

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2008 AUG -7 A 10:35

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

OCWEN LOAN SERVICING, LLC,

Plaintiff,

v.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

Defendant.

Civil Action No. 1:08CV824

GBL/TRJ

COMPLAINT FOR
DECLARATORY JUDGMENT,
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY AND
PERMANENT INJUNCTION, AND
DAMAGES

INTRODUCTION

1. This action arises out of events that occurred at approximately 3:15 pm on Wednesday, August 6, 2008. At that time, defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), the nation's principal registry of home mortgage loans, terminated the access of Ocwen Loan Servicing, LLC ("Ocwen"), one of the nation's largest mortgage servicers, to the "MERS System," an electronic platform used to record and transfer interests in tens of millions of mortgages secured by property throughout the United States. MERS's purported basis for excluding Ocwen involves a financial dispute that MERS has refused to resolve through the mandatory dispute resolution process specified in MERS's "Terms and Conditions," which are part of MERS's contract with its members. In essence, MERS seeks to use its monopoly power and its exclusive control over access to mortgages registered on the MERS System to force Ocwen to choose between paying an amount it does not owe, on the one hand, and facing continued exclusion from the MERS System, on the other. Ocwen's exclusion from the MERS System without the due process guaranteed in MERS's Terms and Conditions, if allowed to

persist, will reduce competition significantly in the market for mortgage servicing by eliminating one of the nation's largest mortgage servicers. Without access to MERS, Ocwen cannot compete because it will be denied access to a business element necessary for effective competition.

2. Ocwen thus has commenced this action seeking, *inter alia*, an order compelling MERS to afford Ocwen the procedural protections guaranteed in MERS's Terms and Conditions (including arbitration), and a temporary restraining order and preliminary injunction to preserve the status quo pending completion of that dispute resolution process.

THE PARTIES

3. Ocwen services hundreds of thousands of mortgages that are registered on the MERS System, including both mortgages owned by Ocwen and mortgages serviced by Ocwen for the benefit of third-party investors. Ocwen is a limited liability company the sole member of which is Ocwen Financial Corporation, a corporation organized under the laws of Florida and headquartered in Florida. Ocwen therefore is a citizen of Florida.

4. MERS was created by the mortgage banking industry to streamline the mortgage process through an electronic registry system designed to eliminate the need to transfer mortgage interests in paper form. MERS is incorporated under the laws of the State of Delaware and has its principal place of business in Reston, Virginia. MERS thus is a citizen of Delaware and Virginia.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between Ocwen and MERS and the amount in controversy exceeds \$75,000.

6. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15. This Complaint is filed under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to redress injuries Ocwen has sustained and will continue to sustain by reason of MERS's violations of Sections 1 and/or 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

7. Venue is proper within the Eastern District of Virginia pursuant to 28 U.S.C. § 1391(b)(1) because MERS's principal place of business is located within the Eastern District of Virginia. Venue is also proper in this District pursuant to 15 U.S.C. § 22.

FACTUAL ALLEGATIONS

BACKGROUND

8. MERS is a company that holds legal title to mortgage liens in a nominee capacity in order to facilitate a registry system (the "MERS System"). The MERS System is an electronic registry created by the mortgage banking industry to track transfers of ownership interests and servicing rights in mortgage loans as such loans are bought, sold and securitized in the secondary mortgage market.

9. The MERS System is the system approved by standard-setters in the mortgage industry (including the Federal Housing Administration, the Department of Veterans Affairs, Ginnie Mae, Fannie Mae, Freddie Mac, and various state housing finance agencies) for registering the status of all interests in mortgages, including beneficial interests and servicing and sub-servicing arrangements. The MERS System is used by virtually every major mortgage servicer in the United States for this purpose. The MERS System is also essential to the foreclosure process, since mortgage servicers seeking to foreclose on defaulted mortgages that are registered on the MERS System must obtain an assignment from MERS in order to

commence foreclosure proceedings. Without access to the MERS System, mortgage servicers are not able to compete or to provide their products and services.

10. As of late 2006, more than 45 million mortgages were registered on the MERS System. This represented more than 60 percent of new loan originations in the United States and more than 30 percent of the total outstanding mortgage debt in the nation. On information and belief, this market share has increased since 2006.

11. Membership in MERS and access to the MERS System is a requirement of many financing facilities used in the mortgage industry.

12. Ocwen is a member of the MERS System.

13. As a member of the MERS System, Ocwen rights are governed by, among other things, MERS's "Rules of Membership" and MERS's "Terms and Conditions."

