

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 05-02425 CA 05

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Plaintiff,

v.

ENZO CABRERA, et al.,

Defendants.

PLAINTIFF'S NOTICE OF FILING TRANSCRIPT OF PROCEEDINGS

Plaintiff, Mortgage Electronic Registration Systems, Inc., hereby gives notice of filing the attached September 16, 2005 transcript of the hearing on the Corrected Order to Show Cause.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *Plaintiff's Notice of Filing Transcript of Proceedings* was served via U.S. Mail on September 23, 2005, to each of the parties listed on the attached Service List.

Robert M. Brochin

Robert M. Brochin

SERVICE LIST
MERS v. Enzo Cabrera, et al.
Case No. 05-02425-CA 05

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1 IN THE CIRCUIT COURT OF THE
2 11TH JUDICIAL CIRCUIT, IN AND
3 FOR MIAMI-DADE COUNTY, FLORIDA
4 GENERAL JURISDICTION DIVISION

5 CASE NO. 05-2425 CA 05
6 05-10022 CA 05
7 05-11350 CA 05
8 05-11570 CA 05
9 05-12227 CA 05
10 05-12531 CA 05
11 05-14401 CA 05
12 05-14911 CA 05
13 05-15138 CA 05

14 MORTGAGE ELECTRONIC REGISTRATION
15 SYSTEMS, INC.,

16 Plaintiff,

17 vs.

18 ENZO CABRERA, et al.,

19 Defendants.
20 _____/

COPY

21 Miami-Dade County Courthouse
22 73 West Flagler Street
23 4th Floor
24 Miami, Florida 33130
25 Friday, September 16, 2005
1:30 p.m.

26 The above-entitled cause came on for hearing
27 before the Honorable Jon Gordon, Circuit Court Judge
28 pursuant to Notice.

1 APPEARANCES:

2 MORGAN, LEWIS

3 BY: ROBERT BROCHIN, ESQ.

4 200 South Biscayne Boulevard

5 Suite 5300

6 Miami, Florida 33131

7 on behalf of MERS.

8 AKERMAN, SENTERFITT

9 BY: WILLIAM HELLER, ESQ.

10 350 East Las Olas Boulevard

11 Suite 1600

12 Fort Lauderdale, Florida 33301

13 on behalf of Countrywide.

14 SHARON HORSTKAMP

15 1595 Spring Hill Road

16 Suite 310

17 Vienna, VA 22182

18 ELIZABETH WELLBORN, ESQ

19 BARRY MARCUS, ESQ.

20 DONNA GLICK, ESQ.

21 and DONNA EVERTZ, ESQ.

22 on behalf of U.S. Bank National Associates.

23 CARLOS ENRIQUEZ, ESQ.

24 on behalf of the Estate of Jose Martinez.

25 MARISOL MORALES, ESQ.

on behalf of MERS.

E X H I B I T S

Court	Description	Page
No. 1	Binder	13

1 THE COURT: Thank you. Please be seated.
2 A lot of people here. Why don't I first start
3 off by asking you please to make your
4 appearances.

5 Yes, sir.

6 MR. BROCHIN: Good afternoon, Your Honor.
7 Bobby Brochin, Morgan, Lewis and Bockius on
8 behalf of MERS.

9 THE COURT: Thank you.

10 Is there --

11 MR. BROCHIN: I will introduce Sharon
12 Horstkamp who is general counsel from MERS' who's
13 sitting here.

14 THE COURT: I'm sorry, your name, please,
15 ma'am.

16 MS. HORSTKAMP: Sharon Horstkamp, Your
17 Honor. I'm general counsel with MERS.

18 THE COURT: Okay. Yes, sir.

19 MR. HELLER: Judge, good afternoon. Bill
20 Heller from Akerman, Senterfitt with Countrywide
21 Home Loans in the Spencer Gordon case, 12531.

22 THE COURT: Thank you. Okay. I received
23 your memo yesterday at 4:30. Did you say your
24 name was Housecamp (phonetic)?

25 MS. HORSTKAMP: Horstkamp, Your Honor.

1 THE COURT: Okay. Thank you. Are there any
2 other lawyers here representing any of these
3 other defendants? Did you all want to make your
4 appearances? You're welcome to come up here.

5 Yes, ma'am.

6 MS. GLICK: Good afternoon, Your Honor,
7 Donna Glick on behalf of -- actually we would
8 like to enter a notice of appearance on the
9 Cabrera case on behalf of U.S. Bank National
10 Association as trustee. We'd like to enter an
11 appearance as the assignee of MERS. We would
12 like to file a motion to replead, to --

13 THE COURT: To what?

14 MS. GLICK: To replead, to bring the action
15 in the name of U.S. Bank National Association as
16 trustee. The holder of the note.

17 THE COURT: It's a motion to amend.

18 MS. GLICK: Yes, Your Honor.

19 THE COURT: I'm reserving on motions to
20 amend. You're welcome, if you believe yourself
21 to be a party, to sit at table.

22 Yes, ma'am.

23 MS. MORALES: Good afternoon, Your Honor,
24 Marisol Morales appearing from the law firm of
25 Ben-Ezra & Katz in the case of Mortgage

1 Electronic versus Revoreda, Case Number 05-11570.

2 THE COURT: I'm sorry, who did you say you
3 represented?

4 MS. MORALES: I also represent MERS.

5 THE COURT: Okay.

6 MS. MORALES: I'm from the law firm of
7 Ben-Ezra & Katz.

8 THE COURT: Okay. All right.

9 MS. MORALES: I'm one of the law firms that
10 was ordered to show cause.

11 THE COURT: Yes, ma'am. You're here I guess
12 as co-counsel then with the other counsel.

13 MS. MORALES: Yes, Your Honor.

14 THE COURT: You're welcome, ma'am, if you
15 wish, to sit at the table, whatever your
16 pleasure.

17 MS. MORALES: Thank you.

18 THE COURT: Yes, sir.

19 MR. MARCUS: Good afternoon, Your Honor.
20 I'm Barry Marcus from Marshall Watson.

21 THE COURT: Yes.

22 MR. MARCUS: We actually were noticed for
23 four cases this afternoon.

24 THE COURT: Yes, sir.

25 MR. MARCUS: And just so -- to address the

1 court to make them aware that three of the cases
2 have actually already been dismissed. So I only
3 have one case before Your Honor.

4 THE COURT: I know that some had been. I
5 believe I'm here on consolidated cases 05-2425,
6 05-10022, 05-11350, 05-11570, 05-12531, 05-14401,
7 05-14911, and 05-15138.

8 I know there were some voluntary dismissals.
9 Are any of these that I identified voluntary
10 dismissals?

11 MR. MARCUS: Your Honor, there's a voluntary
12 dismissal issue on 05-11 -- I'm sorry 05-0 --
13 05-10022, 05-11350. I'm sorry, that was the only
14 one that's actually still open. 05-11350 is
15 still open. 05-14401 there's a voluntary
16 dismissal entered. 05-14911 there's also a
17 voluntary dismissal issued. Those four cases are
18 ours.

