IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, WEST PALM BEACH, FLORIDA

STATE OF FLORIDA,
OFFICE OF THE
ATTORNEY GENERAL,

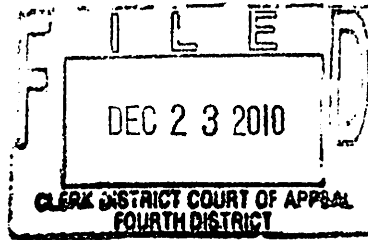
CASE NO. 4D10-4526
LT No. 502010CA21246

Petitioner,

v.

SHAPIRO & FISHMAN, LLP,

Respondent.



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DISTRICT COURT OF APPEAL
FOURTH DISTRICT

RESPONSE TO PETITION FOR CERTIORARI

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INTRODUCTION

On or about August 6, 2010, the Office of the Attorney General ("OAG") issued an investigative subpoena duces tecum to Shapiro & Fishman, LLP ("S&F") under the authority of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") for the stated "general purpose and scope" of investigating "possible unfair and deceptive trade practices which involve the advertising and marketing practices" of S&F. On October 4, 2010, the trial court, Hon. Jack S. Cox, issued an order quashing the subpoena, and finding, in part, that FDUTPA does not confer jurisdiction on the OAG to investigate the conduct of the law firm that was the stated subject of the investigation. The trial court's ruling was correct and the Petition of the OAG must be denied.

STATEMENT OF THE FACTS

Shapiro & Fishman ("S&F") is a law firm that represents mortgage servicing companies and provides legal services to its clients in foreclosure matters throughout the State of Florida and has done so for over 20 years.

Exh. 3, p. 1.[1] As lawyers, the Shapiro Firm has a duty to its clients, a duty to the judiciary and a duty to the Florida Bar to act in accordance with the rules established regarding attorney conduct, which duties they have maintained at all times. *Id.*

On August 6, 2010, the Office of the Attorney General ("OAG") issued an investigative subpoena duces tecum (the "Subpoena") upon S&F. Exh. 2. On its face, the Subpoena states that the OAG relied exclusively upon its investigative powers conferred to it pursuant to Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). *Id.* The Petition makes clear that FDUTPA is the sole basis for the OAG's purported authority in issuing the Subpoena. Petition, 1. The subpoena states that, "The general purpose and scope of this investigation extends to possible unfair and deceptive trade practices which involve the <u>advertising and marketing practices</u> of [S&F]." (Emphasis added). Exh. 2. Just four days later, the OAG issued a press release announcing its investigation of three law firms handling foreclosure lawsuits on behalf of lenders; S&F was specifically mentioned by name as a target of the investigation. Exh. 3 at Exh. B. Specifically, the press release announced that the OAG,

[1] Citations to "Exh." herein reference the exhibits to the OAG's Petition.

> launched three new investigations into allegations of unfair and deceptive actions by Florida law firms handling foreclosure cases. The Attorney General's Economic Crimes Division is investigating whether improper documentation may have been created and filed with Florida courts to speed up the foreclosure processes, potentially without the knowledge or consent of the homeowners involved.
>
> * * *
>
> Because many mortgages have been bought and sold by different institutions multiple times, key paperwork involved in the process to obtain foreclosure judgments is often missing. On numerous occasions, allegedly fabricated documents have been presented to the courts in foreclosure actions to obtain final judgments against homeowners. Thousands of final judgments of foreclosure against Florida homeowners may have been the result of the allegedly improper actions of the law firms under investigation.

Id.

The Subpoena commanded the production of thirteen categories of documents related to S&F's legal representation of lending institutions in foreclosure matters as well as the internal operations of the firm. Exh. 1, p. 2; Exh. 2, pp.6-8. Despite the clearly expressed purpose and scope of the investigation, the Subpoena does not seek any evidence whatsoever related to S&F's "advertising and marketing practices." *Id.*

On August 20, 2010, S&F filed a petition to quash the OAG's investigative subpoena ("Petition to Quash"). Exh. 3. The Petition to Quash cited three primary bases on which to quash the Subpoena: (1) the OAG lacks authority under FDUTPA to investigate claims against a law firm based on its practice of law and its conduct of litigation during and incidental to a judicial proceeding, (2) the subpoena sought to investigate conduct of the firm and its employees that is protected pursuant to Florida's absolute litigation privilege, and (3) the subpoena was overbroad and unduly burdensome.[2] Exh. p.8-10.

