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IN THE CIRCUIT COURT  
FOR  
MONTGOMERY COUNTY, ALABAMA

DEBRA A. HENDERSON,  
Plaintiff,

vs.

CIVIL ACTION NO.

CV-08-900805.00

MERSCORP, INC., et al.,

Defendants.

\* \* \* \* \*

VIDEO DEPOSITION OF R.K. ARNOLD,  
taken pursuant to stipulation and agreement before  
Tracye Sadler Blackwell, Certified Court Reporter  
and Commissioner for the State of Alabama at Large,  
in the Offices of The American Association for  
Justice, 777 6th Street, NW, Suite 200, Washington,  
D.C., on September 25, 2009, commencing at  
approximately 10:10 a.m.

\* \* \* \* \*

## APPEARANCES

1  
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22 ALSO PRESENT:

23 Mr. Fred Walker, Videographer

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1 between the parties hereto and the witness that the  
2 signature of the witness to this deposition is  
3 hereby not waived.

4

5

\* \* \* \* \*

6

7

THE VIDEOGRAPHER: This is Disk 1

8

in the video deposition of

9

R.K. Arnold in the matter of

10

Debra Henderson versus

11

MERSCORP, Incorporated, and

12

Mortgage Electronic

13

Registration Systems, Inc.,

14

filed in the Circuit Court of

15

Montgomery County, Alabama.

16

Today's date is September

17

25th, 2009, and the time is

18

now 10:10 p.m. -- a.m. We are

19

located at the offices of

20

American Association for

21

Justice at 777 6th Street,

22

Northwest, Washington, D.C.

23

Will counsel identify

1                   themselves beginning with the  
2                   attorney giving notice.

3           MR. WOOTEN: My name is Nick  
4                   Wooten, and I represent Debra  
5                   Henderson. I'm here with my  
6                   co-counsel, Lynn Jinks.

7           MR. BROCHIN: My name is Bobby  
8                   Brochin, Morgan-Lewis. I  
9                   represent the deponent, R.K.  
10                  Arnold.

11          MR. RAMEY: Shaun Ramey with  
12                  Sirote and Permutt. I  
13                  represent the defendant  
14                  MERSCORP and MERS, Inc.

15          MS. HORSTKAMP: Sharon Horstkamp.  
16                  And I'm general counsel with  
17                  MERS.

18          THE VIDEOGRAPHER: Also present,  
19                  the court reporter, Tracye  
20                  Blackwell, representing  
21                  Haislip, Ragan, Green, Starkie  
22                  & Watson Reporting. And  
23                  videographer and notary

1 public, Fred Walker,  
2 representing Capital  
3 Reporting.

4 I will now swear in the  
5 witness.

6 (Witness sworn.)

7 MR. WOOTEN: Shaun, you have that  
8 agreement. Did you want to  
9 mark it, or do you just want  
10 to reference it?

11 I can mark it if you want  
12 me to.

13 MR. BROCHIN: Yeah. I just want  
14 to mark the discovery and  
15 confidentiality agreement  
16 which deals with the  
17 dissemination of the videotape  
18 of this deposition as an  
19 exhibit to the transcript.

20 THE COURT REPORTER: Thank you.  
21 Do y'all want usual  
22 stipulations?

23 MR. RAMEY: I think the only

1 difference is I don't think  
2 Mr. Arnold is going to waive  
3 reading and signing.

4 MR. BROCHIN: Yeah. If that's  
5 what stipulation means. We  
6 don't -- we do not waive  
7 reading.

8 THE COURT REPORTER: Okay.  
9 (Plaintiff's Exhibit 1 was marked  
10 for identification.)

11 MR. WOOTEN: All right. And I  
12 marked this agreement as  
13 Plaintiff's Exhibit 1 to the  
14 deposition just so we'll have  
15 that out of the way. And this  
16 is the negotiated agreement  
17 with respect to the parties'  
18 agreement not to disseminate  
19 this video outside of this  
20 litigation without -- except  
21 according to the terms of this  
22 agreement.

23 And, again, just for the



1 record, that has nothing to do  
2 with the transcript. This is  
3 purely with the video today.