19 THE COURT: What I then have apparently
20 pending is 05-2425, 05-11570, 05-12531 and
21 05-15138.

22 MS. WELLBORN: Correct.

23 THE COURT: All right. The court does
24 retain jurisdiction pending the disposition of
25 the pending matter. Voluntary dismissals

1 notwithstanding at this point. Those which have
2 been previously dismissed so be it.

3 Hi, Your Honor. You're welcome to --

4 JUDGE GENDEN: I'll sit over here.

5 THE COURT: Okay. Give Judge Genden one of
6 these.

7 Yes.

8 MS. WELLBORN: Good afternoon, Your Honor,
9 I'm here making an appearance in case 05-15138.

10 THE COURT: Yes, ma'am.

11 MS. WELLBORN: And 05-12531 on behalf of the
12 Cheveria and Associates, and the two Mortgagee
13 Electronic Registration in those cases.

14 THE COURT: Whoa, you went too fast, too
15 slow for me. I didn't catch the rest of it.

16 MS. WELLBORN: I'm here on behalf of the
17 Cheveria and Associates in those two cases that I
18 mentioned, Your Honor.

19 THE COURT: I got the 15138.

20 MS. WELLBORN: Okay. And the other one was
21 05-12531 Mortgagee Electronic versus Gordon.

22 THE COURT: Okay. You're welcome, counsel,
23 to sit up here as well.

24 THE COURT REPORTER: I'm sorry, what was
25 your name?

1 MR. WELLBORN: Elizabeth Wellborn.

2 THE COURT: Okay.

3 MR. ENRIQUEZ: Good afternoon, Your Honor.

4 My name is Carlos Enriquez and I'm here on the
5 case counsel just cited, opposing counsel,
6 05-15138. I represent the Estate of Jose
7 Martinez.

8 THE COURT: Counsel, thank you for being
9 here.

10 I have given a great deal of thought to how
11 we all should proceed with this hearing. It has
12 come before the court or the court has brought it
13 before me on the Corrected Order to Show Cause.
14 I did review your memorandum of law. This is the
15 evidentiary hearing. This is the hearing on the
16 Order to Show Cause why these cases and similar
17 cases ought not to be dismissed as a sham and/or
18 as a frivolous pleading. The cases that I
19 selected here on the Order to Show Cause were
20 frankly simple random cases in my division.
21 These were not selected with any particular
22 purpose other than as a happen to come before my
23 desk.

24 Let's start by discussing some of the things
25 that have come to the court's attention. And I

1 made some notes on this and let me just share
2 them with you and then we will proceed hopefully
3 in due course. I made notes on one of the cases
4 or several of them. Case Number 05-15138 which
5 is still pending. That's filed by the
6 Cheveria -- am I pronouncing that correctly?

7 MS. WELLBORN: Yes, sir.

8 THE COURT: I see that this is a case -- is
9 this on? My voice is going.

10 I see that this is a case filed by MERS as a
11 nominee on behalf of Washington Mutual Bank. The
12 lender is GN Mortgage Corporation. In Paragraph
13 4 of the complaint MERS as nominee claims that it
14 is the holder and the owner of the note. The
15 note which is attached obviously does not
16 reflect -- I don't believe there's a note
17 attached to that. There also is attached to the
18 complaint a notice of debt collection. The
19 notice indicates that unless the defendants do
20 something within 30 days they will proceed,
21 although the summons of course is 20 days.

22 In Case Number 05-14401 filed by the Watson
23 firm MERS is nominee for Aurora Loan Services,
24 Inc. is bringing the action. The lender is
25 Finance America, LLC. Count I to reestablish the

1 note alleges that the plaintiff is the owner of
2 the note and the plaintiff was in possession when
3 lost.

4 Count IV alleges -- strike that.

5 Count II, Paragraph 11 alleges that the
6 plaintiff owns and holds the note. MERS is sued
7 as a defendant nominee for Financial America, so
8 they are both the plaintiff and the defendant in
9 the same lawsuit.

10 Case 05-11350 filed by the Watson firm.
11 MERS brings the action as nominee for GMAC Corp.
12 The lender is Impac Funding Corporation d/b/a
13 Impac Lending Corporation. Count I to
14 reestablish the note, Paragraph 3 alleges that
15 the plaintiff is the owner of the note.

16 Count II for foreclosure alleges that the
17 plaintiff owns and holds the note.

18 Count -- Paragraph 20 alleges that MERS as
19 nominee for Impac is sued as the defendant.

20 So again you have the plaintiff suing itself
21 as the defendant.

22 Paragraph 2 of the complaint alleges that
23 the borrower delivered to MERS as nominee for
24 Impac a promissory note. That's all in the
25 complaint.

1 There's an answer filed by the same law firm
2 on behalf of the defendant in which it denies
3 knowledge of the allegations in Paragraph 1.

4 Paragraph 1 MERS answer asserts that it's
5 without knowledge to the allegations filed in the
6 complaint.

7 Paragraph 10 of the complaint alleges that
8 the borrower delivered the note and the mortgage
9 to MERS as nominee for Impac.

10 Paragraph 2 of the answer says it's without
11 knowledge. By the same law firm. Plaintiff and
12 defendant.

13 In Case 05-1227 -- I think I got all the
14 twos in there. 12227 MERS files a lawsuit as
15 nominee for Countrywide Home Loans, the lender is
16 Quick Loans, Inc. MERS as nominee for Quick is
17 joined as a defendant. In that case I never
18 found any service of process.

19 Paragraph 2 the plaintiff alleges as agent
20 of the server it is the present owner and
21 constructive holder of the promissory note and
22 mortgage.

23 Paragraph 20 alleges plaintiff is the
24 agent -- plaintiff as agent became the holder.

25 Case Number 05-12531. This was the one

1 that the court granted the order on rehearing
2 having sua sponte previously dismissed the action
3 believing that it was appropriate as no hearing
4 on the matter and the court thought we were
5 without a -- was appropriate.

6 MERS as nominee for Countrywide Home Loans
7 brings the lawsuit. The lender is Countrywide
8 Home Loans. Attached to the complaint is one of
9 the fair debt notice collection things of 30
10 days. The plaintiff now alleges that it owns and
11 holds the note. The plaintiff is MERS as
12 nominee.

13 Case 05-2425 the Office of David Stern.
14 MERS is the plaintiff in its own right. It's not
15 suing as nominee. The lender is Fremont
16 Investment and Loan.

17 Paragraph 5 says the plaintiff owns and
18 holds the note and mortgage. There's a fair debt
19 collection notice.

20 Paragraph 17 joins MERS as a nominee for
21 Fremont. It answers the complaint and admits
22 that it may have an interest in the property.

23 Case Number 05-14911 filed by the Watson
24 firm. MERS is nominee of GMAC Mortgage. The
25 lender is Popular Mortgage.

1 Paragraph 3. The plaintiff owns -- is the
2 owner of the note.

3 Paragraph 19 joins MERS as a nominee
4 defendant for Popular Mortgage. Both the
5 plaintiff and defendant again.

6 Case number 05-11570. MERS is nominee for
7 Accredited Home Lenders, Inc. The lender is
8 Accredited Home Lenders, Inc.

