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.

______________________________________/

MOTION FOR RELIEF FROM
ORDER ADJUDICATING ATTORNEYS IN CONTEMPT
OR IN THE ALTERNATIVE MOTION FOR REHEARING

SMITH, HIATT & DIAZ P.A., ("SHD") by and through the undersigned counsel and pursuant to Rule 1.540(b), Florida Rules of Civil Procedure and applicable law as more particularly stated below, files this, its Motion for Relief from the September 2, 2010 Order Adjudicating Attorneys in Contempt, or in the alternative, motion for rehearing, and in support thereof states as follows:

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BASIS FOR RELIEF

1. Rule 1.540(b) Florida Rules of Civil Procedure provides in pertinent part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon just terms as are just, the court may relieve a party or a party's legal representative from any . . . order . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . ."

2. Additionally, under common law a court may grant rehearing of an interlocutory or non-final order to correct an error that the court may have committed. *Commercial Garden Mall v. Success Academy, Inc.*, 453 So.2d 934 (Fla 4th DCA 1984). "The court has jurisdiction to control its own non-final orders. . .and therefore has the discretion to entertain petition for rehearing if it chooses to do so." Id. at 936. A motion to rehear provides a vehicle not only for the court to reconsider the facts of the case, but also to correct any error if it becomes convinced that it has erred. *Elmore v. Palmer First National Bank & Trust Co.*, 221 So.2d 164 (Fla 2d DCA 1969). A mistaken view of the law constitutes judicial error and must be presented on a motion for rehearing. *Schrank v. State Farm Mutual Automobile Insurance Co.*, 438 So.2d 410 (Fla 4th DCA 1983). It would be an abuse of discretion to deny the Motion for rehearing when the court is presented with legal authority (either for a new legal argument or for an argument previously made). *National Enterprises, Inc. v. Martin*, 679 So.2d 331 (Fla 4th DCA 1996); *See also, Prestress Erectors, Inc. v. James Talcott, Inc.*, 235 So.2d 739 (Fla 3rd DCA 1970).

BACKGROUND OF PROCEEDINGS

3. On or about July 6, 2010, this court issued an order to show cause why Plaintiff and Plaintiff's attorney should not be held in contempt and sanctioned. A copy of the order is attached hereto as Exhibit 1.

4. The order to show cause recited various hearings in this case that were scheduled by Smith, Hiatt& Diaz, P.A. and were later cancelled.

5. On August 18, 2010, Plaintiff, together with the named attorneys that were served with the order to show cause, filed a response to the Court's order. A copy of the response is attached hereto as Exhibit 2. The response identified the procedures which led to the issues complained of in the order to show cause, advised the court that the issues were corrected by Plaintiff's counsel and requested relief from the order to show cause.

6. On or about August 23, 2010, the Court entered an order excusing appearance of Michael Wild, Daniel Stein, and Robert A. Smith. A copy of the order is attached hereto as Exhibit 3.

7. On August 30, 2010, Plaintiff, S.H.D., Ryan T. Cox, Patrice A. Tedescko, Gavin W. MacMillan, and Gabrielle Strauss,[1] appeared before the Court on the order to show cause.

8. Based on the language of the order to show cause, the proceedings did not give the requisite notice that the Court sought to impose sanctions for indirect criminal contempt. The hearing proceeded and the foregoing parties proffered evidence to show cause as to why they should not be held in indirect civil contempt.

9. The evidence "showing cause" to avoid contempt was proffered to the Court. At the conclusion of the proffer, Roy A. Diaz, on behalf of Plaintiff, SHD and each attorney named in paragraph 7 above was present. Each was sworn in by the Court and acknowledged that the proffer was true and correct and was presented as their sworn statements.[2]

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[1] The named attorneys appeared personally and by and through the undersigned counsel.

[2] A transcript of the hearing has been filed with the Court under Notice of Filing dated September 9, 2010.

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10. The evidence established that after receipt of the Court's Order to Show Cause, extreme changes were made to the processes and procedures followed by SHD to address the unnecessary setting and cancellation of hearings before the Court.[3] Roy A. Diaz's testimony was also adopted by the four (4) other attorneys associated with SHD which were summoned to appear before the Court.