4 MR. RAMEY: Correct.

5

6 \* \* \* \* \*

7

8 R.K. ARNOLD

9 The witness, after having first been duly sworn  
10 to speak the truth, the whole truth and nothing but  
11 the truth testified as follows:

12 EXAMINATION

13 BY MR. WOOTEN:

14 Q. Mr. Arnold, if you would, would you state  
15 your full name for the record, please,  
16 sir.

17 A. R.K. Arnold.

18 Q. And how are you presently employed, sir?

19 A. I work for MERSCORP, Inc.

20 Q. What is your position with MERSCORP, Inc.?

21 A. I'm president and CEO.

22 Q. Okay. Do you remember what you were doing  
23 three years ago today?

1 MR. BROCHIN: Object to the form  
2 of the question.

3 Q. It's not a trick question. Do you remember  
4 what you were doing three years ago today?

5 A. Where I was maybe. I don't know.

6 (Plaintiff's Exhibit 2 was marked  
7 for identification.)

8 Q. I ask you to take a look at that and ask  
9 you if you recognize that. It's marked as  
10 Plaintiff's Exhibit 2.

11 (Brief interruption.)

12 MR. BROCHIN: Just for the record,  
13 it appears that you've handed  
14 the witness a transcript of a  
15 copy of a deposition with all  
16 sorts of highlighted notes and  
17 et cetera on it.

18 Q. And I'll represent to you, Mr. Arnold,  
19 that's a transcript of your testimony from  
20 the matter of Trent versus MERS that was a  
21 case in the District Court for the United  
22 States in Florida. Does that appear to be  
23 what that actually is?

1 A. Yes.

2 Q. Okay. And does it appear that on this date  
3 three years ago you gave that deposition?

4 A. Yes.

5 Q. And have you ever reviewed that transcript  
6 other than signing it for the purpose of  
7 certifying your testimony?

8 A. Most of it.

9 Q. Okay. And I actually have two copies. I'm  
10 going to swap with you, if you will, the  
11 unmarked copy. If you'll hand me that copy  
12 I marked back, please, sir.

13 With respect to -- and I'm trying to  
14 save us a little time. But with respect to  
15 the background information that you  
16 provided during the course of that  
17 deposition regarding your education,  
18 experience, and training, any of that  
19 information different today than it was  
20 when you gave that deposition?

21 MR. BROCHIN: Object to the --  
22 excuse me. Let me object to  
23 the form of that question. I

1 don't think it's appropriate  
2 to ask a witness if the  
3 previous testimony certainly  
4 in general nature is  
5 accurate.

6 A. Are you asking about my --

7 Q. Have you obtained any additional degrees  
8 since you gave that deposition?

9 A. No additional degrees.

10 Q. Okay. All right. And has anything changed  
11 about your qualifications or experience  
12 other than your longevity in your current  
13 position since that deposition?

14 A. Probably just experience.

15 Q. Okay. And the information that you  
16 provided during that deposition with  
17 respect to your background and history,  
18 employment history, your education and  
19 qualifications is all still accurate;  
20 correct?

21 MR. BROCHIN: Same objection of  
22 asking a witness to testify  
23 about the accuracy of

1                   testimony given three years  
2                   ago in a general nature.

3       Q.   Well, let's do that this way, then,  
4            Mr. Arnold, so we can just make sure we  
5            don't have any disputes about the  
6            admissibility of this.

7                   You're currently employed as the CEO of  
8            MERSCORP; is that correct?

9       A.   Yes.

10      Q.   Were you so employed when you gave the  
11            Trent deposition?

12      A.   Yes.

13      Q.   Are you affiliated with any other company  
14            other than MERSCORP?

15      A.   I'm an officer of Mortgage Electronic  
16            Registration Systems, Inc.

17      Q.   Is that the subsidiary of MERSCORP which  
18            serves as the nominee of record in public  
19            land records throughout America?

20                   MR. BROCHIN: Object to the form  
21                   of the question.

22      A.   It's a subsidiary of MERSCORP.

23      Q.   Okay. And are both of these corporations

1 private corporations?

2 A. Yes.

3 Q. Are there any individual shareholders of  
4 either of these corporations that are not  
5 institutions or entities related to the  
6 mortgage, banking, and lending industry?

7 MR. BROCHIN: Object to the form  
8 of the question.

9 A. They're all corporations.

10 Q. Certainly. Do you serve on the board of  
11 directors of any other corporations other  
12 than MERSCORP and Mortgage Electronic  
13 Registration Systems?

14 A. No.

15 Q. Are you compensated by any other business  
16 or corporation other than the two entities  
17 you've identified?

18 A. No.

19 Q. Currently how many directors serve on  
20 Mortgage Electronic Registration Systems,  
21 Inc.'s board?

22 A. 16.

23 Q. And how many directors serve on MERSCORP's

1 board?

