IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

BRUCE JACOBS,

Respondent.
_____/

CASE NO.: SC20-1602

The Florida Bar File Nos.
2019-70,188 (11H)
2019-70,358 (11H)
2020-70,056 (11H)

AMENDED APPENDIX IV TO CORRECTED REPLY/ANSWER BRIEF OF RESPONDENT

JACOBS LEGAL, PLLC
ALFRED I. DUPONT BUILDING
169 EAST FLAGLER STREET, SUITE 1620
MIAMI, FLORIDA 33131
TEL (305) 358-7991
FAX (305) 358-7992
SERVICE EMAIL: EFILE@JAKELEGAL.COM

BY: */S/ BRUCE JACOBS*
BRUCE JACOBS
FLORIDA BAR NO. 116203

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

GENERAL JURISDICTION DIVISION

CASE NO.: 05-2425 CA 05
05-11570 CA 05
05-12531 CA 05
05-15138 CA 05

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Plantiff(s),

vs.

ENZO CABRERA, ET AL.,

Defendant(s).

_____/

ORDER OF DISMISSAL ON THE CORRECTED ORDER TO SHOW CAUSE

This cause came on to be heard pursuant to the "Corrected Order to Show Cause" dated September 1, 2005 directed to Mortgage Electronic Registration Systems, Inc., (hereafter referred to as MERS) in which they were Ordered to Appear and to Show Cause why the above consolidated actions should not be dismissed either as a sham and/or a frivolous pleading. The principle concerns of the Court were as follows:

1. Whether MERS had legal standing to prosecute those actions in the capacity of a "nominee" for a Third party; or as a simple "holder" of the instrument without "ownership" thereof;
2. Whether MERS, in fact, made the following allegations knowing them to be palpably or inherently false from the plain or conceded facts at the time they were made:
    a. that they "owned and held" the notes in question;
    b. that they were entitled to enforce the note when loss of possession occurred or that they had directly or indirectly acquired ownership of

the notes from a person who was entitled to enforce it when loss of possession occurred; and

c. that they cannot reasonably obtain possession of the note because it was destroyed, its whereabouts cannot be determined…..

A BRIEF PROCEDURAL HISTORY

Following the issuance of the "Corrected Order to Show Cause", a number of the consolidated actions were voluntarily dismissed (Case # 05-10022, 05-11350, 05-12227, 05-14401 and 05-14911). The Court had previously dismissed sua sponte the case styled Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc., v. Gordon, Case # 05-12531 for the lack of legal standing of the Plaintiff but, the Court granted the Plaintiff's Motion for Rehearing on Plaintiff's objection, scheduling the same to coincide with the Show Cause hearing involving the other cases.

A review of the remaining cases reveals the following:

1. Case # 05-15138 styled Mortgage Electronic Registration Systems, Inc. as nominee for Washington Mutual Bank, F.A. and Washington Mutual Bank, f/k/a/ Washington Mutual Bank, F.A. v. Martinez, et al.,: The Plaintiff, MERS, alleges in paragraph four of the Complaint that as nominee for Washington Mutual Bank it is the owner and holder of the Mortgage and that Washington Mutual Bank is the owner and holder of the note. The lender, as reflected in the attached exhibit is GM Mortgage Corporation. The Complaint fails to allege any facts that demonstrate how Washington Mutual Bank acquired ownership of the note which

is at odds with the attached exhibits; nor does the complaint allege that MERS as nominee for Washington Mutual Bank is the payee on the indebtedness that is the subject of the foreclosure. At the Plaintiff's request, the Court appointed a Guardian Ad Litem, Richard Allen, Esq. for a number of the named Defendants. In the interest of justice, the Court hereby appoints Mr. Allen as Guardian Ad Litem for the other unserved, absentee or incompetent Defendants in the other three consolidated cases. (Case# 05-2425, 05-12531, and 05-11570) see Peppard v. Peppard, 198 So. 2d 68 (3d D.C.A. Fla. 1967).

