

1 all the time. I have cases in front of me right
2 now I have to go back and finish, the lawyers are
3 all sitting here, where there's a lost note
4 affidavit. Here's my question to you. Did they
5 ever possess the note so that they can in good
6 faith and honestly sign an affidavit that said at
7 the time the note was lost or stolen it was in
8 our possession?

9 MR. BROCHIN: Your Honor --

10 JUDGE GENDEN: You're the MERS lawyer.

11 MR. BROCHIN: The only answer I can give you
12 today in honesty is I don't know.

13 JUDGE GENDEN: Okay.

14 MR. BROCHIN: I mean for me to say yes --

15 JUDGE GENDEN: Well, that's an honest
16 answer.

17 MR. BROCHIN: I don't know.

18 JUDGE GENDEN: And I appreciate it.

19 MR. BROCHIN: I mean I don't know what case
20 we are on and I don't know. I will do this. I
21 will be glad to try to determine that to some
22 issue. I do believe that if nothing else the
23 routine filing of lost note claims should be
24 modified. I mean it does seem to be a little bit
25 beyond the pale of control.

1 THE COURT: Millions of dollars is indicated
2 in the prior memo that I read that -- the memo
3 from the lawyer to you all saying how can you
4 have this -- all these notes being lost. I mean
5 in most all the cases there's a lost note there
6 and it seems quite natural because you don't have
7 it. So you want to get your foreclosure so the
8 best you can do is have it reestablished but one
9 of the conditions to reestablishing is that the
10 loss of possession was not the result of a
11 transfer by the person or unlawful keeping but
12 the loss of possession was the result of a
13 transfer because it's transferred among a lot of
14 people, isn't it?

15 MR. BROCHIN: Yes, it is transferred, notes
16 get lost in those transfers but, you know, the
17 statute provides the requirements for proffering
18 and proving lost notes. Lawyers and MERS and
19 everyone else who files it obviously should be
20 held to the constraints of that statute. No one
21 should file false affidavits representing that
22 they have notes. But that doesn't mean that MERS
23 doesn't have the right standing to do it. What
24 it does mean is MERS needs to be more diligent in
25 its pleadings, it needs to be more careful in how

1 it pleads its cases not only in lost note
2 affidavits, standing and holder. But it doesn't
3 mean it's not the proper party and it doesn't
4 mean that this is some charade and it certainly
5 doesn't mean that it is coming here in some sort
6 of fraudulent way.

7 THE COURT: Let me thank his honor and I
8 know we have been doing this. If you need to
9 take a break or something. You okay?

10 MR. BROCHIN: I'm fine, thank you for you
11 consideration.

12 THE COURT: If I might, please, I was
13 wanting to cover that issue with the lost note,
14 but I believe my colleague Judge Genden addressed
15 it better. My question to you is you're going
16 back and we were discussing how you can prosecute
17 these mortgage foreclosure actions in the absence
18 of alleging that you're the owner because I
19 noticed in your proposed amended complaint it
20 does not allege that you're the owner.

21 MR. BROCHIN: Yes, that is accurate.

22 THE COURT: Why did you eliminate that as a
23 necessary allegation when heretofore in thousands
24 and thousands of cases you have alleged you were
25 the owner?

1 MR. BROCHIN: Because it's my view that and
2 I believe MERS' view that you may not need to
3 allege to be an owner of the note for purposes of
4 maintaining a foreclosure action. And I have
5 those cases. And, second --

6 THE COURT: By the way I did read the one
7 that you cited to me. And frankly it doesn't
8 quite say you don't need to be the owner. It
9 simply interprets the code as to what a holder is.

10 MR. BROCHIN: And it says to foreclose you
11 need to be the holder. It doesn't say to
12 foreclose you need to be the owner and the
13 holder. And there are more. I mean there are
14 more.

15 THE COURT: Okay.

16 MR. BROCHIN: But your question is why do we
17 amend it. And I said because I don't think you
18 need to be the owner because if you're telling me
19 owner is I have a beneficial interest in the
20 note, I don't. If you're saying owner means I
21 came into the note legitimately and I have it and
22 hold it and have possession of it or do so on
23 behalf of the agent we have pled that but we
24 haven't used the magic word that amounts to
25 ownership.

1 THE COURT: See -- I'm sorry.

2 MR. BROCHIN: And I was trying in that case
3 to be precise and accurate in terms of what facts
4 are appropriate and I do believe that that claim
5 as alleged most definitely states a cause of
6 action of foreclosure.

7 THE COURT: What troubles me is prior to
8 Judge Logan's ruling and prior to this court
9 issuing its order to show cause it had been
10 common practice to allege that MERS was the
11 owner. Only after Judge Logan ruled and this
12 hearing comes to pass does your website frankly
13 reveal the new proposed complaint which
14 eliminates the issue that we most seriously had
15 trouble with. If you do not believe that you are
16 the owner or need to allege it, how about the
17 thousands and thousands of cases that you filed
18 prior to this time claiming you were the owner to
19 comply with the statutory -- strike that -- to
20 comply with the common law. And now since you're
21 being called to task as to whether or not you
22 really are the owner, your position is, well, we
23 really don't have to allege it. What are we to
24 do with that? What are we to do with all the
25 foreclosures that have occurred in the past when

1 you may not indeed have been the owner or the
2 holder. People have been foreclosed, they have
3 been dispossessed, they have been moved out of
4 their homes, persons have purchased houses, what
5 their title is to these houses at these sales I
6 do not know but if they were foreclosed based
7 upon false accusations, false affidavits and now
8 you're saying, well, we really don't have to
9 allege it anyway. If you didn't feel you had to
10 allege it, and you presented it to me in this
11 fashion, we could legitimately rule upon it and
12 you would not be misrepresenting the facts. You
13 say, well, either you do or you don't and if the
14 appellate court says you don't have to, then God
15 bless you but to allege facts that you know MERS
16 is not true and then to say when you're called to
17 task, okay, we won't allege it again, that
18 troubles me.

19 Did you want to respond?

20 MR. BROCHIN: I do. First of all I don't
21 think people are being put out of their homes,
22 being foreclosed upon inappropriately. They have
23 all defaulted on their loans. Debtors aren't
24 coming forward and saying, you're the wrong
25 party, and that, you know, I paid my debt and I'm

1 current on this and I have been treated
2 inappropriately. These people have failed to
3 make payment. At the time they entered into the
4 mortgage contract they knew MERS would be the
5 party coming to foreclose on them. So I think
6 it's a little bit of an overreach to suggest that
7 we are -- MERS has somehow inappropriately thrown
8 people out of their houses.