2 A. Six.

3 Q. With regard to Mortgage Electronic  
4 Registration Systems, sir, can you tell us  
5 when that company was incorporated?

6 A. In 1999.

7 Q. And with respect to that company, sir, can  
8 you tell us when the subsidiary was formed?

9 A. That is a subsidiary.

10 Q. Okay. Can you tell us when the parent was  
11 formed?

12 A. In 1998.

13 Q. In the case that we're here about today  
14 Mr. Hultman has provided an affidavit in  
15 support of some pleadings that your  
16 attorneys filed. What is Mr. William  
17 Hultman's employment relationship with  
18 these defendants -- with your company, I  
19 should say? I'm sorry.

20 A. He works for MERSCORP, Inc.

21 Q. And what is his employment title?

22 A. He's senior vice president and corporate  
23 division manager.

1 Q. With respect to the structure of this  
2 corporation, Mr. Arnold, can you explain to  
3 the ladies and gentlemen of the jury the  
4 relationship between these two entities?

5 MR. BROCHIN: Object to the form  
6 of the question.

7 A. Mortgage Electronic Registration Systems,  
8 Inc., is a wholly-owned subsidiary of  
9 MERSCORP, Inc.

10 Q. So the parent corporation has 100-percent  
11 ownership of the subsidiary, which is the  
12 company that appears in the land records in  
13 this case; right?

14 A. Correct.

15 Q. Is that also the company that instituted  
16 the foreclosure against Ms. Henderson?

17 A. Yes.

18 Q. And that is the corporation that has six  
19 directors; correct?

20 A. Yes.

21 Q. And of those directors are five of those  
22 directors members -- also directors of the  
23 parent corporation?



1 A. Yes.

2 Q. Who is the independent director of the  
3 subsidiary?

4 MR. BROCHIN: Object to the form  
5 of the question.

6 A. Bruce Posey.

7 Q. It's my understanding that your corporate  
8 structure of the subsidiary requires that  
9 the independent director have no  
10 affiliation with the parent corporation; is  
11 that correct?

12 A. I -- I don't know what the question means.

13 Q. When you structured the subsidiary from a  
14 parent, you structured the subsidiary with  
15 the idea of creating a bankruptcy-remote  
16 entity; is that correct?

17 A. That's correct.

18 Q. And one of the requirements of doing that  
19 was that you have at least one independent  
20 director; correct?

21 A. Yes.

22 Q. And according to your understanding, what  
23 are the requirements of independents to

1 meet that test so that that entity  
2 qualifies for bankruptcy remoteness?

3 A. Well, at a very basic level can't be a  
4 shareholder or a director of the parent.

5 Q. And how is it determined -- well, let me  
6 rephrase.

7 Outside of Mr. Posey's service on the  
8 board of the subsidiary corporation, do you  
9 know if he's otherwise employed?

10 A. Yes.

11 Q. And how is he employed?

12 A. He's the CEO of Streeter Brothers Mortgage.

13 Q. So is Streeter Brothers Mortgage what the  
14 industry would commonly refer to as an  
15 originator?

16 A. An originator?

17 Q. A company that originates mortgage loans?

18 A. Yes.

19 Q. So although he has no ownership interest  
20 with the parent corporation, he is -- his  
21 company is involved in the mortgage lending  
22 industry?

23 MR. BROCHIN: Object to the form

1                                   of the question.

2       A.   Streeter Brothers is an originator.

3       Q.   All right.  I noticed in reviewing the  
4           documents -- at least some of the documents  
5           I've seen regarding your company that some  
6           of the original members were Fannie Mae and  
7           Freddie Mac; is that correct?

8       A.   Yes.

9       Q.   And at the time they became members is it  
10          fair to say that they had a significant  
11          influence on the mortgage industry as a  
12          whole?

13      A.   Yes.

14      Q.   Is it fair to say that the mortgage  
15          industry generally looks to those two  
16          entities for industry standards regarding  
17          things like mortgage servicing and document  
18          custodianship arrangements and that sort of  
19          thing?

20      A.   I don't understand the question.

21      Q.   Are the Fannie Mae and Freddie Mac  
22          published guidelines with respect to  
23          mortgage servicing typically considered to

1 be an industry standard?

2 A. Among others.

3 Q. Are they also considered to be an industry  
4 standard with respect to document custodial  
5 agreements between mortgage securitization  
6 participants?