2. Case #05-2425 styled Mortgage Electronic Registration Systems v. Cabrera, et al., The Plaintiff, in its own right, alleges in paragraph four of the Amended that it "owns and holds the Note and Mortgage." MERS has joined itself as a party Defendant, as a nominee, for Fermont Investment and Loan. The exhibit attached to the complaint identifies Fermont Investment and Loan as the lender. The Amended Complaint fails to allege any facts that demonstrate how MERS acquired ownership of the note which is at odds with the attached exhibit. At the conclusion of the Show Cause hearing, counsel for the Plaintiff, MERS, filed a Notice of Appearance on behalf of an entity named "U.S. Bank National Association as Trustee under the Securitization Servicing Agreement dated as of October 1, 2004 structured Asset Securities Corporation Fermont Home Loan Trust Mortgage Pass Through Certificate, series 2004-3, the assignee of Mortgage Electronic Registration Systems, Inc., and the owner and holder of the Note and Mortgage." In addition, counsel for this new entity filed a "Motion to Replead to

Substitute Plaintiff" and asserted that since the filing of the law suit and as a result of the issuance of the Order to Show Cause, MERS assigned the subject Mortgage to the moving party. Exhibit B to the proposed Second Amended Complaint purports to be an assignment from MERS to that entity of the Note and Mortgage. Interestingly, paragraph 17 of the proposed amended complaint continue to join MERS as nominee for Ferment Investment and Loan as a party defendant.

3. Case # 05-12531 styled Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., v. Gordon , Plaintiff, MERS as nominee for Countrywide Home Loans, Inc., alleged in paragraph 4 of the Complaint that it "now owns and holds the Mortgage Note and Mortgage." Count II, to Re-establish the Note, alleges in paragraph 17 of the Complaint that "there was executed and delivered a Promissory Note ("Mortgage Note") to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc.," Paragraph 19 alleges that Plaintiff "owns the Mortgage Note and is entitled to enforce said Mortgage Note." (emphasis added) Paragraph 20, however, alleges that the note has been lost or destroyed and that it is no longer in its custody or control. Paragraph 22 alleges that Plaintiff was in possession of the Mortgage Note and entitled to enforce it when loss of possession occurred or Plaintiff has been assigned the right to enforce the Mortgage Note. Paragraph 24 alleges that "the note has not been seized or transferred by Plaintiff."

The Court, by its order of August 3, 2005 sua sponte dismissed this action for lack of legal standing, but upon objection of the Plaintiff, the Court granted a

Rehearing scheduling the same at the Show Cause Hearing.

4. Case # 05-11570 styled Mortgage Electronic Registration Systems, Inc., as nominee for Accredited Home Lenders, Inc., v. Revoredo, et al., The original complaint alleged in paragraph 5 that "There has been a default under the note and mortgage held by Plaintiff....." (emphasis added) Interestingly, the Plaintiff does not allege that it "owns" the note in Count I to foreclose. Paragraph 16 of Count II, to Reestablish the Note, alleged, however, that Plaintiff owns and holds the subject Note and Mortgage. Paragraph 18 alleged that Plaintiff or its predecessor(s) was in possession of the Promissory Note and was entitled to enforce it when the loss of possession occurred." In response to the Order to Show Cause, the Plaintiff, MERS filed an Amended Complaint, apparently now in its own right---not as nominee---as "holder" of the note and mortgage. The amended complaint does not allege that the Plaintiff "owns" the note. Paragraph 7 of the Amended Complaint invite the parties to visit its Web cite (www.MERSInc.org) to review the various Agreements, Rules, and Procedures that define the relationship between MERS and its members.

LEGAL STANDING AS "NOMINEE"

MERS has in a number of cases, initiated these mortgage foreclosure action in the capacity of "nominee." Are they "nominee" for the "payee"? Are they "nominee for the "servicer"? What are the recognized legal rights and obligations of a "nominee" in the

mortgage foreclosure context? MERS has promulgated certain Recommended Foreclosure Procedures for various states including the State of Florida. (see Court's Composite Exhibit). Their procedures state:

.....

> "..... if MERS is the original mortgagee of record, meaning that MERS is named on the mortgage in a nominee capacity for the originating lender. The caption should then state Mortgage Electronic Registration Systems, Inc. as nominee for [insert name of the current servicer] .....
>
> .....
>
> The body of the complaint should be the same as when foreclosing in the name of the servicer. MERS stands in the same shoes as the servicer to the extent that it is not the beneficial owner of the promissory note. An investor, typically a secondary market investor, will be the ultimate owner of the note. (emphasis added page 26)

Of course the next question is what is a "servicer." As explained at the Show Cause hearing (and as described in the Court's Composite Exhibit), a "servicer" is a separate entity contractually charged with the responsibility of servicing the mortgage account. The servicer has no beneficial interest in the Mortgage Note, yet the actions are brought on their behalf, as nominee, as though they were a "payee" on the Mortgage Note. see Overseas Development Inc. v. Krause, 323 So. 2d 679 (3d D.C.A. Fla. 1975). see also Mortgage Electronic Registration Systems, Inc., v. Estrella, 390 F. 3d 522 (7th Cir 2004); Mortgage Electronic Registration Systems, Inc., v. Paul Bureck, 798 N.Y.S. 2d 346 (Supreme Court Richmond County, 2004).