9 Paragraph 10 alleges MERS may have an
10 interest. There's a notice of fair credit. MERS
11 was defaulted by the clerk in this case. The
12 plaintiff defaulted itself in the case. The
13 original note was filed.

14 There's something terribly wrong here,
15 folks. There's something wrong here. If this
16 doesn't red flag a significant problem nothing
17 does. I notice in your memorandum of law,
18 counsel, that you made reference to your
19 website. The court will take judicial notice of
20 that site and the documents therein contained and
21 in that light the court will ask the clerk to
22 mark that volume there as Court's Exhibit 1 which
23 are copies of the website material.

24 And, counsel, if you like, please, why don't
25 you take a copy for your reference and we will go

1 through some of these documents. Those can
2 remain there unless some other person feels a
3 need to have a copy for the moment. If not, then
4 so be it.

5 So the issue before the court, counsel, as I
6 see it is does the plaintiff have legal standing
7 to foreclose on these mortgages and to
8 reestablish the notes in question, or the
9 allegations that the plaintiff owns and holds the
10 note, that they were entitled to enforce the note
11 when the loss of possession occurred, that they
12 directly or indirectly acquired ownership in the
13 instrument from a person who was entitled to
14 enforce it from the loss of possession and that
15 the loss of possession was not the result of a
16 transfer and that they had a right to enforce the
17 instrument. All these allegations as set forth
18 in each of these complaints. And the question
19 before the court is on the motion -- on the
20 court's motion to dismiss as a sham is has the
21 plaintiff made these allegations knowing them to
22 be false from the plain and received facts in the
23 case.

24 Before, counsel, I invite you to respond, I
25 want to, if I might, direct your attention to the

1 folder that I have provided to you which I have
2 marked as Court's Exhibit -- Composite Exhibit
3 1. If I can invite your attention, please, to
4 Number 16, the last one. On your website there
5 are posted inquiries and responses and these are
6 some of the inquiries and responses that have
7 been made. And then I'm going to ask you,
8 please, for your position.

9 And in fact a number of these responses were
10 made by you Ms. Horstkamp, correct?

11 MS. HORSTKAMP: That's correct, Your Honor,
12 yes.

13 THE COURT: And perhaps you can give the
14 court some insight. Looking first to the inquiry
15 of September 23, 2003 by a Ms. -- I believe it's
16 Ms. Nye. N-Y-E.

17 MR. BROCHIN: Wait a minute, Your Honor,
18 where is that?

19 THE COURT: Okay. Let me give you a moment,
20 please. It's towards --

21 MR. BROCHIN: Is there a page?

22 THE COURT: No, I didn't number it. It's
23 under Tab 16 and it is -- the most recent is on
24 the top and the older is below so if you take a
25 moment to look at the September 23rd inquiry.

1 MR. BROCHIN: 2003?

2 THE COURT: Do you have it? Okay.

3 MR. BROCHIN: 2003?

4 THE COURT: Right. Let's read it. The memo
5 from her says: Can you explain to us how
6 hundreds of millions of dollars of promissory
7 notes in the State of Florida are being lost,
8 stolen or destroyed and how such notes are being
9 accounted for on the books of the various
10 investors such as Fannie Mae, Freddie and various
11 trusts?

12 In light of the recent events, it begs the
13 question if notes, mortgages and other documents
14 (assignments in particular) securing loan
15 indebtedness that are not being recorded or being
16 posted or predated to allow various accounting
17 treatments.

18 Another question we've had posed to us by
19 members of the media is could notes be
20 cross-collateralized as part of different loan
21 pools or are delays in payoffs of such loans
22 being held back to smooth out earnings or
23 prepayments so as not to accept the assumption --
24 affect the assumptions being used to value the
25 MSRs of various owners and members of the

1 organization.

2 How can you explain the plethora of missing
3 notes that representatives of your organization
4 attest in affidavits are being lost, stolen or
5 destroyed. If destroyed, how and why and how can
6 we assure investors in mutual funds, corporations
7 and pension funds who are investing in these MBS
8 products why the perfected collateral securing
9 such investments are being lost, stolen or
10 destroyed?

11 We are at loss here as to why is MERS
12 covered up and allowing such affidavits to be
13 signed under its corporate seal and name.

14 Your response. This response is limited
15 only to the questions asked that deal directly
16 with MERS' role as a mortgage industry. There's
17 always a recorded document (mortgage or
18 assignment) naming MERS as the mortgagee in the
19 applicable county land records. Notes are not
20 recordable documents. Once MERS becomes the
21 recorded mortgagee, if the mortgage lien remains
22 with MERS, there are no assignments to record,
23 but if the mortgage lien leaves MERS, then
24 there's also a recorded assignment from MERS to
25 the new mortgage lien holder.

1 If you're looking for specific loan
2 information on a mortgage for which MERS holds
3 the mortgage lien in the land records, you may
4 call our service information system number I
5 guess (888) 679-6377. The number operates seven
6 days a week, etcetera.

7 Her response to you was. No, Sharon, I want
8 to know why all your lawyers and those of your
9 cohorts are filing false affidavits in Florida
10 courts with all the tight controls of document
11 custody (see Fannie and Freddie guidelines as
12 well as your own foreclosure guide for the
13 state). I want to know why affidavits being
14 signed by servicers in your name claim no one
15 else has beneficial rights to mortgage.

16 Beneficial holders being shielded. Why?

17 Assignee liability perhaps. Postdating or
18 later dating of notes on the books (when are
19 investors taking notes off the books?). How many
20 are claiming the note on the books? We have seen
21 cases where three different parties are claiming
22 ownership of the note.

23 How could three parties all own the same
24 note unless they have some little piece, but they
25 are all claiming the same amount.

1 You may want to study the Florida RICO law.
2 It may prove useful to you in your upcoming
3 depositions and perhaps when you have to explain
4 yourself and your business to government
5 regulators, AGS and USDOJ. I don't know what
6 that is. Much luck. Hey, and will you answer my
7 question on here for all to see?

8 It doesn't appear they gave a response.

9 Another memo of particular interest is the
10 one of September 23rd and it is the one following
11 the one from counsel by the same individual.

12 The question is: Does MERS (not the server,
13 trust, SPV, REMIC, or any holder of pledged
14 securities, pools, notes, mortgages, etcetera)
15 ever have as an organization, not as a nominee
16 for another party, entity, a beneficial interest
17 in the mortgage, promissory note, deed of trust
18 or other document securing the loan on a
19 property?

20 Your response. MERS holds the mortgage lien
21 as mortgagee in an agency capacity for the
22 mortgage lender, its successors and assigns.
23 This occurs either through a recorded mortgage in
24 which the borrower names MERS as the mortgagee or
25 through a recorded assignment. The borrower, by

1 signing the mortgage document, acknowledges that
2 MERS holds a legal interest in their mortgage.