The OAG filed its response to the Petition to Quash on September 23, 2010. In that response, the OAG emphasized the scope of the investigation as announced in the press release, but not in its subpoena; specifically, that it

> received complaints from consumers and attorneys representing consumers that [S&F] or lawyers association with [S&F] have been fabricating and presenting false and misleading documents which

[2] The OAG states that its Petition "seeks review of only that part of the circuit court's order holding that it lacks the authority to require S&F to respond to the subpoena." Petition, p.8. Accordingly, S&F's Response addresses only the authority of the OAG under FDUTPA and does not address the overbreadth and unduly burdensome arguments raised below which are overwhelmingly supported by the record.

> are then used on behalf of [S&F]'s clients in foreclosure cases. These documents, often assignments of security interests in real estate mortgages, have been used to establish the right to foreclose on mortgages in favor of [S&F]'s clients. These documents have been presented in court and have been recorded in the public records of the county where the property is located; yet later they have been shown to be legally inadequate and/or insufficient. The [OAG] has reason to believe that such documents are being presented in thousands of foreclosures per month in a scheme that has gone on at least since 2005. [S&F] litigates foreclosures in the state on behalf of loan servicing companies and the [OAG] has received complains that documents filed on behalf of [S&F]'s clients have been fabricated.

Exh. 4, p.2.

On September 30, 2010, the Hon. Jack S. Cox conducted a hearing on S&F's Petition to Quash. At that hearing, counsel for the OAG told the court that "[t]he front of the subpoena does mis-state the purpose of the investigation," and that the language that mentions its investigation of S&F's advertising practices was a "mistake." Exh. 5, p.11. The OAG further argued to the court that the investigation "doesn't necessarily [sic] that the law firm is the bad apple. They're simply the source of the information. As if they were a witness who might have information about the bad apples somewhere else." Exh. 5, p.14. The court noted, and the OAG agreed, that the subpoena

was not being used for the investigation of a crime. *Id.* at p. 16. The court noted that the subpoena did not mention anywhere that it was looking for "information about some bad actor." *Id.* at p.17.

At the hearing, S&F's counsel advised the court that it agreed to voluntarily cooperate with the investigation of the OAG, but maintained that the OAG lacked jurisdiction to compel the production of the requested information. Exh. 5, pp. 5-10. The OAG never withdrew the August 6, 2010 subpoena, nor has an amended subpoena been issued and served upon S&F. Exh. 5, pp.5-8, 23-24.

Following the hearing, on October 4, 2010, the trial court issued its order quashing the OAG's investigative subpoena. In its order, the trial court noted that the Florida Constitution confers exclusive jurisdiction to regulate and discipline attorneys to the Florida Supreme Court. Exh. 1, p. 2-3. The conduct referenced by the OAG as the stated basis of its investigation – advertising and marketing – is expressly regulated by The Florida Bar as an arm of the supreme court. *Id.* Based on the cited authorities, the court concluded that the OAG did not have "constitutional authority to travel under FDUTPA in order to investigate and/or discipline [S&F]'s alleged misfeasance in its practice of law." *Id.* In rejecting the arguments made by

the OAG that the subpoena may reveal actionable conduct by others and not necessarily the lawyers at S&F, the court noted that it "is confined to the four corners of the Subpoena itself, which does not include any limiting language to that effect." Exh. 1, p. 5. The court concluded by finding that "even if the conduct of [S&F] is subject to FDUTPA, the terms of the Subpoena are overbroad, vague, inconsistent and unduly burdensome in light of the investigation's suggested purpose." *Id.*

SUMMARY OF ARGUMENT

While Florida Statutes §501.206 confers upon the OAG broad investigatory authority arising from violations of FDUTPA, such authority has limits. The applicable limit here is that the conduct sought to be investigated must relate or pertain to "trade or commerce." The alleged wrongful conduct of S&F and its clients does not constitute "trade or commerce" within the meaning of FDUTPA. Accordingly, the trial court was correct in quashing the investigative subpoena.

