In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR EQUIFIRST CORPORATION,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888
Email: mail@icelegal.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE AND FACTS 1

A. Introduction – The Initial Complaint Is Filed by MERS. 1

B. Plaintiff's Counsel Represents that the Use of MERS' Name was a "Clerical Error" and Substitutes SUTTON as Plaintiff *Ex Parte*. 2

C. In Vacating the *Ex Parte* Substitution, the Court Instructs that the Matter be Set for Hearing. 4

D. SUTTON Instead Files a First Amended Complaint. 4

E. Plaintiff's Counsel Again Substitutes SUTTON as Plaintiff *Ex Parte.* 6

F. [redacted] Attempts (Unsuccessfully) to Depose MERS and SUTTON.....7

G. [redacted] Moves for Sanctions for Discovery Abuse. 12

H. MERS' Moves to Change the Style of the Case. 12

I. The SHAPIRO Attorney Represents in Open Court That MERS Is Still the Named Plaintiff. 13

J. [redacted] Attempts (Unsuccessfully) to Depose the MERS Officer, Bill Hultman. 14

K. Plaintiff Voluntarily Dismisses the Case.....16

L. SUTTON Files a Second Case Against [redacted] 17

M. SUTTON Files Another Motion for Protective Order to Stop the Hultman Deposition, Which is Denied.....18

N. New Counsel Accidentally Appears for MERS, Withdraws, and Then Files A Third Motion for Protective Order to Halt the Hultman Deposition on Behalf of SUTTON. 19

O. SUTTON Argues that [redacted] Cannot Depose MERS Because SUTTON Was the Plaintiff When the Case Was Dismissed. 21

P. [redacted] Moves to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b). 23

Q. The Court Denies [redacted] Motion to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b) Without An Evidentiary Hearing. 25

SUMMARY OF THE ARGUMENT 26

STANDARD OF REVIEW 27

ARGUMENT 28

A. The Notice of Voluntary Dismissal is a "Proceeding" From Which the Court May Grant Relief under Rule 1.540(b). 28

B. [redacted] Showing of a "Colorable Entitlement" to Relief Triggered the Requirement for an Evidentiary Hearing. 28

C. The Right of Voluntary Dismissal Without Prejudice Does Not Extend So Far as to Permit a Plaintiff to Commit Fraud With Impunity. 47

CONCLUSION 49

CERTIFICATE OF SERVICE 50

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD 51

TABLE OF AUTHORITIES

Page

Cases

Channel Components, Inc. v. America II Electronics, Inc.,
915 So. 2d 1278 (Fla. 2d DCA 2005).....42

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

Desimone v. Old Dominion Ins. Co.,
740 So. 2d 1233 (Fla. 4th DCA 1999) 46

Dynasty Exp. Corp. v. Weiss,
675 So. 2d 235 (Fla. 4th DCA1996) 29

Hanono v. Murphy,
723 So. 2d 892 (Fla. 3d DCA 1998).....46

In re Parsley,
384 B.R. 138 (Bankr. S.D. Tex. 2008).....39

Knight Energy Services, Inc. v. Amoco Oil Co.,
660 So. 2d 786 (Fla. 4th DCA 1995) 47

Mahmoud v. International Islamic Trading (IIT), Ltd.,
572 So. 2d 979 (Fla. 1st DCA 1991).....44

Mercer v. Raine,
443 So. 2d 944 (Fla., 1983).....44

Miller v. Fortune Ins. Co.,
484 So. 2d 1221 (Fla. 1986).....28

Robinson v. Weiland,
936 So. 2d 777 (Fla. 5th DCA 2006) 27

Robinson v. Weiland,
988 So. 2d 1110 (Fla. 5th DCA 2008) 41

Savino v. Fla. Drive In Theatre Mgmt., Inc.,
697 So. 2d 1011 (Fla. 4th DCA 1997) 46

Schleger v. Stebelsky,
957 So. 2d 71 (Fla. 4th DCA 2007) 27, 29

Select Builders of Florida, Inc. v. Wong,
367 So. 2d 1089 (Fla. 3d DCA 1979).....28

Singleton v. Greymar Associates,
882 So. 2d 1004 (Fla. 2004) 47

Southern Bell Tel. & Tel. Co. v. Welden,
483 So. 2d 487 (Fla. 1st DCA 1986).....27

Stella v. Stella,
418 So. 2d 1029 (Fla. 4th DCA 1982) 27

Wallraff v. T.G.I. Friday's Inc.,
490 So. 2d. 50 (Fla. 1986) 43, 48

Rules

Rule 1.310(b)(6) Fla.R.Civ.P. 40, 43

Rule 1.380(a)(3) Fla.R.Civ.P. 42

Rule 1.380(b)(2)(C) Fla.R.Civ.P.....43

Rule 1.380(d) Fla.R.Civ.P.....43

Rule 1.540(b) Fla.R.Civ.P..... 23, 25, 26, 27, 29, 44, 47

Rule 2.515(a) Fla. R. Jud. Admin. 39

Rule 4-1.4 R. Regulating Fla. Bar.....39

Rule 4-1.8 R. Regulating Fla. Bar.....39

Rule 4-3.1 R. Regulating Fla. Bar.....39

Statutes

§57.105 Florida Statutes. 31, 35

Notes:

1) References to pages in the Appendix will be indicated as **(A. __)**.

2) An effort was made to refer to parties by their names (such as, “ or “MERS”), but the generic “Plaintiff” (or the names of counsel, such as “SHAPIRO” or “JONES FOSTER”) was used where the identity of the party to which a particular act is to be attributed may be disputed.

STATEMENT OF THE CASE AND FACTS

A. Introduction – The Initial Complaint Is Filed by MERS.

This is a foreclosure action filed by Appellee and Plaintiff below, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR EQUIFIRST CORPORATION ("MERS"). The Complaint alleged that MERS was the "legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents."[1] MERS also alleged that the promissory note (which had been lost, stolen or destroyed) and mortgage were "executed and delivered" to MERS.[2] The attached Notice Required by the Fair Debt Collections Practices Act ("FDCPA Notice), identified the creditor as "Barclays Capital Real Estate Inc. dba HomEq Servicing as Servicer for [MERS]"[3] The attached Notice of Lis Pendens was in the name of MERS.

Defendant, [redacted] ("[redacted] moved to dismiss the complaint on the grounds that the attachments to the Complaint contradicted, and thus negated, MERS' allegation that it was the real party in interest.[4] According to

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[1] Complaint, ¶ 6 **(A. 3)**.

[2] Complaint, ¶ 24 **(A. 6)**.

[3] FDCPA Notice. ¶ 4 **(A 12)**.

[4] Defendant, [redacted] Motion to Dismiss Complaint, dated December 8, 2008 **(A. 14)**.

the attached mortgage, MERS was the original mortgagee. According to the attached copy of the unendorsed promissory note, however, EquiFirst Corporation, ("EquiFirst") was the original lender and, in the absence of an endorsement, was still the note owner.

B. Plaintiff's Counsel Represents that the Use of MERS' Name was a "Clerical Error" and Substitutes SUTTON as Plaintiff *Ex Parte*.

Knowing that MERS prohibits the use of its name as a plaintiff in foreclosure actions in Florida, [redacted] sent Plaintiff's counsel a letter requesting dates for a deposition of a MERS representative with the most knowledge of, among other things:

> 1. The MERS Rules of Membership, including, but not limited to, Rule 8(c), to wit:
>
> > In the State of Florida, the authority to conduct foreclosures 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.[5]

[5] *See*, Defendant, [redacted] [redacted] Amended Motion to Strike First Amended Complaint, Motion for More Definite Statement and Memorandum in Opposition to Motion to Substitute Party Plaintiff dated March 18, 2009, p. 2 **(A. 73)**; Notice of Taking Depositions, dated April 7, 2009 (incorporating language of original proposed notice) **(A. 96)**.