3 Her response. Mortgages are typically used
4 and are foreclosed judicially. MERS local
5 counsel advises that a loan can be foreclosed in
6 the name of MERS. When MERS has been assigned
7 the mortgage, the caption of the complaint should
8 state Mortgage Electronics. However, this
9 changes slightly if MERS is the original
10 mortgagee, et cetera. MERS stands in the same
11 shoes as the servicer. An investor, typically a
12 secondary market investor, will be the ultimate
13 owner of the note.

14 Following down without reading the entire
15 thing. There is much fraud in the mortgage
16 servicing and banking industry as evidenced by
17 recent headlines from predatory lending to
18 Fairbanks and Freddie.

19 Therefore, attention should be paid by all
20 to red flags for fraud which include missing or
21 lost documentation as stated in many industry
22 guidelines but especially in the OTS and OCC
23 guidelines -- guides and audit manuals.

24 You still have not answered my question
25 regarding all the affidavits in the many cases

1 you have filed in Florida claiming to be the only
2 holder of a beneficial interest in a note with no
3 one having a claim and that the aforesaid note
4 was lost, stolen or destroyed which defies all
5 logic and raises huge red flags for the entire
6 industry. Why? Simple questions and should be a
7 simple answer.

8 Finally the memo of September 23. Actually
9 I think that's the one I just read. The other
10 one that caught had my eye was the memo of
11 September 26, 2003.

12 Why does MERS' name appear on so many' lost
13 note affidavits in the State of Florida? Florida
14 is a judicial foreclosure state. Note/Mortgage
15 to be made part of the foreclosure filing. Yet,
16 mysteriously, negotiable paper endorsed in blank
17 being lost, stolen or destroyed. How? Explain.

18 As having investments in the Fannie and
19 Freddie, I want to know where these notes are,
20 especially in light of the stringent document
21 custody procedures put in place. Are you not
22 concerned about the filing of potentially many
23 false affidavits under your name? Examine your
24 own foreclosure manuals for Florida and reconcile
25 the fact that you don't have a beneficial

1 interest in the note, yet so many affidavits
2 claim you do. Why are you hiding the names of
3 the investors? How are these notes being booked
4 and on which entities' balance sheet? Are
5 implicit or implied recourse agreements occurring
6 that are invalidating the true sale nature of the
7 MBS transactions? Why can't borrowers learn from
8 you who has custody of their note and what the
9 chain of assignments to that note were on your
10 system? Answer the questions for all to see.

11 No response.

12 Perhaps the final one is. The one by --
13 dated January 15, 2003. By Madeline Pew. P-E-W.
14 It says as follows: I was recently told that the
15 manner in which our firm was filing foreclosure
16 actions in Florida was problematic in that MERS
17 was claiming to hold the note and be the only
18 beneficial party with an interest in establishing
19 the note, when we all know that servicers,
20 investors and the GSEs hold the interests and the
21 payments eventually go to them.

22 Also, my research of MERS information and
23 procedures shows that MERS never holds any
24 documents including the note and does not have
25 any beneficial interest in the note. Can we all

1 be in violation of any applicable laws or putting
2 ourselves individually or as a company for claims
3 by borrowers claiming that MERS is not the owner
4 or holder in due course for the loan? I am
5 troubled by this. Can you help?

6 Thanks.

7 The answer. Please contact us directly to
8 discuss your concerns.

9 I think that might be it. So in light of
10 the history and the cases that I've recited to
11 you and the concerns here, having taken judicial
12 notice of the matters on the website, counsel,
13 please explain to me whether or not or how it can
14 be that MERS claims that it owns -- excuse me --
15 that it owns and holds the note to prosecute
16 mortgage foreclosure actions and/or for the
17 reestablishment of notes that it owns the note
18 and that they were entitled to enforce them when
19 the note was lost from possession, et cetera.

20 Yes, sir.

21 MR. BROCHIN: Your Honor, you threw a lot
22 out, but I would first suggest that I recognize
23 there are pleadings, many of them that contain
24 inconsistent allegations perhaps --

25 THE COURT: Excuse me one minute.

1 MR. BROCHIN: There are complaints and
2 allegations that contain inconsistent allegations
3 that certainly need to be amended to state
4 straightforward the standing that MERS has.

5 I would start with this. I believe I can
6 demonstrate to this court without doubt and
7 properly allege MERS is the real party in
8 interest who has appropriate standing to bring
9 these foreclosure actions.

10 THE COURT: Counsel, I notice in your
11 memorandum you make reference to a proposed
12 amended complaint. I didn't -- I don't have it.

13 MR. BROCHIN: I have a copy for you. It was
14 filed yesterday.

15 THE COURT: Would you hand it to the clerk
16 and let me take a look at it.

17 MR. BROCHIN: I will. And I would suggest,
18 Your Honor.

19 THE COURT: Give me, please, just a moment.
20 Okay. I have reviewed it.

21 MR. BROCHIN: And I was going to say I would
22 suggest that that amended complaint, A,
23 demonstrates that MERS has standing as the right
24 party, the real party in interest and as the
25 holder of the note who has physical possession of

1 the note to bring a foreclosure action.

2 THE COURT: Let's talk about that. Does
3 MERS assert that it owns any of these notes, has
4 any beneficial interest in any of these notes?

5 MR. BROCHIN: I'm going to take the second
6 half because I do believe that's a two-part
7 question. As to whether it has a beneficial
8 interest.

9 THE COURT: Yes, sir.

10 MR. BROCHIN: Defining beneficial interest
11 as the investor or lender who is ultimately
12 entitled to the proceeds of those notes once they
13 have been collected by MERS and enforced by MERS
14 the answer is no. I would add strongly that the
15 beneficial interest in the notes by anyone, MERS,
16 servicers or any entity coming before the court
17 is totally irrelevant under Florida law as to
18 whether they are the real party in interest to
19 bring the foreclosure action.

20 THE COURT: You mentioned the word servicer.
21 Would you explain to me what you understand a
22 servicer to be under the MERS system.

23 MR. BROCHIN: The notes being negotiable
24 instruments travel through the markets, they go
25 from the original lender perhaps to a secondary

1 market like Fannie Mae and Ginnie Mae and Freddie
2 Mac. They may in turn sell it to third-party
3 investors, mutual funds, title insurance
4 companies and the like.

5 Servicers arose because of the traveling of
6 those notes to service the notes, collect on the
7 notes, enforce the terms of the notes, and
8 basically administer the rights and obligations
9 under the notes on behalf of those various
10 investors as they travel through the market.

11 THE COURT: MERS is not a servicer?

12 MR. BROCHIN: MERS is not a servicer, but in
13 a legal sense MERS stands in a similar position
14 to a servicer in its ability to
15 foreclose because--

16 THE COURT: Who selects the servicer?

17 MR. BROCHIN: The investors and the lenders.

18 THE COURT: Okay.

19 MR. BROCHIN: Those who ultimately I suppose
20 have that beneficial interest in the notes. The
21 ones who are interested in getting their
22 investment in returns.