9 The pleading issue I think is a little bit
10 different in the sense that --

11 THE COURT: Let me just say this.

12 MR. BROCHIN: And I don't think that --

13 THE COURT: Counsel. I don't mean to
14 interrupt you but I do believe in most instances
15 that notes are normally in default. I don't
16 believe that to be otherwise. Now, I don't know
17 the frustration these people have when they try
18 to contact MERS to find out the name of the
19 servicer to see what the payoff figure is and
20 whether in frustration it just goes down the
21 tubes, but I think it's incumbent on all of us
22 who are in this profession to do it in good
23 conscience and if the law says you've got to own
24 it and you've got to hold it, then that's what
25 you got to do. To say, well, they are not hurt

1 anyway, what the hell, it doesn't really do it.

2 MR. BROCHIN: I didn't mean to suggest that
3 we shouldn't plead properly. I did not. What I
4 meant to suggest is that I don't think that
5 pleading practice has brought some terrible
6 injustice upon homeowners inappropriately
7 throwing them out of their homes and the like.

8 But the pleading issue which is the one you
9 have addressed.

10 THE COURT: Yes, sir, go ahead.

11 MR. BROCHIN: And asked me about. First of
12 all make no mistake. If you allege you own and
13 hold the note, you can foreclose too, and when
14 they allege MERS and other parties who are
15 foreclosing servicers, for example. Servicers
16 who file claims in their name, who come before
17 you, maybe not as much as MERS.

18 THE COURT: You know what if they do they
19 are not identified as servicers. They're
20 represented to be the lenders.

21 MR. BROCHIN: And I'm telling you there are
22 servicers filing cases in their names alleging
23 they own and hold the note. I am not -- I don't
24 think MERS does it, I don't think the servicers
25 do it in some sort of inappropriate manner or

1 some sort of fraudulent claim because of the
2 meaning of the word own. And I really think
3 that's a fair distinction to draw now and at the
4 time that these complaints were filed. I really
5 think that to suggest -- they're not saying when
6 they plead we own the note that we are entitled
7 to the beneficial interest and I don't think they
8 meant it and I don't think that --

9 THE COURT: They're not entitled to it nor
10 can they direct who gets the money nor can they
11 control when it's foreclosed. I'm not certain
12 what interest, if any, they have. They can't do
13 anything with it.

14 MR. BROCHIN: Who?

15 THE COURT: MERS.

16 MR. BROCHIN: MERS holds the note. They can
17 foreclose.

18 THE COURT: Yeah, but they do it at the
19 direction -- I mean they don't act on their own,
20 do they?

21 MR. BROCHIN: No, they act at the direction.

22 THE COURT: Of who?

23 MR. BROCHIN: Florida law --

24 THE COURT: One second. Whose direction do
25 they act on behalf of? Your rules say they act

1 on behalf of the owner or the holder.

2 MR. BROCHIN: Yes, but they act on behalf of
3 investor.

4 THE COURT: The owner --

5 MR. BROCHIN: The note owner.

6 THE COURT: And the holder.

7 MR. BROCHIN: It depends. It may have been
8 the note holder but you can transfer the note and
9 possession of the note. That's a negotiable
10 instrument.

11 THE COURT: Are you believing that the UCC
12 addresses ownership?

13 MR. BROCHIN: No. In fact that's the
14 problem. The UCC doesn't speak in terms of
15 ownership. Article 3 of the UCC doesn't really
16 talk about owning anything. It talks about
17 negotiable instrument.

18 THE COURT: It says specifically nothing in
19 the UCC applies to ownership, correct?

20 MR. BROCHIN: What it does, which is where I
21 think MERS is on its best footing, is the UCC
22 says I can enforce the note even if I don't own
23 it. So when you asked me do I have to allege I'm
24 the owner of the note, I say the UCC says I can
25 enforce that note even though I'm not the owner

1 and if you want me to read that statute, I will
2 be glad to.

3 THE COURT: One second. If you look in the
4 back of the Rules of Civil Procedure you will see
5 a form pursued on the note. I read the note --
6 the provision for suit on a mortgage foreclosure.
7 If I'm correct, I think the form says you have to
8 own and hold the note. Correct?

9 MR. BROCHIN: It does, but --

10 THE COURT: Okay. So --

11 MR. BROCHIN: I'm sorry.

12 THE COURT: If the form says, and we've got
13 to believe the Supreme Court knows what it wants
14 us to allege, that you have to own it and hold
15 it, how are you eliminating that one essential
16 element of ownership by simply saying, well, I
17 guess the UCC supersedes it and the forms are
18 antiquated, and the case law is antiquated and I
19 guess you really don't have to own it to sue on
20 it. All you have to do is say I'm the holder.

21 MR. BROCHIN: 673.3011 of the Florida
22 Statutes says the holder of the note can enforce
23 the note even though it is not the owner. That's
24 what it says.

25 THE COURT: Okay. That may be but Florida

1 mortgage foreclosure law obliges the owner to
2 foreclose.

3 MR. BROCHIN: Well, I agree that the form
4 complaints says that but as we know that's not
5 the exclusive allegations that can be made to
6 state a cause of action. Those are forms that if
7 you make those allegations, you state a cause of
8 action. I don't think the reverse can be said
9 that if you don't make the allegations in the
10 form, you do not state a cause of action.

11 THE COURT: Let me just say this. Aside
12 from the form there are just a host of cases that
13 say you need to allege ownership. It seems quite
14 clear to the court that's not really an open
15 issue but looking at the UCC if you might for a
16 moment, under the official comments under the
17 3-110 I see that the comment says, the provisions
18 merely determine who can deal with an instrument
19 as a holder, it does not determine ownership of
20 the instrument or its proceeds.

21 And then under Section 3-203 official notes
22 says, although transfer of an instrument might
23 mean in a particular case entitlement to the
24 instrument passes to the transferee, that result
25 does not follow in all cases. The right to

1 enforce an instrument and ownership of the
2 instrument are two different concepts. If a
3 purchaser is not a holder in due course, the
4 owner -- just strike that. It says ownership
5 rights and instruments may be determined by
6 principals of the law of property independent of
7 Article 3 which do not need to depend upon
8 whether the instrument was transferred under
9 Section 3-203. Moreover, a person who has
10 ownership right in an instrument might not be the
11 person entitled to enforce the instrument. Such
12 as I guess if one gives the instrument up as a
13 pledge to collateral, they own it, someone else
14 holds it, they can't bring the mortgage
15 foreclosure action. And I guess the holder can't
16 either because he's got the collateral. No?

17 MR. BROCHIN: Well --

18 THE COURT: Am I wrong?

19 MR. BROCHIN: You asked for cases, here's
20 Florida Supreme Court 1894. The law is now well
21 settled back in 1895 to admit a longer
22 controversy that an action on a note endorsed in
23 blank may be maintained in the name of the
24 nominal holder who is not the owner, and that
25 possession by such nominal holder is prima facie

1 evidence of his right to sue and cannot be
2 rebutted by proof that he has no beneficial
3 interest.