In response, Plaintiff served a Motion to Substitute Party Plaintiff, which alleged that the naming of MERS as Plaintiff was a mere "clerical error" and that the "true and correct owner and holder of the mortgage and note [was] Sutton Funding, LLC."[6] Although the motion bore no indication it was being made *ex parte*, and although the copy served on [redacted] was not accompanied by a proposed order, the motion was granted without a hearing having been coordinated, noticed, or held.[7]

Although the confusion between MERS and Sutton Funding, LLC ("SUTTON") was attributed to a "clerical error," Plaintiff's counsel, Shapiro & Fishman, LLC ("SHAPIRO"), initiated a campaign of filing similar motions in dozens, if not hundreds, of its cases across the state in which MERS was the nominal plaintiff.[8] In those cases, SHAPIRO or its client apparently confused MERS with U.S. Bank N.A., Wells Fargo Bank, N.A., Deutsche Bank National Trust Co., Wachovia Bank, N.A., HSBC Bank, USA, and potentially others.[9]

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[6] Motion to Substitute Party Plaintiff, dated December 9, 2008, ¶ 1 **(A. 22)**.

[7] Order to Substitute Party Plaintiff, dated December 11, 2008 **(A. 24)**.

[8] *See*, cases tabulated in Defendant, [redacted] [redacted] Amended Motion to Strike First Amended Complaint, Motion for More Definite Statement and Memorandum in Opposition To Motion to Substitute Party Plaintiff, pp. 9-11 (**A. 80-82)**.

[9] *Id*.

C. In Vacating the *Ex Parte* Substitution, the Court Instructs that the Matter be Set for Hearing.

In this case, [redacted] moved to vacate the *ex parte* order substituting SUTTON as the plaintiff, which Plaintiff opposed. Judge Cook granted the motion to vacate, indicating that [redacted] should be given the opportunity to be heard on the merits of the substitution:

> THE COURT: … So I'm going to grant your motion to vacate it, Mr. Ice, and then it can be set for the hearing and I can hear the arguments on both sides on whether there's any prejudice to the defendant or not.[10]

D. SUTTON Instead Files a First Amended Complaint.

Rather than noticing a hearing as directed by the court, a week later SHAPIRO served a document entitled "First Amended Complaint" in which MERS was still the Plaintiff in the caption, but in which SUTTON's name was substituted for that of MERS in the body.[11]

The amendment alleged that SUTTON had acquired the loan from EquiFirst by way of an "assignment and transfer" of both the note and mortgage before the Complaint was filed. Yet, it also alleged that SUTTON was the assignee on a

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[10] Transcript of Proceedings Held Before The Honorable Jack H. Cook January 26, 2009, pp. 4-5 **(A. 31-32)**.

[11] First Amended Complaint, dated February 2, 2009 **(A. 42)**.

written Assignment of Mortgage transferring both the mortgage and the note from MERS after the Complaint was filed.[12]

The count to reestablish a lost note quietly disappeared and the copy of the note attached to the amended complaint was now accompanied by an additional page entitled "Note Endorsements," ostensibly endorsing the note in blank. The attached written assignment of the mortgage and note (prepared by Plaintiff's counsel) was from MERS to SUTTON and was executed in Sacramento, where HomEq Servicing ("HOMEQ") has an office.[13] Neither the FDCPA Notice nor the Lis Pendens was amended to reflect the new Plaintiff.

On the very same day that the First Amended Complaint was served, served a Motion to Strike First Amended Complaint.[14] Among other reasons, asserted that the amendment should not be permitted because it would be futile; namely, SUTTON could not state a cause of action because it was not the real party in interest.[15] In contesting both the amendment to the Complaint

[12] First Amended Complaint, ¶ 6 **(A. 44)**.

[13] Assignment of Mortgage attached to First Amended Complaint and recorded at OR BK 23055 PG 1339 **(A. 49)**; Deposition of Jill Orrison as SUTTON taken April 22, 2009 ("SUTTON Depo."), p. 13 **(A. 121)**.

[14] Motion to Strike Amended Complaint, dated February 2, 2009 **(A. 51)**.

[15] Motion to Strike Amended Complaint, p. 3 **(A. 54)**.

and the still-pending Motion to Substitute Party Plaintiff, [redacted] argued that "Plaintiff (whoever that may actually be) should not be permitted to simply substitute another party into this litigation without a full evidentiary hearing…"[16]

E. Plaintiff's Counsel Again Substitutes SUTTON as Plaintiff *Ex Parte.*

A month and a half after the filing of the First Amended Complaint, SHAPIRO served an Amended Motion to Substitute [SUTTON as] Party Plaintiff, this time alleging that the original mortgagee, MERS, was the "owner and holder of the subject note and mortgage"[17] and that the "mortgage was subsequently assigned to Assignee [SUTTON] as set forth in the Assignment of Mortgage."[18] Once again, SHAPIRO did not label the motion as *ex parte*, nor did it serve a proposed order upon [redacted] Once again, the court granted the substitution of SUTTON without a hearing having been coordinated, noticed or held.[19]

This time SHAPIRO agreed to an order vacating the substitution. The agreed order drafted by SHAPIRO and entered by the court stated that the previous

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[16] Defendant, [redacted] [redacted] Amended Motion to Strike First Amended Complaint, Motion for More Definite Statement and Memorandum in Opposition to Motion to Substitute Party Plaintiff, dated March 18, 2009, p. 14 **(A. 85)**.

[17] Amended Motion to Substitute Party Plaintiff, dated March 18, 2009, ¶ 2 **(A. 88)**.

[18] *Id*. at ¶3 **(A. 88)**.

[19] Amended Order to Substitute Party Plaintiff, dated March 24, 2009 **(A. 91)**.

Order substituting SUTTON as the party plaintiff was "hereby vacated and annulled."[20]

F. [redacted] Attempts (Unsuccessfully) to Depose MERS and SUTTON.

After the filing of the First Amended Complaint, [redacted] embarked on a course of discovery to garner the evidence for the requested hearing. Among those discovery efforts was an attempt to depose both MERS and SUTTON on a range of issues, including ownership of the promissory note. Plaintiff resisted the deposition of SUTTON, filing a motion for protective order which was denied.[21] The parties finally agreed upon back-to-back telephone depositions of MERS and SUTTON.[22]

In arranging for the court reporter's attendance, [redacted] learned that the depositions would actually be held at the offices of HOMEQ, rather than those of SUTTON or MERS. [redacted] confirmed by an email to SHAPIRO that the deponents would, in fact, be persons selected by those entities as having the most

[20] Agreed Order to Vacate Amended Order Substituting Party Plaintiff, dated April 15, 2009 **(A. 105)**.

[21] Motion for Protective Order, dated March 4, 2009 **(A. 66)**; Order on Plaintiff's Motion for Protective Order, dated March 25, 2009 **(A. 94)**.

[22] Notice of Taking Depositions, dated April 7, 2009 **(A. 96)**.

knowledge of the subject matters specified in the notice.[23] [redacted] counsel also confirmed by email that SHAPIRO would voluntarily produce SUTTON without the need for a subpoena even though it was no longer Plaintiff.[24]

1. HOMEQ appears for deposition as the MERS representative.

On the appointed day, a lone HOMEQ employee, Jill Orrison, appeared as the corporate representative of both SUTTON and MERS. At the MERS deposition, Ms. Orrison confessed that it was HOMEQ, not MERS, who had decided she would appear that day as the "employee of MERS with the most knowledge."[25] The witness did not contact anyone from MERS to see if they knew any of the answers to questions relating to the areas of knowledge listed in the deposition notice.[26] She did not know whether anyone at MERS even knew that this case was brought in the name of MERS.[27] She did not even feel she had any authority to bind MERS with any of the answers that she gave at the deposition.[28]

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[23] *See*, [redacted] Amended Second Motion for Sanctions, dated May 27, 2009, p. 3 **(A. 249)**.

[24] *See id*. at 2 **(A. 248)**.

[25] Deposition of Jill Orrison as MERS taken April 22, 2009 ("MERS Depo.") p. 7 **(A. 169)**.

[26] MERS Depo. p. 33 **(A. 195)**.

[27] MERS Depo. pp. 13-14 **(A. 175-176)**.

[28] MERS Depo. p. 33 **(A. 195)**.