7 A. I don't know.

8 Q. But you would agree that at the time they  
9 became members of MERS they did have a  
10 significant influence in the mortgage  
11 industry?

12 A. Yes.

13 Q. Is it your opinion that the MERS concept  
14 could have taken root without their  
15 participation?

16 MR. BROCHIN: Object to the form  
17 of the question to the extent  
18 it calls for an opinion and  
19 speculation.

20 A. I don't know.

21 Q. Were they afforded any special  
22 considerations for becoming members of MERS  
23 when MERS was originally formed?

1 A. No.

2 Q. Did they make an equity contribution to  
3 MERS when it was formed?

4 A. Yes.

5 Q. Do you remember the amount of that  
6 contribution?

7 A. Well, it was a rollover from a -- from the  
8 previous company.

9 Q. Okay. So you're talking about old MERS;  
10 right?

11 A. Old MERS?

12 Q. The original company that was formed when  
13 they made their equity contribution was to  
14 the new company that was formed that is the  
15 present company?

16 A. In 1995 they made equity contributions.

17 Q. Okay. And do you remember the dollar  
18 amounts of those contributions?

19 A. In 1995?

20 Q. Uh-huh (positive response).

21 A. No.

22 Q. Are there any documents available through  
23 any public resource that would indicate the

1           dollar amount of those contributions by  
2           those two entities?

3                       MR. BROCHIN: Object to the form  
4                               of the question. Calls for  
5                               speculation.

6       A. I don't know what -- what documents there  
7       are.

8       Q. Mr. Arnold, you testified in the Trent case  
9       that you were a member of the first  
10       executive team that was hired by MERS; is  
11       that correct?

12      A. Yes.

13      Q. And I guess before we go any further, I  
14      guess you and I and your lawyers should  
15      agree on how we're going to delineate  
16      between these two companies as we talk  
17      about it.

18                       I have been referring to the parent  
19      corporation as MERSCORP. Is that correct?

20      A. That's correct.

21      Q. Okay. And so if I say MERSCORP, I am  
22      discussing the parent.

23                       The subsidiary I have typically

1 referred to simply as MERS, M-E-R-S. Is  
2 that how you typically refer to the  
3 subsidiary?

4 A. No.

5 Q. How do you refer to the subsidiary?

6 A. Mortgage Electronic Registration Systems,  
7 Inc.

8 Q. For the sake of my voice, can we agree to  
9 refer to the subsidiary as MERS, Inc.? Is  
10 that sufficient to delineate the two for  
11 the purpose of this deposition?

12 A. As opposed to MERS?

13 Q. As opposed to simply MERS, the  
14 subsidiary -- for the purposes of this  
15 deposition, if you and your lawyers can  
16 agree to it, I'd like to just refer to the  
17 subsidiary as MERS, Inc. Is that okay?

18 A. Okay.

19 Q. You testified in the Trent case that you  
20 were part of the original executive team  
21 for -- that was hired by MERSCORP; is that  
22 correct?

23 A. There wasn't a MERSCORP.

1 Q. At that time?

2 A. At that time.

3 Q. Right. And that would -- I mentioned a  
4 moment ago old MERS. That was the original  
5 incarnation of this company in the state of  
6 Delaware; correct?

7 A. In 1995.

8 Q. In 1995. And, just briefly, because I  
9 think the judge and the jury would want to  
10 understand this issue, can you briefly  
11 outline the corporate history from 1995  
12 until we reach this present structure where  
13 we have MERSCORP and MERS, Inc.?

14 Just -- and I'm not asking you for  
15 specific days. I know y'all have produced  
16 some documents relative to some of that.  
17 But just in general can you lay out for the  
18 jury and the judge the transformation of  
19 this corporation till it reached its  
20 present state, please?

21 A. It was -- old MERS, as you referred to it,  
22 was created in 1995 with temporary  
23 officers. It was capitalized maybe up to



1           50-percent level, and that was a  
2           combination of equity and debt.

3       Q.    And is that -- I'm sorry. I didn't mean to  
4           interrupt you. But is that the  
5           contribution we mentioned awhile ago from  
6           Fannie and Freddie?

7       A.    Yes. And it was a combination of equity  
8           and debt, and you asked about equity.

9       Q.    Sure. All right. Go ahead. I'm sorry.

10      A.    So the first task, of course, was to hire  
11           permanent officers. And that was the  
12           original executive team that you referred  
13           to. And that happened in December of 1995.

14      Q.    Other than yourself, do you recall who else  
15           was hired as a member of the executive  
16           team?

