of the Petitioners joining in this Petition have a motion to quash service of process that has been pending for more than ninety days,[3] and therefore, under the terms of the Orders, has been deemed denied without a hearing, without addressing the merits, and without an individual order being entered in his or her case.

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[1] In re: timely Resolution of Motions in Foreclosure Division "AW", Administrative Order 3.314-4/14, dated April 30, 2014 ("Administrative Order," App. 1).

[2] In Re: Standing Order On Outstanding Motions in Division "AW," dated May 1, 2014 (App. 3).

[3] App. 8 - 215.

The issue to be decided, therefore, is whether the Chief Judge of the Fifteenth Circuit is authorized to create a rule specific to foreclosure cases that provides for the automatic denial of unheard motions—particularly pre-answer defensive motions—by declaring them "abandoned."

A secondary issue is whether a standing order can be used to collectively deny motions and effectively deny them *nunc pro tunc* to a time more than thirty days in the past such that litigants may be deprived of the opportunity to file a non-final appeal.

STATEMENT OF JURISDICTION

Article V, Section 4(b)(3) of the Florida Constitution vests this Court with the power to issue writs of mandamus or writs of certiorari. The Court's power to issue a writ of certiorari is properly invoked for the review of administrative orders of the lower court. *1-888-Traffic Sch. v. Chief Circuit Judge, Fourth Judicial Circuit*, 734 So. 2d 413, 415 (Fla. 1999) ("[C]hallenges to administrative orders … routinely have been made by petition for writ of common law certiorari in the district courts of appeal.").

In addition, or in the alternative, the Court may exercise its power to issue a writ of mandamus to compel the lower court to rule on the merits of the motions to quash and to enter written orders in individual cases so that there is an identifiable, appealable order with a date certain. *See Otis Elevator Co. v. Gerstein*, 612 So. 2d 659, 660 (Fla. 3d DCA 1993) (issuing writ of mandamus instructing the court to rule upon the merits of the pending motions). This Court's power to issue a writ of mandamus is properly invoked to compel a lower court judge to perform a ministerial act. *Lakeshore Townhomes Condo. Ass'n, Inc. v. Bush*, 664 So. 2d 1170 (Fla. 4th DCA 1995). Here, the ministerial act to be compelled is the holding of hearings and the entering of written orders as required by the Rules of Civil Procedure.

Lastly, if the Court should determine that the Administrative Order is a valid exercise of the Chief Judge's administrative powers and that the Standing Order constitutes a written, appealable order denying the motions to quash (but that the appeal time runs from the entry of the Order rather than from a denial dated *nunc pro tunc* in the past), the Court may treat this Petition as a notice of appeal. Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought…"); *Johnson v. Citizens State Bank,* 537 So.2d 96, 97-98 (Fla.1989) ("a district court shall not dismiss a timely filed notice of appeal, if upon consideration, the court concludes that relief would be warranted under a petition"). *City Ad Associates, Inc. v. City of Miami*, 557 So. 2d 73, 74 (Fla. 3d DCA 1990) (where proper remedy is an appeal, the district court of appeal is required to treat an improvidently filed petition for a writ of certiorari as a notice of appeal).

If the Court determines that the Petition should be treated as an appeal,[4] this Court has jurisdiction to review non-final orders that determine the jurisdiction of the person. Fla. R. App. P. 9.030(b)(1)(B) and 9.130(a)(e)(C)(i).

[4] If the Court should decide to address this issue by separating this Petition into individual appeals, the Petitioners are prepared to pay the necessary filing fees for each case and would request an opportunity to fully brief the individual merits of their motions to quash service.

NATURE OF THE RELIEF SOUGHT

The Petitioners request that this Court issue a writ quashing the following portion of the Fifteenth Circuit's Administrative Order:[5]

> Motions to Dismiss, Motions for Extension of Time which seek additional time to respond to a complaint, counterclaim, cross-claim or third party claim, Motions to Quash, and other motions which prevent a matter from being at issue filed in Foreclosure Division "AW" and which have not been set and heard by the Court within ninety (90) days from filing, may be considered by the judge assigned to Foreclosure Division "AW" as having been abandoned.