Additionally, the alleged wrongful conduct of S&F and its clients – "fabricating and presenting false and misleading documents which are then used on behalf of the [firm's] clients in foreclosure cases" – are actions arising in the context of civil litigation. Such actions are protected by

Florida's absolute litigation privilege that affords <u>absolute immunity</u> to any act occurring during, or necessarily preliminary to, a judicial proceeding, so long as the act has some relation to the proceeding.

Finally, the OAG argues that it and not The Florida Bar is the proper agency to police the actions of attorneys undertaken on behalf of their clients. The Florida Constitution confers upon the Supreme Court of Florida the exclusive jurisdiction to regulate and discipline attorneys. The Florida Bar, as an official arm of the Supreme Court of Florida, regulates the conduct of law firms and law firm staff by regulating and disciplining the attorneys in the firm and those with supervisory authority over non-lawyer staff.

ARGUMENT

I. THE OFFICE OF THE ATTORNEY GENERAL DOES NOT HAVE AUTHORITY UNDER FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT TO ISSUE AN INVESTIGATIVE SUBPOENA TO SHAPIRO & FISHMAN

The genesis of the OAG's Petition is the false premise that the purported conduct of S&F and its clients – if true – constitutes violations of FDUTPA. However, because the complained of practices do not fall within FDUTPA's prohibitions, the trial court was correct in quashing the OAG's investigatory subpoena.

Florida's Deceptive and Unfair Trade Practices Act was designed "to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stats. §501.203(8). As defined by the Act, "trade or commerce" means,

> the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. 'Trade or commerce' shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.

Fla. Stats. §501.203(8). Thus, the threshold question is whether the alleged wrongful practices of S&F and its clients fall within the statutory definition of "trade or commerce."

The OAG's announced purpose of its investigation centers around its assertion that S&F and its clients are or have been "fabricating and presenting false and misleading documents which are then used on behalf of the [firm's] clients in foreclosure cases" and that "such documents are being presented in thousands of foreclosures per month in a scheme that has gone on since at least 2005. S&F litigates foreclosures in the state on behalf of

loan servicing companies and the OAG has received complaints that documents filed on behalf of the firm's clients have been fabricated."[3] Petition, p. 2-3. While the face of the subpoena stated it was issued pursuant to FDUTPA, it further identified the purpose and scope of the subpoena as extending to "possible unfair and deceptive trade practices which involve the advertising and marketing practices of [S&F]."[4] The arguments raised by the OAG at the hearing and in its Petition attempted to change the clear and unambiguous scope and purpose that is clearly set forth on the face of the subpoena. There is nothing in the record by way of evidence or testimony – other than the OAG's press release – to support the OAG's attempt to ignore

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[3] This language tracks the language contained in the OAG's August 10, 2010 press release. Exh. 3, at Exh. B. The very issuance of that press release may very well violate Rule 4-3.6(a) which instructs that a "lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding."

[4] It is important to note that the Petitioner disclaimed as a "mistake" the stated scope of the subpoena in its Petition and at the hearing below. Exh. 5, at p.11. As will be made clear below, the <u>only</u> way the subpoena could arguably be valid and authorized under FDUTPA is if it were investigating alleged violations in "trade or commerce" such as unfair or deceptive "advertising and marketing practices" – which the OAG now admits it was not!

the plain language contained within the four corners of its subpoena. Exh. 2. As explained below, though FDUTPA has and is intended to have broad application, its protections do not extend to the types of conduct complained of by the OAG.