11. Despite the presentation of detailed testimony regarding the processes established to respond the Court's Order to Show Cause, at the conclusion of the hearing, the Court made a finding that it would adjudicate Plaintiff's attorneys, SHD, in contempt of court.

12. In furtherance thereof, on September 2, 2010, the Court entered an order adjudicating SHD in contempt of court [3]. A copy of the order is attached hereto as Exhibit 4.

13. The Court's order included a coercive fine of $49,000.00.[4] The Court made a finding that SHD's appearance at the Show Cause proceedings cost the firm $7,000.00. The Court then attributed that amount to each hearing allegedly missed by SHD.

14. It is from this order that Smith, Hiatt & Diaz, P.A. seeks relief, or in the alternative, rehearing, based upon the fact that the Court erred in it findings regarding contempt and relied upon improper and irrelevant evidence to reach its conclusion of contempt.

I

SHD PRESENTED EVIDENCE DEMONSTRATING THAT THE ISSUES IDENTIFIED BY THE COURT IN THE ORDER TO SHOW CAUSE WERE ADDRESSED AND CORRECTED

[3] *See:* Hearing Transcript, Pages 10-12 of 60; Pages 14-16 0f 60.

[4] *See:* paragraph number 21 of the order adjudicating Plaintiff's attorneys in contempt of court.

15. During the course of the hearing on this Court's Order to Show Cause, SHD addressed the Court's concerns regarding the repeated setting and cancellation of hearings. Roy A. Diaz testified on behalf of SHD that since the issuance of the Court's Order to Show Cause, extreme changes were made to avoid the unnecessary setting and cancellation of hearings before the Court.[5] These changes included the following:

1. SHD will refrain from setting any hearings before the Court unless and until all documents required to set the hearing are physically in the hands of SHD [6];
2. SHD has assigned an attorney to look at every case, twenty (20) days prior to a scheduled hearing, with a checklist to determine whether the case has been properly noticed and to determine if it is proper to proceed[7];
3. SHD has verified that all parties, including defaulted parties failing to make an appearance, are provided proper notices of hearing and notices of cancellation of hearings.
4. That there exists a constant stream of training of SHD staff to address all of the changes implemented by (*i*) the Florida Supreme Court, (*ii*) the Circuit Courts, (*iii*) the local Courts and (*iv*) and each individual Judge, to address the on-going foreclosure crisis[8] .

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[5] *See:* Hearing Transcript, Pages 10of 60.

[6] *See:* Hearing Transcript, Pages 10of 60.

[7] *See:* Hearing Transcript, Pages 10-11of 60.

[8] *See:* Hearing Transcript, Pages 9-10 of 60.

16. Despite the extensive testimony provided by Roy A. Diaz, Esq. of SHD that extreme steps were taken to address the issues raised by the Court in its Order to Show Cause, this Court determined that the evidence was not credible. In support of that determination the Court made the following finding:

> " [o]n the very morning of the hearing on this matter, a plaintiff and an attorney from The Law Firm did not appear at or properly cancel a scheduled hearing in case number Manatee County Circuit Case No. 2007-CA-4470. The Law Firm's alleged newly implemented policies and procedures, therefore, do not provide this Court with assurance of future compliance."[9]

17. SHD asserts that the above finding by the Court (*i*) was erroneous and (*ii*) exceeded the Court's authority when the court conducted its own independent investigation and relied on incorrect and mis-characterized evidence (*See* Argument II below). The actions alleged by the Court to have been committed by SHD "on the very morning" of the contempt hearing never occurred. The Court's misapprehension of the facts was based on a delay in docketing pleadings by the Manatee County Circuit Court Clerk.

18. To the contrary, as is demonstrated below, the Manatee County Circuit Case No. 2007-CA-4470 establishes that SHD ***addressed and corrected*** the issues identified by the Court in its Order to Show Cause. However, the Court's misapprehension of the Manatee County Circuit Case No. 2007-CA-4470 lead the Court to find SHD's evidence to be not credible,[10] and was relied upon in adjudicating contempt for alleged actions occurring outside of this case and outside the Court's jurisdiction.