Even the SHAPIRO attorney in attendance was unwilling to announce an appearance at the MERS deposition as counsel for either MERS or SUTTON.[29]

All told, the witness responded that she did not know the answer to a question over 70 times in less than 45 minutes. For each and every one of the twenty areas of inquiry identified on the notice of deposition, she admitted that she was not the person at MERS with the most knowledge. Nor could she identify any person at MERS who had more knowledge.[30] And when reminded that had questioned even before the deposition whether it was appropriate to designate a HOMEQ employee for the MERS representative, the SHAPIRO attorney replied that "[w]e moved for a protective order and it was denied and that's why we're here today."[31]

2. HOMEQ appears for deposition as the SUTTON representative.

As with the MERS deposition, Ms. Orrison admitted that she had not been designated by SUTTON to appear on its behalf.[32] She was not an employee,

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[29] MERS Depo. pp. 34-35 **(A. 196-197)**.

[30] *See generally*, MERS Depo., summarized in Amended Second Motion for Sanctions, dated May 27, 2009, at 5 **(A. 251)**.

[31] MERS Depo. pp. 19-21 **(A. 181-183)**.

[32] SUTTON Depo. p. 7 **(A. 115)**.

officer or board member of SUTTON.[33] Nor did she know where SUTTON was incorporated or headquartered.[34] She could not testify how many employees worked at SUTTON, who its officers were, or how many offices it has, if any.[35] She at first denied that she knew who owned SUTTON,[36] but later testified that HOMEQ and SUTTON are owned by the same company, Barclays Capital.[37]

During the deposition, Plaintiff's counsel maintained that he had not been obligated to produce an actual SUTTON representative, because SUTTON was not the plaintiff and – despite the earlier email confirmation otherwise – [redacted] was required to compel SUTTON's appearance by subpoena.[38]

3. HOMEQ testifies that SUTTON is not the owner of the note.

Although the depositions were largely fruitless, the deponent did make four admissions. First, she admitted that the case was not actually being brought by

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[33] *Id.*

[34] SUTTON Depo. p. 8 **(A. 116)**.

[35] *Id.*

[36] SUTTON Depo. p. 9 **(A. 117)**.

[37] SUTTON Depo. p. 18 **(A. 126)**.

[38] SUTTON Depo. p. 8 **(A. 116)**.

MERS, but was being conducted by HOMEQ in the name of MERS,[39] apparently without its consent, or even knowledge.

Second, she admitted that the subject loan is governed by a Pooling and Servicing Agreement ("PSA") and that a PSA is "associated with the formation of a trust."[40] If the subject loan is securitized into a trust, SUTTON's ownership relationship to that loan, if any, could only be that of a trustee. Yet, the witness could not say whether or not SUTTON was the trustee for any loan trust, much less, that which apparently owns the subject loan.[41] (After the depositions, served a Request for Production to obtain the PSA mentioned by Ms. Orrison.[42])

Third, SUTTON's claim to "legal" ownership of the note was via an assignment from MERS. But the deponent acknowledged under oath that MERS is never the owner of any promissory note,[43] such that it would have any rights in the

[39] MERS Depo. pp. 22-23 **(A. 184-185)**.

[40] SUTTON Depo. pp. 30-32 **(A. 138-140)**.

[41] SUTTON Depo. p. 32 **(A. 140)**.

[42] Defendant, Request for Production Regarding Pooling and Servicing Agreement, dated May 14, 2009 **(A. 239)**.

[43] SUTTON depo. p. 26 **(A. 134)**.

note to transfer. And fourth, the deponent testified that she believed that, contrary to the allegations in the original Complaint, the promissory note was never lost.[44]

G. [redacted] Moves for Sanctions for Discovery Abuse.

Following the depositions, [redacted] moved the court to impose the sanction of dismissal given that neither the actual Plaintiff, MERS, nor the would-be Plaintiff, SUTTON, had appeared for their depositions, and that either SHAPIRO or HOMEQ had intentionally thwarted [redacted] discovery.[45]

H. MERS' Moves to Change the Style of the Case.

The day after the MERS and SUTTON depositions, the same SHAPIRO attorney who had appeared at those depositions – and objected on the grounds that SUTTON was not the Plaintiff – served a motion to change the caption of the case to show SUTTON as the "proper Plaintiff."[46] And although the court had vacated and annulled the second *ex parte* substitution of SUTTON as Plaintiff only eight days before, the motion sought to change the caption "in accordance with" the

[44] SUTTON depo. p. 22 **(A. 130)**.

[45] Defendant, [redacted] [redacted] Second Motion for Sanctions, dated May 8, 2009 **(A. 223)**.

[46] Motion to Change Style, dated April 23, 2009 **(A. 199)**.

disputed amendment to the Complaint filed months earlier.[47] [redacted] opposed this motion, serving a response memorandum within two days.[48]

I. The SHAPIRO Attorney Represents in Open Court That MERS Is Still the Named Plaintiff.

Six days after the depositions, the same SHAPIRO attorney appeared in court to argue an objection to a request for production propounded on MERS. [redacted] argued that, because the SHAPIRO attorney had refused to make an appearance as counsel for MERS at the depositions, MERS was unrepresented at the hearing. However, when questioned by Judge Cook, the SHAPIRO attorney stated that he represented MERS and that MERS was still the named Plaintiff:

> **THE COURT:** Okay. Are you representing MERS or not?
>
> **MR. GUNER:** We represent the plaintiff, Your Honor, and that plaintiff is MERS and/as Sutton Funding. Sutton Funding is the proper plaintiff in this action through a valid assignment.[49]

[47] Motion to Change Style, ¶ 3 **(A. 200)**.

[48] Defendant, [redacted] [redacted] Memorandum in Opposition to Plaintiff's Motion to Change Style, dated April 25, 2009 **(A. 202)**.

[49] Transcript of Hearing Before the Honorable Jack H. Cook, April 28, 2009, p. 4 (emphasis added) **(A. 214)**.

The court overruled MERS' objection and ordered that MERS produce the printouts of the computer data that tracks the ownership of the note.[50]

J. [redacted] Attempts (Unsuccessfully) to Depose the MERS Officer, Bill Hultman.

Since permitting Plaintiff to choose the deponent to testify for MERS had proved unproductive, [redacted] noticed the deposition of a MERS corporate representative by name – Bill Hultman, the MERS Senior Vice President and Corporate Division Manager.[51] Because SHAPIRO would not provide dates for this proposed telephone deposition, Defendant unilaterally chose a date twenty days from the Notice of Taking Deposition. On the Notice itself, [redacted] reiterated its willingness to depose Mr. Hultman at a mutually agreed date, if only Plaintiff's counsel would provide some alternatives:

> The time and date were selected by Defendant due to Plaintiff's failure to respond to efforts to coordinate the deposition. Defendant will agree to reasonable requests to reschedule the deposition for the convenience of the witness and Plaintiff's counsel.[52]

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[50] *Id*., at 5-6 (A. 215-216); *see also*, Affidavit of Ira Scot Silverstein, Esq., Exhibit A to Motion for Protective Order, dated July 31, 2009, ¶ 10 **(A. 328)**.

[51] Notice of Taking [Telephone] Deposition of Bill Hultman, dated May 1, 2009 **(A. 219)**.

[52] *Id*., p. 1, fn. 1 **(A. 220)**.

Although a newly assigned SHAPIRO attorney initially agreed not to oppose [redacted] right to depose Hultman,[53] the day before the deposition, he reported he would be breaching the agreement. Instead, he would be filing yet another Motion for Protective Order – the fourth such motion to block [redacted] discovery in the case.[54]

On the morning of the deposition, [redacted] counsel appeared by way of the prearranged conference call and the court reporter appeared at MERS' headquarters in Reston, Virginia. Neither the witness nor the SHAPIRO attorney appeared. However, by email time-stamped 17 minutes after the deposition was to have started, SHAPIRO served its Motion for Protective Order to block the Hultman deposition.[55] While, the Motion asserted that Plaintiff was confused as to whether [redacted] had cancelled the deposition, ultimately, Plaintiff's motion was directed only to the scheduling dispute. It did not quarrel with [redacted] right to take Hultman's deposition.[56]

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[53] *See*, Defendant, [redacted] [redacted] Amended Second Motion for Sanctions, dated May 27, 2009, p. 11 **(A. 257)**.