14. Rule 1 of MERS's Rules of Membership states that MERS "shall make the services of the [MERS System] available to any Member of MERS. A Member is defined as an organization or natural person who has signed a Membership Agreement and is not more than 60 days past due as to the payment of any fees due and owing to MERS."

15. Rule 5 of MERS's Rules of Membership (discussed more fully below) governs the assessment and payment of fees for services provided by MERS.

16. Rule 7 of MERS's Rules of Membership provides that, in the event of an alleged violation of any Rule (including Rule 5's provisions concerning the payment of fees), the member shall be provided with written notice of the alleged violation (such as nonpayment of fees), and shall have 15 days from the date of the notice to respond in writing. Rule 7 further provides that, following that 15-day written response period, the member shall have an additional

30 days to cure the alleged breach before MERS imposes any sanction (such as suspension) on the member.

17. Paragraph 13 of MERS's Terms and Conditions specifies the procedures for resolving disputes between MERS and a MERS member such as Ocwen. Disputes are to be resolved in the first instance "through direct negotiation with the other party. If the Dispute is not resolved within thirty (30) days after a written demand for direct negotiation, the parties shall attempt to resolve the Dispute through mediation. If the parties do not promptly agree on a mediator, either party may request the then chief judge of the Circuit Court of Fairfax County, Virginia to appoint a mediator. All mediation proceedings hereunder shall be held in Washington, D.C. If the mediator is unable to facilitate a settlement of the Dispute within a reasonable period of time, as determined by the mediator, the mediator shall issue a written statement to the parties to that effect and the aggrieved party may then seek relief in accordance with the arbitration provisions of this Paragraph."

18. Paragraph 13 of the Terms and Conditions further provides that, in the event a mediated resolution cannot be reached, disputes such as the fee dispute between Ocwen and MERS "shall be settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules"

19. Because MERS is located in Virginia, and Ocwen is located in Florida, the MERS Terms and Conditions is a contract in interstate commerce for purposes of the Federal Arbitration Act.

THE FEE DISPUTE

20. MERS has excluded Ocwen from access to the MERS System based on Ocwen's nonpayment of a disputed charge for certain mortgage servicing transfers. The basis of MERS's

claim for the disputed charge is a set of agreements signed by Joseph DeRinaldi, an employee of Ocwen who is not an officer of the company and has no authority to bind the company contractually.

21. Rule 3 of MERS's Rules of Membership states that "(a) Upon request from the Member, Mortgage Electronic Registration Systems, Inc. shall promptly furnish to the Member, in accordance with the Procedures, a corporate resolution designating one or more employees of such Member, selected by such Member, as "certifying officers" of Mortgage Electronic Registration Systems, Inc."

22. Scott Anderson, a senior vice president of Ocwen, is the only designated "certifying officer" for Ocwen with respect to the MERS System. No other employee of Ocwen has been designated as a "certifying officer" with respect to the MERS System.

23. At all relevant times, MERS has been aware that Scott Anderson was Ocwen's sole "certifying officer" for purposes of the MERS System.

24. Neither Scott Anderson nor any other officer of Ocwen signed any agreement with respect to the disputed charge, authorized Joseph DeRinaldi to sign any such agreement, or was aware that Mr. DeRinaldi had signed any such agreement at the time it was signed.

25. The disputed charge at issue involves transaction fees primarily for the transfer of servicing between an affiliate of Delta Financial Corporation ("Delta"), a MERS member, and Ocwen. The remaining amount of the disputed charge at issue involves transaction fees for the transfer of servicing between Ocwen and other entities that were MERS members at the time of transfer are that are either bankrupt or out of business.

26. Rule 5 of MERS's Rules of Membership states that "(c) Transaction fees for the transfer of servicing between MERS Members (including Intra-company Transfers) shall be

payable by the transferor. If the transferor fails to pay such transaction fees due to bankruptcy, or because the transferor is no longer in business or cannot otherwise be located or contacted, and MERS has exhausted all reasonable means of collection, then the transferee shall be responsible for the payment of those transaction fees because the transferee has received the benefit of the service provided by MERS and is in the best position to protect itself by holding back a portion of the purchase price when purchasing the corresponding loans.”

27. In January 2008, MERS instituted a change in its rules related to fees for servicing transfers. Effective January 2008, MERS began charging \$10 per loan to administratively make a change to a loan on the MERS System to reflect a servicing transfer.