The Petitioners also request that this Court issue a writ quashing the Standing Order which relies entirely upon the above-quoted portion of the Administrative Order as its authority. Specifically, the following language should be quashed:[6]

> ORDERED that unless good cause has been found as to why there has not been compliance with Administrative Order 3.314, any (1) Motion to Dismiss; (2) Motion for Extension of Time which seeks additional time to respond to a complaint, counterclaim, cross-claim or third party claim; (3) Motion to Quash; or (4) other motion which prevents a matter filed in the foreclosure division from being at issue and which has not been heard by the Court shall, upon the ninety-first (91) day following the day the motion is filed, be deemed abandoned.

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[5] In Re: Timely Resolution of Motions in Foreclosure Division "AW," Administrative Order: 3.314-4/14.

[6] In Re: Standing Order On Outstanding Motions in Division "AW," dated May 1, 2014 (App. 3).

In addition, or in the alternative, the Petitioners request that this Court issue a writ of mandamus to compel the Foreclosure Division Judge to hold hearings for all pre-answer motions as required by the Florida Rules of Civil Procedure and enter a written order in each case.

And finally, in the alternative, the Petitioners request that the Court accept jurisdiction over these matters as individual appeals of non-final orders and reverse and remand the denials for a hearing on the merits.

STATEMENT OF THE CASE AND FACTS

In each foreclosure case identified in this Petition, the Petitioners have moved to quash service of process for various reasons. In each of the cases, neither party set the motion for hearing.

Although it is the plaintiff that normally bears the burden of prosecuting its case (and the consequences of not doing so), the Chief Judge issued an Administrative Order that shifts that burden to the defendant homeowners. Specifically, it purports to authorize a new procedure by which motions directed to the pleadings or the court's jurisdiction may be automatically denied without a hearing and without a written order in the case by simply declaring them "abandoned."

The day following the entry of this Administrative Order—and in express reliance on that Order—the judge assigned to the Foreclosure Division issued a Standing Order that denies all pre-answer motions that have been pending for more than ninety days as "abandoned."

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit Orders create a new "abandonment" rule in foreclosure cases to dispose of pre-answer motions, without a hearing on, or consideration of, the merits. The Administrative Order exceeds the authority of the Chief Judge because it contradicts specific Rules of Civil Procedure, as well as their overall procedural scheme.

Moreover, the Orders unnecessarily impinge upon the litigants' rights of due process, equal protection, and access to courts because they do not accomplish their stated goal of getting the cases "at issue" and because there already exists an alternative, less restrictive method of having pending motions heard on their merits. Additionally, the Orders unnecessarily discriminate against foreclosure defendants as compared to foreclosure plaintiffs or defendants in other types of cases.

Accordingly those portions of the Orders creating an "abandonment" rule should be quashed.

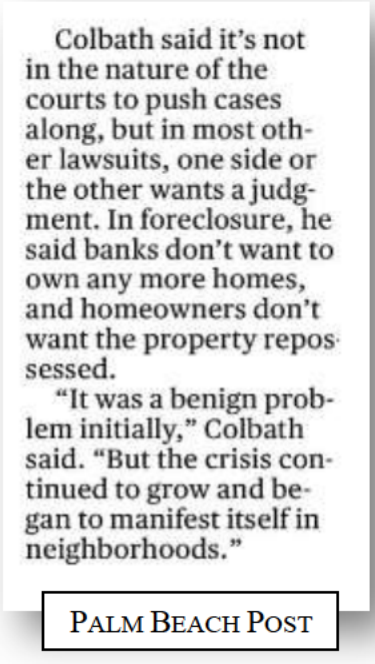
ARGUMENT

I. The Administrative Order Exceeds the Authority of the Chief Judge Because Deeming Motions "Abandoned" Contradicts Existing Rules of Procedure.

A. Purpose and motivation of the Orders.

The stated intent of the Administrative Order under review is to help reduce unresolved motions that **"have languished for months and years without any attempt or effort on the part of any party to set the matter for hearing."** (emphasis original). **"These unresolved motions delay the proceedings and frustrate the timely disposition of foreclosure cases in the Fifteenth Judicial Circuit."** (emphasis original).

The author of the Administrative Order, Chief Judge Colbath, has publicly acknowledged that foreclosure cases are unusual in that the plaintiffs have little incentive to prosecute their cases to judgment. The motivation for the Administrative Order, therefore, was "to push banks and homeowners to a quicker resolution – something he said neither side appears to want."[7] The Chief Judge



Colbath said it's not in the nature of the courts to push cases along, but in most other lawsuits, one side or the other wants a judgment. In foreclosure, he said banks don't want to own any more homes, and homeowners don't want the property repossessed.