[54] *Id*. at 11-12 **(A. 257-258)**.

[55] Motion for Protective Order, dated May 21, 2009 **(A. 243)**.

[56] *Id*.

K. Plaintiff Voluntarily Dismisses the Case

[redacted] amended his motion for the sanction of dismissal to add this second occasion that MERS had failed to appear for its deposition.[57] On the very day that [redacted] noticed his motion for hearing, Plaintiff voluntarily dismissed the case.[58]

Besides the Second Amended Motion for Sanctions against MERS, the following motions and discovery were still pending at the time of dismissal:

a) Defendant, [redacted] [redacted] Amended Motion to Strike First Amended Complaint, Motion for More Definite Statement and Memorandum in Opposition to Motion to Substitute Party Plaintiff;

b) Plaintiff's Motion to Change Style (to which [redacted] had filed a memorandum in opposition);

c) Defendant's Request for Production seeking the PSA mentioned in the SUTTON deposition, aimed at determining the trust that owns the loan; and

d) Plaintiff's Motion for Protective Order regarding the deposition of Bill Hultman.

The unambiguous Notice of Dismissal and Discharge of Lis Pendens filed by SHAPIRO states that "Plaintiff" is dismissing the cause. The only "Plaintiff"

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[57] Defendant, [redacted] [redacted] Amended Second Motion for Sanctions, dated May 27, 2009 **(A. 246)**.

[58] Notice of Dismissal and Discharge of Lis Pendens, dated May 29, 2009 **(A. 264)**.

anywhere mentioned in the Notice is the captioned Plaintiff, MERS.[59] The only Lis Pendens against the subject property which could have been discharged by the Notice was the Lis Pendens filed by MERS.

L. SUTTON Files a Second Case Against

Less than a month after this case was dismissed, an identical action was filed against seeking to foreclose the same mortgage.[60] This time the action was filed by SUTTON. According to the Complaint, the promissory note has again been "lost, stolen or destroyed."[61] The copy attached to the Complaint was no longer accompanied by an endorsement. A new Lis Pendens was filed in the name of SUTTON, and the new FDCPA Notice that was attached stated that the creditor is now HOMEQ as servicer for SUTTON.[62]

With regard to ownership of the note and mortgage, SUTTON now alleged that "[p]rior to the filing of this action, Plaintiff acquired the right to enforce the Note and Mortgage from the party entitled to enforce the Note and Mortgage.

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[59] *Id*.

[60] Complaint, filed in S*utton Funding, LLC v.* Case No. 50 2009 CA 021818XXXX MB (Palm Beach County) (" *II*") dated June 25, 2009 **(A. 280)**. The pleadings in *II* were considered by the Court in reaching the ruling under review. Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 33 **(A. 427)**.

[61] Complaint in *II*, dated June 25, 2009, ¶ 28 **(A. 285)**.

[62] *See*, Lis Pendens and FDCPA Notice filed in *II* **(A. 287-290)**.

SUTTON also alleged that "[t]he Plaintiff is the owner and holder of the Note and Mortgage or is the party entitled to enforce the subject Note consistent with Chapter 673 of the Florida Statutes."[63]

M. SUTTON Files Another Motion for Protective Order to Stop the Hultman Deposition, Which is Denied.

After the dismissal of the instant case, [redacted] moved for attorneys' fees as the prevailing party.[64] Plaintiff opposed the amount of the fees requested. An evidentiary hearing was set[65] and [redacted] began discovery on the issue of reasonableness of the fees by, among other things, re-noticing the telephone deposition of the MERS officer, Bill Hultman.[66]

SUTTON filed a Motion for Protective Order arguing only that the deposition would not provide evidence relevant to the attorneys' fee issue.[67] At the hearing, [redacted] argued that SUTTON was not the Plaintiff[68] and that MERS –

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[63] Complaint, [redacted] *II*, ¶¶ 7-8 **(A. 282)**.

[64] Defendant, [redacted] [redacted] Motion for Attorneys' Fees, dated June 5, 2009 **(A. 267)**.

[65] Order Specially Setting Evidentiary Hearing on Motion for Attorneys' Fees and Costs, dated July 7, 2009 **(A. 295)**.

[66] Notice of Taking Deposition, dated June 26, 2009 **(A. 291)**.

[67] Motion for Protective Order, dated July 8, 2009 **(A. 298)**.

[68] Transcript of Hearing before the Honorable Meenu Sasser on July 13, 2009, p. 7 **(A. 308)**.

which had not objected to the deposition – would be the entity which would ultimately pay the attorneys' fee award.[69] The SHAPIRO attorney at the hearing told the court that he was counsel for both MERS and SUTTON, and made an *ore tenus* request that the motion for protective order "should also be considered on behalf of MERS."[70]

The court denied the motion for protective order. Plaintiff's counsel, nevertheless, asked that the telephone deposition (noticed to take place later that day) be rescheduled because "it was coordinated with my office but not with the client."[71] The court granted the request.[72]

N. New Counsel Accidentally Appears for MERS, Withdraws, and Then Files A Third Motion for Protective Order to Halt the Hultman Deposition on Behalf of SUTTON.

The time granted by the court to coordinate the telephone deposition was not used for that purpose, but was used instead to hire new counsel, Jones, Foster, Johnston & Stubbs, P.A. ("JONES FOSTER") to reargue the matter. JONES FOSTER filed an appearance on behalf of MERS,[73] and filed six documents

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[69] *Id*., at 8 **(A. 309)**.

[70] *Id*. at 10 **(A. 311)**.

[71] *Id*. at 11 **(A. 312)**.

[72] *Id*.

[73] Notice of Appearance, dated July 15, 2009 **(A. 314)**.

(motions, notices and discovery) all on behalf of MERS, none of which related to the MERS deposition.[74]

Two weeks later, apparently when it learned about the pending deposition of its own client, JONES FOSTER tried to recant its appearance on behalf of MERS describing it as "inadvertent."[75] It now claimed it was counsel for SUTTON and moved, once again, for a protective order to stop the Hultman deposition.[76] JONES FOSTER also systematically withdrew all its motions, discovery and notices filed on behalf of MERS and re-filed them as SUTTON.[77]

SUTTON's revived Motion for Protective Order included an affidavit executed by a SHAPIRO attorney stating that SHAPIRO is paid by HOMEQ, not MERS or SUTTON.[78] However, the original Complaint signed by SHAPIRO in this case alleged that MERS "has retained the undersigned attorney and is

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[74] Listed in Defendant, [redacted] [redacted] Motion To Strike "Withdrawal Of Inadvertent Appearance" of Jones Foster And Motion To Strike Motions And Discovery Served By Non-Party, Sutton Funding, LLC., p. 2 **(A. 331)**.

[75] Withdrawal of Inadvertent Appearance [on behalf of MERS] and Notice of Appearance [on behalf of SUTTON], dated July 30, 2009 **(A. 316)**.

[76] *Id*.

[77] Listed in Defendant, [redacted] [redacted] Motion To Strike "Withdrawal Of Inadvertent Appearance" of Jones Foster And Motion To Strike Motions And Discovery Served By Non-Party, Sutton Funding, LLC., p. 3 **(A. 332)**.

[78] Affidavit of Ira Scot Silverstein, Esq., Exhibit A to Motion for Protective Order, dated July 31, 2009, ¶¶ 7-9 **(A. 327)**.

obligated to pay said attorney a reasonable fee for his services."[79] The First Amended Complaint (as well as the Complaint in *II*) alleged that SUTTON was to pay SHAPIRO's fees.[80] The latter was signed by the very same attorney who signed the affidavit stating that HOMEQ, not MERS or SUTTON, paid his fees.[81]

moved to strike the SUTTON filings on the grounds that SUTTON was not a party, much less the Plaintiff, in the action.[82] also filed a memorandum opposing the repeat motion for protective order.[83]

O. SUTTON Argues that Cannot Depose MERS Because SUTTON Was the Plaintiff When the Case Was Dismissed.

SUTTON argued that the MERS deposition should not go forward because SUTTON, not MERS, was the Plaintiff when the case was dismissed. In support of this argument, SUTTON asked the court to look back past the MERS Notice of

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[79] Complaint ¶17 **(A. 4)**.