23 THE COURT: What is it, please, that MERS
24 does? It's all an affront, isn't it?

25 MR. BROCHIN: MERS electronically registers

1 the mortgage in their names. The borrower -- the
2 borrower takes a loan. On that mortgage contract
3 between the borrower and MERS MERS is the named
4 mortgagee. It says right there MERS is the
5 mortgagee. It says MERS is the mortgagee on that
6 contract as the nominee for the lender, its
7 successors and assigns.

8 It also says by the way, which I think is of
9 some importance, that MERS, Mr. Borrower, is the
10 party who will foreclose on your property should
11 there be a default.

12 THE COURT: MERS is not the servicer,
13 correct?

14 MR. BROCHIN: It is not the servicer.

15 THE COURT: A servicer is a separate
16 independent legal entity, correct?

17 MR. BROCHIN: Separate from MERS, correct.

18 THE COURT: Okay. When these lawsuits are
19 brought, they are brought as nominee for an
20 entity. Is that entity the servicer?

21 MR. BROCHIN: It could be and it should.
22 And I should tell you if it is brought as a
23 nominee or authorized agent for the servicer, it
24 should plead that so the court knows and that's
25 what Florida law requires. And if it pleads it,

1 it pleads it because that servicer is the note
2 holder. And the note holder, not the owner --
3 the note holder is the party in Florida who is
4 the real party in interest to foreclosure.

5 THE COURT: So the person who owns the
6 note -- strike that.

7 MR. BROCHIN: Holds it.

8 THE COURT: The person who holds the note,
9 the physical possession of the note is the
10 servicer?

11 MR. BROCHIN: In the amended complaint I
12 handed you MERS holds the note.

13 THE COURT: Okay. You've handed me this. I
14 haven't given leave to file it, but we can
15 certainly discuss it for a moment. Are you
16 asserting that MERS is saying in good faith that
17 it has actual physical possession of the document?

18 MR. BROCHIN: In that case absolutely. Not
19 only of the document. It has physical possession
20 of the note, it is the payee of the note under
21 Florida law because the note is endorsed -- that
22 note is endorsed in blank. Under Florida law if
23 a note is endorsed in blank and transferred to
24 MERS, which it was, and alleged, MERS is the
25 payee because they are the bearer of the note and

1 so not only do they have physical possession,
2 they are the named payee and therefore the holder
3 of the note.

4 THE COURT: Is this the common practice for
5 MERS to have physical possession?

6 MR. BROCHIN: When it comes to
7 foreclosures?

8 THE COURT: Yes, sir.

9 MR. BROCHIN: It is the preferred practice.

10 THE COURT: Take a look, if you would,
11 please, on Tab Number 14. Under the website
12 mortgage foreclosures in Florida it sets forth
13 what the procedure is. Let's read it together.

14 MR. BROCHIN: If you could just tell us
15 where we are at.

16 THE COURT: Okay. Let's -- we'll read it.
17 It says: Foreclosing a loan in the name of
18 Mortgage Electronic Registration Systems, Inc. is
19 something new in the foreclosure arena. However,
20 when the role of MERS is examined, it becomes
21 clear that MERS stands in the same position to
22 foreclose as the servicer. MERS, like the
23 servicer, will be the mortgagee of record.

24 Skipping down. It says: The body of the
25 complaint should be the same as when foreclosing

1 in the name of the servicer. MERS stands in the
2 same shoes as the servicer to the extent that it
3 is not beneficial owner of the promissory note.
4 As an investor, typically a secondary market
5 investor, will be the owner of the note.

6 Then it goes on to say that employees of the
7 servicer will be certifying officers of MERS.
8 This means that they are authorized to sign any
9 necessary documents as an officer of MERS. The
10 certifying officer is granted the power by
11 corporate resolution from MERS. In other words,
12 the same individual that signs the document for
13 the servicer will continue to sign documents, but
14 now as an officer of MERS.

15 If you look there at Footnote Number 1. It
16 says: "Even though the servicer has physical
17 custody of the note, custom in the mortgage
18 industry is that the investor (Fannie Mae,
19 Freddie Mac or Ginnie Mae or the private
20 investor) owns the beneficial rights to the
21 promissory note.

22 Footnote Number 2. If the promissory note
23 is endorsed in blank and the servicer has
24 physical custody of the note, the servicer will
25 technically be the note holder as well as the

1 recorded mortgage holder. By virtue of having
2 the servicer's employees be the certifying
3 officer of MERS, there can be an in-house
4 transfer or possession of the note so that MERS
5 is considered the note holder for the purpose of
6 foreclosing the loan.

7 Counsel, it just really doesn't seem to me
8 that in truth MERS holds anything. It looks like
9 under their own procedure they do not have
10 physical custody of the instrument.

11 MR. BROCHIN: Well, actually what was said
12 there is all accurate in terms of the status.

13 THE COURT: Okay.

14 MR. BROCHIN: Let me just by contrast draw a
15 comparison to another case, Spencer Gordon, which
16 is before you.

17 THE COURT: No, no, talk about this. You
18 represented to me because I'm concerned about the
19 allegations made by this company that they own
20 and hold the note. Maybe they hold it. They
21 don't hold it. Their procedure reflects that
22 they don't hold it. That the servicer holds it,
23 which is a separate legal entity. That a charade
24 of sorts has been instituted to have some
25 resolution instituted that says, okay, well,

1 we're going to pretend like you're our employee
2 so therefore, although you have physical custody,
3 wherever you are, we are going to say we have
4 custody. That doesn't seem honest.

5 MR. BROCHIN: Well, I take exception to
6 the suggestion that it's either dishonest or some
7 sort of charade. MERS as a separate independent
8 company certifies as officers of MERS individuals
9 and you can certainly be --

10 THE COURT: What does that mean?

11 MR. BROCHIN: It means that they say, Mr.
12 Jones, you are an officer, secretary, vice
13 president or the like of MERS. You can certainly
14 in any entity serve as an officer of more than
15 one company. So they are an officer with
16 fiduciary relationships to MERS, with fiduciary
17 relationships to counsel they hire and then they
18 go out and they hire counsel on behalf of MERS.
19 They act and talk and speak and make
20 representations as officers of MERS. Do they at
21 the same time simultaneously perhaps serve as an
22 officer or an agent of a different entity?
23 Perhaps. But that doesn't take away nor does it
24 make it in any way illegitimate the fact that
25 they are at that time an officer of MERS who

1 hires counsel to come to this court to represent
2 MERS and say I got the note.

3 THE COURT: But let me ask you this. Who
4 has discretion, control over the note, the
5 payment and the like? Is it MERS, the server or
6 the holder? Strike that. Or the investor. Who
7 does MERS listen to? Or does it have its own
8 discretion? If they hold it, they can do what
9 they want with it or do they follow directions?

10 MR. BROCHIN: I think ultimately they are
11 the holder, which again I need to underscore is
12 perfectly not only legitimate under Florida law,
13 it is the preferred way. They go out and they
14 collect on these notes, file suits on these
15 notes, enforce these notes and foreclose for
16 these people who have the ultimate beneficial
17 interest in the notes who would ultimately be the
18 ones to give the direction because they are the
19 ones who are going to ultimately receive the
20 proceeds of those notes.