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[9] *See:* paragraph number 10 of the order adjudicating Plaintiff's attorneys in contempt of court.

[10] *See:* Hearing Transcript, Pages 59of 60

II

THE COURT ERRED IN CONDUCTING ITS OWN INVESTIGATION AND RELIED UPON INCORRECT EVIDENCE AS SHD DID PROPERLY AND TIMELY CANCEL THE HEARING IN THE MATTER OF MANATEE COUNTY CIRCUIT CASE NO. 2007-CA-4470

19. Florida law is well settled that a trial court is not authorized to take judicial notice of the records in a different case pending or disposed of in the same court but outside the record in the case before it. *Krishin P. Abichandani v. Related Homes of Tampa, Inc., and Paradise Contractors, Inc., 696 So.2d 802 (Fla. 2nd DCA 1997)* citing *Kostecos v. Johnson, 85 So.2d 594 (Fla. 1956); Bergeron Land Development, Inc., v. Knight, 307 So.2d 240 (Fla. 4th DCA 1975); Novack v. Novack, 196 So.2d 499 (Fla. 3rd DCA 1967),* cert. denied *196 So.2d 926 (Fla. 1967).* In order to know of issues in another case other than the one being litigated, a party must offer certified copies of the relevant documents from the record of that case. *Carson v. Gibson, 595 So.2d 175, 176-77 (Fla. 2nd DCA 1992).*

20. It is irrefutable that this Court considered issues from another unrelated Manatee County Circuit Court case in rendering its finding of contempt against Plaintiff's attorneys. This 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 concluded that Plaintiff's attorneys failed to address the Court's issues identified in the Order to Show Cause as a result of a review of docket of the *CHENAULT* case[11].

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[11] *See*: paragraph number 10 of the order adjudicating Plaintiff's attorneys in contempt of court.

21. However, the information identified by the Court in the *CHENAULT* case was erroneous in that a notice of cancellation was timely filed by Plaintiff's attorneys on August 24, 2010 and uploaded to the Manatee County Circuit Court Clerk's website on the same day. (A copy of the Notice of Cancellation and Internet Confirmation Page is attached hereto as Composite Exhibit 5). That notice of cancellation was filed **six (6) days prior to the scheduled hearing date**.

22. Unfortunately, due to the ongoing crisis of volume faced by all parties involved in the foreclosure litigation process, it appears that the Manatee County Circuit Court Clerk failed to timely update the Manatee County Court docket to reflect the timely filed notice of cancellation submitted by Plaintiff's attorneys in the *CHENAULT* matter. Consequently, when this Court reviewed the docket and penalized Plaintiff's attorneys by using the *CHENAULT* case, it was operating from a position of missing information and mis-information having absolutely nothing to do with SHD's conduct before the Court. Notwithstanding the issues surrounding the *CHENAULT* case, this Court had no legal basis nor legal authority to review any other unrelated cases or to use any other unrelated case to hold SHD in contempt.

23. Composite Exhibit 6 includes a print out of the *CHENAULT* docket. Entry 73 reflects the notice of cancellation dated August 24, 2010 which was not docketed as of August 30, 2010. The Docket further reveals an order of dismissal erroneously entered under the basis that the August 24, 2010 Notice of Cancellation was not filed. This demonstrates the difficulty both SHD and the Manatee County Clerk are having with routine procedures that are impacted by the foreclosure crisis.

III

THE COURT ERRED IN ITS FINDING THAT SHD FILED SHAM PLEADINGS IN THE INSTANT CASE AS NOTICES OF HEARING MAY NOT SERVE AS THE BASIS FOR A FINDING OF FILING SHAM PLEADINGS

24. This Court's Order Adjudicating Plaintiff's Attorneys in Contempt of Court (See Exhibit 4) states that "...the continued noticing of hearings on a motion that had been previously denied amounts to the filing of sham pleadings."[12] That finding is erroneous for several reasons.

25. Initially, this Court indicated on the record that it was not considering the issue regarding the filing of a sham pleading [13]. However, despite this Court's statement on the record that it was not considering that issue of a sham pleading, this Court found in its Order of Contempt that "the continued notice of hearings on a motion that had been previously denied amounts to the filing of sham pleadings."