[80] First Amended Complaint, ¶17 **(A. 45)**.

[81] Affidavit of Ira Scot Silverstein, Esq., Exhibit A to Motion for Protective Order, dated July 31, 2009 **(A. 326)**.

[82] Defendant, Motion To Strike "Withdrawal Of Inadvertent Appearance" of Jones Foster And Motion To Strike Motions And Discovery Served By Non-Party, Sutton Funding, LLC, dated August 3, 2009 **(A. 329)**.

[83] Defendant, Memorandum in Opposition to Sutton's [Second] Motion for Protective Order, dated August 3, 2009 **(A. 341)**.

Dismissal and rule upon issues that were still in dispute when the case was dismissed.[84] Specifically, SUTTON devoted a page of its three-page Motion for Protective order, and nearly its entire ten-page supporting memorandum[85] arguing that the First Amended Complaint had successfully substituted SUTTON as the party plaintiff.

Notably, the SUTTON supporting memorandum filed by JONES FOSTER raised yet another, previously unmentioned basis for SUTTON's standing – that of an agent for the real party in interest:

> **Sutton Funding LLC is the Plaintiff Because It Is the Real Party in Interest**
>
> Fla.R.Civ.P. 1.210(a), the Florida real party interest rule, permits an action to be prosecuted under the name of someone other than, but acting for, the real party in interest. Thus, where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, the party is an appropriate plaintiff. … Thus, Sutton Funding LLC is clearly the appropriate plaintiff on the state of this record. *See*, *Kumar Corporation v. Nopal Lines. Ltd*., 462 So. 2d 1178 (3 DCA Fla. 1985).[86]

[84] Motion for Protective Order, dated July 31, 2009, ¶ 4 **(A. 322)**.

[85] SUTTON's Memorandum of Law, dated August 6, 2009 **(A. 371)**.

[86] *Id*. at 10 (emphasis added) **(A. 381)**.

P. [redacted] Moves to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b).

[redacted] repeatedly objected to the consideration of SUTTON's motion because the court had no jurisdiction to go beyond the Notice of Dismissal and address the very issues that were being litigated when the case was voluntarily dismissed.[87] [redacted] argued that the request to revisit matters raised prior to the dismissal of the case was really a Rule 1.540 motion by Plaintiff, which would require an evidentiary hearing.[88] And in any event, even if the court had jurisdiction to give effect to the amendment, [redacted] was entitled to an evidentiary hearing on his motion to strike the attempted amendment as one which would be futile.[89] [redacted] also argued that Plaintiff was judicially estopped from arguing that the amended Complaint changed the Plaintiff from MERS to

[87] Transcript of Proceedings held before the Honorable Meenu Sasser, August 5, 2009, p. 6 **(A. 362)**; Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 18 **(A. 412);** Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, pp. 2-3 **(A. 386-387)**.

[88] Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, p 3 **(A. 387)**.

[89] Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 34 **(A. 428)**.

SUTTON, given the representations of Plaintiff's counsel after the amendment that MERS was still the Plaintiff.[90]

then filed the motion under review – a 1.540(b) motion conditioned upon whether the court decided to entertain SUTTON's request to look behind the dismissal of the case.[91] also moved for dismissal with prejudice on the grounds of fraud.

The motion couplet requested an evidentiary hearing to demonstrate that Plaintiff's discovery misconduct, *ex parte* changes in Plaintiff, and ever-shifting bases for SUTTON's claim of standing, were all aimed at concealing the identity of the real party in interest – and thus, constituted fraud on the court.[92] expected to prove that HOMEQ had urged its counsel to use the names of MERS and SUTTON as Plaintiff, and that both SHAPIRO and JONES FOSTER had complied without ever communicating with the "clients" they purported to represent.[93]

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[90] Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, pp. 21-22 **(A. 415-416)**.

[91] Defendant, Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated August 7, 2009 **(A. 384)**.

[92] *Id*. at 6 **(A. 390)**.

[93] *Id*. at 6-7 **(A. 390-391)**.

Q. The Court Denies [redacted] Motion to Strike the Notice of Voluntary Dismissal Under Rule 1.540(b) Without An Evidentiary Hearing.

Judge Sasser heard argument on various post-dismissal motions, including the Motion for Protective Order, [redacted] Rule 1.540(b) motion and [redacted] motion to dismiss for fraud. [redacted] argued that he was entitled to an evidentiary hearing on his own motions, as well as Plaintiff's motion.[94]

The court granted SUTTON's Motion for Protective order on the grounds that SUTTON had been the party plaintiff since the filing of the First Amended Complaint, which the court found had been "validly filed."[95] The court denied [redacted] Rule 1.540(b) motion without an evidentiary hearing.[96]

The court signed the Order on [redacted] motions the following day from which this appeal timely ensued.[97]

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[94] Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 29 **(A. 423)**.

[95] *Id.* at 43 **(A. 437)**.

[96] Order on Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated August 11, 2009 **(A. 440)**.

[97] Notice of Appeal of Order Entered on Motion Filed Under Rule 1.540 Fla.R.Civ.P., dated August 14, 2009 **(A. 443)**.

SUMMARY OF THE ARGUMENT

The homeowner, [redacted] asked a seemingly simple (but case-dispositive) question of the captioned "Plaintiff" in this case: Do you own my loan? The response was six months of bitter litigation in which attorneys, at the bidding of an entirely different financial institution, HOMEQ, obstructed [redacted] every effort to learn the truth. HOMEQ directed its attorneys to substitute its sister company, SUTTON, as the Plaintiff, even though HOMEQ's own admissions indicate SUTTON is no more the owner of the loan than was MERS. Its attorneys complied, apparently without consulting MERS or SUTTON. On the eve of having the case dismissed for fraud, the HOMEQ attorneys voluntarily dismissed the case, hoping to shield their clients from punishment.

[redacted] asked for an evidentiary hearing when the Complaint was amended, when the court declared SUTTON to be Plaintiff (after MERS had already dismissed the case), and when [redacted] asked the court to reopen the case so his fraud claims could be heard. And even though the record is replete with evidence of Plaintiff's constant discovery abuses and "contumacious disregard of the court's authority," the court denied [redacted] motion without an evidentiary hearing. With far more than a "colorable entitlement" to Rule 1.540 relief in the record, this Court should remand for an evidentiary hearing.

STANDARD OF REVIEW

This Court has jurisdiction to review the order denying the Rule 1.540(b) motion under Florida Rule of Appellate Procedure 9.130(a)(5).

Generally, the standard of review of a ruling on a Rule 1.540(b) motion is abuse of discretion. *Schleger v. Stebelsky*, 957 So. 2d 71 (Fla. 4th DCA 2007). However, the issue on this appeal is whether the trial court erred in failing to grant an evidentiary hearing on the Rule 1.540(b) motion. Such a motion should not be summarily denied without an evidentiary hearing. *Id*. at 73. Denial of a Rule 1.540(b) motion without an evidentiary hearing is, as a matter of law, an abuse of discretion unless the motion fails to allege a "colorable entitlement" to relief. *See id*.; *Stella v. Stella*, 418 So. 2d 1029 (Fla. 4th DCA 1982); *Robinson v. Weiland*, 936 So. 2d 777 (Fla. 5th DCA 2006) (evidentiary hearing requirement applies when fraud is asserted as a grounds for relief under Rule 1.540); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (holding that the trial court erred because "where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.")

ARGUMENT

A. The Notice of Voluntary Dismissal is a "Proceeding" From Which the Court May Grant Relief under Rule 1.540(b).

Rule 1.540(b)(3) of the Florida Rules of Civil Procedure provides relief from "a final judgment, decree, order or proceeding" for:

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

A notice of voluntary dismissal is a "proceeding" from which the court may grant relief under Rule 1.540(b). *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986) ("Rule 1.540(b) may be used to afford relief to all litigants who can demonstrate the existence of the grounds set out under the rule.") Where fraud is alleged, even a defendant may ask the court to strike a notice of voluntary dismissal. *See Select Builders of Florida, Inc. v. Wong*, 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979) (affirming an order granting defendant's motion to strike the voluntary dismissal of a plaintiff: "[W]e find the court to be correct in striking the voluntary dismissal and reinstating the matter to prevent a fraud on the court.")