Trent v. Mortgage Electronic Registration Systems, Inc., 618 F.Supp.2d 1356, 1357 (M.D.Fla. 2007) was a putative class action filed against MERS based on its actions in foreclosing upon mortgages in Florida. The plaintiffs sought relief under both Florida's Consumer Collection Practices Act (FCCPA) and FDUTPA. Plaintiffs alleged that MERS violated FDUTPA by engaging in the unlicensed practice of law and using deceptive means to collect debts on residential mortgage loans. *Id.* at 1358. The allegations of the plaintiffs included claims that MERS' presuit demand letters and representations violated FDUTPA and FCCPA. MERS raised multiple grounds on which the complaint should be dismissed, including that MERS did not engage in "trade or commerce" under FDUTPA. *Id.*

In determining that the alleged conduct of MERS did not constitute deceptive acts or unfair trade practices, the court analyzed the meaning and intent of "trade or commerce" as defined under the Act: "[A]dvertising, soliciting, providing, offering, or distributing, whether by sale, rental, or

otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." *Id.* at 1365. n.12 (quoting F.S. 501.203(8)). The court found that under the plain language of the Act, MERS did not "advertise, solicit, provide, or distribute" anything. *Id.* All MERS did was obtain a legal interest in a note from third party lenders and proceed to foreclose on that note. Thus, none of MERS' presuit communications with the putative plaintiffs fell within the purview of "trade or commerce". *Id.*

In *Kelly v. Palmer, Reifler & Assoc., P.A.*, 681 F.Supp.2d 1356 (S.D.Fla. 2010), relied on by the trial court below in quashing the OAG's subpoena, the court granted a law firm's motion for summary judgment on FDUTPA claims asserted against it which arose from the firm's sending of civil theft demand letters which, *inter alia*, threatened the filing of a lawsuit if the demanded payments were not made. The court ruled in favor of the law firm on two principle grounds: ***one***, that the presuit demand letters were absolutely privileged under Florida's litigation privilege;[5] and ***two***, that

[5] Florida's absolute litigation privilege is addressed *infra*, at Point II.

attorney conduct does not give rise to claims under FDUTPA. *Id.* at 1367-71.

In addressing the FDUTPA claims, the court held that presuit demand letters in which payment was demanded did not fall within the Act's definition of "trade or commerce." *Id.* 1375-75. The *Kelly* plaintiffs attempted to "bootstrap" their FDUTPA claims against the law firm by alleging that the releases offered in exchange for payment of the alleged debt constituted "'a thing of value' in exchange for money." *Id.* 1374. The court rejected this argument and plaintiffs' reliance on *Sweringen v. New York State Dispute Resolution Annn.* (NYSDRA), 2006 WL 2811825 (N.D.N.Y. Sept. 28, 2006). In arriving at its conclusion, the court analyzed the stated purpose of FDUTPA to "protect the consuming public and legitimate business enterprises" from "unconscionable, deceptive, or unfair acts or practices *in the conduct of* any trade or commerce." *Id.* at 1375 (emphasis in original). The acts of the law firm which occurred during its exercise of a legal remedy had "zero connection whatsoever to any 'trade or commerce.'" *Id.*

Kelly is further instructive as to the scope of FDUTPA in its analysis of the law of other jurisdictions with consumer protection statutes with

language very similar to that contained in the Act. *See Dalesandro v. Longs Drug Stores Cal., Inc.*, 383 F.Supp.2d 1244, 1250-51 (D. Hawaii 2005)(conduct in context of settlement and preparation for litigation is distinct from "business context" and therefore defendant is not engaged in "trade or commerce" within meaning of statute); *Begelfer v. Najarian*, 381 Mass. 177, 409 N.E.2d 167, 169-70 (Sup.Jud.Ct.Mass. July 18, 1980)(lender's written demand for payment under promissory note that allegedly violated usury law did not constitute unfair and deceptive act entitling plaintiff to damages; exercise of contractual or legal remedies does not constitute trade or commerce); *Benvenuti Oil Co. v. Foss Consultants, Inc.*, 2006 WL 328678 (Conn.Super.Ct. Jan. 25, 2006)(isolated act of forgery to further claims in lawsuit did not take place in "business context" and thus did not relate to the conduct of the business to bring it within the scope of consumer protection act).

