

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO. 12-013597 (18)

COMERICA BANK, a Texas banking
association,

Plaintiff,

vs.

TROPIC RANCH, INC. a Florida
corporation, H.K. HOTEL
MANAGEMENT, LLC, a Michigan limited
liability company, HANNA KARCHO-
POLSELLI, individually, BROWARD
COUNTY, FLORIDA, a political
subdivision of the State of Florida, and
KENNETH A. FRANK, individually,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION TO COMPEL BETTER PRODUCTION**

Plaintiff, Comerica Bank, hereby responds to Defendants H.K. Hotel Management, LLC, Tropic Ranch, Inc. and Hanna Karcho-Polselli's ("Defendants") Motion to Compel Better Production dated November 9, 2012 ("Motion"). In support, Comerica Bank states as follows:

I. INTRODUCTION.

A party responding to a request for production pursuant to Rule 1.350 has two options: (i) produce the documents as they are kept in the usual course of business; or (ii) identify which documents relate to each request. Here, Comerica Bank responded to Defendants' First Request for Production by producing the documents requested as they were kept in the usual course of business. Defendants, however, want Comerica Bank to identify which documents relate to each request because Defendants do not want to review all the documents they requested. Because Comerica Bank's response is proper under the rules, Defendants' Motion must be denied

II. COMERICA BANK'S RESPONSE IS PROPER UNDER THE RULES.

**A. DOCUMENTS CAN BE PRODUCED AS THEY ARE KEPT
IN THE USUAL COURSE OF BUSINESS.**

Rule 1.350 is clear. When producing documents, the responding party has two options: (i) produce the documents as they are kept in the usual course of business; or (ii) identify which documents relate to each request. Fla. R. Civ. P. 1.350(b). If the documents requested are produced as they are kept in the usual course of business, it is reversible error to require the responding party to reorganize the documents so as to correspond with the categories created by the requesting party. *See e.g. Evangelos v. H.H. Dachiel*, 553 So. 2d 245, 246 (Fla. 3d DCA 1989) (per curiam) (“Since the records were produced as they were then kept, it was error to order the defendant to reorganize the documents so as to correspond to the categories employed by the plaintiff in his request.”). It makes no difference if the documents produced would require the requesting party to sift through a large volume of documents. *Id.* (“Having requested a large volume of records, the plaintiff should not have been surprised when a large volume was produced.”).

Here, Defendants requested a large volume of documents and that is exactly what they were given — a large volume of documents. Comerica Bank produced all of its documents as they were kept in the usual course of business. Specifically, Comerica Bank submitted a CD containing bates-stamped documents compiled by Comerica Bank’s outside transactional counsel and also made Comerica Bank’s own files available for inspection at undersigned counsel’s office. Prior to filing their motion, Defendants made no effort to inspect Comerica Bank’s actual files, which consists of four boxes. Instead, Defendants only reviewed the electronic files produced by Comerica Bank’s outside counsel. That, apparently, was too much for Defendants to handle. Defendants are now asking this Court to disregard the Florida Rules of

Civil Procedure and force Defendants to reorganize of its files so they correspond with Defendant's arbitrary categories, even though all the documents were produced as they were kept in the usual course of business.

To support their argument, Defendants make two erroneous conclusions: (i) because Comerica Bank opposed consolidating the instant case with Case No. 11-028447 (03), then Comerica Bank cannot produce documents relating to Case No. 11-028447 (03) in response to Defendants' First Request for Production; and (ii) bates-stamped documents cannot be produced in the usual course of business. Both arguments fail.

B. DEFENDANTS' FIRST ARGUMENT IGNORES THE FACT THAT COMERICA BANK PRODUCED DOCUMENTS AS THEY WERE KEPT IN THE USUAL COURSE OF BUSINESS.

While Defendants disagree with how Comerica Bank's outside transactional counsel organizes its documents, that is no basis to order Comerica Bank to reorganize documents that were properly produced. *See Evangelos*, 553 So. 2d at 246. Accordingly, Defendants' first argument fails because whether this case is consolidated with Case No. 11-028447 (03) has no relevance to whether the documents produced were produced as they were kept in the usual course of business.