21 THE COURT: So we go back -- one second. We
22 go back again to the question is you're asserting
23 although the separate entity holds the physical
24 paper, because MERS promulgates a resolution
25 making the same individuals -- of course one

1 doesn't know what the organization is or who the
2 records custodian is and these things, but your
3 belief is whoever these people are can be made
4 employees of MERS such that MERS can legitimately
5 allege that it holds the note. And the question
6 is who has the ultimate say-so over the note.
7 Whose direction, if any, does MERS follow?

8 MR. BROCHIN: I would say the person, entity
9 who ultimately is going to -- who owns the note
10 in a beneficial way who is going to -- whose
11 money it is to be collected. They are the ones
12 that the servicers serve and they are the ones
13 that are members of MERS who ultimately they take
14 direction from.

15 THE COURT: Take a look, if you would,
16 please.

17 MR. BROCHIN: And it says so by the way in
18 the agreements that MERS enters into with
19 members. These owners, if you will --

20 THE COURT: I do want to go over that
21 agreement. Take for a moment if you would,
22 please. Take a look at Tab Number 9.

23 MR. BROCHIN: Your Honor, just as a point.
24 All these owners, these people that you say that
25 are out there, they are all members of MERS so

1 these aren't some strangers out there. In fact
2 if they are not members of MERS, then these
3 actions aren't brought. So they are all members
4 of MERS who are part of this organization in
5 terms of being membership and subject to the
6 rules of the agreement.

7 THE COURT: Take a look, if you would,
8 please, at Tab 9 which is the rules of
9 membership. And if you would go please to Page
10 26 -- actually before you reach Page 26, go if
11 you would, please, to Page 10. I am reading
12 under Section 4, Sub B and that's under
13 registration of MERS which says: As long as
14 there are no contrary instructions, when the
15 beneficial ownership of a mortgage loan
16 registered on the MERS system is vested in a
17 non-member MERS and Mortgage Electronic
18 Registration Systems, Inc. shall at all times
19 comply with the instructions of the members shown
20 on the MERS system as the servicer of such
21 mortgage loan with respect to transactions
22 relating to such mortgage loan.

23 Then if I might, please, direct you to Page
24 13, Subsection 6. It says: MERS shall at all
25 times comply with the instructions of the holder

1 of mortgage loan promissory notes.

2 I will read it again. MERS shall at all
3 times comply with the instructions of the holder
4 of mortgage loan promissory notes. In the
5 absence of contrary instructions from the
6 beneficial owner, MERS and Mortgage Electronic
7 Registration Systems, Inc. may rely on
8 instructions from the servicer shown on the MERS
9 system in accordance with these rules and the
10 procedures with respect to transfers of
11 beneficial ownership. The beneficial owner shall
12 give any such instructions to MERS and Mortgage
13 Electronic Registration Systems, Inc. in writing
14 and they may rely, et cetera.

15 It looks like the procedures belie your
16 assertion that you are the holder. It seems like
17 the holder is somebody else. You're looking to
18 someone else who is -- who you say is the holder
19 and owner to tell you what to do. How do you
20 reconcile this with your assertion that you are
21 the holder when your procedure suggests that
22 you're taking directions from the holder?

23 MR. BROCHIN: Because the notes can change
24 status as holders. Initially, for example, the
25 servicer may not be the holder. It's held in

1 custody as the note is performing. The note is
2 transferred -- possession is transferred often
3 when it's time to foreclose on the note. In
4 other words, when you're transferring possession
5 of a note, you can do so for the purposes of
6 maintaining a foreclosure action. So they may
7 not, MERS, hold the note initially, they may not
8 hold the note ever but when it comes to the point
9 of foreclosure, they either will hold the note or
10 they are filing the suit as the authorized agent
11 on behalf of that note holder.

12 THE COURT: When you say they hold the note,
13 are you saying notwithstanding the procedure set
14 forth in your manual that they have physical
15 possession and not some other entity that they
16 give some resolution to? If so, where is the
17 depository or where is that? Where do they
18 collect these documents? Where would one go at
19 MERS to take a look at it. If you were to call
20 MERS and say I really want to see this note.
21 Where would one go to look at it?

22 MR. BROCHIN: MERS, as a matter of course,
23 does not hold the notes. They only become
24 holders of the notes if they need to foreclose.
25 And I may add they are not necessarily the holder

1 of the note even on a foreclosure action because
2 as I'm trying to suggest in Florida particularly,
3 you don't need -- if you're acting on behalf of
4 that holder of the note as his agent, you are the
5 party appropriate to file the foreclosure action.

6 THE COURT: But you don't allege you're
7 acting on behalf of the holder. You allege you
8 hold it.

9 MR. BROCHIN: In that case, correct.

10 THE COURT: In all the cases.

11 MR. BROCHIN: In that case -- no, well.
12 I'll get to that in a minute. In that case MERS
13 holds the note. Its counsel has -- MERS' counsel
14 has the note. Its lawyer -- that's where you
15 would go and quite frankly as the court would say
16 you need to proffer the note to me because I need
17 to see that note and if it alleges, which it did
18 in this case, that it has actual physical
19 possession, it will, as required by law,
20 proffer --

21 THE COURT: Notwithstanding these procedures
22 that say -- that says MERS really doesn't
23 actually hold it, the servicer holds it. You
24 give them a resolution and we tell the court
25 because they're, quote, our employees, I guess we

1 kind of hold it. You're saying notwithstanding
2 this -- you're saying that they really do hold it.

3 MR. BROCHIN: No, I'm saying the servicer
4 often doesn't hold the note. Let's say a note is
5 performing. The servicer doesn't hold the note.

6 THE COURT: Well, who does?

7 MR. BROCHIN: The investor.

8 THE COURT: Oh, okay.

9 MR. BROCHIN: In custody holds the note.

10 THE COURT: Well, who is the investor?

11 Okay. You don't know. Okay. So you say,
12 but MERS itself doesn't have a place, a big safe
13 like the clerk's office, that it holds the notes.
14 It doesn't say, okay, we are going to file
15 foreclosure action in Florida, you know, send all
16 these notes here to Tampa or wherever and we'll
17 hold them here and -- or send them to a central
18 location. That's not done, is it?

19 MR. BROCHIN: No, MERS doesn't have a
20 central depository where it holds notes for the
21 pending foreclosure actions. What MERS does
22 do --

23 THE COURT: Yes, sir.

24 MR. BROCHIN: The servicer has those notes,
25 holds those notes, and either that officer of

1 MERS then either authorizes MERS to go ahead,
2 file suit and either will transfer physical
3 possession, which it did in the case before you,
4 or the servicer then may hold the note and
5 authorize MERS to go ahead and foreclose on its
6 behalf.

7 THE COURT: Go back, if you would, please,
8 to my earlier question. The assertion that MERS
9 owns the note. You talked about owning and you
10 talked about holding. MERS does not own any of
11 these notes, does it?