"It was a benign problem initially," Colbath said. "But the crisis continued to grow and began to manifest itself in neighborhoods."

PALM BEACH POST

[7] Kimberly Miller, *New 'fix' aims to speed up foreclosure backlog*. Palm Beach Post, April 30, 2014 at A1 (App. 6).

is quoted as saying that the reason for the court's intervention in the pacing of the litigation that the parties have set for themselves was a "crisis [that] began to manifest itself in neighborhoods."[8]

The Administrative Order alludes to its own motivation—the aspirational goal set by the Florida Rule of Judicial Administration that non-jury civil cases be resolved in twelve months. Fla. R. Jud. Admin. 2.250(a)(1)(B). This "presumptively reasonable time period," however, never contemplated the present circumstance where, not only have a large number of cases flooded the system, but the litigants are not themselves pressing for resolution within this time frame.

B. The limits of the Chief Judge's authority.

The Rules of Judicial Administration provide a chief judge with the power to issue administrative orders for the purpose of managing the affairs of the court. Fla. R. Jud. Admin. 2.215(b)(2). But such orders cannot be inconsistent with court rules already approved by this Court. Fla. R. Jud. Admin. 2.120(c). Administrative orders that attempt to amend the rules, or undercut the overall scheme or design of the rules are invalid because they exceed the authority granted under the Florida

[8] Petitioners assert that there is no evidence of a "crisis in neighborhoods." Indeed, the very same article mentions the judicially noticeable fact that "the housing crisis is in the rearview mirror for much of the country." Petitioners submit that, even if there were a demonstrable housing crisis, such broad social and economic policy implications are within the purview of the legislature, not the court system.

Rules of Judicial Administration. *Payret v. Adams,* 471 So.2d 218, 220 (Fla. 4th DCA 1985) ("[C]ourts of this state are not empowered to develop local rules which contravene those promulgated by the Supreme Court.

Nor may courts devise practices which skirt the requirements of duly promulgated rules.") (quoting *Berkheimer v. Berkheimer,* 466 So.2d 1219, 1221 (Fla. 4th DCA 1985)); *Obando v. Bradshaw*, 920 So. 2d 198, 200 (Fla. 4th DCA 2006) (same); *see also Melkonian v. Goldman*, 647 So. 2d 1008, 1009 (Fla. 3d DCA 1994) (administrative judge's memorandum order may not be inconsistent with local rules approved by the Florida Supreme Court); *United Services Auto. Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002) (order prohibiting defense counsel employed as full-time insurance company staff from using individual firm names in pleadings improperly encroached upon the Supreme Court's jurisdiction to adopt rules for the courts).

Invalid administrative orders include those that create time limits for a party to exercise a right where the rules of civil procedure have no such limits. In *Bathurst v. Turner*, 533 So. 2d 939, 941 (Fla. 3d DCA 1988), the appellate court granted a writ of mandamus which challenged an order which created a five-day time limit for objecting to a referral to a magistrate. Because the rule of civil procedure required a party's "consent"—an affirmative, voluntary action—mere

acquiescence through inaction during the five-day period was insufficient. While the opinion in this case addressed a trial court's order, the court noted that the result would be the same if an existing administrative order were interpreted the same way. *Id*. at 941, n. 4.

Here, the Administrative Order creates a time limit for obtaining a ruling on motions that are timely under the rules by instructing judges that the motions can be deemed "abandoned" or waived. This newly minted waiver through inaction undercuts the Rules of Civil Procedure in several ways.

Pre-answer motions must be determined by hearing.

First, the Rules of Civil Procedure already specify the manner in which preliminary motions must be determined. Rule 1.140(d) Fla. R. Civ. P. unequivocally states that pre-answer motions "shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination shall be deferred until the trial." (emphasis added). The directive that the courts "shall" hear and determine such motions leaves no room for a new rule that allows the court to dispose of them without a hearing by deeming them abandoned. *See S. R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (in statutory interpretation, "shall," is normally meant to be mandatory).

Additionally, unrebutted motions to quash that present a factual dispute—such as those of some of the Petitioners here—are entitled to an evidentiary hearing. *Linville v. Home Sav. of Am., FSB*, 629 So. 2d 295 (Fla. 4th DCA 1993); *Talton v. CU Members Mortg.*, 126 So. 3d 446 (Fla. 4th DCA 2013).[9]

Impermissible creation of a new waiver rule.