Based on the court's review of cases from other jurisdictions, *Kelly* concluded that conduct undertaken in pursuit of legal remedies does not constitute "trade or commerce" under the unfair trade practices acts of the respective states. In *Benvenuti*, relied on in *Kelly*, the plaintiff asserted a claim under the Connecticut Unfair Trade Practices Act. The alleged

wrongful conduct included defendant's forging of a signature onto an agreement and then presenting that forged document in court to further its claims. 2006 WL 328678 at *9. There, the relevant inquiry was not whether the forgery or fraud could constitute an unfair or deceptive practice, but, rather, whether the complained of act or practice occurred "in the conduct of any trade or commerce." *Id.* The court noted that despite the stated intent that the Act have broad application, it is nonetheless limited by the requirement that the complained of conduct occur in the conduct of trade or commerce.

In determining that the forgery did not occur in "trade or commerce", the *Benvenuti* court considered the following facts:

> the forgery and resulting fraud in this case took place years after the plaintiff was induced into enter into a business relationship with [defendants]. The forged document was concocted [not] [6] to entice the plaintiff corporation into establishing a business relationship; it was an attempt to lead a trial court to accept the defendant's characterization of a business relationship that had already been entered into and was in fact terminated. Thus the courts and

[6]The undersigned believes that the word "not" must have been omitted from the written opinion as the preceding sentence indicates that the forged document was created after the business relationship was established and not to induce the relationship.

> plaintiff were misled in *court proceedings* not by an act involving the initiation or carrying on of an ongoing business relationship and directly involved in such matters." (emphasis in original)

Id. at *10.

Benvenuti is particularly instructive as it relates to the OAG's claim that S&F and its clients were engaged in "fabricating and presenting false and misleading documents which are then used on behalf of the [firm's] clients in foreclosure cases." Here, the OAG complains of alleged conduct by S&F and its clients of the precise nature found <u>not</u> to constitute "trade or commerce" by *Benvenuti.* Specifically, the OAG <u>does not</u> allege that borrowers were defrauded into taking out mortgages or entering into lending relationships through the use of false or fabricated documents; rather the stated purpose of its investigation is its belief that that false and fabricated documents were used to bolster the lenders' claims in connection with foreclosure lawsuits commenced and prosecuted by S&F. Clearly, under no interpretation of "trade or commerce" accepted by Florida's courts or in any of the above noted jurisdictions, could the alleged fabrication of documents which were then purportedly used to gain an unfair or even unlawful advantage in a foreclosure proceeding fall within the ambit of "trade or commerce".

Finally, the trial court cited to *Jamgochian v. Prousalis*, 2000 WL 1610750 (Del. Super. Aug. 31, 2009) as persuasive authority that FDUTPA does not extend to conduct of law firms, since that conduct is already subject to regulation by the Supreme Court of Florida.

> the very nature of the Act itself weighs heavily against any inference that the General Assembly intended it to apply to the conduct of attorneys in their practice. The Consumer Fraud Act, while nominally a "protective" enactment for the benefit of consumers, has the effect of being a "punitive" statute. This alone would not necessarily preclude application to lawyers. After all, lawyers are subject to the criminal code. However, the disciplinary nature of this Act is specifically targeted toward the conduct of a business enterprise. The business of an attorney is his or her practice.
>
> The grant of authority to the Supreme Court calls for attorneys to "behave themselves justly and faithfully in their *practice*, and if they misbehave themselves therein, they shall be *subject to such disciplinary measures as the Supreme Court, in its discretion, may determine.*" 10 Del. C. § 1906 (Emphasis added.) In light of this language, it is clear to this Court that lawyers, engaged in the practice of law, are subject to discipline only by the Supreme Court. Since the Supreme Court holds at least a statutory monopoly over the discipline of attorneys, had the General Assembly wished to include attorney conduct under the Act's purview, that body would have specifically inserted such

> language to override the provisions of 10 Del. C. § 1906.[7]

Id. at *6.