As background, Comerica Bank is the plaintiff in the instant action (the "Tropic Ranch Action") and in Case No. 11-028447 (03) (the "Ocean 4660 Action"). In both cases, Comerica Bank is seeking to foreclose on a commercial mortgage. Comerica Bank is opposed to consolidating the Tropic Ranch Action with the Ocean 4660 Action for various reasons including, but not limited to: (i) the borrowers are different; (ii) the parties are different; (iii) the Ocean 4660 Action involves issues relating to an International Swaps and Derivatives Association agreement, but the Tropic Ranch Action does not; and (iv) the Tropic Ranch Action

has several life-safety issues that are present, but the Ocean 4660 Action does not. The only common link between the Tropic Ranch Action and the Ocean 4660 Action is that the principal in charge of each corporate mortgagee is an individual named Remo Polselli. That, however, is why the documents kept by Comerica Bank have documents relating to the Tropic Ranch Action interwoven with documents relating to the Ocean 4660 Action. To argue that “[Comerica Bank], a major banking institution, cannot maintain the position that it is their usual business practice to haphazardly comingle files on separate commercial loans” ignores reality and is nothing more than Defendants’ personal grievance that they now have to review the large number of documents they requested. Put simply, correspondence between Comerica Bank and Mr. Polselli would often refer to both loans and both loans were distressed. Thus, when documents relating to either the Tropic Ranch Action or the Ocean 4660 Action are produced as they are kept in the usual course of business, the production will include documents relating to the other action.

C. BATES-STAMPED DOCUMENTS CAN BE PRODUCED IN THE USUAL COURSE OF BUSINESS.

Defendants’ second argument, that bates-stamped documents cannot be produced in the usual course of business, also fails. Specifically, Defendants incorrectly conclude that “since the documents were bates-stamped, [Comerica Bank] has catalogued which documents correspondent to which bates-stamp[.]” That conclusion, however, is unsubstantiated and is nothing more than Defendants’ personal beliefs. The documents produced were bates-stamped so the parties have a clean record as to what was produced, not because they were reviewed to coordinate with Defendants’ made-up categories. To the extent the documents produced were reviewed, they were reviewed to remove all privileged and confidential material — nothing more. Thus, the fact that the documents produced have a bates-stamp do not change the fact that

the documents were produced as they were kept in the usual course of business, which is permissible under Rule 1.350(b).

III. CONCLUSION.

Defendants' Motion fails as a matter of law. Defendants requested a large volume of documents and are now complaining that they have to review a large volume of documents. Just because Defendants disagree with how Comerica Bank organizes its files in the usual course of business is no basis to force Comerica Bank to reorganize its files.

WHEREFORE, Comerica Bank respectfully requests that this Court:

- (i) deny the Motion;
- (ii) grant any and all other relief this Court deems necessary and equitable.

Dated: December 7, 2012

HOLLAND & KNIGHT LLP
Counsel for Comerica Bank
515 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, FL 33301
954-525-1000 (telephone)
954-463-2030 (fax)

By: *Joshua R. Levenson*
Brian K. Hole
Florida Bar No. 0019968
brian.hole@hklaw.com
Joshua R. Levenson
Florida Bar No. 0056208
joshua.levenson@hklaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or email this 7th day of December, 2012 to all parties on the attached Service List.

HOLLAND & KNIGHT LLP

By: *Joshua R. Levenson*
Joshua R. Levenson
Florida Bar No. 0056208

SERVICE LIST

Michael S. Tobin, Esq.
Orlando R. Cicilia, Esq.
Rothman & Tobin, P.A.
11900 Biscayne Boulevard, Suite 740
Miami, FL 33181
Email: mtobin@rothmanandtobin.com; ocicilia@rothmanandtobin.com;
bfortun@rothmanandtobin.com
Counsel for Tropic Ranches, Inc., H.K. Hotel Management, LLC, and Hanna Karcho-Polselli
[Via Email]

Maya A. Moore, Esq.
Joni Armstrong Coffey, Esq.
County Attorney for Broward County
Office of the County Attorney
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, FL 33301
Email: mmoore@broward.org
Counsel for Broward County
[Via Email]

Kenneth A. Frank
2310 East Atlantic Boulevard, Suite 206
Pompano Beach, FL 33062
[Via U.S. Mail]