

IN THE CIRCUIT COURT FOR MANATEE  
COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 412007CA007993XXXXXX

HSBC BANK USA, NATIONAL ASSOCIATION,  
AS TRUSTEE FOR LUMINENT MORTGAGE  
TRUST 2006-6 ,

Plaintiff,

vs.

ANTONIO DE FREITAS; CAMILA DE FREITAS;  
BARRINGTON RIDGE HOMEOWNERS  
ASSOCIATION, INC.; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. MIN NO.  
1000460-0012835542-1; UNKNOWN TENANT  
NO. 1; UNKNOWN TENANT NO. 2; and ALL  
UNKNOWN PARTIES CLAIMING INTERESTS  
BY, THROUGH, UNDER OR AGAINST A NAMED  
DEFENDANT TO THIS ACTION, OR HAVING OR  
CLAIMING TO HAVE ANY RIGHT, TITLE OR  
INTEREST IN THE PROPERTY HEREIN  
DESCRIBED,

Defendants.

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**SWORN AND VERIFIED MOTION TO DISQUALIFY**

Smith, Hiatt and Diaz, P.A. ("SHD"), through undersigned counsel and pursuant to Florida Statute '38.02 and 38.10 and Fla. R. Jud. Adm. 2.160(d), respectfully move for an order disqualifying the Honorable Janette Dunnigan from further proceedings in this case, and as and for grounds would state as follows:

1. Reasonable Fear that SHD Will Not Receive Fair Consideration: This matter is pending before Honorable Janette Dunnigan ("Presiding Judge") on contempt proceedings that the Court initiated on July 6, 2010. As set forth specifically herein below, SHD fears that it will not receive fair consideration due to prejudice and bias of the Presiding Judge, and requests that she recuse herself from further proceedings in this case.

2. Appearance of Impropriety: In reaching a finding that SHD was in contempt of court, the Presiding Judge conducted an independent investigation seeking evidence in support of her order to Show Cause. This conduct was in violation of Judicial Canon 3B(7). The commentary related to this section provides that “A judge must not independently investigate facts in a case and must consider only the evidence provided”. In the underlying case the Presiding Judge considered issues from another unrelated Manatee County Circuit Court case in rendering its finding of contempt against SHD attorneys. The Court essentially “blind-sided” SHD and its attorneys by citing to the case, entitled *HSBC BANK USA NATIONAL ASSOCIATION vs. DENNIS CHENAULT, et. al.*, Manatee Circuit Court Case No. 2007CA4470, (hereinafter “*CHENAULT*”) and demanding an explanation for the alleged failure to appear at or cancel a hearing scheduled on the same day as this Court’s hearing on the Order to Show Cause. Despite the fact that it was an entirely different case pending in the Court’s circuit, but outside the record before it, this Court utilized the *CHENAULT* case to reach the conclusion that SHD failed to address the Court’s issues identified in the Order to Show Cause. What is more troubling is that the Court’s conclusion regarding the *CHENAULT* case was wrong. The *CHENAULT* cases supported and established SHD’s evidence regarding correcting the issues complained of in the Order to Show Cause.

3. In addition to *CHENAULT*, the Presiding Judge independently investigated and took into consideration the records of a matter disposed of by another Florida court as the basis for finding SHD in contempt. Once again, in imposing contempt, this Court cited to a previous Hillsborough County case. The presiding Judge found that SHD was warned regarding the filing of sham pleadings in the Hillsborough County case. Not only should the presiding Judge have not conducted the independent investigation, the findings made by the Judge are factually inaccurate.

4. In addition, the Presiding Judge was clearly in possession of misinformation which became apparent when questioning one of the attorneys at the hearing of the Order to Show Cause. The Presiding Judge posed the following question to Patrice Tedesco:

“JUDGE: May I ask you Ma’am, did you, um, did you make the statement that you would not be changing your procedures, your policies, until such time as you were sanctioned? Did you ever make that statement?”<sup>1</sup>

The foregoing leading question demonstrates that the Presiding Judge either (i) considered evidence of statements she believed were made by the attorneys of SHD outside the record or (ii) attempted to intimidate Patrice Tedesco through cross-examination styled questions that were completely unfounded.