12 MR. BROCHIN: I thought about that question
13 for many weeks.

14 THE COURT: It's been in your system since
15 2002.

16 MR. BROCHIN: It's been in my head for about
17 30 days so let me give you the answer I think is
18 appropriate in the context here. And I don't
19 mean to sound evasive but I do think it's the
20 right answer. It really depends when you say or
21 anyone says what we mean by own the note. And I
22 have researched this and quite frankly find it a
23 vague term and so I answer it this way. If you
24 mean owns the note that it has some beneficial
25 interest ultimately to the proceeds, I tell you

1 MERS does not own the note.

2 But ownership can mean something different.
3 There's equitable ownership and there's legal
4 ownership. And as I read the cases, I think it
5 is very fair to say that what ownership means is
6 that I have that note or I am acting on behalf of
7 somebody who has that note for the purpose of
8 enforcing it and the purpose of foreclosing and
9 the purpose of collecting on it and therefore I
10 am legitimately the right party vis-a-vis these
11 debtors to show up and knock on your door and
12 demand payment because I, MERS, own that note
13 appropriately in the sense of owning and holding.

14 THE COURT: Let me ask you the question
15 unless I interrupted you.

16 MR. BROCHIN: I was just going to add that--

17 THE COURT: Counsel, would you feel more
18 comfortable being seated? I know you have been
19 up there a long time.

20 MR. BROCHIN: No, I am fine, but I would
21 add -- and I appreciate that. I would add that
22 when you then read the cases since before the
23 turn of the century and particularly Florida
24 Statutes, my explanation makes sense because what
25 those cases and what those statutes say is that

1 when you foreclose ownership is not relevant.

2 You can foreclose, you can collect and you can
3 sue on those notes even though you don't own it.

4 THE COURT: Okay. Stop. What is the
5 difference between what you're saying your
6 interpretation of ownership is and someone who
7 holds the note? Or are you saying there is no
8 difference?

9 MR. BROCHIN: Well, no, I make a distinction
10 between the term -- again, depends what you mean
11 by owner. Owner of the note.

12 THE COURT: Yes, sir.

13 MR. BROCHIN: I've got cases here to suggest
14 it's at length, but particularly the Florida
15 Statute. The holder of the note is someone who
16 has possession of the note.

17 THE COURT: And can enforce it.

18 MR. BROCHIN: And therefore can enforce it.

19 THE COURT: Okay. Are you saying that if
20 one is holder who has possession and has the
21 legal right to enforce it that they are
22 necessarily the owner?

23 MR. BROCHIN: That's the part I can't -- to
24 be honest I don't know. I don't think they are
25 necessarily the owner.

1 THE COURT: I don't think so either.

2 MR. BROCHIN: But if you describe owner as
3 beneficial interest, no, they're not necessarily
4 the owner and they're not the owner. They are
5 only the party or the entity with the right
6 legally.

7 THE COURT: They hold it.

8 MR. BROCHIN: No, they hold it.

9 THE COURT: They hold it.

10 MR. BROCHIN: And that's what makes them
11 under Florida law entitled to enforce it because
12 they hold it regardless if they own it,
13 regardless if they're entitled to the beneficial
14 interest of it.

15 THE COURT: Before we go into that, take a
16 look if you would, please, on Tab 8 which is the
17 terms and conditions of the agreement that's been
18 mentioned here. I see on Paragraph 2 of the
19 second sentence it says, MERS shall serve as
20 mortgagee of record with respect to all such
21 mortgage loans solely as a nominee, in an
22 administrative capacity, for the beneficial owner
23 or owners thereof from time to time. MERS shall
24 have no rights whatsoever to any payments made on
25 account of such mortgage loans, to any servicing

1 rights related to such mortgage loans, or any --
2 or to any mortgaged properties securing such
3 mortgage loans. MERS agrees not to assert any
4 rights with respect to such mortgage loans or
5 mortgaged properties.

6 Skipping down to Paragraph 3. MERS shall at
7 all times comply with the instructions of the
8 holder of mortgage loan promissory notes. In the
9 absence of contrary instructions from the note
10 holder, MERS shall comply with instructions from
11 the servicer shown on the MERS system in
12 accordance with rules and procedures of MERS.

13 Paragraph 6. MERS and its members agree,
14 one, MERS system is not a vehicle for creating or
15 transferring beneficial interests in mortgage
16 loans. Number 2, transfers of servicing
17 interests reflected on the MERS system are
18 subject to the consent of the beneficial owner of
19 the mortgage loans. So --

20 MR. BROCHIN: If you're talking again and
21 asking me beneficial interest.

22 THE COURT: Okay.

23 MR. BROCHIN: Beneficial owner which the law
24 recognizes various types of ownership. I, again,
25 represent MERS is not the -- has -- does not have

1 the beneficial interest in the notes.

2 THE COURT: Do you believe Florida law
3 permits a person to institute a mortgage
4 foreclosure action without alleging that they own
5 and hold the note?

6 MR. BROCHIN: I do. I do.

7 THE COURT: Have you checked the form?

8 MR. BROCHIN: I have. And I know --

9 THE COURT: Can you explain then why the
10 Supreme Court would oblige you to allege that you
11 both own it and hold it and you're saying I only
12 have to allege I hold it?

13 MR. BROCHIN: First of all the reason I
14 believe that it is because I have read at least
15 ten cases that tell you you don't need to own the
16 note to initiate a foreclosure action, including
17 cases from the Florida Supreme Court,
18 including --

19 THE COURT: Do you have any of those cases
20 here?

21 MR. BROCHIN: Absolutely. In fact what I
22 have prepared for the court is -- this is Judge
23 Logan's order who dealt with beneficial interests.

24 THE COURT: Yes, I have Judge Logan's order.

25 MR. BROCHIN: And I did want to speak to the

1 court about that but attached to that --

2 THE COURT: Yes, sir.

3 MR. BROCHIN: Is all the cases that suggest
4 ownership or beneficial interest ownership is not
5 necessary to a case.

6 THE COURT: Counsel, you're welcome to give
7 that to the clerk, but why don't we talk some law
8 for a second.

9 MR. BROCHIN: Okay.

10 THE COURT: First of all Florida form 1.946,
11 Paragraph -- strike that. That's the wrong one.
12 1.944, Paragraph 3. Plaintiff owns and holds the
13 note.

14 MR. BROCHIN: That's the form. There's no
15 question of form. Now --

16 THE COURT: One second, please.

17 The case of Edason, E-D-A-S-O-N, versus
18 Central Farmers Trust. A bill to foreclose a
19 mortgage should show that it is brought in the
20 name of the owner of the debt secured by the
21 mortgage.

22 There are any number of cases that support
23 the proposition. Next case. Your Construction
24 Center, Inc. versus Gross found at 316 So2d 596,
25 Fourth District. When the plaintiff files his

1 complaint, he must necessarily allege that he is
2 the owner and holder of the mortgage note. On
3 and on and on.