4 THE COURT: Okay.

5 MR. BROCHIN: The Florida Supreme Court in
6 1895, and I got more if you would like.
7 Subsequent has said that you don't have to be the
8 owner of the note. And maybe, Your Honor, what
9 we can do is -- maybe I can understand when
10 you're saying or suggesting that you have to
11 allege owner, what does it mean? Just the term
12 owner? Just allege it that you're the owner?

13 THE COURT: Well I hope in good faith you
14 plead what you are and I think that's the problem
15 in the past that the attorneys have been prepared
16 to plead anything so long as they get their
17 judgment. And it's more than simply saying that,
18 hey, if that's all you need for me to plead. If
19 you're not the owner, don't plead it. If you are
20 the owner, do. I believe Florida law obliges you
21 to plead that you're the owner and the holder in
22 order to prosecute the mortgage foreclosure
23 action. And certainly to reestablish the lost
24 instrument as Judge Genden mentioned.

25 MR. BROCHIN: Now can I ask if it

1 requires -- Florida law requires you to plead
2 that you're the owner, what proof of ownership is
3 necessary to show to obtain the action? I mean
4 what does it mean when you plead and have to, of
5 course, prove you're the owner? I think that's
6 really the heart of this.

7 THE COURT: I mean I can venture some with
8 you without doing research. I would imagine that
9 you have the right to control it, the right to
10 receive payments, the right to modify it or do
11 whatever you want with it. It's your right. You
12 can do what you want with it. You can forgive
13 it, you can do all these things with it. Those
14 are -- to me seem like some of the incidents of
15 ownership. I suspect case law must talk more to
16 it, but, you know, it's like the bundle of straw
17 or sticks as we learned in law school. How many
18 do you have to have? It seems to me if you own
19 something, you can do with it as you wish. You
20 know, if you don't own it, you better not do it.

21 I did look at your memorandum of law and I
22 had noted and if you like I would be happy to
23 touch base with you on that. Let me see what
24 else I have here. Oddly enough I did find one
25 case where there was a mortgage foreclosure

1 brought on behalf of the nominee but the note
2 identified him as a payee. And in this case MERS
3 is not bringing it on behalf of the payee. It's
4 bringing it on behalf of the servicer which is
5 not the payee.

6 MR. BROCHIN: It's endorsed. They are the
7 payee. If it's endorsed in blank, they are the
8 payee. Pay to the bearer.

9 THE COURT: Who's the payee? If it's
10 endorsed in blank --

11 MR. BROCHIN: The holder is the payee.

12 THE COURT: The holder is the payee. 'Who's
13 the holder? The servicer. But MERS' is bringing
14 it on behalf of the servicers.

15 MR. BROCHIN: And the Florida law --

16 THE COURT: Correct?

17 MR. BROCHIN: Third District. Durant,
18 Fourth District. But more specifically Florida
19 Rules of Civil Procedure 1.210 specifically says
20 MERS can do that. It can bring it on behalf of
21 the party who is the real party in interest.

22 THE COURT: Well, you know what, let's look
23 at your memo for a second, if I might.

24 Before we do that, let me just go back to
25 the procedures under the --

1 MR. BROCHIN: You know --

2 THE COURT: MERS recommended procedures.

3 MR. BROCHIN: I thought of one practical
4 thought.

5 THE COURT: What is that, please.

6 MR. BROCHIN: If I'm understanding you right
7 is what would be saying in converse is that
8 owners would be the necessary party to a
9 foreclosure action.

10 THE COURT: You know what, counsel, I don't
11 know why that's a surprise to you. I mean the
12 memo was brought up to her, your co-counsel two
13 years ago. The lawsuits are always filed making
14 that allegation. And you're looking at me now
15 like, gee whiz, do we really have to allege that?
16 What do you think they have been doing?

17 MR. BROCHIN: No, I'm just saying that in
18 the marketplace there are a lot of beneficial --
19 people with beneficial interest in these notes
20 that are owners and it would be --

21 THE COURT: It's just as Judge Logan said.
22 You know what maybe it's a matter that the
23 Florida Legislature has to deal with and maybe
24 they need to specifically authorize mortgage
25 foreclosures for people who do business like

1 MERS, but in the absence of that we have to
2 follow traditional rules of law. They say owner,
3 they say holder. You're not the owner. It
4 doesn't sound like you're the holder. The
5 allegations are made and now they are not made.

6 MR. BROCHIN: With all due respect the
7 Florida Legislature has dealt with it. It has
8 said --

9 THE COURT: The UCC?

10 MR. BROCHIN: UCC. It's Florida Statute
11 673.3011 specifically says you can enforce the
12 note even though you're not --

13 THE COURT: Does it say you can foreclose?

14 MR. BROCHIN: No, but McCallon versus Diggs
15 does, Traunch says that you have to be the
16 holder. That's what the UCC says. That's why
17 the UCC says that and all the cases say that you
18 don't need to be the beneficial owner of that
19 note to maintain --

20 THE COURT: Your belief is at this point in
21 time lawsuits that are filed here in Florida will
22 not be alleging that MERS is the owner if they
23 follow this form complaint that's on the
24 Internet.

25 MR. BROCHIN: I believe that if they file

1 that complaint which we filed --

2 THE COURT: Yes.

3 MR. BROCHIN: -- in the Revoredo case that
4 that definitely states a cause of action for
5 foreclosure and that MERS is a real party in
6 interest to bring this foreclosure action.
7 Undoubtedly I believe that.

8 THE COURT: You know what it would be okay
9 if a lawyer felt that that was the law, that
10 should be the law, wanting to test it. At least
11 the attorney would not be filing allegations that
12 they knew to be untrue, that they knew to be
13 unsupported such as they are the owner, you know,
14 they're really not the beneficial. We really
15 don't own it. I don't really know what ownership
16 means but if I don't know what it means, we
17 really don't have to allege it, it's okay to
18 challenge the law up-front but to allege things
19 that you know to be untrue and then when you're
20 called short on it say, okay, I don't need to do
21 it.

22 But let's take a look at your memo for a
23 second because I know it's getting late in the
24 day for us both. I'm looking on page -- I guess
25 I'm looking on the introduction page. I see you

1 have in there holder MERS has an absolute
2 statutory right to enforce. Again, we go to
3 holder meaning the person in active possession.
4 I'm understanding the servicer in most instances
5 was the one -- is the one who has physical
6 possession of the document.