Second, the Rules themselves provide what constitutes a waiver of matters that can be raised in preliminary, pre-answer motions. Rules 1.140(b) and (h) of the Florida Rules of Civil Procedure specify that a party waives defenses and objections (such as insufficiency of service) if they are not raised in the answer or a pre-answer motion. The Rules provide time limits for raising these defenses—twenty days from service for the typical defendant, or ten days from the denial of a pre-answer motion. Fla. R. Civ. P. 1.140(a). The Rules also provide a method for waiving the right to file motions directed to the pleadings by way of an affirmative, voluntary action (reminiscent of the "consent" rule discussed in *Bathurst*)—the filing of a notice for trial. Fla. R. Civ. P. 1.440(a).

[9] Because the parties often agree to certain factual issues before a hearing, the determination of whether an affidavit or verification is required to bolster the motion to quash is often postponed until the plaintiff indicates a readiness to address the motion and the parties confer. Thus, the unexpected denial of these motions also prejudices the defendants by depriving them the opportunity to provide sworn factual support and otherwise preserve their position for appeal.

The Rules and decades of case law also address how jurisdictional objections such as those of the Petitioners may be waived. For example, they may be waived by seeking affirmative relief. *See Brown v. U.S. Bank Nat. Ass'n*, 117 So. 3d 823, 824 (Fla. 4th DCA 2013) (making discovery requests and moving for sanctions were not requests for affirmative relief that would waive service); *Am. Exp. Ins. Services Europe Ltd. v. Duvall*, 972 So. 2d 1035, 1040 (Fla. 3d DCA 2008) (attendance at deposition did not waive challenge to personal jurisdiction); *Alvarado v. Cisneros*, 919 So. 2d 585, 588 (Fla. 3d DCA 2006) ("[I]f a defending party timely raises an objection to personal jurisdiction or service of process, then that defendant may plea to the merits and actively defend the lawsuit without waiving the objection."), *quoting*, *Berne v. Beznos*, 819 So.2d 235, 238 (Fla. 3d DCA 2002).[10]

The Administrative Order now adds another method of waiver never approved by the Florida Supreme Court and establishes a new time limit (for

[10] If actively participating in the litigation does not waive a jurisdictional objection, then certainly inaction—i.e. choosing to rely on an absence of jurisdiction—cannot do so. Indeed, the Petitioners could have chosen the ultimate inaction—filing no motion at all—because it is well-settled that "[a] judgment entered without valid service is void for lack of personal jurisdiction and may be collaterally attacked at any time." *Alvarado v. Cisneros*, 919 So. 2d at 587 (internal quotation omitted). Instead, the Petitioners chose to put the plaintiffs on notice of the service problem early in the litigation. But by converting the motion to quash into a general appearance, the Orders have, ironically, penalized the Petitioners for choosing to react more promptly than required.

obtaining a hearing on preliminary motions) not found in the Rules. However, the Florida Supreme Court's express declaration describing the manner in which defenses may be waived through inaction implies the exclusion of other methods. *See Subirats v. Fid. Nat. Prop.*, 106 So. 3d 997, 999 (Fla. 3d DCA 2013) (applying the "expressio unius est exclusio alterius" rule of construction to conclude that the Florida Department of Financial Services exceeded its rulemaking authority when it created a five-day waiver rule). Accordingly, a chief judge has no authority to invent new rules which can operate to waive a party's rights.

Impermissible shifting of the burden to prosecute.

Third, an underlying theme in the design of the Rules of Civil Procedure is that the plaintiff bears the burden of prosecuting the case. Rule 1.420(e) provides that an action may be dismissed after a period of inactivity of one year. A defendant, therefore, is entitled to a dismissal if a plaintiff does not set a pending pre-answer motion for hearing for a year (provided the parties or the court take no other action in the interim). *Patton v. Kera Tech., Inc.*, 895 So. 2d 1175, 1178 (Fla. 5th DCA 2005) *approved,* 946 So. 2d 983 (Fla. 2006) ("The plaintiff bears responsibility to expedite litigation and Plaintiff's failure to take steps within Plaintiff's control to resolve the case or to ensure prompt dispatch of court orders warrants dismissal."); *see Dashew v. Marks*, 352 So.2d 554 (Fla. 3d DCA 1977)

(court's failure to enter a written order on an oral decision did not relieve plaintiff of the duty to proceed and did not affect the defendant's right to dismiss the case for lack of prosecution); *Sewell Masonry Co. v. DCC Const. Inc.*, 862 So.2d 893 (Fla. 5th DCA 2003) (it is not the role of the trial judge to schedule hearings on motions for parties who do not themselves seek rulings on their pleadings).