In ordering the Subpoena quashed, the circuit court below ruled that it would be a "constitutional absurdity" to conclude that the OAG has the power to control attorneys under the guise of FDUTPA when that power is unambiguously and exclusively granted to the Florida Supreme Court pursuant to Article V of the Florida Constitution. Exh. 1, p.3. The court further found that it was "confined to the four corners of the subpoena" which stated that it was issued pursuant to authority granted by FDUTPA and intended to investigate "unfair and deceptive practice which involve the advertising and marketing practices of [S&F]." Exh. 1, p.5.

Accordingly, the OAG has no authority under FDUTPA to investigate complaints against attorneys or law firms of alleged fabrication or use of false documents in foreclosure proceedings as set forth in its Petition.

[7] Regulates the admission of attorneys in Delaware.

II. ABSOLUTE IMMUNITY IS AFFORDED TO ANY ACT OCCURRING DURING THE COURSE OF, OR NECESSARILY PRELIMINARY TO, THE COURSE OF A JUDICIAL PROCEEDING

As recently reaffirmed by the Supreme Court of Florida in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 383-84 (Fla. 2007), Florida's absolute litigation immunity is afforded to any act occurring during, or necessarily preliminary to, a judicial proceeding, so long as the act has some relation to the proceeding. Because the expressly alleged misconduct sought to be investigated by the OAG was undertaken in connection with a judicial proceeding, to wit, the alleged fabrication and presentation of false and misleading documents in foreclosure proceedings, such acts are cloaked in absolute immunity.

In *Echevarria*, plaintiffs were property owners who defaulted on their mortgages and sought class action status to pursue claims against law firms engaged by their lenders to initiate foreclosure proceedings. *Id.* at 381. Plaintiffs' claims included alleged violations of FCCPA and FDUTPA. "The essence of the complaint was that the defendants acted unlawfully by asserting a claim for a debt that was in excess of the actual costs their clients incurred during the foreclosure proceedings." *Id.* While the specific holding

in *Echevarria* had the effect of confirming that the absolute litigation privilege extended "across the board" to both common law and statutory causes of action, the discussion of the privilege is applicable to the instant Petition. *Id.* at 384.

The *Echevarria* court's analysis of the litigation privilege included a review of the court's prior decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994). The *Levin* court noted that Florida's absolute litigation privilege originally extended to those defamatory statements made during the course of a judicial proceeding. *Levin*, 639 So. 2d at 607, citing *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992). Thus the "torts of perjury, libel, slander, defamation and similar proceedings that are based on statements made in connection with a judicial proceeding are not actionable." *Id.* at 608, citing *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984). This immunity protects not only the parties to a judicial proceeding, but extends to judges, witnesses and counsel. *Id.*

In *Levin*, the Supreme Court of Florida extended the "absolute litigation privilege" to include those actions occurring during the course of a judicial proceeding that might otherwise give rise to a claim for injury, such

as a claim for tortious interference with a business relationship. In the *Levin* case, a plaintiff law firm alleged that the defendant had intentionally interfered with the law firm's relationship with its client in bad faith by maliciously taking steps to disqualify the firm from representing its client in pending litigation. *Id.* at 607. The court acknowledged that defamatory statements made in the course of judicial proceedings, no matter how false or malicious, have been traditionally deemed to be absolutely privileged. *Id.* at 607. The *Levin* court further explained that the **absolute protection** afforded to statements made during the course of a judicial proceeding is not limited to defamation or tortious interference, but **extends to any alleged tortious conduct that relates to litigation**:

> In balancing policy considerations, we find that **absolute immunity must be afforded to any act occurring during the course of a judicial proceeding**, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to

> defend their actions in a subsequent civil action for misconduct.

Id. at 608 (emphasis added).

The *Echevarria* court expressly noted that it concluded its prior decision in *Levin* "by noting that adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power as well as the disciplinary measures of the state court system and bar association." *Id.* at 384.