As a "nominee" the complaints fail to allege that MERS has legal standing to maintain these actions and their allegations are at odds with the exhibits attached to the complaints. see Smith v. Kleiser, 107 So. 262 (Fla. 1926); Harry Pepper and Associates

Inc., v. Lasseter, 247 So. 2d 736 (3d. D.C.A. Fla. 1971); see also, Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885 (4th D.C.A. Fla. 1990). As plead, the actions prosecuted by MERS as "nominee" fail to state a cause of action and should be dismissed. see Morales v. All Right Miami, Inc., 755 So. 2d 198 (3d D.C.A. Fla. 2000); Dollar Systems, Inc., v. Detto, 688 So. 2d 470 (3d D.C.A. Fla. 1997). see also Sobel v. Mutual Developments, Inc., 313 So. 2d 77 (1st D.C.A. Fla. 1975).

LEGAL STANDIND AS A "HOLDER"

Next, notwithstanding the many allegations to the contrary in thousands of other cases, that they "own" the Notes in question, MERS concedes that it has no "beneficial interest" in the Mortgage Notes. Indeed, the "Terms and Conditions" if its Membership Agreement as well as its Rules of Membership clearly and unequivocally disclaim MERS's right or interest in the "payment made on account of such mortgage loans" (see Terms and Conditions of Courts' Composite Exhibit). After Judge Logan's decision in Mortgage Electronic Registration Systems, Inc., v. Azize (see attachment to the Court's "Corrected Order to Show Cause") and this Court's Order to Show Cause, contrary to long standing and establish Florida law, MERS now asserts in defense of its Amended Complaint in Case # 05-11570, that it need not allege "ownership" of the Mortgage Notes in order to foreclose. but see Forms 1.944 and 1.934 of the Fla. R. Civ. P., Smith v. Kleiser, Supra, Edason v. Central Farmers' Trust Co, 129 So. 698 (Fla. 1930); Booker v. Sarasota, 707 So. 2d 886 (1st D.C.A. Fla. 1998); Your Construction Center, Inc., v. Gross, 316 So. 2d 596 (4th D.C.A.Fla. 1975); see also Davarzo v. Resolute Insurance Company,

346 So. 2d 1227 (3d. D.C.A. Fla. 1977); see generally Costa Bella Development Corp., v. Costa Development Corporation; 441 So. 2d 1114 (3d D.C.A. Fla. 1983).

MERS relies upon the UCC, Chapter 673, Fla. Statutes in support of its argument that it is entitled to foreclose on the notes in question simply by asserting that it is a "holder" without alleging and proving in addition thereto that it "owns" the instrument. An examination of the Official Comments to the UCC are pertinent. In particular,

Official comment § 3-110 states:

> "This provision merely determines who can deal with an instrument as a holder. It does not determine ownership of the instrument or its proceeds." (emphasis added)

Official comment § 3-203

> "The right to enforce an instrument and ownership of the instrument are two different concepts. (emphasis added)
>
> .....
>
> Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3..... (emphasis added)

Concededly, some commentators are in agreement with the Plaintiff's position that the foreclosure complaint need only allege that they "hold" the Mortgage Note without being required to plead in addition thereto that they "own" the Note. Until such time as the appropriate Florida Appellate Court has definitively ruled that "ownership" is unnecessary to plead and to prove in a foreclosure action, this trial Court will adhere to establish Florida precedent. see generally, Vol. 4 Hawkland, Uniform Commercial Code Services § 3-301:2 (4/99); Vol. 5A, Anderson, Uniform Commercial Code (3d Edition) § 3 -301:9 (1994). The Complaints which fail to "allege ownership" of the Mortgage Notes in question fail to state a cause of action and should be dismissed. Smith v. Kleiser, supra; see also Morales v. AllRight Miami, Inc., 755 So. 2d 198 (3d D.C.A.Fla. 2000);

Dollar Systems v. Detta, 688 So. 2d 470 (3d D.C.A. Fla. 1977).