The Administrative Order, however, impermissibly shifts the burden to the defendant to prosecute the plaintiff's action against him or her. Because the candidly stated purpose of the new "abandonment" rule is to force cases to be at issue so they may be tried, it eviscerates the existing lack of prosecution rule, ensuring that no foreclosure plaintiff can suffer dismissal for failure to prosecute. Given the Chief Judge's apparent goal of clearing the court's dockets of a backlog of stagnant foreclosure cases, stripping away the potential to dismiss cases for lack of prosecution is seemingly self-defeating.

This is not to say that attorneys do not have a professional responsibility to "make reasonable efforts to expedite litigation consistent with the interests of the client." R. Regulating Fla. Bar 4-3.2. But the Comment to the Rule, and the cases applying it, make clear that it applies when an attorney neglects the client, routinely delays proceedings for personal reasons, or files frivolous motions that do not have "some substantial purpose other than delay." Comment to R.

Regulating Fla. Bar 4-3.2. It would not apply to require an attorney to expedite litigation inconsistent with the interests of the client, such as helping an opponent prosecute its case against the client or taking unnecessary action that extinguishes the opportunity for the case to be dismissed for lack of prosecution. The Administrative Order, therefore, cannot be supported by reference to the Rules of Professional Conduct.

Nor can it be supported by the Order's express reference to Fla. R. Jud. Admin. 2.515:

> Florida Rule of Judicial Administration 2.515 provides that a signature of an attorney shall constitute a certificate by the attorney that to the best of the attorney's knowledge, information and belief there is good grounds to support the court filing and that the court filing is not interposed for delay.[11]

That the attorney filing the motion opted to rely upon the rules that place the onus on his or her opponent to set the hearing does not mean that motion was frivolous or that it was improperly interposed solely for delay.[12] Nor should defense counsel

[11] Administrative Order, p. 1.

[12] The term "delay," like the term "prejudice" is often misused. Every motion will delay the proceedings (in the sense that it will require court time to resolve), just as every motion will prejudice an opponent (in the sense that it is intended to damage the opponent's case). With prejudice, the issue is always whether an opponent has been unfairly prejudiced. With delay, the issue is always whether the motion was interposed solely for delay. *See*, Comment to R. Regulating Fla. Bar 4-3.2 (requiring "some substantial purpose other than delay"). Thus, in most instances

be castigated for conducting the case in a way that could lead to a dismissal for lack of prosecution. Indeed, the reference to this Rule of Judicial Administration is so glaringly out of place, it appears to manifest a belief that all pre-answer motions filed by homeowners are without merit.

Impermissible deviation from the established method by which the courts manage their cases.

Fourth, while the plaintiff bears the burden of prosecuting its case, the Petitioners acknowledge that the trial court has the concomitant responsibility to prevent cases from languishing on its docket. As Justice Harding, in a special concurring opinion in *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1066 (Fla. 2000), explained:

> Trial judges have a duty to periodically review their dockets and bring up matters which the attorneys have not set for hearing. …[I]t is the judge's, not the attorneys', responsibility to ensure that cases move through the system appropriately.

But, the Rules of Civil Procedure already provide a mechanism for the courts to manage their cases—a method that does not involve adopting a legal fiction that litigants have abandoned their motions. Rule 1.200(a) Fla. R. Civ. P. provides that the court may order a status conference so that it may

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the issue of delay is secondary to, and subsumed within, the analysis of whether the motion itself is frivolous.

"determine…matters that may aid in the disposition of the action." The court, therefore, may call a status conference and, with notice to the parties (and coordination with their schedules), rule upon any pending motions directed to the pleadings. *See also*, Fla. R. Civ. P. 1.090(d) (Notice of hearing for motions which may not be heard *ex parte* must "be served a reasonable time before the time specified for the hearing.").

The Administrative Order, however, creates a new shortcut to the established rules, inviting judges to dispose of pre-answer motions without spending the time to read them, hear argument on them, rule upon them, and enter orders on them. Such automated resolution of disputed issues, where the rules contemplate case-by-case decision-making by judges, is itself a basis for declaring an administrative order null and void. *Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867 (Fla. 1st DCA 1979) (Blanket administrative order requiring all deposition transcripts in all cases to be sealed quashed as in conflict with the Rules of Civil Procedure which contemplate case-by-case consideration.)