Since *Levin*, Florida's courts have applied absolute immunity to dismiss or grant judgments on the pleadings in many contexts. For example, in *Florida Evergreen Foliage v. E.I. Du Pont De Nemours & Co.*, 135 F. Supp. 2d 1271 (S.D. Fla. 2001), the United States District Court for the Southern District of Florida granted a motion for judgment on the pleadings against claims of conspiracy, abuse of process, infliction of emotional distress, tortious interference, and violations of FDUTPA. One of the claims asserted by the *Florida Evergreen* plaintiffs was that the defendant "made false statements in implementation of a scheme to defraud" the plaintiffs. *Id.* at 1276. There, the court granted the defendant's motion for judgment on the pleadings and held that, "the acts allegedly committed by [defendant], although perhaps egregious and damaging to Plaintiffs, are definitely related

to other judicial proceedings, and that [defendant] is therefore immune from civil liability for its actions." *Id.* at 1283. In considering the *Levin* opinion when arriving at its decision, the court in *Florida Evergreen* articulated that the absolute litigation immunity "results from a balancing between the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public to a free and full disclosure of the facts in the conduct of judicial proceedings, and the general finding that fear of chilling the actions of participants in judicial proceedings and hampering the adversary system outweighs the inability of some genuinely and injured parties to seek relief." *Id.* at1279.

Similarly, in *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*, 748 So.2d 1054 (Fla. 4th DCA 1999), this Court affirmed a summary judgment entered against a plaintiff who sued an attorney for abuse of process and extortion. The attorney's alleged misconduct included prosecuting a claim for injunctive relief and procuring the appointment of a receiver for the improper purpose of coercing the payment of money. *Id.* at 1055. The plaintiff argued that the litigation privilege extended only to publications or communications made during litigation. *Id.* This Court rejected that argument and held that **all acts taken**

during pending litigation that relate to the litigation, not merely to statements made in the litigation, are afforded absolute immunity. *Id.* at 1056. *See also Ponzoli & Walsenburg, P.A. v. Zuckerman*, 545 So. 2d 309 (Fla. 3d DCA 1989) (tortious claim of extortion based upon alleged fraud and delaying tactics of counsel in course of litigation was improper because conduct at issue was committed during course of judicial proceeding and was therefore immune from civil liability).

More recently, in *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273 (Fla. 3d DCA 2002), the plaintiff complained that it was injured by the defendants filing of several lawsuits that disrupted plaintiff's efforts to close on the purchase of property. *Id.* at 274. The trial court granted judgment on the pleadings to the defendants based on the absolute litigation privilege articulated in *Levin*. *Boca Investors* made clear that even the filing of the lawsuit is protected by the absolute litigation privilege and does not give rise to a cause of action for any purported injury resulting therefrom.

While *Levin* addressed a claim for tortious interference as a result of the filing of a lawsuit, its principle and privilege **extends to any and all harm purportedly caused by the filing of a lawsuit or any conduct occurring during the course of that lawsuit**. *Levin* held that:

> Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement, or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding.

Boca Investors, 835 So. 2d at 274 (quoting *Levin*, 639 So. 2d at 608). This "privilege arises upon the doing of any act necessarily preliminary to judicial proceedings." *Id.* at 275 (quoting *Burton v. Salzberg*, 725 So. 2d 450, 451 (Fla. 3rd DCA 1999); *Sailboat Key, Inc. v. Gardner*, 378 So. 2d 47, 48 (Fla. 3rd DCA 1980)("Statements and allegations in pleadings are absolutely privileged and cannot form the basis of a disparagement or slander of title suit.")

In *Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA 1995) this Court affirmed the dismissal of a civil conspiracy count founded upon the alleged violations of Florida Rule of Judicial Administration 2.060(d) that requires the execution of pleadings. In addition to finding that the complained of conduct did not provide the required independent wrong on which to base a claim for civil conspiracy, this court held that the claim was also barred by the absolute immunity established in *Levin*. The *Rushing* court held:

> Additionally, absolute immunity would be afforded to any conduct by defendants occurring during the course of the adoption proceedings,

> regardless of whether the conduct involved a defamatory statement or other tortious behavior, including a violation of rule 2.060(d) because signing the petition for adoption and subsequent documents required for the proceeding has some relation to the adoption proceeding.