B. [redacted] Showing of a "Colorable Entitlement" to Relief Triggered the Requirement for an Evidentiary Hearing.

Summarily denying a Rule 1.540(b) motion without an evidentiary hearing is an abuse of discretion unless the motion fails to allege a "colorable entitlement"

to relief. *Schleger v. Stebelsky*, 957 So. 2d 71 (Fla. 4th DCA 2007); *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA1996).

1. [redacted] demonstrated more than a "colorable entitlement" to the sanction of dismissal based on the misconduct of Plaintiff and its counsel.

In order to warrant an evidentiary hearing, a Rule 1.540(b)(3) motion must specify the essential facts of the fraud and misconduct, and not merely assert legal conclusions. *Id*. Here, [redacted] motion adopted all the arguments and supporting fact references in five motions and memoranda that had been filed over the course of six months of litigation, two of which were motions for sanctions.[98] One of the motions – the very motion that precipitated the voluntary dismissal – sought a dismissal with prejudice as a sanction for discovery misconduct.[99]

[redacted] also specified the misconduct and fraud which entitled him to dismissal, or at the very least, an evidentiary hearing on the issue.[100] The misconduct listed by [redacted] was: 1) repeat ex parte contact with the court;

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[98] Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated August 7, 2009, p. 4 **(A. 388)**.

[99] Defendant, [redacted] [redacted] Amended Second Motion for Sanctions, dated May 27, 2009 **(A. 246)**.

[100] Defendant, [redacted] [redacted] Conditional Motion to Strike the Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice for Fraud Upon the Court, dated August 7, 2009, p. 4 **(A. 388)**.

2) contradictory representations as to which entity is the real party in interest and how it obtained standing; 3) failure of Plaintiff's counsel to communicate with their clients; 4) producing an alleged corporate representative of MERS and SUTTON for deposition who was not a representative of either entity and who had no knowledge of the matters designated; 5) Plaintiff's failure to appear for its own deposition; and 6) rearguing matters already decided.[101]

a) Repeat *ex parte* contact with the court;

Twice, SHAPIRO furtively acquired *ex parte* orders substituting SUTTON as the Plaintiff by leaving the designation "*ex parte*" off the motions themselves and serving [redacted] with only the motions – not the orders that SHAPIRO sent to the court for signature. The first notice that [redacted] had of these *ex parte* applications was when defense counsel received the signed orders.[102]

Such *ex parte* communications are expressly prohibited by Section J, Florida Guidelines for Professional Conduct, unless there is a "bona fide emergency that will result in serious prejudice to the lawyer's client." And although there was no

[101] *Id*.

[102] Transcript of Proceedings Held Before The Honorable Jack H. Cook January 26, 2009, p. 6 **(A. 33)**.

such emergency, Plaintiff refused to agree to vacate the first *ex parte* order even after being served with a motion for sanctions under §57.105 Florida Statutes.[103]

Instead, Plaintiff forced a hearing on whether Defendant was entitled to be heard on Plaintiff's motion to substitute plaintiff. At the hearing, Plaintiff argued that the order was not *ex parte* because it served the motion on [redacted] and because it allegedly copied [redacted] with a cover letter to the judge.[104] Nothing in the motion, however, indicated that it was being submitted for an *ex parte* ruling. And [redacted] counsel denied having received a cover letter and requested an evidentiary hearing to prove it was never sent.[105] Of course, even if Plaintiff had served Defendant with the cover letter, the court's entry of the order without a hearing would still have been *ex parte*, and therefore, improper.

At the hearing, the court granted [redacted] motion to vacate the *ex parte* order.[106] In doing so, the court expressly stated that its intention was to give

[103] Transcript of Proceedings Held Before The Honorable Jack H. Cook January 26, 2009 **(A. 27)**.

[104] *Id.* at 3-4 **(A. 30-31)**.

[105] *Id*. at 6 **(A. 33)**.

[106] *Id.* at 5, 11 **(A. 32, 38)**.

an opportunity to be heard on the merits of Plaintiff's substitution motion.[107]

But contrary to the court's wishes, Plaintiff did not set its motion for hearing. Instead, SHAPIRO (apparently on behalf of SUTTON) simply filed an "amendment" to the MERS Complaint. MERS remained the Plaintiff in the caption of the amendment, but SUTTON's name replaced that of MERS in the first line. Later, after impeding discovery on the grounds that MERS, rather than SUTTON, was still the Plaintiff,[108] SHAPIRO argued that this amendment did what the two *ex parte* motions had failed to do – substitute SUTTON as Plaintiff without a hearing ever being held.

b) Contradictory representations as to which entity is the real party in interest and how it obtained standing;

Plaintiff's counsel made several contradictory claims as to whether MERS or SUTTON was the real party in interest, and how that party became the owner and holder of the promissory note. First, the Complaint alleged that MERS was the "legal and/or equitable owner and holder of the Note and Mortgage and has the

[107] *Id*. at 5 **(A. 32)**.

[108] Section F, Statement of Facts, above.

right to enforce the loan documents."[109] The first Motion to Substitute Party Plaintiff alleged, however, that the "true and correct owner and holder of the mortgage and note" was actually SUTTON, suggesting that, from the very beginning, the allegations that MERS was the "legal and/or equitable" owner and holder of the Note and Mortgage" had been nothing but a clerical error.[110]

The Amended Motion to Substitute Party Plaintiff still claimed that the MERS-SUTTON mix-up was a "clerical mistake" and a "corporate name misnomer."[111] Now, however, it was alleged that MERS was actually the original "owner and holder of the subject note and mortgage" after all. But the mortgage (though apparently not the note) was then "subsequently assigned" to SUTTON by a written assignment.[112] That assignment was executed December 12, 2008 – after the case was filed and after [redacted] questioned whether MERS was the real

[109] Complaint, ¶6 **(A. 3)**.

[110] Motion to Substitute Party Plaintiff, dated December 9, 2009 **(A 21)**.

[111] Amended Motion to Substitute Party Plaintiff, dated March 18, 2009, ¶¶ 1, 4 **(A. 88, 89)**.

[112] Amended Motion to Substitute Party Plaintiff, dated March 18, 2009, ¶¶ 2-3 **(A. 88)**.

party in interest.[113] It was notarized in Sacramento, where HOMEQ has an office.[114]

The earlier-filed First Amended Complaint, however, presented yet a different claim. It alleged that SUTTON became the "equitable owner" of the Promissory Note and Mortgage due to an "assignment and transfer" from the original lender, EquiFirst, on June 14, 2007 – six days after the note was signed.[115] SUTTON later became the "legal owner" by way of the December 12th written assignment from MERS. Of course, MERS could not have granted legal title to the promissory note, since it was not the lender, and – as conceded by the HOMEQ representative – MERS was never the owner or holder of the note.[116]

In a final twist, SUTTON's new counsel, JONES FOSTER, introduced yet another, contradictory reason why SUTTON would be "the appropriate plaintiff." JONES FOSTER suggested SUTTON could prosecute the action under its own

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[113] Assignment attached to First Amended Complaint, dated February 2, 2009 **(A. 49)**.

[114] Assignment of Mortgage **(A. 49)**; SUTTON Depo., p. 13 **(A. 121)**.

[115] First Amended Complaint, dated February 2, 2009, ¶6 **(A. 44)**.

[116] SUTTON Depo. p. 26 **(A. 134)**.

name even if it was not the real party in interest, as long as it was acting for the (unidentified) entity that was.[117]

This cavalier attitude with respect to the most basic of facts – who owns the note being sued upon – epitomizes that which prompted the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases to recommend a rule change that would require banks to verify their foreclosure complaints:

> Requiring the plaintiff to verify its ownership of the note at time of filing provides incentive to review and ensures that the filing is accurate, ensures that investigation has been made and that the plaintiff is the owner and holder of the note. This requirement will reduce confusion and give the trial judges the authority to sanction those who file without assuring themselves of their authority to do so.[118]

While the courts already have the authority to sanction those who do not confirm the facts before filing a complaint (§ 57.105 Florida Statutes), such a rule might have saved months of financially burdensome litigation in this case.

c) Failure of Plaintiff's counsel to communicate with their clients;

Throughout the case, the attorneys representing Plaintiff, whether that be SHAPIRO or JONES FOSTER, were seemingly baffled as to who they

[117] Memorandum of Law, dated August 6, 2009, p. 10 **(A. 381)**.

