IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 05-2425 CA 05
05-10022 CA 05
05-11350 CA 05
05-11570 CA 05
05-12227 CA 05
05-12531 CA 05
05-14401 CA 05
05-14911 CA 05
05-15138 CA 05

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Plaintiff(s),

vs.

ENZO CABRERA, ET AL.,

Defendant(s).
_______________________________________/

CORRECTED ORDER TO SHOW CAUSE

On August 8, 2005, this Court sua sponte issued Orders to Show Cause in each of the above referenced cases directing the Plaintiffs to appear before the undersigned Judge at 11:00 AM on the 26th day of August, 2005 to Show Cause why the action should not be dismissed for the reasons therein stated. Additionally, the Court granted a Motion for Rehearing in the case styled Mortgage Electronics Registration Systems, Inc., v. Spencer B. Gordon, et al., Case # 05-12531 in response to the Plaintiff's objection to the Court's sua sponte order dismissing the action for lack of standing. The order granting rehearing scheduled a further hearing for August 26, 2005 at the same time as the other cases were to appear and Show Cause. Due to hurricane Katrina the Courts' were closed August 26, 2005 which has necessitated the rescheduling of the pending matters. For the purpose of the Order to show Cause and the motion for rehearing in Case #05-12531, the above referenced cases are consolidated.

Pursuant to the inherent power of the Court to prevent an abuse of its process and to peremptory dispose of causes of action that are frivolous or a sham, this Court issues the

following Corrected Order to Show Cause for the reasons more fully set forth below. Rhea v. Hackney, 157 So. 90 (Fla. 1954); Rios v. Moore, 902 So. 2d 181 (3d D.C.A. Fla. 19780; see Long v. Swofford, 805 So. 2d 882 (3d D.C.A. Fla. 2001);

Notwithstanding the lack of objection raised by the Defendants, the Court must determine whether the complaints state a cause of action before it enters judgments. see Morales v. All Right Miami, Inc., 755 So. 2d 198 (3d D.C.A. Fla. 2000). It must be remembered that litigation can have a devastating affect on those persons being sued. Often their homes, lives and general wellbeing are directly impacted by these Court proceedings. Foreclosure actions in particular can be disruptive to the individuals and their family. Most Defendants in these matters are defaulted. This is not to say that they may not legitimately owe the money to someone, but it behooves all concerned to ensure that the correct legal party Plaintiff is maintaining the action.

The Courts are the ultimate guardian of the judicial process, but lawyers as officers of the Court are also charged with the corresponding professional responsibility to assist in the proper administration of justice. As such, it is incumbent on both the bench and the bar to examine these type of proceedings and to assure that short cuts motivated by financial expediency do not trample on the right of the less educated or well to do.

Over the past several years, the Plaintiff, Mortgage Electronic Registration Systems, Inc., (hereafter referred to MERS) as "Nominee" for various third parties have initiated several thousand mortgage foreclosure actions in this Circuit alone. "MERS currently has over 30 million loans registered, and is registering over 40% of all mortgage loans originating in the United State" see Response to Order to Show Cause, Case No #05-11570 p. 2 They, as Plaintiffs, have even sued themselves as Defendant's in the same case. (By example, see Cases

#05-14911; 05-12227; 05-2425; 05-11350; 05-11570, and 05-11401). The law does not appear to recognize any legal consequences, entitlement, rights or liabilities to one ostensibly designated as a "Nominee". In the absence thereof, the Plaintiff, Mortgage Electronic Registration Systems, Inc., lacks standing to maintain these actions on behalf of third parties and the complaints fail to state a cause of action. see Morales v. All Right Miami, Inc., 755 So. 2d 198 (3d D.C.A. Fla. 2000); Dollar Systems, Inc., v. Detto, 688 So. 2d 470 (3d D.C.A. Fla. 1997).

More troubling, however, are the Plaintiff's allegations that it "owns and holds the note and mortgage". A cursory examination of some of the files in question reveals the following:

1. The complaint in Case #05-10022 alleges that the Plaintiff, "as agent of the servicer, is the present owner and constructive holder of the Promissory Note and Mortgage". (emphasis added) see paragraph 1 of the complaint. Who is the "servicer"? How does an agent become an "owner"? Then within the same Count, the Plaintiff alleges that it is the assignee of the note and mortgage. see paragraph 3. In paragraph 19 of the complaint, seeking to Reestablish the Lost Note, it alleges that it is the agent of the "current owner" or its servicer (whoever they may be), and that either of them was entitled to enforce the note when loss of possession occurred! Who is the "current owner"? Who is the "servicer"?

2. In Case #05-2425 the Plaintiff, MERS does not allege that it is bringing the action as "nominee"; but it is suing in its own right. Paragraph 5 alleges that it "owns and holds the Note and Mortgage". In addition, the Plaintiff joins itself as a party Defendant as "nominee" for a third party. The Plaintiff further alleges in Count II to Reestablish the Note and Mortgage that it was in possession of the Note and Mortgage and entitled to enforce them when the loss occurred. The copy of the note attached to the complaint identified Fermont Investment and Loan as the

lender. There are no allegation as to how the Plaintiff became the owner and holder of the Note and Mortgage.