26. As reflected by the Court's docket, ***an order was never entered*** by the Court which denied Plaintiff's motion for summary judgment. While the Court docket does indicate a ruling to this effect, that ruling was never followed by entry of an order. A ruling, absent the issuance of a written order containing the contents of the Court's ruling, does not have the same effect as an order. Moreover, a ruling that has not been reduced to writing, via a court order, can not be properly appealed.

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[12] *See:* paragraph number 8 of the order adjudicating Plaintiff's attorneys in contempt of court.

[13] *See:* Hearing Transcript, Page37of 60.

27. The Florida Supreme Court notes approvingly in *Florida v. Wagner, 863 So.2d 1224 (Fla. 2004)*, at footnote 3, that Florida Rule of Appellate Procedure 9.020(h) states "[a]n order is rendered when a ***signed, written order*** is filed with the clerk of the lower tribunal" (***emphasis added***), thereby disapproving of the practice, adopted in the present case, of relying on a notation indicated on the docket. The court in *Florida v. Wagner* indicates that "the rules [Fla. R. App. 9.020] explicitly exclude 'minutes and minute book entries' from the definition of 'order'"explaining that "a formal written order will articulate the trial court's decision and its supporting reasoning much more clearly than a clerk's notation in a court minutes form."*Id.* at 1226. As such, this Court's statement that "the continued noticing of hearings on a motion that had been previously denied amounts to the filing of sham pleadings"is legally incorrect.

28. Moreover, a notice of hearing can not be the basis for a sham pleading for the simple reason that a notice does not constitute a pleading. "Although commonly employed, the use of the term 'pleading' to describe all of the various papers filed in an action is incorrect. A pleading seeks to frame issues for determination." *Motzer v. Tanner, 561 So.2d 1336, 1338 (Fla 5th DCA 1990).* In *Motzer*, the court, in fact, rejected a motion to dismiss as a sham pleading for the reason that even a motion was not considered a pleading. Therefore, even if this Court was inclined to consider the Plaintiff's motion for summary judgment, and not the notice of hearing on same, to be the sham, the *Motzer* court relies on Trawick's Florida Practice and Procedure to note that "motions are not pleadings." (*Id*).

29. This point is reinforced by the standards by which actual pleadings are reviewed to determine if they are a sham. "A hearing on a motion to strike a pleading as sham is not for the

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purpose of trying the issues, but rather serves the purpose of determining whether there are any issues to be tried." *Cromer v. Mullally, 861 So. 2d 523, 525 (Fla. 3rd DCA 2003).* Clearly, a notice of hearing does not present issues to be tried, and cannot be reconciled with this standard. Even the motion that the notice refers to in the instant case, being Plaintiff's motion for summary judgment, presents Plaintiff's argument in support of the issues it seeks to try, and could not be stricken on the basis that it, too, fails to present any issues to be tried.

30. Furthermore, "neither the failure to include all the essential elements of a cause of action, the inclusion of redundant allegations, nor the frivolous filing of a pleading constitutes sufficient grounds to strike a pleading in its entirety under the rule [Florida Rule of Civil Procedure 1.150, Sham Pleadings]" *Decker v. County of Volusia, 698 So.2d 650, 652 (Fla. 5th DCA 1997).* "[A] pleading cannot be stricken out as sham unless the falsity therefore clearly and indisputably appears." *Rhea v. Hackney, 157 so. 190 (Fla 1934).* Therefore, even if one were to assume for the sake of argument that an order had been entered denying Plaintiff's motion for summary judgment, and even if one were to assume that the subsequent notice of hearing on same (or underlying motion for summary judgment) were filed, these documents do not constitute a sham unless there is something intrinsic to the filings that constitutes a clear and indisputable falsehood. There is no such element within these documents filed by the Plaintiff.