Impermissible attempt to shield rulings from appellate review (violations of due process and access to courts)

Fifth, the Rules of Civil Procedure and the Rules of Appellate Procedure, as well as the Florida and United States Constitutions were specifically and carefully designed to provide litigants with a fundamental right of due process—appellate

review. Art. I, §§ 9, 21, Fla. Const.; Art. V, § 4, Fla. Const.; Amend. XIV, § 1, U.S. Const.; *Lehmann v. Cloniger*, 294 So. 2d 344, 347 (Fla. 1st DCA 1974) ("Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right.")

The entire edifice of the judicial system presumes that the trial courts will determine motions on their merits and erroneous decisions can be rectified by the appellate court. *See Combs v. State*, 420 So. 2d 316, 317 (Fla. 5th DCA 1982) *approved*, 436 So. 2d 93 (Fla. 1983) (equating rulings that effectively deny appellate review with violations of due process rights); *Bain v. State*, 730 So. 2d 296, 298 (Fla. 2d DCA 1999) (Art. V, Section 4(b)(1), Fla. Const. provides a right to appeal all final orders and that the Florida Supreme Court determines which non-final orders may be appealed).

The Administrative Order, however, constructs a method by which the trial court can dispose of motions without deciding them upon their merits. Deeming them "abandoned" when there was no such intent, falsely clothes these decisions with the appearance of a waiver, which could prevent appellate review. *See e.g. Melara v. Cicione*, 712 So. 2d 429, 430 (Fla. 3d DCA 1998) (issue not preserved for appellate review where there was a "clear waiver or abandonment").

The Standing Order adds an another wrinkle to the problem in that it purports to deny all pre-answer motions "upon the ninety-first day following the day the motion is filed." The Order does not "grandfather in" existing motions or motions that have already been pending for more than ninety days. The Standing Order, therefore, may be interpreted as backdating the denial of motions such that homeowners are denied their right of appeal. Any motion that has been pending more than 121 days at the entry of this Order could be said to have been denied more than thirty days before the Order—even though the order was never filed in the case, never served on the parties, and never existed until after the appellate time expired. The Chief Judge and the Division Judge are without authority to change the Rules of Civil and Appellate Procedure to deny litigants their right to appeal.

It is significant that the Administrative Order under review was preceded by another similar Order entered less than three weeks earlier.[13] That Order required (rather than suggested) that the foreclosure judge deny pre-answer motions as abandoned. Responding to the criticism that a chief judge may not instruct other judges how to rule, Judge Colbath amended the language of the Administrative Order such that it was no longer mandatory (substituting "will" with "may"). The

[13] In Re: Timely Resolution of Motions in Foreclosure Division "AW," Administrative Order 3.314-3/14, dated March 13, 2014 (App. 4).

next day, however, the Foreclosure Division Judge issued the Standing Order which not only has all the characteristics of an administrative order (applying to more than 16,000 cases), but which accomplishes what the original Administrative Order intended to achieve. In context, therefore, the Division Judge's Standing Order is revealed as merely an extension of the Chief Judge's will and an attempt to delegate authority (which does not exist) without a formal delegation—another reason why the Standing Order should be quashed.

II. The Administrative Order Is More Prejudicial to Homeowner-Defendants Than Bank-Plaintiffs.

The Chief Judge has recognized that, in a majority of the current foreclosure cases, neither of the parties appear to want a "quicker resolution."[14] Despite laying the blame squarely at the feet of both parties, the remedy he devised is asymmetrically prejudicial to homeowners. First, it elevates a plaintiff-oriented goal of obtaining a judgment of foreclosure over the defense-oriented goal of dismissal for lack of prosecution—a remedy to which homeowners are entitled under the rules. Indeed, it places an additional economic burden on homeowners (the party who can least afford it) to coordinate, notice and attend hearings that may never have been necessary. And by eliminating hearings at which the banks

[14] Kimberly Miller, *New 'fix' aims to speed up foreclosure backlog*. Palm Beach Post, April 30, 2014 at A1 (App. 6).

must address the merits of their opponents' motions, the Administrative Order actually encourages the banks not to set hearings—which promotes, rather than deters, delay.