Id. at 876 (citing *Levin*).

Accordingly, to the extent that the OAG has commenced an investigation under the purported authority of FDUTPA to determine if S&F or its clients have fabricated and utilized false and misleading documents in the course of a judicial foreclosure proceeding, those alleged acts are absolutely privileged and not actionable. The only remedies available to persons who claim to have been injured by such acts – if true – are claims for malicious prosecution, or the initiation of complaints against the offending lawyers and law firms with The Florida Bar. Based on the foregoing, the Petition should be denied.

III. THE FLORIDA BAR HAS SOLE AND EXCLUSIVE JURISDICTION OVER THE CONDUCT AND DISCIPLINE OF LAWYERS AND, BY NECESSARY IMPLICATION, THE FIRMS WITH WHICH THOSE ATTORNEYS PRACTICE

In its final point, the OAG maintains that The Florida Bar has no jurisdiction to regulate or discipline law firms. Petition, p. 20. While in the most technical sense this may be true, The Florida Bar is an official arm of

the Supreme Court of Florida and is charged with the duty of enforcing rules regarding, *inter alia*, lawyer trust accounts, (Chapter 3), the unlicensed practice of law (Chapter 10), and lawyer advertising (Chapter 15). The Florida Bar regulates and disciplines law firms through the enforcement of these rules against admitted lawyers, which necessarily includes disciplining those lawyers for acts committed by the firm generally (such as a firm advertisement that violates bar rules) or the acts of non-lawyers (such as paralegals, secretaries, and other non-lawyer staff).

In quashing the OAG's subpoena, the trial court specifically cited Fla. Stats. §501.209, which specifically provides that,

> If the enforcing authority receives a complaint or other information relating to noncompliance with this act by a person who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision.

The Florida Constitution grants "exclusive jurisdiction" to the Florida Supreme Court "to regulate the admission of persons to the practice of law and the discipline of persons admitted." See Art. V, §15, Fla. Const.

Accordingly, and based upon the foregoing authorities, if the OAG believes that S&F violated FDUTPA[8], the Florida Supreme Court has the exclusive jurisdiction to regulate and discipline attorneys in connection with their provision of legal services, and The Florida Bar is charged with investigating such complaints.

[8] Assuming, *arguendo*, that the complained of actions even fall within FDUTPA's definition of "trade or commerce." For the reasons stated above, they do not.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Petition be denied in all respects.

Respectfully submitted,

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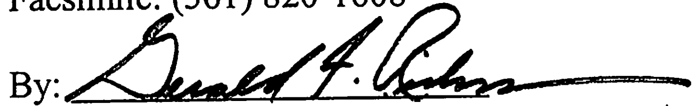
By: 

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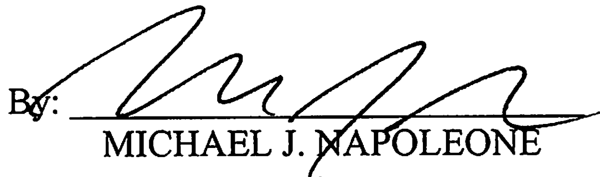
CERTIFICATE OF SERVICE

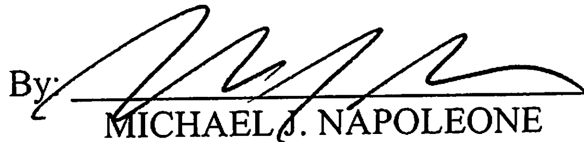
I HEREBY CERTIFY that a true and correct copy of the foregoing *Response to Petition for Certiorari* was served via Facsimile and U.S. Mail this 23rd day of December, 2010 to Jason Vail, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399.

By: 

MICHAEL J. NAPOLEONE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion has been printed in Times New Roman 14-point proportionate type.

By: 
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