7 MR. BROCHIN: Right, and --

8 THE COURT: And the MERS system is an
9 electronic system. It's not geared to holding
10 paper documents.

11 MR. BROCHIN: That's correct. It's geared
12 toward registering mortgages and tracking the
13 loans through its registration system and that's
14 the purpose and I do want to be clear about the
15 memorandum in the sense that, so there's no
16 misunderstanding, I have stated that it's --
17 there are two scenarios where I feel it's
18 appropriate. Either they are the holder with
19 actual physical possession or they are bringing
20 that suit on behalf of that note holder who has
21 authority to --

22 THE COURT: But your procedures themselves
23 say that you are not the holder.

24 MR. BROCHIN: As a matter of course we're
25 not. I mean we do not hold the notes as a matter

1 of course. Now if we are going to foreclose and
2 the servicer transfers possession of that note to
3 MERS endorsed in blank and says, MERS, here's the
4 note.

5 THE COURT: So you're saying --

6 MR. BROCHIN: Go into Judge Gordon's court,
7 MERS, enforce the note, you're the named
8 mortgagee of record, you're the one who entered
9 into the contract with the borrower, the borrower
10 is expecting MERS to show up and foreclose,
11 here's the note. I'm transferring it to you
12 physically endorsed in blank, you got the note,
13 you got the mortgage, go and foreclose.

14 Yes, I think they are the proper party and
15 have every good right to foreclose. That's what
16 I'm saying.

17 Alternatively what I'm saying is that if
18 that same note holder, the servicer, says to
19 MERS, I've got the note here, I'm not going to
20 give it to you, I'm going to hold it right over
21 here as the servicer. You go in on my behalf.
22 I'm authorizing you, in fact I'm asking you
23 pursuant to our rules and procedures to go in and
24 foreclose, you're the mortgagee.

25 I'm saying under our permissive pleading

1 rules of Rule 1.210 and the cases particularly in
2 the Third District as a nominal contracting party
3 MERS -- I can -- MERS can go in on behalf of
4 servicers like Countrywide and say we are
5 authorized. I do believe they need to plead that
6 though. I think they need to plead that
7 relationship to say I am authorized on behalf.

8 In fact the Third District case you cited
9 in --

10 THE COURT: MERS is not a servicer, correct?

11 MR. BROCHIN: It is not.

12 THE COURT: Okay. You allege -- you assert
13 in your memo on Page 5 an important function of
14 the servicer is its ability to foreclose on
15 behalf of the note owner but you're not the
16 servicer.

17 MR. BROCHIN: Well, that could be an
18 important function of the servicer.

19 THE COURT: Well, it can be. I mean you
20 just said it is. You're not the servicer.

21 MR. BROCHIN: I know but all I'm suggesting
22 is the servicer -- they're not the exclusive
23 party that can foreclose. A servicer's function
24 may be to foreclose. By the way the servicer
25 doesn't own the note either and they're

1 foreclosing.

2 THE COURT: Well, I think that's a real
3 problem. I agree with you.

4 MR. BROCHIN: Well --

5 THE COURT: Why don't we look back at the
6 guidelines for filing foreclosure suits in
7 Florida.

8 There's another issue. In so many of these
9 cases there's no attachment. Even if there's an
10 allegation of assignment that the note has ever
11 been assigned to MERS, there's no allegation
12 tracking the ownership of the note from whoever
13 is on the mortgage and the original note to how
14 this MERS as nominee for presumably itself or
15 servicer ever acquires rights to the note.
16 There's no allegation in there and I guess maybe
17 that falls in with your belief that since you
18 don't need to prove ownership you don't have to
19 show the strain and type.

20 MR. BROCHIN: I think that on the note --
21 ultimately I think this is what really this all
22 comes down to is I either have to produce the
23 note or I have to cause the person MERS is suing
24 on behalf of to come in and produce the note. So
25 I really -- I don't know if that answered your

1 question, but I think that the --

2 THE COURT: I know it's a matter that you
3 discussed with Judge Logan and reading his order
4 he was concerned that the action was brought in
5 the name of one person; however, the note
6 attached to the complaint reflected a different
7 payee with no allegation as to how the present
8 plaintiff acquired a right -- strike -- ownership
9 to receive payment on a note which the exhibits
10 reflect belong to someone else and I believe it
11 was your rely to him that you didn't believe it
12 was necessary, practical or possible.

13 MR. BROCHIN: Well, I think you can -- first
14 of all the note can be attached and if the note
15 is attached like it is in --

16 THE COURT: It's not going to show you, is
17 it?

18 MR. BROCHIN: No. What it shows -- I'll use
19 the example of the pleading before you. It shows
20 the original lender Accredited Home Lenders that
21 the note was made out to them and there's an
22 endorsement on that note in blank without
23 recourse.

24 THE COURT: Okay.

25 MR. BROCHIN: And to the point then the

1 complaint tracks that if you want to call it
2 title, 'I don't think that's appropriate, but
3 track that history saying the note was executed,
4 delivered to Accredited. Accredited in turn
5 endorsed the note in blank, meaning it's payable
6 to MERS, here it is and here's a copy and filed.
7 And there are other complaints MERS has filed
8 including before Judge Logan which likewise
9 tracks that history of endorsement of the note.
10 That is -- in fact we proposed one in a case
11 before him called Fitch which has now been paid
12 off but that one, for example, showed -- it
13 wasn't the title of the note but the endorsement
14 history that it was endorsed by the original
15 lender over to -- in that case specially endorsed
16 over to another --

17 THE COURT: I guess we're getting back to
18 the issue of your belief that a holder is
19 sufficient to prosecute a mortgage foreclosure
20 action absent ownership, notwithstanding
21 ownership and therefore if you track the -- where
22 the document goes eventually if it ultimately
23 ends up with you whether you're the owner or not
24 it's okay.

25 MR. BROCHIN: Yes, I do believe --

1 absolutely do and I think Florida law is
2 well-established on this that you do not have to
3 be the beneficial owner or have beneficial
4 interest in the proceeds of that note in order to
5 allege --

6 THE COURT: No, I guess sometimes if it's
7 given up as collateral for a loan maybe. But let
8 me ask you something. Look on Page 14 of your
9 memo, please. Again, counsel, if you're getting
10 tired and you want to be seated, by all means do
11 so.

12 MR. BROCHIN: Thank you for the concern.

13 THE COURT: You make a quote there. You
14 cite this case of what is it Jones versus Central
15 Hanover Bank and Trust.

16 MR. BROCHIN: Yes.

17 THE COURT: You say one who holds a full
18 legal title to a note may bring an action
19 notwithstanding that he has no beneficial
20 ownership.

21 MR. BROCHIN: Yes.

22 THE COURT: Counsel, I'm afraid you must
23 have miscited that. What was left out of that
24 quote was it says title to a note by assignment.

25 MR. BROCHIN: Well, but if it's endorsed in

1 blank.