Second, because the "abandonment" shortcut is only applied to motions directed at the pleadings, the vast majority of which are defense motions, homeowners take the brunt of these automated denials. Notably, homeowners actively litigating their cases are often stymied by objections to discovery and motions to extend the time for responding to discovery, which the banks generally do not set for hearing, but which are not deemed abandoned. Thus, the cases are to be rushed to trial, but pending discovery issues are left unresolved, which will leave homeowners unarmed to adequately defend themselves.[15]

Third, it could be said with equal (or perhaps greater) logic that, because the plaintiff is tasked by the rules to prosecute its case, failure to set a hearing on a motion to dismiss indicates acquiescence to the motion. Thus, the Administrative Order could have declared that the judges should deem the motion to dismiss granted or the complaint abandoned—a resolution that would also help reduce the

[15] This problem already exists in the Fifteenth Circuit because the court routinely sets case management conferences in which it will only resolve motions directed to the pleadings. The court refuses to hear and resolve any other motions at the case management conferences, such as homeowner motions to compel discovery. As a result, the cases are often rushed to trial before recalcitrant plaintiffs can be compelled to disclose their trial evidence.

backlog. That the Administrative Order chooses sides in the litigation, assisting one party to the detriment of the other, casts a shadow of impropriety over the Orders.

Fourth, the Orders prejudice homeowners because the Orders apply only to foreclosure cases. There are other types of litigation where thousands of cases languish—such as tobacco litigation (pending *Engle* cases[16])—but which the courts do not push to resolution. Unlike plaintiffs in foreclosure litigation, plaintiffs in tobacco litigation are anxious to obtain trial dates. Yet, there are no corresponding administrative orders designed to accelerate the process for setting trials even for the cases that are already at issue. The singling out of homeowners for this new waiver rule raises equal protection concerns and is generally incompatible with a court system dedicated to the impartial treatment of litigants.

III. The Orders Violate the Due Process, Access to Courts, and Equal Protection Rights of Homeowners.

Vital to the concept of procedural due process is the notion that valuable property interests must not be "arbitrarily undermined." *Aldana v. Holub*, 381 So.

[16] According to press reports, about 8,000 *Engle* plaintiffs have cases pending in Florida Courts. Richard Craver, *Setback for R.J. Reynolds in decision emerging from class-action suit*, Winston-Salem Journal, September 6, 2013 (available at: http://www.journalnow.com/business/business_news/local/article_8197876e-1754-11e3-9f59-0019bb30f31a.html). These cases have not been resolved within the eighteen month goal of Fla. R. Jud. Admin. 2.250(a)(1)(B).

2d 231, 236 n. 9 (Fla. 1980). Here, the Orders arbitrarily encroach upon the homeowners' property rights without due process by disposing of motions without hearings or any consideration of the merits. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"). The Orders also impinge upon due process, access to courts, and equal protection by placing additional barriers to appellate review that discriminate against foreclosure defendants when compared to foreclosure plaintiffs or defendants in other types of cases. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (while a state is not required to provide appellate review, a state that does grant appellate review may not do so in a discriminatory way).

The Court should consider, therefore, whether the problem sought to be resolved by the Orders is genuine (and an appropriate concern of the judicial system), whether the Orders resolve the perceived problem, and whether there exists another, less harmful way of resolving the perceived problem. *See Westerheide v. State*, 831 So. 2d 93, 104 (Fla. 2002) ("To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen

by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.")

A. There is no evidence of a genuine problem that affects the litigants, the court, or the public.

The author of the Administrative Order has acknowledged that foreclosure litigants on both sides are content with the pace of the litigation and are not pressing for early resolution by the court. Benchmarks for the court's performance (such as those in the Rules of Judicial Administration) were set prior to the glut of foreclosure cases and assume that one of the parties would be anxious for judicial resolution (rather than, for example, settlement through loan renegotiation).

Stagnant cases do not consume the court's resources or the public at large. And while it is beyond the jurisdiction of the judicial system to concern itself about the effect "languishing" cases may have on the housing market or neighborhoods, there is no evidence that hurrying to provide an overabundance of homes for sale will benefit that market, rather than damage it.

Accordingly, the stated purpose of the Orders should be viewed with some skepticism as to whether there is a valid basis for taking any unusual action that threatens the integrity of the judicial system.