SHAM PLEADINGS

Now we address the more troubling question of whether MERS has committed fraud upon the Court by knowingly filing pleadings which contain allegations which are clearly false, as a mere pretense set up in bad faith and without color of fact. "A plea is considered 'sham' when it is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue." see Rhea v. Halkney, 157 So. 190, 193 (Fla. 1934). The Corrected Order to Show Cause directed MERS to appear before the Court and Show Cause why these consolidated actions and all other similar pending or subsequently filed actions should not be dismissed as a sham and/or a frivolous pleading. MERS had adequate notice and a fair opportunity to present any evidence in response to the Corrected Order to Show Cause. MERS appeared through local and corporate counsel; aside from argument and representations of counsel, MERS failed to produce any witnesses or to offer any evidence in response to the Corrected Order to Show Cause. The only evidence admitted at the hearing was the Courts' composite exhibit which consisted of copies of documents obtain from MERS official web site (www.MERSINC.org) of which the Court took judicial notice -- the same web site referred to paragraph 7 of MERS Amended Complaint in Case # 05-11570. The Court has the inherent authority to present evidence or to call witnesses in the interest of justice and in the ascertainment of the truth. see Ritter v. Jimenez, 343 So. 2d 659 (3d D.C.A. Fla. 1977); see also F.S. §§ 90.612 and

90.615 (2005). Moreover, paragraph 7 of the Amended Complaint, pursuant to Rule 1.130 of the Fla. R. Civ. P., by reference effectively adopted and incorporated therein those documents available on the web-site, copies of which were compiled as the Court's composite exhibit. Further, MERS's Responses in Cases # 05-12227 and 05-10022 to the Court's Order to Show Cause attach thereto the Terms and Conditions of the Membership Agreement together with its Rules of Membership.

Does MERS "own" the mortgage notes as alleged? "Ownership of property implies the right of possession and control thereof, as well as the right to dispose of, alienate, or transfer the property rights freely and without interference or restraint." see 42 Fla. Jur 2d Property § 14. Although promissory notes may be subject to conversion they also constitute "chose in actions." see 12 Fla. Jur 2d Conversion and Replevin § 8; 42 Fla. Jur 2d Property § 10. MERS concedes that it has no beneficial interest in the Mortgage notes; "that it has no rights whatsoever to any payments made on account of such mortgage loans;" "that it is not a vehicle for creating or transferring beneficial interest in the mortgage loans;" that it will comply with the instructions of the holder of the mortgage loan promissory notes or, in the absence of contrary instructions from the Note holder, it will comply with the instructions of the "servicer" of the mortgage loan; and that with regard to foreclosures, "the beneficial owner of such mortgage loan or its servicer shall determine whether foreclosure proceedings with respect to such mortgage loan shall be conducted in the name of Mortgage Electronic Registration Systems, Inc., the name of the servicer, or the name of a different party to be designated by the beneficial owner." (see Terms and Conditions and Rules of Membership in Courts' composite exhibit).

The Recommended Foreclosure Procedure Manual provides,

> "The transfer process of the beneficial ownership of mortgage loans does not change with the arrival of MERS. Promissory notes still require an endorsement and delivery from the current owner to the next owner in order to change the beneficial ownership of a mortgage loan" see Courts' composite exhibit page 4 of the Foreclosure Procedure Manual (emphasis added)
>
> "Typically, the loan servicer, as the mortgagee of record, is the party that initiates the foreclosure proceedings on behalf of the investor. When MERS is the mortgage of record, the foreclosure can be commenced in the name of MERS in place of the loan servicer." Page 7 of the Foreclosure Procedure Manual (emphasis added)
>
> "To help a smooth transition from foreclosing loans in the name of the servicer to foreclosing loans in the name of MERS, we have developed state by state recommended guidelines to follow. These guidelines were developed in conjunction with experienced foreclosure counsel in your state. We have been able to keep the MERs recommended procedures consistent with the existing foreclosure procedures. The goal of the recommended procedures is to avoid adding any extra steps or incurring any additional taxes or costs by foreclosing in the name of MERS instead of the servicer.
>
> .....
>
> The body of the complaint should be the same as when foreclosing in the name of the servicer. MERS stands in the same shoes as the servicer to the extent that it is not the beneficial owner of the promissory note. An investor, typically a secondary market. investor, will be the ultimate owner of the note. [8] (emphasis added) Page 26 of the MERS Foreclosure Manual

---

8 Even though the servicer has physical custody of the note, custom in the mortgage industry is that the investor (Fannie Mae, Freddie Mac, Ginnie Mae or a private investor) owns the beneficial rights to the promissory. (emphasis added)

Based upon the evidence and the argument advance at the Order to Show Cause hearing, consistent with the findings of Judge Logan in Mortgage Electronic Registration Systems, Inc., v. Azize Case #05-001295 CI-11 pending in the Circuit Court of the 6th Judicial Circuit (this Court has previously taken judicial notice of that proceeding as per the Corrected Order to Show Cause and attachment thereto) MERS is not the "owner" of these mortgage loans as alleged. The problem for MERS is obvious; it is not the "owner", ought not to have ever plead it and cannot prove it. Frankly, this explains why MERS posted on its web site a revised Model Florida Foreclosure Complaint August 24, 2005 which omits an allegation that they "own" the note in question.