3. In Case #05-11350, the Plaintiff, MERS sues as nominee for a third party and alleges in Count I to Reestablish the Note that it is the owner of the Note and that at the time it was loss, it was entitled to enforce it. Count II further alleges that Plaintiff owns and holds the note. The complaint joins MERS as a party Defendant. The same law firm both filed the complaint on behalf of MERS as Plaintiff and answered the complaint on behalf of MERS as nominee for a third party Defendant.

4. Likewise in Case #05-11570 MERS joins itself as a party Defendant and alleges that it owns and holds the subject note.

5. In Case #05-12227, MERS joins itself as a party Defendant; and alleges that it is "as agent of the servicer" the present owner; the "constructive" holder and as "an interested party in that it is the agent of the current owner or its servicer who was in possession and entitled to enforce the note when loss. Who is the current owner? Who is the "servicer"?

The Court takes judicial notice of the Courts' orders dated August 19, 2005 and August 31, 2005 in the case styled Mortgage Electronic Registration Systems, Inc., v. Azize, Case # 05-001295 CI-11 pending in the Circuit Court of the 6th Judicial Circuit (copies attached hereto). That Court found that MERS does not "own or hold" the notes in question despite their allegations to the contrary. Further, attached to Plaintiff's response to the Court's earlier Order to Show Cause, in the case of Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., Case #05-12227, are documents that clearly disavowal the Plaintiff's beneficial interest in the promissory notes. Specifically, Terms and Conditions of the

Agreement entered into between MERS and its members provides in part:

> 2. ....MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agreed not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties............
>
> 3. MERS shall at all times comply with instructions of the holder of mortgage loan promissory notes. In the absence of contract instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS System in accordance with the Rules and Procedures of MERS. (emphasis added)
>
> 6. MERS and the Member agree that: (i) the MERS System is not a vehicle for creating or transferring beneficial interests in mortgage loans, (ii) transfer of servicing interests reflecting on MERS System are subject to the consent of the beneficial owner if the mortgage loans, ...

Moreover, Section 6 of Rule 2 of the Rules of Membership attached to Plaintiff's response to the Court's Order to Show Cause filed in Case # 05-12227 states:

> MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes...... (emphasis added).

Rule 8 titled "Foreclosure", allows the beneficial owner of the mortgage loan or its servicer to designate the entity to prosecute the foreclosure action. MERS' own documents belie the assertion that they either "own" or "hold" the mortgage loan promissory notes, notwithstanding the allegations in the complaints.

The mortgages themselves attached to the various complaints do not purport to assign to the Plaintiff any beneficial interest in the mortgage loans. An assignment of a mortgage in the absences of the assignment and physical delivery of the note in question is a nullity. Sobel v. Mutual Development, Inc., 313 So. 2d 77 (1st D.C.A. Fla. 1975);

As stated in the response to the Order to Show Cause in Case# 05-11570,

> "The lender or other holder of the note registers the loan on MERS's Electronic System. Thereafter, all sales or assignments of the mortgage loan are accomplished electronically under the MERS system" see page 2 of response served on 23rd day of August 2005.

Apparently, all transactions occur electronically. As their name implies, MERS never acquires actual physical possession of the mortgage note nor do they acquire any beneficial interest in the note. see 6 Fla Jur Bills, Note and Other Commercial Paper § 120.

Similar serious concerns are raised when examining those Counts seeking the Reestablishment of Lost Notes and Mortgages. Not withstanding their allegations, MERS apparently never had actual possession of the notes, nor were they able to enforce them when loss of possession occurred, see F.S. § 673.3091 (2004).

As the Court stated in Rhea supra

> "A plea is considered "sham" when it is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue. Pleading a matter known by the party to be "false" for the purpose of delay or other unworthy object has always been considered a very culpable abuse against justice and at common law was subject to censure and summary setting aside with cost." ....supra at 193
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> "A "sham" plea is one good on its face but absolutely false in fact. A "frivolous" plea is one which on it face plainly sets up no defense, although it may be true in fact." supra at 194

Based then upon the above matters described, the Plaintiff MERS is hereby directed to appear before the undersigned Judge at **1:30 PM** on the 16th day of **September** to then Show Cause why these actions and all other similar pending or subsequently filed actions assigned to the undersign Judge should not be dismissed as a sham and/or as a frivolous pleading with judgment,

sanctions and cost entered against the Plaintiff, MERS without further notice or hearing.

DONE and ORDERED in Chambers at Miami-Dade County, Florida, on this 1st day of September.

JON I. GORDON CIRCUIT JUDGE

JON I. GORDON
Circuit Court Judge

cc: Counsels/Parties of Record