2 THE COURT: Counsel, you left out by
3 assignment though.

4 MR. BROCHIN: Here. I will read the whole
5 thing.

6 THE COURT: Read the whole thing.

7 MR. BROCHIN: In a suit brought by an
8 endorsee of a negotiable instrument against the
9 maker thereof it is enough that the plaintiff's
10 title appears to be good as against the defendant
11 maker. One who holds full legal title, the
12 promissory note by assignment.

13 THE COURT: Stop. By assignment is not in
14 your brief.

15 MR. BROCHIN: Well, I know but if you have
16 it endorsed in blank, that is --

17 THE COURT: Well, no, but weren't you citing
18 that particular sentence of the opinion? I'm
19 just saying you left out by assignment.

20 MR. BROCHIN: It certainly was not
21 intentional. I mean the assignment or endorsed
22 in blank means you are the holder of the note.
23 You take full rights to enforce the note. I
24 didn't mean to leave it out to -- in any
25 intentional way. I assure the court that.

1 THE COURT: Okay.

2 MR. BROCHIN: But if I could finish that
3 because that case I actually think supports what
4 I'm saying. It says one who holds may maintain
5 the action thereon against the maker
6 notwithstanding he has no beneficial interest in
7 the proceeds. The title or interest of the
8 holder -- holder of commercial paper cannot be
9 disputed or inquired into unless necessary for
10 purposes of the legitimate defense nor unless a
11 meritorious defense is presented. Meaning that
12 you as the holder can maintain an action against
13 the maker notwithstanding that you as the holder
14 have no beneficial interest in the proceeds. And
15 that's why I hark back to what I was initially
16 suggesting and that is if we are defining owner
17 as one who has a beneficial interest in the
18 proceeds this case and many others say -- and by
19 the way just so you know.

20 THE COURT: Yes, sir.

21 MR. BROCHIN: We looked at all the states
22 and I cited in the footnote this proposition that
23 you don't have to have a beneficial interest in
24 the proceeds of the note to maintain a
25 foreclosure action and as the court can perhaps

1 observe, it's fairly universal wherever the UCC
2 has been adopted.

3 THE COURT: I understand what you're
4 saying. I'm going to give some other people here
5 a chance to respond. I can only summarize,
6 number one is I would like to see the transcript
7 of the proceedings. I will reserve ruling until
8 I have the opportunity to read the transcript.
9 Number two, what concerns me of course is whether
10 or not the allegation of ownership and holding
11 the note were known by MERS at the time they made
12 the allegations to be untrue and unsupported and
13 clearly not supported by conceded facts. That is
14 the standard I believe on the sham thing.

15 MR. BROCHIN: Maybe I could make a
16 suggestion if it would be helpful to the court.

17 THE COURT: Yes.

18 MR. BROCHIN: MERS could submit a memorandum
19 on that issue.

20 THE COURT: Counsel, that's what we have
21 been doing all day.

22 MR. BROCHIN: Okay. I thought maybe if you
23 want me to address it, you know, in a very
24 precise way with cases and I have not
25 sufficiently presented it. I think I have but --

1 THE COURT: Counsel, I'm not going to tax
2 you anymore on that. I think that you've had a
3 grueling day, you've had difficult issues to
4 address from the court and Judge Genden. I think
5 you've done well for yourself and I understand
6 your point. It truly concerns me, however, that
7 thousands and thousands -- thousands and
8 thousands of mortgage foreclosure actions have
9 been filed with these allegations. I am not
10 certain what remedy, if any, these people would
11 have were it to be determined that MERS was not
12 ever the proper party notwithstanding that these
13 folks might have been in default what their
14 recourse, if any, would be. I'm not certain with
15 the satisfaction of mortgages that have been
16 filed on behalf of MERS how good those are and I
17 am not certain how good title to property is that
18 people bought at these foreclosure sales if it
19 turns or becomes established that MERS was indeed
20 not only not the right party but misrepresented
21 by way of their pleadings and affidavits that
22 they held something they didn't own, so I'm not
23 certain of the consequences but it seems vast.
24 So I can invite you -- I don't want to cut you
25 off but I'm going to go around here and ask any

1 of the other interested parties if they have
2 anything further they want to add. And if not,
3 it's been a long day.

4 MR. BROCHIN: Can I just make one last
5 thought?

6 THE COURT: Yes, sir.

7 MR. BROCHIN: Whatever the court ruling is I
8 would ask, particularly if there will be an
9 appeal --

10 THE COURT: Well, I would suspect there will
11 be.

12 MR. BROCHIN: -- that you allow in those
13 cases for orders to show cause, where
14 appropriate, MERS the right to amend its
15 pleadings so the issue is properly framed for the
16 Third District.

17 THE COURT: Amended in what way, counsel?

18 MR. BROCHIN: Amend in a way that corrects
19 some of the perhaps inconsistencies you raised.
20 Indeed one of the points for order to show cause
21 made is that the allegations in the complaint are
22 inconsistent with the exhibits.

23 THE COURT: Indeed.

24 MR. BROCHIN: And I believe if that is the
25 case that Florida law should allow us to amend.

1 THE COURT: In what way? What would --
2 would you at this stage get an assignment from
3 the servicer or the investor and then move to
4 amend and attach the subsequently attained
5 assignment?

6 MR. BROCHIN: I would amend similar to what
7 we've already done in the Revoredo case which we
8 filed -- we had to do as a matter of right, no
9 responsive pleading was filed and that's why it
10 was done in that case. It would amend consistent
11 with that pleading or consistent with the
12 pleadings that suggest that MERS holds the note
13 as the authorized agent or nominee for the actual
14 holder of the note. And in essence I would amend
15 the complaints to be consistent with the attached
16 exhibits. I would have MERS amend the complaint
17 to make it clear what its position is so that the
18 perceived inconsistencies or problems that you
19 have raised are -- at least we can attempt to
20 cure them. And I think we should be afforded
21 that right.

22 THE COURT: A couple of things on that.
23 Number one is there's nothing that I've raised
24 here today that Judge Logan didn't raise a month
25 ago. So there's nothing new that I'm putting on

1 the table that his honor didn't address already.
2 Two is if MERS is not a proper party plaintiff,
3 did not have a sufficient interest in the lawsuit
4 to bring the lawsuit, I don't believe it's proper
5 to permit an amendment to allow them to allege a
6 subsequently acquired right. If they didn't have
7 the right in the first instance, they can't amend
8 to substitute a later acquired right. They
9 cannot amend to bring in another party who truly
10 owned the action at the time the lawsuit was
11 filed. I don't believe the rules dealing with
12 substitution permit a party who ought not to have
13 brought the lawsuit to amend to bring in a party
14 who does have the right. The rules as I
15 understand them deal with the party who has a
16 legitimate lawsuit can amend the claim. A person
17 who later acquires the right of a legitimate
18 party can be substituted, but a plaintiff who
19 never had a right cannot substitute in the proper
20 party nor can they buttress their position by a
21 later acquired right.

