

**IN THE CIRCUIT COURT FOR THE 15TH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA**

AMTRUST BANK,

GENERAL JURISDICTION DIVISION

Plaintiff,

CASE NO.

50 2008 CA 033946XXXX MB

vs.

JOANNE T. WHATLEY; JEROME W. CRAFT; JOANNE W. TUTTLE; UNKNOWN SPOUSE OF JOANNE W. TUTTLE, IF ANY; 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; BUENA VIDA MASTER ASSOCIATION, INC.; BUENA VIDA WEST HOMEOWNERS ASSOCIATION, INC. ; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; JOHN DOE AND JANE DOE AS UNKNOWN TENANTS IN POSSESSION,

**MOTION FOR
SANCTIONS FOR
FAILURE TO COMPLY
WITH COURT ORDER
AND MOTION FOR
CONTEMPT ORDER**

Defendants.

Defendants, JOANNE T. WHATLEY and JOANNE W. TUTTLE, move for sanctions against Mortgage Electronic Registration Systems, Inc. ("MERS") for failure to comply with a Court order. Defendants also move for a contempt order to coerce compliance with the Court's order. In support of these motions, Defendants state as follows:

1. On December 12, 2008, Defendants served a request for production on the co-Defendant, MERS.

2. MERS failed to answer or object to the request for production within 30 days, as required by Florida Rule of Civil Procedure 1.350(b). MERS did not request an extension.

3. Although MERS has been properly served in this case, no attorney has appeared in the case on its behalf. Accordingly, defense counsel contacted MERS's legal department directly in order confer with MERS with the goal of obtaining the discovery without Court intervention. While acknowledging receipt of the discovery request, MERS failed – or refused – to voluntarily provide the three pages of documents requested.

4. Defendants, therefore, moved to compel the discovery. On January 16, 2009, in accordance with Administrative Order No. 3010-2/97(B), this Court entered an Order requiring a response to Defendant's discovery request within ten days.

5. On the eleventh day¹ after the court ordered MERS to produce the discovery, MERS sent a letter to movants' counsel in which it announced:

MERS will not produce documents as a named party to the above litigation, as it does not contest the allegations made in the plaintiff's complaint. MERS will not otherwise participate in the above litigation.

MERS letter dated January 26, 2009, Exhibit A.

6. MERS's response is stunningly arrogant, not only because it flouts this Court's order compelling production of the documents, but because it raises no

¹ While the letter bears the date of January 26, 2009, it was delivered by facsimile after 7:00 p.m. on that day. Rule 1.080 Fla.R.Civ.P. provides that service by delivery – which includes by facsimile – after 5:00 p.m. “shall be deemed to have been made on the next day...”

intelligible reason for its refusal. It is difficult to imagine a better example of a flagrantly contumacious response richly deserving of sanctions.

7. MERS is not only a party to this action (having been properly served by Plaintiff), but is a necessary, indispensable party to this action. The court rules regarding discovery do not excuse a party from responding or comply with court orders merely because “it does not contest the allegations in the plaintiff’s complaint.” Indeed, MERS’s implicit admission that its interests are aligned with Plaintiff’s (and thus adverse to the movants’ interests) is all the more reason to compel the production.

8. In *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So.2d 1278 (Fla. 2d DCA 2005), the court affirmed a fine of \$2,500 per day against parties who had failed to comply with several discovery deadlines. The fine was imposed as a “coercive civil contempt sanction arising from the violation of the discovery orders.” *Id.* at 1283-1284.

9. The Court need not, and should not, tolerate MERS’s abuse of the discovery process:

Pretrial discovery is not intended as a game. Many trial judges throughout this state have bemoaned the tactics of the minority of lawyers and parties that abuse the discovery process. [citations omitted] As this court has stated:

The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary’s ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way.

Robinson v. Weiland, 988 So.2d 1110, 1113 (Fla. 5th DCA 2008), quoting *Cox v.*

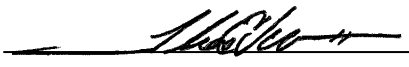
Burke, 706 So.2d 43, 46 (Fla. 5th DCA 1998).

WHEREFORE, the Defendants hereby move for an order sanctioning MERS under Rule 1.380(b)(2) Fla.R.Civ.P. and under its general powers of civil contempt, to wit:

- a. That an appropriate monetary sanction be entered to coerce MERS's compliance with this Court's order.² While the amount of the coercive fine is discretionary with the Court, the Court should note that MERS's own standard for fining its members for a single violation of the MERS rules is \$10,000.³ This provides an indication of the order of magnitude for a monetary sanction that would be needed to coerce MERS into compliance with this Court's order.
- b. That Defendants be awarded reasonable expenses, including attorneys fees, for bringing this motion. Rule 1.380(b)(2)(E).

Dated: January 27, 2009.

ICE LEGAL, P.A.
Counsel for Defendants
1975 Sansburys Way, Suite 115
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888

By: 
THOMAS E. ICE
Florida Bar No. 0521655

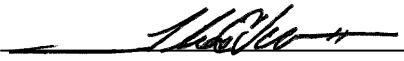
²“It is well settled that determining whether sanctions should be imposed for discovery violations and the amount or nature of those sanctions are matters committed to the discretion of the trial court, and the trial court's decision will not be disturbed upon appeal absent an abuse of that discretion ... [I]n cases imposing a coercive fine that can be avoided entirely by complying with a court order, there is no requirement that the amount of a fine coincide with some strict element of proof of damages or losses caused by the noncompliance.” *Channel Components*, at 1284.

³ MERS Rule 8(c): “In the State of Florida, the authority to conduct foreclosure in the name of MERS granted to a Member's Certifying Officers under Paragraph Three of the Member's MERS Corporate Resolution is revoked. Effective June 1, 2006, the Member shall be sanctioned \$10,000.00 per violation for commencing a foreclosure in Florida in the name of MERS.”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this January 27, 2009 to all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Defendants
1975 Sansburys Way, Suite 115
West Palm Beach, FL 33411
Telephone: (561) 793-5658
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By: 
THOMAS E. ICE
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SERVICE LIST

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MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
c/o Electronic Data Systems Corporation
3300 SW 34th Ave., Suite 101
Ocala, FL 33474



Process loans, not paperwork.SM

January 26, 2009

VIA FACSIMILE & ELECTRONIC MAIL

Thomas E. Ice, Esq.
Ice Legal, P.A.
1975 Sansburys Way, Suite 115
West Palm Beach, FL 33411

Re: Mortgage Electronic Registration Systems, Inc. ("MERS"), Request for Production in *AmTrust Bank v. Joanne T. Whatley, et al.*, 15th Judicial Circuit, Palm Beach County, Florida, Case No. 50 2008 CA 033946XXXX MB

Dear Mr. Ice,

We are in receipt of your document partially entitled, "Request for Production Regarding MERS Tracking." MERS will not produce documents as a named party to the above litigation, as it does not contest the allegations made in the plaintiff's complaint. MERS will not otherwise participate in the above litigation.

Last week, we received a copy of your Ex Parte Motion to Compel Discovery and unsigned order to compel same (attached). If you plan to seek this or any further court orders, please provide us timely notice so that we may have an opportunity to take appropriate action.

Should you have any questions, please feel free to contact me. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Anderson", is written over a light-colored background.

Richard Anderson
Counsel

cc: Kelly M. Williams, Esq.

Exhibit A