31. Plaintiff did, in fact, file its notices of hearing with full intention that they be attended, and with full faith that its motion for summary judgment presented a cognizable basis for Plaintiff to prevail in the case. On February 18, 2010 Plaintiff was ordered by this Court to set the pending Motion for Summary Judgment within 90 days of the order. Plaintiff noticed the hearing as required by the Court and had a good faith belief the motion would be prosecuted.[14]

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[14] *See:* Hearing Transcript, Pages 24-25 of 60.

32. There is nothing within these documents that negates this presumption, and "in deciding whether to strike a pleading as a sham, 'the trial court must resolve all doubts in favor of the pleading.'" *Decker v. County of Volusia, 698 So.2d 650, 652 (Fla. 5th DCA 1997),* citing *Destiny Const. Co. v. Martin K. Eby Const., 662 So.2d 388, 390 (Fla 5th DCA 1995).*

33. Instead, in attempting to define these filings as a sham, this Court engaged in its own independent investigation, and made a determination of "sham" based on a correlation to the filing of other matters in other courtrooms in other districts and circuits. A review of the entirety of the docket in the instant case and comparing it to the extrinsic factual occurrences (and, more appropriately, non-occurrences) of other unrelated cases is wholly improper. The Fifth District Court of Appeal so stated in *Upland Development of Central Florida, Inc. v. Bridge, 910 So.2d 942 (Fla 5th DCA 2005),* in which the lower court dismissed a complaint as a sham on the basis of the defendant's motion to dismiss, which attached a previously entered arbitration award that nullified the allegations. The court reversed the striking of the complaint as a sham, since "it was improper for the trial court to consider extrinsic evidence to reach its decision." (*Id.* at 945). A similarly flawed review and consideration of extrinsic evidence was done in the present case when this Court entered its Order Adjudicating Contempt against Plaintiff's attorneys.

IV

THE COURT ERRED IN CONDUCTING ITS OWN INVESTIGATION AND RELIED UPON INAPPROPRIATE AND MIS-CHARACTERIZED EVIDENCE REGARDING THE ALLEGED FILING OF SHAM PLEADINGS BY SHD BEFORE THE HILLSBOROUGH COUNTY CIRCUIT COURT

34. In addition to considering *CHENAULT,* this Court also erred by taking into consideration the records of a matter disposed of by another Florida court as the basis for finding SHD in contempt. SHD adopts the arguments presented in Argument II above regarding a trial court's lack

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of authority to take judicial notice of the records in a different case pending or disposed of in the same court but outside the record in the case before it. Once again, in imposing contempt, this Court cited to a previous Hillsborough County case alleging that SHD was warned regarding the filing of sham pleadings[15]. However, not only should this case have never been considered by the Court based upon the assertions contained in Argument II above, but the Court's characterization of the findings in that Hillsboro County case are factually inaccurate.

35. Attached hereto as Exhibit 6 is the order on Order to appear and Show Cause filed in the case entitled *BANK OF AMERICA V. ALBERT S. KEATON, ET AL.,* Hillsborough County Circuit Court Case Number 09-7541 (Division H). (hereinafter *"KEATON"*) The Hillsborough Circuit Court Judge **did not find SHD in contempt of court**. In addition, contrary to this Court's notation that "Plaintiff's attorneys have been previously warned in Hillsborough County concerning the filing of sham pleadings", the court in Hillsborough County issued a "reminder" to SHD attorneys of their ongoing obligation "to refrain from conduct involving any misrepresentation to the court" and "that their signature to a pleading constitutes a certificate by that attorney that he or she has read it and to the best of the attorney's knowledge, information and belief, there are good grounds to support it." (Exhibit 6, Section 1). The distinction in *KEATON* was the mistake of a first year attorney in completing a local form required to be completed by the court and regarding original documents. The form indicated that original documents were not being filed, when the original documents were in fact filed together with the form. SHD explained the mistake and also advised the court that steps were taken to protect against a repeat of the mistake. The court accepted the evidence and found that ***neither*** SHD nor the attorneys involved in that proceeding were in contempt of court. SHD repeatedly

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[15] *See*: paragraph number 8 of the order adjudicating Plaintiff's attorneys in contempt of court.