22 MR. BROCHIN: But to be clear, and I want to
23 be for the record, I'm not asking leave to amend
24 to bring a new party in. I'm not asking for
25 leave to amend to allege subsequently acquired

1 rights. I'm asking leave to amend to take issue
2 and cure perhaps some of the pleadings we've
3 talked about in this hearing, pleading
4 deficiencies of inconsistent allegations, perhaps
5 incorrect allegations, allegations --

6 THE COURT: To eliminate the allegation of
7 ownership?

8 MR. BROCHIN: Well, in part but you have
9 raised other issues in the pleading deficiencies.

10 THE COURT: That's one of the things that
11 you wanted to do.

12 MR. BROCHIN: Yes. Yes. And I think that
13 as a pleading matter that would be perfectly
14 appropriate. I'm not suggesting under the
15 substitution of party rule and we are not asking
16 for us to come in and amend by adding some other
17 party. It would be MERS and it would be a
18 foreclosure action. It would just address the
19 pleading deficiencies and I quite frankly did
20 take strong issue with Judge Logan's refusal to
21 allow MERS the opportunity to amend and I believe
22 at a minimum -- you know, the ruling is what the
23 ruling is and the appellate court can make a
24 decision but we should have the opportunity to
25 amend the complaint.

1 THE COURT: Well, I'm in the parameters I
2 discussed before that if you were never the
3 proper party, you certainly do not have the right
4 to amend. If you were the proper party, then,
5 you know, that would be a different thing, but
6 frankly if --

7 MR. BROCHIN: Just to make the point. The
8 pleadings say we are the owner and the holder of
9 the note.

10 THE COURT: I know that.

11 MR. BROCHIN: The issue we want to get I
12 guess decided by the appellate court --

13 THE COURT: Yes, sir.

14 MR. BROCHIN: -- is is that allegation
15 necessary. Now, the Revoredo case --

16 THE COURT: Counsel, you know what that
17 might have been the issue if the lawsuit was
18 initially filed that way and a court dismissed it
19 because it failed to state a cause of action.
20 What's before me now are the many, many thousands
21 of lawsuits -- I don't have them all -- in which
22 it was alleged by MERS that they owned and held
23 the note, that they held the note at the time and
24 had a right to enforce it. And the question is
25 based upon the argument, the presentation, the

1 conceded facts and the exhibit whether MERS knew
2 that indeed they never did own it, they never did
3 hold it and they didn't have a right to enforce
4 it in which case that would be a sham, a fraud on
5 the court for which this court would not be
6 inclined to do anything so far as permitting an
7 amendment.

8 So let me go around the room quickly to see
9 if anyone has anything else to say.

10 Let me compliment you on a long, difficult
11 presentation. Thank you.

12 Lawyer, anything?

13 MR. MARCUS: No, Your Honor.

14 THE COURT: Stand up. Anything?

15 MR. MARCUS: No, Your Honor.

16 MS. GLICK: Your Honor, on the Cabrera case
17 2425.

18 THE COURT: Yes, ma'am.

19 MS. GLICK: The Cabrera case 2425. The
20 original note was in the possession and as we
21 have alleged; however, we would like -- we are
22 trying to figure out.

23 THE COURT: You're moving on behalf of MERS,
24 right?

25 MS. GLICK: Well, we are moving at this

1 point on behalf of U.S. Bank National Association
2 the assignee at this point.

3 THE COURT: Who are they? Where are they at?

4 MS. GLICK: I have the assignment of the
5 mortgage.

6 THE COURT: Did the assignment occur when?

7 MS. GLICK: Recently.

8 THE COURT: Recently. Well, I can't grant
9 an amendment on a post -- on an assignment which
10 occurred after the lawsuit has been filed. Can't
11 do that. You've got to have the right to bring
12 it in at the time the lawsuit is filed.

13 MS. GLICK: Well, at the time the lawsuit
14 was filed the mortgage was in the name of MERS.

15 THE COURT: Who assigned it to you?

16 MS. GLICK: MERS who was the original
17 mortgagee at the time the lawsuit was filed.

18 THE COURT: Yes, ma'am.

19 MS. GLICK: So --

20 THE COURT: Who owned the note?

21 MS. GLICK: Who owned the note? At the time
22 the lawsuit was filed was Fremont.

23 THE COURT: Fremont. Who assigned the note
24 to you?

25 MS. GLICK: Fremont.

1 THE COURT: When did they assign the note to
2 you?

3 MS. GLICK: It was endorsed over recently.

4 THE COURT: When?

5 MS. GLICK: At the time of the assignment.

6 THE COURT: Well, when was that?

7 MS. GLICK: The assignment got sent off --

8 THE COURT: Within the last month?

9 MS. GLICK: Excuse me, Your Honor?

10 THE COURT: Within the last month?

11 MS. GLICK: Yes, Your Honor.

12 THE COURT: Okay. Well, I guess the
13 question is how can Fremont assign to you a note
14 that --

15 MS. GLICK: They endorsed the note, Your
16 Honor.

17 THE COURT: I thought you said they assigned
18 it.

19 MS. GLICK: No, the mortgage got assigned
20 from MERS who held the mortgage.

21 THE COURT: Okay. And Fremont endorsed the
22 note over to you. But when the lawsuit was
23 filed --

24 MS. EVERTZ: The note was endorsed in blank.

25 MS. GLICK: The note was endorsed in blank.

1 MS. EVERTZ: But it was held.

2 MS. GLICK: And it was presented to us at
3 the time.

4 THE COURT: Okay.

5 MS. GLICK: So under those circumstances we
6 had the original note, we did not have a count
7 two.

8 THE COURT: You say you had the original
9 note. Who is you?

10 MS. EVERTZ: Our client.

11 THE COURT: Who is that?

12 MS. GLICK: Our client had it. It was
13 presented to us.

14 MS. EVERTZ: The complaint was filed on
15 February 2nd and the actual note was presented to
16 our law office on February 15th.

17 THE COURT: From who?

18 MS. EVERTZ: From our client.

19 THE COURT: Well, who's your client?

20 MS. EVERTZ: Well, at that point it was MERS
21 and they -- it was MERS and they have a
22 relationship as -- and their member bank is U.S.
23 Bank National Association.

24 THE COURT: Okay.

25 MS. EVERTZ: Subsequently just to

1 get because everyone wants -- I'm sorry.

2 Everyone wants this to get acted upon. We have
3 basically an absentee mortgagor and --

4 THE COURT: What's the motion?

5 MS. GLICK: We have a notice of appearance
6 on behalf of the assignee, we have a motion to
7 replead, to --

8 THE COURT: Motion to amend?

9 MS. GLICK: Motion to replead and to amend
10 the complaint to bring in the name of the
11 assignee now which is U.S. Bank National
12 Association. We have the original documents. I
13 have the assignment, I have the endorsement. We
14 want to be able to proceed. We want to be able
15 to get to the end result.