[118] *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases dated August 17, 2009. p. 43.

represented. Both appeared initially as counsel for MERS. Both later claimed that, through "clerical error" or "inadvertence," they had intended to appear on behalf of SUTTON – a completely different, entity unrelated to MERS (but related to HOMEQ).

At the deposition of the SUTTON representative, the SHAPIRO attorney in attendance stated that he represented "the plaintiff" and when asked whether that was MERS or SUTTON, responded that "it is MERS listed as a plaintiff in the style."[119] He stated that he was also representing HOMEQ, which he believed was the servicer.[120] Oddly, later that same morning at the deposition of the MERS representative, the SHAPIRO attorney refused to announce an appearance as the attorney for MERS, SUTTON or HOMEQ:

MR. ICE: … I am appearing on behalf of Mr. [redacted] John, can you make your appearances, please.

MR. GUNER: John Guner on behalf of the plaintiff.

MR. ICE: And the plaintiff being who?

MR. GUNER: The plaintiff is listed as MERS currently.

MR. ICE: Okay. So you are representing MERS today.

[119] SUTTON Depo, p. 6 **(A. 114)**.

[120] *Id*.

MR. GUNER: That is how they're listed as nominee for Equifirst Corporation.

MR. ICE: Okay. Well, I know how it's listed, but are you appearing as their attorney today?

MR. GUNER: Counselor, I've stated my position. I'm not the one that's being deposed here. I've made my appearance.

MR. ICE: I just like to know who shows up at my depos. In this particular deposition, were you appearing on behalf of Sutton?

MR. GUNER: I'm sorry?

MR. ICE: In this deposition, the MERS deposition, were you appearing also on behalf of Sutton.

MR. GUNER: Mr. Ice, I'm not the one being who's deposed here today.

MR. ICE: Okay. So you're refusing to announce who you're appearing for.

MR. GUNER: I'm under no obligation to answer any of your questions other than making my appearance and making objections.

MR. ICE: Okay. What about HomEq, are you representing HomEq here today?

MR. GUNER: Again, same answer.[121]

[121] MERS Depo, pp. 33-35 **(A. 195-197)**.

When the JONES FOSTER attorney appeared in Court for the first time, he too was openly bewildered as to the identity of his own client:

> **MR. STUBBS**: Your Honor, I wonder if I might – Sid Stubbs on behalf of someone. Frankly, I'm not real sure who.[122]

The affidavit executed by the SHAPIRO Senior Litigation Attorney (and filed by JONES FOSTER as an attachment to its Motion for Protective Order) offers an explanation for SHAPIRO's confusion. It conceded that SHAPIRO's contract for legal services was with HOMEQ all along, not MERS or SUTTON.[123] This, of course, directly contradicted representations made in both the Complaint and the First Amended Complaint, one of which was signed by the same attorney who signed the affidavit.

The affidavit also made the remarkable confession that "[a]ll communications regarding the prosecution of this foreclosure occurred between Shapiro & Fishman LLP and HomEq Servicing ("HomEq"), the servicing agent for Sutton Funding, LLC."[124] In short, SHAPIRO admitted it had not communicated regarding the prosecution of this case with either of the two clients it has claimed

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[122] Transcript of Proceedings held before the Honorable Meenu Sasser, August 5, 2009, p. 3 **(A. 359)**.

[123] Affidavit of Ira Scot Silverstein, Esq., Exhibit A to Motion for Protective Order, dated July 31, 2009, ¶¶ 7-9 **(A. 327)**.

[124] *Id*. at ¶4 **(A. 327)**.

to represent: MERS and SUTTON. It is difficult to square this statement with SHAPIRO's obligations under the Rules Regulating the Florida Bar. *See*, Rule 4-1.4 R. Regulating Fla. Bar (requiring communication between the attorney and the client); Rule 4-1.8 R. Regulating Fla. Bar and Comment (representation of a client when another client is paying for the representation creates ethical risks which may be avoided only by communication with both clients). *See also In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (condemning the banking industry practice of thwarting communications between attorneys and their clients which led to the filing of inaccurate motions and the recanting of counsel's sworn testimony).

Similarly, JONES FOSTER filed a Notice of Appearance, as well as five other documents, on behalf of MERS, all of which were signed by an attorney. Those signatures should have complied with Rule 2.515(a) Fla. R. Jud. Admin., which provides that "[t]he signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper [and] that to the best of the attorney's knowledge, information and belief there is good ground to support it…" *See also*, Rule 4-3.1 R. Regulating Fla. Bar and Comment ("What is required of lawyers…is that they inform themselves about the facts of their clients' cases…"). Despite these obligations, JONES FOSTER later claimed that it had mistakenly prepared and signed all these documents on behalf of the wrong entity.

d) Producing an alleged corporate representative of MERS and SUTTON for deposition who was not a representative of either entity and who had no knowledge of the matters designated;

Under Rule 1.310(b)(6) Fla.R.Civ.P., [redacted] noticed the depositions of both MERS and SUTTON. The notice requested testimony from employees of those entities who had the most knowledge of various issues, including ownership of the promissory note and mortgage.[125] In response, SHAPIRO produced a single employee of its real client, HOMEQ, to pose as the designated representatives of MERS and SUTTON. The questioning revealed that the witness had not been selected by either MERS or SUTTON, but rather by HOMEQ, and that she knew nothing about either of the two entities who had claimed to be Plaintiff. The deponent had no knowledge of the matters specified in the deposition notice, much less, the most knowledge.[126]

SHAPIRO or its client, HOMEQ, intentionally produced a witness who was singularly ignorant of the facts as part of the overall strategy of concealing the identity of the real party in interest. In a stunning self-incrimination, the SHAPIRO attorney who attended the deposition stated that he had produced the

[125] Notice of Taking Depositions, dated April 7, 2009 **(A. 96)**.

[126] MERS Depo. (A. 162); SUTTON Depo **(A. 108)**.

uninformed HOMEQ witness because the court had denied his motion aimed at stopping the deposition:

> **MR. ICE:** Are you acknowledging, John, that you didn't produce the person today with the most knowledge of the items on my list?
>
> **MR. GUNER:** Well, Tom, we did move for a protective order and we did inform you that Jill Orrison was going to be the one produced today and you were informed that she was not an employee of MERS or Sutton Funding prior to this deposition. I can continue on as you'd like.
>
> **MR. ICE:** And we advised you -- it's really disingenuous to leave the record like that. We advised you that we didn't think she qualified for that, but you insisted on producing her anyway; is that right?
>
> **MR. GUNER**: You insisted on taking the deposition. We moved for a protective order and it was denied and that's why we're here today.[127]

Seeking to avoid the intent of the court's order by intentionally producing a "representative" without knowledge of the matters identified in the notice mocks the authority of the court and merits the harshest of condemnation. As summarized by the Fifth District in *Robinson v. Weiland*, 988 So. 2d 1110, 1113 (Fla. 5th DCA 2008):

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[127] MERS Depo. p. 20-21 (emphasis added) **(A. 182-183)**.

> 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 the 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 [fraudulent concealment of facts] must be discouraged in the strongest possible way.

See also Channel Components, Inc. v. America II Electronics, Inc., 915 So. 2d 1278 (Fla. 2d DCA 2005).

e) Plaintiff's failure to appear for its own deposition.

Regardless of whether MERS or SUTTON was the "real" Plaintiff at the time of the depositions of the corporate representatives, neither entity actually appeared. The witness produced by SHAPIRO and HOMEQ admitted that she was not selected by either MERS or SUTTON.[128] And even if HOMEQ were authorized to designate representatives on behalf of these two entities, because the chosen witness knew nothing about the matters listed in the notice, it is as if no one appeared at all. Just as evasive and incomplete answers to discovery are treated as a failure to answer (Rule 1.380(a)(3) Fla.R.Civ.P.), so too must the evasive

[128] MERS Depo. p. 7 (A. 169); SUTTON Depo. p. 7 **(A. 115)**.

selection of know-nothing representatives be treated as a failure to attend the deposition.