Next, does MERS "hold" the Mortgage Notes as alleged? Florida Statute § 671.201 (20) defines "holder" as:

> "(20) "Holder," with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in case of an instrument payable to an identified person, if the identified person is in possession. "Holder", with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession." (emphasis added) see generally 6 Fla. Jur 2d Bills and Notes §§ 118,120,125.

Further, "'Bearer' means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank" Fla. Statute 671.201 (5). (emphasis added).

MERS's Recommended Foreclosure Procedure for Florida clearly addresses this issue:

> .....
> "Employee of the servicer will be certifying officers of MERS. This means they are authorized to sign any necessary documents as an officer of MERS. The certifying officer is granted this power by a corporate resolution from MERS. In other words, the same individual that signs the documents for the servicer will

continue to sign the documents, but now as an officer of MERS." See Page 27

---

8 Even though the servicer has physical custody of the note, custom in the mortgage industry is that the investor (Fannie Mae, Freddie Mac, Ginnie Mae or a private investor) owns the beneficial rights to the promissory note. (emphasis added)

9 If the promissory note is endorsed in blank and the servicer has physical custody of the note, the servicer will technically be the note holder as well as the record mortgage holder. By virtue of having the servicer employee be certifying officers of MERS, there can be an in-house transfer of possession of the note so that MERS is considered the note holder for purposes of foreclosing the loan (footnote 9 page 26, 27 Emphasis Added)

Clearly MERS does not have physical possession of the notes as alleged. As its name implies, Mortgage Electronic Registration Services purpose is to use electronic commerce to eliminate paper. The use of designating employees of the servicer as officers of MERS in order to circumvent the "technical" requirement of law is transparent. MERS, at best, is the agent of the "servicer" or the agent of the "owner" of the note. The servicer itself is the agent of the owner of the note. True, a principle can be said to have "constructive possession" of a negotiable instrument when in the hands of its agent, but not visa versa. Deakter v. Menendez, 830 So. 2d 124 (3d. D.C.A. Fla 2002); see State Street Bank and Trust Company v. Lord, 851 So. 2d 790 (4th D.C.A. Fla. 2003); see generally, Lawyers Title Insurance Company, Inc. v. Novastar Mortgage, Inc., 862 So. 2d 793 (4th D.C.A. Fla. 2004). MERS itself is unable to verify or to certify copies of the promissory notes; such request must be made to the servicer of the mortgage loan in question. Based upon the evidence and arguments presented, MERS does not "hold" the Mortgage Notes as alleged.

Next, in Case # 05-12531 MERS included a Count to Reestablish the Note and

Mortgage. The complaint alleges that MERS "owns" the Mortgage Notes and the Plaintiff was in possession of the note and entitled to enforce it when loss of possession occurred or that it had been assigned the right to enforce the Mortgage Note. Florida Statute § 673.3091 (1) was amended in March, 2004 by Chapter 2004-3 (to comport with the 2002 Revised Article 3 of the UCC) and states:

673.3091. Enforcement of lost, destroyed or stolen instrument

> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (a) The person seeking to enforce the instrument was in possession of the instrument and entitled to enforce the instrument it when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from **a person who was entitled to enforce the instrument when loss of possession occurred;**
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

In order to prevail in a mortgage foreclosure action, the Plaintiff must produce the original note or reestablish the note pursuant to law. National Loan Investors v. Joymar Association, 767 So. 2d 549 (3d D.C.A. Fla. 2000); Pastore-Borroto Development, Inc., v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (3d D.C.A. Fla. 1992); see State Steet Bank and Trust Company v. Lord, 851 So. 2d 790 (4th D.C.A. Fla. 2003); see also, Lawyers Titles Insurance v. Novastar Mortgage, Inc., 862 So. 2d 793 (4th D.A.C. Fla. 2004). Was MERS "entitled to enforce" the Notes when loss of possession occurred? There are no facts alleged which would demonstrate when the Notes were lost; who had

possession of the notes at the time of loss; and by what authority MERS asserts that it was entitled to enforce the notes when loss occurred. See Official Comments §§ 3-301&309. It is clear based upon the evidence that MERS is not an "owner" or "holder" of the notes; nor does MERS take actual possession of the notes themselves.