5. In addition, the Court sent a copy of the contempt order directly to the Plaintiff notwithstanding the fact that the Plaintiff is represented by counsel.

6. Vague Order and Threat of Criminal Prosecution: The Order Adjudicating Plaintiff’s Attorneys In Contempt Of Court does not adequately provide SHD with an opportunity to purge. The conditions compliance by including ambiguous term “Compliance, when accepted by the Court, shall purge the contempt.”<sup>2</sup> Moreover, the Court specifically reserved jurisdiction on “. . . [SHD], Roy Diaz, Ryan T. Cox and Gavin MacMillan on charges of indirect criminal contempt”<sup>3</sup>. The evidence presented in these proceedings clearly establishes that none of the foregoing named parties have conducted themselves in a manner that would arise to a level of criminal contempt. Yet the presiding Judge has essentially threatened those parties with criminal prosecution.

7. SHD Reasonably Fears Bias or Prejudice Will Affect Proceedings: SHD has a reasonable fear that (i) the Presiding Judge’s conduct as stated above, (ii) the unsupportable and extreme penalty imposed by the Presiding Judge against SHD (iii) together with the clear bias that is demonstrated through a reading of the Hearing Transcript portends an insurmountable bias and prejudice against SHD and a predisposition against SHD.

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<sup>1</sup> A transcript of the hearing has been filed with the Court under Notice of Filing dated September 9, 2010. See: Hearing Transcript page 50 of 60 .

<sup>2</sup> See: paragraph number 20 of the order adjudicating Plaintiff’s attorneys in contempt of court.

<sup>3</sup> See: paragraph number 24 of the order adjudicating Plaintiff’s attorneys in contempt of court.

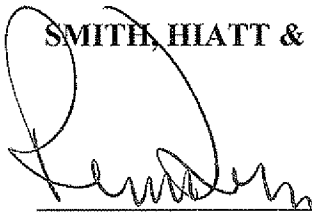
8. Well Grounded Fear: The appearance of impropriety arising from the Presiding Judge's conduct and clear bias against SHD undermines the public confidence in the judiciary and requires the presiding Judge to recuse herself from this matter.

9. Florida Statute §38.10: At §38.10, the Florida Statutes require that a trial judge recuse herself upon the filing of an affidavit by a party who fears that he or she will not receive a fair trial on account of the prejudice of the judge of that court against the party. SHD, has been brought into this matter in the contempt proceedings and fears that it will not be treated fairly. SHD files this sworn pleading in compliance with §38.10, Florida Statutes.

10. Fla.R. Jud. Admin. Rule 2.160: This rule requires that a trial judge recuse herself from any proceeding on a legally sufficient showing by a party who fears it will not receive a fair trial due to bias or prejudice of the judge. Although SHD is not a "party", the Court has treated SHD in such a way that this rule applies in these proceedings.

#### **VERIFICATION BY SHD**

I have read the foregoing Motion to Recuse the Presiding Judge and state that the contents contained therein are true and correct, and that this motion is being filed in my good faith, reasonable belief that this Presiding Judge will not provide me with a fair hearing.

**SMITH, HIATT & DIAZ P.A.**  
  
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Roy A. Diaz, Vice President

STATE OF FLORIDA )  
 ) ss:  
COUNTY OF BROWARD )

The foregoing instrument was acknowledged before me this 17<sup>th</sup> day of September, 2010 ROY A. DIAZ, on behalf of SHD, and who is personally known to me.



[Signature]  
(Signature of Person Taking Acknowledgment)  
Roy Diaz  
(Name of Acknowledger Typed, Printed or Stamped)  
Vice President (Title or Rank)

**CERTIFICATION BY COUNSEL OF GOOD FAITH**

The undersigned counsel hereby affirms that this motion is brought in good faith, after a complete review of the record, and every attempt to verify the information contained herein.

**I HEREBY CERTIFY** that a copy of the Motion for Relief from Order Adjudicating Attorneys in Contempt or in the Alternative Motion for Rehearing has been mailed to the parties on the attached service list this 17 day of September, 2010.

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By: [Signature]  
Roy A. Diaz  
Florida Bar No. 767700

**SERVICE LIST**

Case No. 412007CA007993XXXXXX

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