B. The Orders do not accomplish their stated purpose of getting the cases "at issue."

The Administrative Order is expressly aimed at any "motion which prevents a matter filed in the foreclosure division from being at issue."[17] The presumption appears to be that simply disposing of pre-answer motions will make the case "at issue" and ready to be set for trial. In reality, the pleadings are not closed until the defendants file an answer and the bank has an opportunity to reply. If the defendants do not file an answer, the case will still not be at issue until the bank moves for and obtains a judicial default or drops the party. *Zeigler v. Huston*, 626 So. 2d 1046, 1048 (Fla. 4th DCA 1993) ("Under either rule 1.200(c) or 1.500(b), it is fundamental that in order to properly enter a default after a party has appeared, notice of the intention to enter a default must be served on the party.").

This means that, in cases where the homeowners fail to answer, the plaintiff banks will still ultimately control the pacing of the case, but will now have the advantage of having their opponents' defensive motions automatically denied. And while the court need not hold a hearing to enter a default, judicial resources will still be consumed by the motions for default and the entry and service of the orders.

[17] Administrative Order, ¶¶ 1, 2.

The Orders also set the stage for a wave of default judgments that will generate its own collateral litigation. First, using the "backdating" language of the Standing Order, the plaintiff banks may argue that the time for filing an answer in many cases has already expired. Fla. R. Civ. P. 1.140(a)(3) (responsive pleading must be served within ten days after notice of the court's action on a pre-answer motion).[18] Second, because no order is being served to the parties in individual cases, the homeowners (particularly those litigating *pro se*) may be unaware of the need to file an answer. The morass created by these Orders, therefore, threatens to decrease the efficiency of the judicial system, rather than increase it.

C. There already exists an alternative, less restrictive method of remedying the perceived problem.

If the intent of the Orders was to encourage litigants to set and attend actual hearings on their pre-answer motions (rather than a wholesale denial of motions without hearings), then there would be no efficiency gain over simply holding a status conference—as the court is already permitted to do—and hearing the motions on the merits.

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[18] A case in point: in *Wells Fargo Bank, N.A. v.* [redacted] Case No. 502010CA023143XXXXMB, the bank has already moved for a default citing to the first version of the Administrative Order, 3.314-3/14 and arguing that the [redacted] failed to file an answer after their motions to quash were deemed abandoned. Plaintiff's Motion to Deem Defendants' Motions to Quash Denied as Abandoned and Motion for Judicial Default, dated April 8, 2014 (App. 45).

In reviewing the Orders to determine whether they unconstitutionally infringe upon the rights of due process, equal protection, and access to courts, the appellate court must determine if there is an alternative method of correcting the problem. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) ("there is no relevant difference between the 'compelling governmental interest/strict scrutiny' test [used in due process and equal protection analysis] and the 'no alternative method of correcting the problem/overpowering public necessity' test [used in access to courts analysis]..."). Further, because due process is a fundamental right,[19] the strict scrutiny test is applicable. *See Jackson v. State*, 39 Fla. L. Weekly D635 (Fla. 4th DCA 2014) ("fundamental rights include those guaranteed by the Bill of Rights…"). Thus, the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary. *Mitchell v. Moore*, 786 So. 2d at 527.

Assuming there were a proven public need to sweep lethargic cases from the court system, status conferences are a less restrictive, alternative method of resolving unheard motions on the merits (provided there is notice, coordination

[19] Notably, dispossession of the homestead also impinges upon deeply rooted and constitutionally protected concerns. Art. X, § 4, Fla. Const.; *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997).

with schedules and adequate time to argue). The Orders, therefore, violate this test of constitutionality. *See G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899, 901 (Fla. 3d DCA 1977) (In a foreclosure case, order imposing financial pre-condition reversed under Art. I, § 21, Fla. Const.: "Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right.")

Accordingly, the Orders should be quashed on the additional ground that they are: 1) unduly discriminatory against homeowners; 2) do not accomplish any permissible objective of the court; and 3) are not the least restrictive means of achieving their stated goal.

CONCLUSION

The portions of the Orders which declare that unheard motions may be (or have been) automatically denied as "abandoned" should be quashed. Additionally, or alternatively, the lower court should be ordered to hold hearings on the merits of all pre-answer motions and enter and serve orders in each case. Alternatively, to the extent that the Orders operate to deny the Petitioners' motions to quash, the Court should reverse and remand on the grounds that the court may not assume jurisdiction without holding a hearing.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 9, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this petition has been electronically filed this May 9, 2014.

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