The evidence is clear and convincing the MERS's allegations that it "owned" "held" and "possessed" the Mortgage Notes in questions are clearly, palpably and inherently false based upon the plain and conceded facts in the case. The evidence is likewise clear and convincing that MERS at all times prior to making these allegations acted in bad faith knowing them to be false and indeed, it was forewarned of the potential consequences for making such false allegations. The falsity of the allegations is readily apparent from a cursory review of their own documents readily available on their official web site and incorporated by reference into the Amended Complaint in Case # 05-11570 . MERS created a world of electronic transactions which does not readily integrate into existing Florida law and procedure: it chose to fabricate the facts and to create a charade to give it appearance of proceeding lawfully------- in short, the ends justified the means.

The "integrity" of the civil litigation process depends on truthful disclosure of "facts". Metropolitan Dade County v. Martinson, 736 So. 2d 794 (3d D.C.A. Fla. 1999). Not surprising, the most egregious pleadings, were contained in the actions which were voluntarily dismissed subsequent to the issuance of the Corrected Order to Show Cause. (see Corrected Order to Show Cause and transcript of hearing) The Court in Boca Burger, Inc. v. Forum, ____ So. 2d _____(Fla. 2005), 30 Fla. L. Weekly S 539 said it best,

The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. It is an exacting duty with an imposing burden. Unlike many provisions of the disciplinary rules,

which rely on the court or an opposing lawyer for their invocation, the duty of candor depends on self-regulation; every lawyer must spontaneously disclose contrary authority to a tribunal. It is counter-intuitive, cutting against the lawyer's principal role as an advocate. It is also operated most inconveniently-that is, when victory seems within grasp. But it is precisely because of these things that the duty is so necessary. Although we have an adversary system of justice, it is one founded on the rule of law. Simply because our system is adversarial does not make it unconcerned with outcomes. Might does not make right, at least in the courtroom. We do not accept the notion that outcomes should depend on who is the most powerful, most eloquent, best dressed, most devious and most persistent with the last word-or, for that matter, who is able to misdirect a judge. American civil justice is so designed that established rules of law will be applied and enforced to insure that justice be rightly done. Such a system is surely defective, however, if it is acceptable for lawyers to "suggest" a trial judge into applying a "rule" or a "discretion" that they know-or should know-is contrary to existing law. Even if it hurts the strategy and tactics of a party's counsel, even if it prepares the way for an adverse ruling, even though the adversary has himself failed to cite the correct law, the lawyers is required to disclose law favoring his adversary when the court is obviously under an erroneous impression as to the law's requirements. Forum, 788 So. 2d 1062 (footnote omitted). see Peter T. Fay, "Officer of the Court", 60 Fla. B.J. 9 (1986).

That having been said, based upon the findings and reasons set forth above, it is

ORDER and ADJUDGED as follows:

1. MERS's ore tenus motions to amend in Cases 05-15138, 05-2425, and 05-12531 are denied. see Metropolitan Dade County, v. Martinson, 736 So. 2d 794, 795 (3d D.C.A. Fla. 1999). MERS was entitled, as a matter of right, to amend its complaint in Case # 05-11570. see Boca Burger, Inc., v. Forum, surpra.

2. Following the Show Cause Hearing, MERS has moved in Case # 05-11570, 05-11350 and 05-12531 for an additional evidentiary hearing. (Case # 05-11350 had been voluntarily dismissed). The motion is denied. MERS had adequate notice and a fair opportunity to present evidence at the Show Cause Hearing on September 16, 2005. Having failed to offer any evidence, it cannot now claim it was denied due process.

3. The Motion to Replead to Substitute Plaintiff in Case # 05-2425 is denied.

4. That the above consolidated actions are hereby dismissed as a sham and/or a frivolous pleading without prejudice, however, to the true "owner" and "holder" of the notes in question to file and prosecute their own mortgage foreclosure actions, if warranted. Pending appellate review of this Order, the Court intends to stay by separate order all other pending or subsequently filed mortgage foreclosure actions filed by MERS and assigned to the undersigned Judge.

DONE and ORDERED in Chambers at Miami-Dade County, Florida this 28th day of September 2005.

JON I. GORDON, CIRCUIT JUDGE

JON I. GORDON
CIRCUIT COURT JUDGE