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advised this Court that the *KEATON* issue was cured and did not occur again.[16]

36. Contrary to the statements and finding made by this Court to justify its Order of Contempt, the Hillsborough County Circuit Judge did not warn SHD of the filing of sham pleadings. However, none of this should matter as this Court should never have considered this extrinsic evidence and other court activity to determine SHD's failure to address the issues in the Court's Order to Show Cause.

V

THE COURT ERRED BY IMPOSING A COERCIVE PENALTY OF $49,000.00 WITHOUT PROVIDING SHD THE OPPORTUNITY TO PURGE THE COERCIVE PENALTY.

37. The Court imposed a coercive fine on SHD in the amount of $49,000.00.[14] Although the order states that "Plaintiff's attorney have 30 days (30) from the date of this order to purge the coercive fine", the order does not provide SHD with an opportunity to purge and simply obligates SHD to pay the $49,000.00 fine.

38. Florida Law has established that "a flat unconditional fine is considered a criminal sanction because it does not afford the opportunity to purge the contempt. *"Luis J. Levy v Joseph De Angelo, et al., 819 So. 2d. 864 (Fl.4 DCA 2002)*; *Parisi v. Broward County, 769 So. 2d. 359 (Fl. 2000)*." If compensation is intended by a civil contempt fine, it must be based on evidence of an injured parties actual loss. *Id*

39. Civil contempt fines are levied to coerce the violator into complying with the terms of a court order. *Gregory v. Rice, 727 So. 2d. 251 (FL. 1999); In Re The Matter of Nicolas*

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[16] *See:* paragraph number 21 of the order adjudicating Plaintiff's attorneys in contempt of court.

T. Steffens, Esq., 988 So. 2d. 142 (Fla 5the DCA 2008) "To avoid a valid civil contempt fine, the order imposing the fine must include a purge provision. A purge provision allows the fine to be ***avoided*** or reduced if the violator complies with the court order."(***emphasis added***) *Id.* "Any flat unconditional fine is considered a criminal sanction because it does not afford an opportunity to purge the contempt." *Id.*

40. In distinguishing between criminal contempt and civil contempt, the Florida Supreme Court in *Parisi* establishes that civil contempt sanctions are further classified as either compensatory or coercive sanctions. The same contemptuous conduct may be the subject of both criminal and civil proceedings. The distinction between criminal and civil contempt often terms on the "character and purpose" of the sanction involved. The Court previously explained that the purpose of criminal contempt is to punish. "Criminal contempt proceedings are utilized to vindicate the authority of the Court or to punish for an ***intentional*** violation of an order of the court." (***emphasis added***) *Id.* The *Parisi* Court goes onto say "because civil contempt sanctions are viewed as non-punitive and avoidable, fewer procedural protections for such sanctions have been required. Thus, civil contempt may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required. While civil contempt sanctions do not require the same procedural and constitutional protections as criminal contempt, the key safe guard in civil contempt proceedings is a finding by the trial court that the contemnor has the ability to ***purge*** the contempt." (***emphasis added***) The Supreme Court in *Parisi* acknowledges that a court has a broad arsenal of coercive civil contempt sanctions available. However, the court states that "to be a valid civil contempt sanction, the contempt order must include a purge provision. Without this critical protection there is a danger that the contempt sanction can be transformed from a civil to a criminal contempt

sanction without any order underlying procedural protections attended to the criminal proceedings." The court goes onto state "the dichotomy between coercive and punitive imprisonment has been extended to contempt fines, requiring the contemnors to be given the opportunity to first purge the underlying contempt by performing an affirmative act before the fine can be imposed."

41. The *Parisi* court instructs that an example of a valid coercive fine is a per diem fine imposed each day the contemnor fails to comply with the court's order. However, when the contemnor complies with the underlying order, the requirement to pay the additional fines will be purged. In contrast " any flat unconditional fine is considered a criminal sanction because it does not afford the opportunity to purge the contempt through compliance." *id*

42. The imposition of the $49,000.00 fine, without the opportunity to purge the fine, amounts to a criminal penalty. Although the court order states that "Plaintiff's attorneys have thirty days (30) from the date of this order to purge this coercive fine" said ruling is not a purge and is, in fact an improperly imposed criminal sanction.