Plaintiff's failure to attend its own deposition is itself punishable by dismissal with prejudice under Rules 1.380(d) and 1.380(b)(2)(C) Fla.R.Civ.P. Dismissal may be appropriate even without a willful violation of a court order, as long as there is a showing of "deliberate and contumacious disregard of the court's authority." *Wallraff v. T.G.I. Friday's Inc.*, 490 So. 2d. 50, 51 (Fla. 1986). Here, the court's denial of a protective order was an expression of the court's will that the deposition go forward as noticed. Producing a "straw man" for deposition for the purpose of defeating the court's decision evinces a deliberate and contumacious disregard of the court's authority. It is the functional equivalent of a willful violation of a court order and merits the harshest of sanctions – dismissal with prejudice.

Moreover, Plaintiff failed to attend its deposition more than once. When deposition by designation under Rule 1.310(b)(6) Fla.R.Civ.P. was unavailing, [redacted] noticed the deposition of a MERS officer by name, Bill Hultman.[129] Mr. Hultman did not appear and Plaintiff did not file a motion for protective order

[129] Notice of Taking [Telephone] Deposition of Bill Hultman, dated May 1, 2009 **(A. 219)**.

until after the deposition was to begin.[130] Such a late-filed motion cannot excuse a party's failure to attend its deposition. *See Mahmoud v. International Islamic Trading (IIT), Ltd.*, 572 So. 2d 979, 980 (Fla. 1st DCA 1991) (late-filed motion for protective order treated as a "sham filed after-the-fact in an attempt to justify [party's] refusal to appear.").

* * *

Accordingly, Plaintiff's misconduct in the form of discovery abuse, contradictory representations regarding the facts, willful defiance of a court decision regarding discovery, and deliberate disregard for the court's request that [redacted] be afforded due process on the standing issue was, in the aggregate, sufficient for the court to consider whether the sanction of dismissal with prejudice was appropriate. *Mercer v. Raine*, 443 So. 2d 944 (Fla., 1983).

Misconduct that would justify dismissal of the case authorizes, if not compels, the court to reopen the case under Rule 1.540(b)(3) to address that misconduct. [redacted] therefore, presented the lower court with more than a mere "colorable entitlement" to relief under Rule 1.540(b) Fla.R.Civ.P. Indeed, the picture painted by [redacted] was already brightly colored with record facts. [redacted] deserved the evidentiary hearing he was denied throughout the case.

[130] Motion for Protective Order, dated May 21, 2009 **(A. 243)**.

2. [redacted] also demonstrated more than a "colorable entitlement" to the sanction of dismissal based on fraud and misrepresentation.

When MERS filed the Complaint, [redacted] expected to prove that MERS was not the owner and holder of the promissory note, and thus, not the real party in interest. When SUTTON emerged and claimed that it was the owner and holder of the note and mortgage, [redacted] expected to prove that it too was not the real party in interest. This expectation was corroborated by: 1) SUTTON's final word on the subject which indicated that SUTTON is, perhaps, only an agent for the real owner of the mortgage loan;[131] and 2) HOMEQ's testimony that the mortgage loan is governed by a PSA – i.e. owned by a trust.

But Plaintiff's discovery misconduct prevented [redacted] from gathering his evidence. Its procedural misconduct (*ex parte* contact) and repeated representations that MERS was still the Plaintiff, deprived [redacted] an evidentiary hearing on the issue of SUTTON's standing. The misconduct, therefore, was coldly calculated to conceal the fact that SUTTON's claim that it owned the note was untrue, if not outright fraudulent. Even more than the misconduct itself, the deceitful intent that motivated the misconduct – to mislead

[131] Memorandum of Law, dated August 6, 2009, p. 10 **(A 381)**.

the court on an issue central to the case – provided the court with ample cause to dismiss the case.

Dismissal for fraud is appropriate where "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998). Trial courts have "the right and obligation to deter fraudulent claims from proceeding in court." *Savino v. Fla. Drive In Theatre Mgmt., Inc*., 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997). This is because "[o]ur courts have often recognized and enforced the principle that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends." *Hanono v. Murphy*, 723 So. 2d 892, 895 (Fla. 3d DCA 1998). Where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper. *Desimone v. Old Dominion Ins. Co*., 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999).

The court's concern for protecting the integrity of the judicial process should be all the more heightened where, as here, Plaintiff has invoked the court's equitable jurisdiction. *Singleton v. Greymar Associates,* 882 So. 2d 1004, 1008

(Fla. 2004) ("We must also remember that foreclosure is an equitable remedy…"); *see Knight Energy Services, Inc. v. Amoco Oil Co*., 660 So. 2d 786, 789 (Fla. 4th DCA 1995) ("A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable.").

Aside from misconduct, fraud and misrepresentation are grounds for relief under Rule 1.540(b). Again, [redacted] demonstrated much more than a mere "colorable entitlement" to having the voluntary dismissal stricken such that Plaintiff's fraud could be scrutinized by the court. The lower court erred in refusing to grant [redacted] an evidentiary hearing.

C. The Right of Voluntary Dismissal Without Prejudice Does Not Extend So Far as to Permit a Plaintiff to Commit Fraud With Impunity.

1. Voluntary dismissals were not meant to absolve Plaintiff from wrongdoing.

Plaintiff's right of voluntary dismissal was never intended as an escape hatch to avoid the consequences of its misconduct and fraud. A plaintiff cannot be permitted to knowingly deceive the court and, when its transgressions are discovered, simply press the "reset button" and begin the litigation again as if it had done nothing wrong.

Nor can voluntary dismissal be used as a sanctuary from which plaintiffs can hide from the consequences of their actions. Here, Plaintiff filed the voluntary dismissal to avoid a motion for sanctions which may have ended the case in favor. Thus, Plaintiff's voluntary dismissal had a patently fraudulent purpose – to immunize Plaintiff from retribution.

2. This is the proper case to address Plaintiff's improprieties.

Plaintiff argued that, if "improper things have been going on or are going on," can argue those issues in the new case filed by SUTTON.[132] While it would at first seem reasonable that Plaintiff's misconduct and fraud could be addressed in the second case, the same attorneys for Plaintiff will undoubtedly argue that MERS, not SUTTON, was to blame for any "improper things" going on in this case. *See also Wallraff v. T.G.I. Friday's Inc.*, 490 So. 2d. at 51 (suggesting that misconduct in a voluntarily dismissed action – at least that short of deliberate and contumacious disregard of the court's authority – should not be considered in second action). Voluntary dismissal should not be used as a means for Plaintiff to distance itself from its own misconduct. Plaintiff's improprieties should be addressed in the case in which they lie.

[132] Transcript of Proceedings held before the Honorable Meenu Sasser, August 10, 2009, p. 40 **(A. 434)**.

CONCLUSION

The lower court's denial of [redacted] Motion to Strike the Notice of Voluntary Dismissal should be reversed and remanded for an evidentiary hearing on that motion as well as [redacted] Motion for Dismissal with Prejudice for Fraud Upon the Court, and Amended Second Motion For Sanctions.

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____
THOMAS E. ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this August 27, 2009 to all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____

THOMAS E. ICE
Florida Bar No. 0521655

SERVICE LIST

Sidney A. Stubbs, Esq.
JONES, FOSTER, JOHNSTON
& STUBBS, P.A.
505 South Flagler Drive
Suite 1200
West Palm Beach, FL 33401
Plaintiff/Appellee's counsel

Barry Fishman, Esq.
SHAPIRO & FISHMAN, LLP
2424 North Federal Highway
Suite 360
Boca Raton, Florida 33431
Plaintiff/Appellee's counsel

Rod Tennyson, Esq.
ROD TENNYSON, ESQUIRE P.A.,
Post Office Box 3858
Lantana, FL 33465
Counsel for The Fountains of Palm Beach Condominium, Inc. No. 7

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

ICE LEGAL, P.A.
Counsel for Appellant
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 793-5658
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____
THOMAS E. ICE
Florida Bar No. 0521655