28. In addition, MERS charges a \$4.95 per loan “seasoned servicing transfer fee” for transfers occurring 270 days or more from the original loan date on the loan.

29. In May 2008, MERS approached a low-level non-officer employee of Ocwen—Joseph DeRinaldi—and requested authorization to bill Ocwen for fees related to a transfer of servicing where Ocwen was the *transferee*, not the *transferor*.

30. MERS did not inform Joseph DeRinaldi of the total amount of fees that would be incurred for the transfer of servicing—only that the fees would be at least \$10 per loan.

31. MERS knew or should have known that Joseph DeRinaldi was not authorized to approve fees related to the MERS System, as he was not an officer of Ocwen and was not the “certifying officer” for purposes of the MERS System.

32. At the time the relevant mortgage servicing portfolio was transferred from Delta to Ocwen, Delta was still in business and was not in bankruptcy. The MERS \$10 fee for administratively reflecting a servicing transfer was not in effect when the transfer of servicing occurred.

33. After obtaining an “authorization” from Mr. DeRinaldi, MERS assessed a \$10-per-loan charge for administratively recording the servicing transfer from the prior servicer to Ocwen. MERS also assessed Ocwen a \$4.95-per-loan charge for seasoned servicing transfer fees for each loan it transferred. The total servicing transfer charges assessed to Ocwen by MERS is \$691,576.70, including approximately \$652,951.35 of loans where servicing was transferred from Delta to Ocwen.

34. On information and belief, MERS did not exhaust all reasonable means to collect this service-transfer charge from Delta, the transferor servicer. Indeed, to Ocwen’s knowledge, MERS did not pursue *any* effort to collect the applicable fees from Delta, despite the requirement that it do so pursuant to Rule 5 of the MERS Rules of Membership.

35. On information and belief, MERS did not exhaust all reasonable means to collect this service-transfer charge from the Out Of Business Entities, who were the other transferor servicers. Indeed, to Ocwen’s knowledge, MERS did not pursue *any* effort to collect the applicable fees from Out Of Business Entities, despite the requirement that it do so pursuant to Rule 5 of the MERS Rules of Membership.

36. Ocwen has engaged in written and oral communications with MERS in an attempt to resolve this dispute. Those attempts have been unsuccessful. Ocwen has also sent to MERS a written demand for dispute resolution pursuant to Paragraph 13 of the MERS Terms and Conditions. That demand has been disregarded by MERS. On the afternoon of August 6, 2008, MERS terminated Ocwen’s access to the MERS System without providing any due process for resolving the parties’ fee dispute.

37. At the time MERS terminated Ocwen’s access to the MERS system, (a) the 15-day period for sending a written response provided in Rule 7 of MERS’s Rules of Membership

had not yet elapsed, (b) the 30-period to cure the alleged violation provided in Rule 7 of MERS's Rules of Membership had not yet elapsed, and (c) the dispute as to whether Ocwen owes the fee amount claimed by MERS had not yet been submitted to or decided by the dispute resolution process required in Paragraph 13 of MERS's Terms and Conditions.

**MERS'S ROLE IN PROVIDING EXCLUSIVE ACCESS TO AN ELEMENT ESSENTIAL TO
EFFECTIVE COMPETITION IN THE MORTGAGE INDUSTRY**

38. MERS acts as mortgagee of record for mortgages registered on the MERS System. MERS also maintains physical control of notes, assignments, and other documents relating to registered mortgages. With respect to mortgages registered on the MERS System, MERS is the sole source of assignments and other legal documents necessary to transfer servicing, foreclose on defaulted mortgages, and perform other servicing functions. MERS thus is a monopolist with respect to mortgages registered on the MERS system, inasmuch as there is no competing registry from which the documents necessary to service those mortgages can be obtained. Given the lack of any alternative registry, MERS controls access to a business element that is necessary for effective competition. Without access to the MERS System, Ocwen has no ability to provide its services to the detriment of competition and the market.

39. MERS also has market power in the broader industry. As of late 2006, more than 45 million mortgages were registered on the MERS System. This represented more than 60 percent of new loan originations in the United States and more than 30 percent of the total outstanding mortgage debt in the nation. On information and belief, this market share has increased since 2006.

40. Because of the network characteristics of the MERS registry system, Ocwen has no ability to duplicate the MERS System.