16 THE COURT: Okay. Let me just reserve on
17 it. Thank you, ma'am.

18 Anyone else? Yes, sir.

19 MR. HELLER: Thank you, Judge. May I use
20 the lectern?

21 THE COURT: Yes, sir.

22 MR. HELLER: Judge, again, I'm Bill Heller
23 from Akerman, Senterfitt. I represent
24 Countrywide Homeowners.

25 THE COURT: Yes, sir.

1 MR. HELLER: A wealth of things to say and
2 I don't expect the opportunity to but I do want
3 to start with this. If the court makes a
4 determination that there are erroneous or
5 fraudulent pleadings or affidavits.

6 THE COURT: Yes, sir.

7 MR. HELLER: It is an entirely separate
8 issue from whether or not MERS or -- in its own
9 capacity or MERS as nominee as a representative
10 of a holder of a negotiable instrument can
11 achieve the procedural and substantive
12 requirements for standing before this court.
13 They are separate issues.

14 Now before I forget Your Honor asked a
15 question to Mr. Brochin that I thought required
16 some follow-up. Recourse. Your Honor asked what
17 recourse would a borrower have if somehow subject
18 to something mistaken, fraudulent, whatever.

19 The fact is, Judge, that a borrower who is
20 judicially foreclosed through our process will as
21 it is frequently -- always happens before Your
22 Honor. There is besides this initial pleading,
23 perhaps a lost note, there are affidavits to
24 establish default, the debt. This is proved by
25 sworn testimony. No question -- there's no issue

1 before the court that that component of these
2 cases is erroneous or fraudulent. These are
3 borrowers --

4 THE COURT: I don't know what you're saying.

5 MR. HELLER: What I'm saying is --

6 THE COURT: These affidavits. I don't know
7 who in the world is filing these affidavits,
8 whether or not they have any personal knowledge
9 of anything quite frankly at this point.

10 MR. HELLER: What I'm doing is I'm
11 responding to Your Honor's question about
12 recourse.

13 THE COURT: Yes, sir.

14 MR. HELLER: And I'm pointing out that these
15 borrowers are borrowers who have defaulted, who
16 have broken their promise to repay debts, who
17 signed contracts with MERS accepting that MERS
18 could come into court in its own name and
19 foreclose as nominee.

20 THE COURT: Yes, sir.

21 MR. HELLER: For the court to open up that
22 contract frankly would be a violation of the
23 Florida Constitution Article 1, Section 10. It
24 is an impairment of the contract. It certainly
25 isn't prejudicial to the borrowers who knew it

1 when they received their mortgage loans, agreed
2 to repay those loans, failed to repay those
3 loans, and were judicially foreclosed.

4 And what is the consequence that it
5 shouldn't have been MERS before the court but it
6 should have been Countrywide or it should have
7 Chase Manhattan so we're going to open up these
8 foreclosures because of that technicality when
9 the parties before the court have agreements --

10 THE COURT: Yes.

11 MR. HELLER: -- that establish their places.
12 Really, Judge, the question right there about who
13 was technically the right party is why we have
14 the UCC. We have the UCC because it sets forth
15 what you need to enforce a negotiable instrument.
16 What do you need to have to enforce a note? If
17 I'm going to choose between an optional Florida
18 Supreme Court forum or enactment of the Florida
19 Legislature, I'm going to go with the
20 Legislature, Judge.

21 THE COURT: If you have a problem with the
22 court.

23 MR. HELLER: The Florida Legislature has
24 said --

25 THE COURT: I kind of listen to the Supreme

1 Court rather than the legislature myself, but I
2 tell you what the problem is and it's really
3 insufferable. If that's the right word. What is
4 the word I'm looking for?

5 The problem is I fear -- I fear that the
6 practice of law in this mortgage business has
7 become a volume business powered by paralegals
8 rubber-stamped by attorneys and passed through
9 the court system without true regard for the
10 litigants and the facts, the honest facts. And
11 we in the bar -- I say we. The bar has gotten so
12 sloppy in filing these things. I told you
13 they're suing each other. They sue -- MERS sues
14 them as a defendant. One files the complaint,
15 the same law firm files an answer. It's
16 atrocious. It's trash pleadings. And the
17 practice of law lawyers cannot have fallen to
18 this low level that we can say, well, you know
19 what, you know, the right -- you know, the --
20 what is it? When the right thing happens. The
21 means justifies the end or the end justifies the
22 means which if these people hold it, you know
23 what, we don't really have a professional
24 responsibility to the court to allege what we
25 know. What would have happened if three years

1 ago a lawyer would have said, you know what, you
2 all don't own this and you really don't hold it
3 and I'm not filing the pleading on it, and I
4 don't care what sort of volume business you give
5 me, I'm not doing it. You know what, maybe --
6 maybe the legislature would have addressed it
7 three years ago, but I truly take issue with the
8 bar who are filing these matters knowing that
9 it's really not true. But you know what it goes
10 down without default, go in on a motion calendar,
11 you get the judgment, get our \$1200 and you know
12 what it's such a volume business. I believe that
13 paralegals are doing this. I think young lawyers
14 or lawyers are just signing them because they are
15 overwhelmed with volume. And frankly they come
16 to the courts in volume too. And there's
17 something wrong here that if the lawyers are
18 officers of the court they are not going to
19 present matters to us which they know to be
20 factually wrong. It violates their oath, it
21 violates the canons and that's how I feel about
22 it.

23 MR. HELLER: Judge, I didn't ask to appear
24 this afternoon to spar with the court about
25 professionalism --

1 THE COURT: I told that to Judge Deno
2 (phonetic) one time. I said, Judge, I don't mean
3 to argue with you. He says I haven't argued with
4 a lawyer since I took the bench.

5 MR. HELLER: Professionalism is a separate
6 point from legal standard.

7 THE COURT: What do you think is happening
8 to these mortgage foreclosure things? I mean
9 really. I mean isn't it just atrocious? I mean
10 when you saw the history of these cases, don't
11 you have to say, my, God?