43. To the extent of the courts imposition the $49,000.00 sanction was intended to somehow be compensatory, the fine bears no relation to the evidence presented to the court for various reasons.

44. In determining the amount of the sanctions, the court considered the fact that a 5 minute period of time was reserved by the court for each of the seven hearings that were not attended.[17] Accordingly, based on the court's evaluation, there was an aggregate of 35 minutes of time reserved by the court and not utilized by SHD.

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[17] *See:* Hearing Transcript page 36 of 60.

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45. SHD testified that the value of the 5 attorneys appearing in Manatee County for the contempt proceedings had an aggregate cost of $7,000.00. Because there would never be a reasonable expectation that 5 attorneys would expend an 8 hour day, including travel expenses, to attend a 5 minute hearing, utilizing the $7000.00 amount could not logically result in a sanction of $49,000.00.

46. The Court based the sanction on the $700.00 amount was err under *Parisi* and the cases cited above. However, if the court could utilize the $7,000.00 as a base amount, the sanction bears no relation to the actual amounts that would be attributed to the evidence. Dividing the amount of $7000.00 into an 8 hour day results in an hourly rate of $875 per hour. If one divides that amount into 60 minutes, the result is $14.58 per minute. At that rate, the thirty five minutes that were reserved for the seven hearings referenced by the court would result in a cost of $510.30 of lost time to the Court.

47. Stated another way, the Court's fine for thirty five minutes of aggregate time amounts to $1,400.00 per minute or $84,0000.00 per hour.

48. SHD contends that the court could not impose a compensatory fine based on the court's time associated with the proceedings. Notwithstanding, the $49,000.00 sanction is an improper criminal contempt sanction and must be vacated.

VI

THE COURT ERRED IN IT'S IMPOSITION OF A CERTIFICATION REQUIREMENT

49. In paragraph 17 of the order adjudicating Plaintiff's attorneys in contempt of court the court order states:

> "The law firm shall submit to this court an instrument of certification ***from each individual attorney and support staff***, who are presently employed and will become employed in the future during the pendency of this action who will participate in Manatee County, Florida attesting under oath that such policies and procedures are in fact implemented at the firm and that each has read and understood the Administrative Orders, Local Rules of the Twelfth Judicial Circuit, and the particular judges requirements in handling of mortgage foreclosure cases. Each attorney shall acknowledge that they have read the Guidelines Professional Conduct as provided by the florida bar. (***emphasis added***)

50. SHD has repeatedly advised the court through pleadings and testimony proffered and adopted by the firm and each attorney named in the order to show cause, that the revised policies and procedures regarding hearings in Manatee County have been implemented and were reviewed by the attorneys.

51. The court's order extends the requirement to "each individual attorney and support staff" who are presently employed or become employed by SHD during the pendency of this case.

52. The court's order exceeds its jurisdiction by imposing an obligation on individual attorneys and support staff that did not participate in the above styled case, and were otherwise not in the jurisdiction of the court.

53. SHD has in the past testified, and is prepared to certify on behalf of the firm and the attorneys who appeared in this case that the policies and procedures regarding hearings have been implemented at the firm and that each has read and understood the "Administrative Orders, Local Rules of the Twelfth Judicial Circuit, and the particular judges requirements in handling of mortgage foreclosure cases". However, requiring the remaining attorneys and support staff to provide a certification constitutes judicial error.

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WHEREFORE, SHD moves this court for relief from the order adjudicating attorney's in contempt as stated herein or the alternative, moves this court for rehearing.

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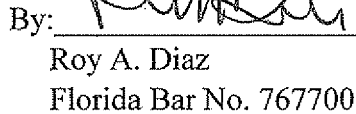

By:____________________
Roy A. Diaz
Florida Bar No. 767700

CERTIFICATE OF SERVICE

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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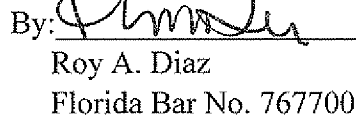

By:____________________
Roy A. Diaz
Florida Bar No. 767700

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SERVICE LIST
Case No. 412007CA007993XXXXXX

ANTONIO DE FREITAS
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