41. MERS has denied Ocwen use of the MERS System.

42. MERS can feasibly provide continued access to Ocwen.

OCWEN'S EXPECTED INJURIES

Irreparable Injury Justifying A Temporary Restraining Order and Preliminary Injunction

43. If MERS's exclusion of Ocwen from the MERS System is permitted to stand, even for one day, Ocwen will suffer irreparable harm, including but not limited to the following:

- Ocwen will be unable to comply with contractual obligations requiring it to record servicing transfers to and from other mortgage servicers.
- Ocwen will be unable to take actions to protect the interest of its customers who own the mortgages it services. For example, Ocwen will be unable to obtain the assignments that are solely available from MERS and that are necessary to foreclose on defaulted mortgages.
- Ocwen will be unable timely to record mortgage satisfactions in accordance with state laws.
- Ocwen will be placed in breach of its servicing contracts with the investors for whom it services mortgages, who will be forced to find back-up servicers who are registered on the MERS System.
- For those hundreds of thousands of loans for which Ocwen depends on MERS to provide information, Ocwen will be put in jeopardy of not being able to respond to qualified written requests submitted to it under the Real Estate Settlement Procedures Act or the Truth in Lending Act.

Compensatory Damages

44. In addition to those injuries that cannot be remedied by an award of damages, Ocwen will also suffer significant financial harm from a denial of access to the MERS System without the due process to which it is entitled under the Terms and Conditions.

45. Ocwen's compensation is based on its ability to collect payments from both current and delinquent borrowers. Exclusion from the MERS network will impede, and in some cases prevent entirely, Ocwen from collecting such payments.

46. In addition, the inability to obtain assignments from the MERS System means that Ocwen will be prevented from foreclosing on defaulted mortgages, and therefore will be prevented from recouping foreclosure sale proceeds various advances and other costs it has incurred in connection with servicing the relevant mortgages.

Balancing Of Harms

47. MERS would face little or no harm if this Court were to enter a temporary restraining order and preliminary injunction. Ocwen simply seeks to compel MERS to follow its own Rules and Terms and Conditions, which include negotiation, mediation, and arbitration of disputes and a requirement that fees for servicing transfers be recovered from transferor rather than transferee servicers. Indeed, MERS would actually make money if it were ordered not to exclude or suspend Ocwen at this time, since MERS would continue to collect undisputed fees from Ocwen—thus increasing rather than decreasing its revenue while the contractually required dispute resolution procedure is completed.

48. Ocwen is likely to succeed on the merits of its claims. By excluding Ocwen from access to the MERS System without first pursuing the dispute resolution process required in the Terms and Conditions, which are part of the contract between Ocwen and MERS, MERS has

breached a contract. And by using its market power and its exclusive control over access to mortgages registered on the MERS System to force Ocwen to choose between paying a charge it does not owe without due process and being excluded from the essential facility of the MERS System, MERS has violated the Sherman Act.

49. Moreover, in cases where “the hardship balances in favor of the plaintiff, then the likelihood of success of the claim is displaced and the plaintiff must only show that questions raised concerning the merits are ‘so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.’” *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)). As shown above, Ocwen’s hardship caused by its exclusion from the MERS System will be much greater than any potential hardship MERS would endure by merely continuing Ocwen’s membership during the pendency of the contractually required dispute resolution process. And, also as noted above, the merits of Ocwen’s case are serious and substantial, making them fair grounds for litigation.

50. Finally, the public interest strongly favors Ocwen in this case. Ocwen services literally hundreds of thousands of mortgages that are registered on the MERS System. Ocwen’s ability to effectively interact with its customers, including mortgage lenders and homeowners across the country, will be compromised if MERS is allowed to exclude Ocwen from the MERS System without due process. For example, Ocwen will not be able to timely effectuate satisfactions and assignments of mortgages, violating state laws and allowing MERS to hold homeowners’ mortgages in limbo.

CAUSES OF ACTION

COUNT 1: BREACH OF CONTRACT

51. Ocwen realleges and incorporates by reference each and every allegation contained in preceding Paragraphs 1 through 50.

52. Ocwen and MERS had a contractual agreement, contained in the MERS Rules of Membership and MERS's Terms and Conditions.

53. Paragraph 13 of MERS's Terms and Conditions requires that MERS follow certain specified dispute resolution procedures.

54. MERS has failed and refused to follow these dispute resolution procedures by excluding Ocwen from access to the MERS System without any due process whatever, thus breaching Paragraph 13 of the Terms and Conditions.