12 MR. HELLER: On what issues?

13 THE COURT: What?

14 MR. HELLER: On which of the issues?

15 THE COURT: How about suing each other and
16 filing the same complaint and filing the answer.
17 Let's start there.

18 MR. HELLER: Let's talk about that for a
19 couple of minutes. Again I am not going --
20 without a specific case in front of me I can't
21 talk about the exact language, but I'll tell
22 you -- I can answer the question as to why that
23 might happen. A lender makes a first mortgage
24 and second mortgage, there's a default on the
25 first mortgage, lender forecloses the first

1 mortgage. It has choices to make. Is it going
2 to foreclose out and eliminate the second
3 mortgage? Is it going to -- or is it going to
4 attempt to recover some equity in the property?
5 In order to recover equity in the property it has
6 to request surplus funds. And so to do that
7 based on our process, our procedure which causes
8 the problem, you make yourself the -- the
9 subordinate loan becomes a --

10 THE COURT: You know what I guess if it
11 wasn't brought in this sort of unorthodox
12 procedure, nominee of this or server and this and
13 that, you would have a straight-out lawsuit and
14 you wouldn't be suing yourself. It doesn't fit
15 comfortably within the body of law that we all
16 know and try to apply. It may be a good business
17 decision but until somebody creates a legal
18 framework that permits us to handle it
19 comfortably, it throws up red flags.

20 MR. HELLER: Fair point. And the issue
21 about a lender suing on its -- a holder suing on
22 a subordinate loan to recover surplus funds has
23 nothing to do with standing but I answered only
24 because I have struggled with that issue. How --
25 do I eliminate the second mortgage altogether or

1 do I attempt to recover surplus funds through the
2 process that's available. The question --

3 THE COURT: Maybe if you told whoever the
4 true owner of the note was that you're the only
5 one who can bring the mortgage foreclosure
6 action, you wouldn't have a problem suing
7 yourself.

8 MR. HELLER: And that's really what the
9 issue is and that's -- Your Honor, I have
10 appeared in the Spencer Gordon case.

11 THE COURT: Which case?

12 MR. HELLER: The Spencer Gordon, Case Number
13 12531. 05-12531.

14 THE COURT: Okay.

15 MR. HELLER: It is the case in which Your
16 Honor dismissed sua sponte and then --

17 THE COURT: Reinstated.

18 MR. HELLER: There was a rehearing
19 permitted for today.

20 THE COURT: Correct. Okay. I thought you
21 were on that? Am I mistaken? On the rehearing.

22 MR. BROCHIN: Yes, well, we're -- I'm
23 counsel for MERS.

24 THE COURT: You're all working together?

25 MR. BROCHIN: He represents --

1 THE COURT: Okay. I felt after the fact it
2 was an error to do it sua sponte.

3 MR. BROCHIN: We brought the action on
4 behalf of the real party in interest being
5 Countrywide. MERS did.

6 THE COURT: Okay. Yes, sir.

7 MR. HELLER: The order Your Honor entered
8 rejected the concept of a nominal representation.
9 The order that -- and it really hasn't been
10 discussed as much today. More of the discussion
11 has been devoted to MERS in its own capacity
12 being a plaintiff. Many of the cases including
13 the Spencer Gordon case that I'm before the court
14 on --

15 THE COURT: Yes, sir.

16 MR. HELLER: -- are cases where MERS sues as
17 nominee for the real party in interest which in
18 the case which I am here before the court on is
19 Countrywide. Countrywide holds the note endorsed
20 in blank. It was also the lender. Here's the
21 note. Perhaps we should put it into evidence so
22 that it's part of the record because it does
23 establish Countrywide as the real party in
24 interest.

25 THE COURT: Who is the lawsuit brought by?

1 MR. HELLER: The lawsuit is brought by MERS
2 as nominee for Countrywide.

3 THE COURT: MERS as nominee.

4 MR. HELLER: As nominee.

5 THE COURT: Okay. So who did you represent?

6 MR. HELLER: Countrywide.

7 THE COURT: You're not a party to this
8 lawsuit, are you?

9 MR. HELLER: I represent the real party in
10 interest.

11 THE COURT: Have you sought leave to
12 intervene?

13 MR. HELLER: I filed an appearance on before
14 of Countrywide. I have not sought leave to
15 intervene.

16 THE COURT: Country Walk is not a named
17 party and that's the problem. I mean MERS is
18 quarterbacking this lawsuit for you. I don't
19 know how one Country Walk just comes into it.

20 MR. HELLER: I can answer.

21 THE COURT: Okay.

22 MR. HELLER: Procedure and substance. The
23 procedure is Florida Rule of Civil Procedure
24 1.210 which permits a party to sue on behalf of a
25 real party in interest and the language --

1 THE COURT: Are you the real party in
2 interest?

3 MR. HELLER: Yes.

4 THE COURT: Have you made a motion to
5 intervene?

6 MR. HELLER: We are represented by MERS.

7 THE COURT: Have you made a motion to
8 intervene?

9 MR. HELLER: No, sir.

10 THE COURT: Then why should I permit you to
11 argue on behalf of a client who is not a party to
12 the lawsuit?

13 MR. HELLER: Because it -- Countrywide is
14 the real party in interest and frankly, Judge,
15 because of the magnitude of the issue. What is
16 at stake? I ask that Your Honor allow me to
17 address Countrywide's rights as a holder.

18 THE COURT: You know what, in the absence of
19 a motion to intervene, the motion is denied.

20 Lawyers it has been -- yes, sir. Did you
21 want to say something?

22 MR. BROCHIN: I did, Your Honor. Again, I
23 know we are getting to the end of a long day but
24 I want to make a point for the record.

25 THE COURT: Yes, sir.

1 MR. BROCHIN: As I understood the procedural
2 context that you brought this in there were nine
3 cases you said to strike as sham pleadings.

4 THE COURT: Yes, sir.

5 MR. BROCHIN: And I've already addressed
6 the court on the right to amend and I know Your
7 Honor will take note of that request, but it does
8 seem to me that if you're going to actually
9 strike them as a sham that it would be
10 appropriate to have an evidentiary hearing on
11 each one of those.

12 THE COURT: I'm sorry, it would be what?

13 MR. BROCHIN: Appropriate to have an
14 evidentiary hearing on each one of the nine cases
15 and I understood at the beginning you said that
16 we -- you know we would just ask that for those
17 cases if you're going to strike them as a sham
18 under the rule that we be afforded the
19 opportunity at some day to come back and proffer
20 evidence on the legitimacy because the standard
21 for striking sham pleadings is that the entire
22 complaint has to be false.

23 THE COURT: Yes, sir.

24 MR. BROCHIN: Not just one, two.

25 THE COURT: This order to show cause was a

1 consolidated hearing on all pending cases to hear
2 whatever argument and/or evidence there was on
3 the order to show cause so I'm frankly not
4 inclined to have further hearings on the matter.
5 But I will look forward to -- when do you think
6 the court reporter might be able to get me a copy
7 of the transcript?

8 MR. BROCHIN: I'll get it to you very soon.
9 I will have it expedited.

10 THE COURT: If you would, please. And
11 file, if you would, a copy with the clerk and
12 give me a courtesy copy and I will endeavor to do
13 the best I can.

14 Lawyers, thank you so much for a long Friday
15 afternoon. I apologize for you having to be here
16 those of you who missed the gym.

17 (The hearing was concluded at 3:32 p.m.)
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