4 MR. BROCHIN: Well, not on and on. Look --

5 THE COURT: Give me the cases that say you
6 don't have to allege it.

7 MR. BROCHIN: I will. Okay. Troupe versus
8 Redner.

9 THE COURT: Pass it up. Give me the cite.

10 MR. BROCHIN: 652 So2d 394, Second District,
11 1995. To foreclose upon a -- I'm quoting. To
12 foreclose upon a promissory note the plaintiff
13 must be the holder in order to be the real party
14 in interest.

15 THE COURT: Okay.

16 MR. BROCHIN: The holder is the person who
17 is in possession of the note endorsed in blank.

18 THE COURT: If you will show me the case,
19 please. I'll look at it. I didn't hear it say
20 you don't have to allege you're the owner. It
21 just says you've got to allege you're the holder
22 by all means. Let me take a look at it.

23 MR. BROCHIN: I've got more.

24 THE COURT: Give me a moment.

25 MR. BROCHIN: I will be glad to.

1 THE COURT: Yes, sir. Judge Genden, did you
2 have a question?

3 JUDGE GENDEN: Yes, I did have one
4 question.

5 THE COURT: Counsel, if you would permit
6 me, please, while I look at your case Judge
7 Genden had a question that he wanted to ask you
8 and as a dear colleague I welcome his inquiry. I
9 hope you do too. So, Your Honor, if you wish to
10 inquire, please do.

11 JUDGE GENDEN: How is it -- because you
12 clearly don't possess the note, as you just said,
13 until you're ready to file the foreclosure. How
14 can you file a count for reestablishment of a
15 lost note which requires you to allege that at
16 the time that it was destroyed or lost it was in
17 your possession when it clearly was never in your
18 possession? How can you have a count for
19 reestablishment of lost note, which a lot of
20 these cases have, for which you're required to
21 say that at the time that the note was lost or
22 destroyed it was in your possession -- your
23 possession -- MERS -- and you're required to have
24 a lost note affidavit signed by somebody that
25 says that when you just stated to Judge Gordon

1 that at the time that you get ready to file these
2 lawsuits you get the note? Where is the note?
3 It was never in your possession at the time it
4 was lost because you could never have brought the
5 lawsuit under your statement because you would
6 not have had it in your possession. Where is it
7 at the time it is lost in all of these myriad
8 hundreds of cases which allege that it's in your
9 possession at the time it was lost or destroyed?

10 And, secondly, if it wasn't in your
11 possession, how can any of us grant you relief in
12 addition to all these other arguments on a
13 foreclosure action?

14 MR. BROCHIN: Just so I make sure I stated
15 it accurately. I do want to be clear. I did not
16 say in all the foreclosure actions MERS
17 necessarily has physical possession of the notes.
18 I did say there are times, as the case that I
19 just discussed, where MERS does have physical
20 possession. There are also times when MERS files
21 actions to foreclose when it does not hold or
22 have possession of the note but does so on behalf
23 of the entity, usually the servicer, who actually
24 holds.

25 JUDGE GENDEN: Whoa.

1 MR. BROCHIN: I just want to make sure I
2 didn't represent --

3 JUDGE GENDEN: You still haven't answered my
4 question. How can you ever state that at the
5 time the note was lost or destroyed it was in
6 your possession when it was never in your
7 possession because we just established there is
8 no depository by which all these notes are being
9 held? How do you do that? I'm curious.

10 MR. BROCHIN: Well, for all those cases I
11 don't know factually each one and how --

12 JUDGE GENDEN: Well, trust me. A lot of
13 these cases -- any one of these lawyers here can
14 tell you 50 percent, 75 percent. What if it's 30
15 percent? There's a count for reestablishment of
16 a lost note which the Florida law requires by
17 statute to allege and prove that it was in your
18 possession at the time it was lost or destroyed.
19 Now explain to me how you can say in a complaint
20 and in a lost note affidavit that at the time the
21 note was lost or destroyed it was in your
22 possession.

23 MR. BROCHIN: I do accept your proffer that
24 many of them do say that.

25 JUDGE GENDEN: Well, I'm sure they will all

1 admit to that. They're sitting here.

2 MR. BROCHIN: Maybe ask them how they allege
3 it, but --

4 JUDGE GENDEN: Oh, I'm asking you. You're
5 the one that's arguing on behalf of MERS.

6 MR. BROCHIN: I am, Judge. And I'm going to
7 try to --

8 JUDGE GENDEN: And it's a legitimate
9 question.

10 MR. BROCHIN: It is and I am going to try to
11 respond. I'm not sure that those pleadings are
12 accurate. I'm not confident that there aren't
13 inconsistencies contained in those pleadings. I
14 don't know. I do know that those pleadings get
15 amended through the course of the foreclosure
16 when those lost notes are recovered and thus
17 subsequently proffered to the court. I do know
18 judges demand that those notes be produced and
19 they in fact are produced. I know Florida law
20 allows you to plead by the way two counts
21 inconsistent with the others.

22 JUDGE GENDEN: Let me make sure that I made
23 myself clear to you. I'm not talking about an
24 inconsistent position. I'm talking about the
25 classic case that all of us have, minimum twice a

1 week, ten times a morning, twice a week in which
2 almost 50 percent or more are the reestablishment
3 of a lost note because the notes are lost.

4 Nobody is coming back to us, take my word for it,
5 weeks later saying, Judge, by the way we found
6 the note. Those cases are -- they're defaulted,
7 they're summary judgments, judgments are entered,
8 sales are instituted, new buyers take the
9 property and that's the end of it.

10 I'm asking two questions. How can these
11 lawyers allege that at the time the note was lost
12 or destroyed it was in the possession of MERS
13 when it's not true? And if it's not true, how
14 can we even consider going forward with a
15 foreclosure? Because you then clearly do not
16 have standing because you have violated the
17 Florida law by filing a false affidavit that says
18 I'm the one who was in possession of this note at
19 the time it was lost or stolen.

20 MR. BROCHIN: Judge, I don't know if that's
21 a problem in foreclosure pleadings that's
22 particular to MERS. My understanding is lost
23 note affidavits and lost note counts are
24 routinely filed by mortgagees and note holders,
25 but that doesn't answer your question.

1 JUDGE GENDEN: No, it doesn't. A lot of
2 lawyers appear in front of me and they know, I
3 say to them, where is your lost note affidavit
4 because, you know, you just can't file a claim
5 for reestablishment of a lost instrument without
6 following the Florida statute and if you're
7 filing an affidavit that says it was in my
8 possession, me, MERS, the only plaintiff, at the
9 time it was lost or stolen and it's not true, why
10 isn't that a fraud on the court and why doesn't
11 that stop the whole process right in its tracks?

12 MR. BROCHIN: Well, I know the statute on
13 lost notes has been recently amended actually
14 where the predecessor or the one who held it
15 previously could have lost it and you can now
16 establish a lost note. No one should file a
17 false affidavit saying they have possession of a
18 note when in fact they don't have possession of
19 the note.

20 JUDGE GENDEN: Okay.

21 MR. BROCHIN: I mean I don't have a better
22 answer for you other than that.

23 JUDGE GENDEN: Let me ask this last
24 question. You're the MERS lawyer here today.
25 Take my word for it that those counts are filed