55. Ocwen has been or imminently will be damaged by MERS's failure to follow these contractually required dispute resolution procedures.

COUNT 2: VIOLATIONS OF THE SHERMAN AND CLAYTON ACTS, 15 U.S.C. §§ 1, 2, AND 15

56. Ocwen realleges and incorporates by reference each and every allegation contained in preceding Paragraphs 1 through 55.

57. MERS is a membership association created by mortgage servicers and other businesses associated with the mortgage industry.

58. The MERS electronic registry is the exclusive source of current information relating to the assignment of ownership and/or servicing rights of mortgages registered with MERS.

59. Access to current information relating to the assignment of ownership and/or servicing rights of mortgages registered with MERS is an essential element of Ocwen's ability to

compete in the market for mortgage servicing because Ocwen cannot perform its core mortgage servicing functions without access to that information.

60. Essential mortgage servicing functions that depend on information stored in the MERS electronic registry include:

- a. Providing borrowers with accurate information concerning the current ownership of their mortgage loans;
- b. Protecting lenders' and investors' interests in properties securing mortgage loans by initiating loss mitigation procedures including, where necessary, foreclosure proceedings;
- c. Accurately and efficiently managing the transfer of servicing rights between Ocwen and other mortgage servicers; and
- d. Facilitating the resolution of issues created by borrower's economic distress through loan modification agreements and other payment plans requiring approval of the record owner of the subject mortgage.

61. Ocwen's exclusion from access to the MERS System will have a significant anticompetitive effect by precluding Ocwen from performing its core business functions due to MERS's exclusive access to information essential to Ocwen's effective competition in the marketplace.

62. The concerted action of MERS, a membership organization including Ocwen's competitors in the mortgage servicing market, to deprive Ocwen of access to essential information by expelling it from membership in MERS constitutes an illegal combination in restraint of trade in violation of Sections 1 and/or 2 of the Sherman Act. MERS's exclusion of Ocwen from the MERS System without affording it any prior due process protections, let alone

the dispute resolution procedures specified in MERS's Terms and Conditions, is a violation of Section 2 of the Sherman Act.

COUNT 3: TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

63. Ocwen realleges and incorporates by reference each and every allegation contained in preceding Paragraphs 1 through 62.

64. If Ocwen's exclusion from the MERS System persists for even a day, it will result in irreparable harm. The harm to Ocwen from being excluded from the MERS System greatly outweighs the harm to MERS caused by requiring MERS to follow its own dispute resolution procedures.

65. Ocwen is likely to succeed on the merits of its claims for the reasons described above.

66. The public interest favors a temporary restraining order and preliminary injunction in this case, enjoining MERS from excluding Ocwen from the MERS System until completion of the dispute resolution procedures required under Paragraph 13 of MERS's Terms and Conditions.

COUNT 4: ORDER COMPELLING ARBITRATION

67. Ocwen realleges and incorporates by reference each and every allegation contained in preceding Paragraphs 1 through 66.

68. The MERS Terms and Conditions constitute a contract in interstate commerce for purposes of the Federal Arbitration Act.

69. Paragraph 13 of MERS's Terms and Conditions sets out a dispute resolution procedure, requiring that disputes that cannot be resolved through negotiation or mediation be

submitted for final resolution by binding arbitration conducted under the Commercial Rules of the American Arbitration Association.

PRAYER FOR RELIEF

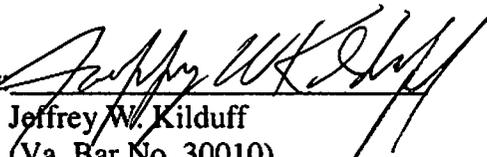
WHEREFORE, Ocwen prays for relief as follows:

1. That this Court issue a Temporary Restraining Order and Preliminary Injunction, restraining and enjoining MERS from excluding Ocwen from access to the MERS System without first completing the dispute resolution procedures required under Paragraph 13 of MERS's Terms and Conditions and requiring MERS to reinstate Ocwen's access to the MERS System during the pendency of the dispute resolution proceedings.
2. That the Court enter an order that, if the negotiation and mediation requirements specified in Paragraph 13 of MERS's Terms and Conditions are unsuccessful, MERS be compelled to submit its fee dispute with Ocwen to binding arbitration conducted under the Commercial Rules of the American Arbitration Association.
3. That the Court award such other and further relief, including costs and attorneys' fees, as the Court deems just and proper.

DATED: August 7, 2008

Respectfully submitted,

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