17      A.    Paul Mullings.

18      Q.    Is he still employed by either the parent  
19           or the subsidiary?

20      A.    No.

21      Q.    Is his last name spelled M-U-L-L-I-N-G-S?

22      A.    Yes.

23      Q.    And do you know what his employment had

1           been prior to this hiring?

2           A.    No.

3           Q.    Was he a member of the team that you were  
4           part of which was charged with implementing  
5           this concept?

6           A.    Yes.

7           Q.    And what was his function on that team?

8           A.    He was the CEO.

9           Q.    Okay.  So he was the initial CEO?

10          A.    Yes.

11          Q.    Do you still have a relationship with  
12          Mr. Mullings?

13          A.    Once-a-year cocktail.

14          Q.    Okay.  As you sit here today, do you know  
15          how he is currently employed or if he is  
16          currently employed?

17          A.    Yes.

18          Q.    Okay.  And how is that?

19          A.    He works for Freddie Mac.

20          Q.    And do you know the position he holds with  
21          Freddie Mac?

22          A.    No.

23          Q.    All right.  Who else was hired initially?

1 A. Jim Dowell.

2 Q. Is that D-O-W-E-L-L?

3 A. I believe so.

4 Q. What was his position?

5 A. Chief technology officer.

6 Q. Is he still employed by either the parent

7 or the subsidiary?

8 A. No.

9 Q. Do you have any relationship with

10 Mr. Dowell?

11 A. Cocktail every three years.

12 Q. Do you know how he's currently employed?

13 A. No.

14 Q. Who else was hired?

15 A. Dan McLaughlin.

16 Q. And do you recall his position?

17 A. He was the operations officer.

18 Q. Is he still employed by either the parent

19 or the subsidiary?

20 A. Yes.

21 Q. And how is he presently employed?

22 A. He's executive vice president over the

23 product division.

1 Q. And is that for the parent or the  
2 subsidiary?

3 A. Parent.

4 Q. Who else was on the initial executive team?

5 A. No one.

6 Q. So -- other than yourself?

7 A. (Witness nods head.)

8 Q. Right?

9 A. Yes.

10 Q. And how were you initially employed?

11 A. Senior vice president and general counsel  
12 and secretary.

13 Q. And those persons all came on board  
14 December of 1995?

15 A. Paul and I.

16 Q. Okay. And how far behind the two of you  
17 were Jim and Mr. McLaughlin, Jim Dowell and  
18 Jim -- Dan McLaughlin?

19 A. A month.

20 Q. Okay. So more or less contemporaneously?

21 A. (Witness nods head.)

22 Q. I assume, then, from -- that all four of  
23 you were a member of that initial

1 implementation team; is that correct?

2 A. Yes.

3 Q. And did you hold corporate meetings or  
4 discussions about how to structure this  
5 organization, how to implement this  
6 concept?

7 A. Yes.

8 Q. Did you maintain records of those meetings?

9 A. I don't know.

10 Q. You were the secretary; correct?

11 A. Yes.

12 Q. Would that have been within your job  
13 function?

14 A. No.

15 Q. Would you have had an assistant who would  
16 have had that function?

17 A. No.

18 Q. Did y'all write any interoffice memoranda  
19 or summaries of these meetings or anything  
20 like that?

21 A. Not -- no, not really.

22 Q. What was the purpose for this concept? I  
23 mean, why did you -- why did your company

1           feel it was necessary?

2                       MR. BROCHIN: Object to the form  
3                       of that question.

4       Q.   Well, and let me re-ask it because that  
5           might be considered a compound question.

6                       What exactly was the concept you were  
7           trying to implement?

8       A.   We were setting up a system to eliminate  
9           unnecessary assignments and track mortgage  
10          loans.

11       Q.   And the timing of this entity -- had you  
12           been involved with any discussions prior to  
13           this initial formation of the company we'll  
14           call old MERS about the need or the  
15           perceived need for this type of entity or  
16           concept?

17       A.   Prior to old MERS?

18       Q.   Uh-huh (positive response).

19       A.   No.

20       Q.   So prior to being hired you had not taken  
21           part in any of this?

22       A.   No.

23       Q.   With respect to the concept, what was the

1 concern or the perceived concern with  
2 respect to public land records and  
3 assignments of mortgages?

4 MR. BROCHIN: Object to the form  
5 of the question.

6 Q. And if that's not a fair statement -- I  
7 don't want to mischaracterize anything.  
8 But what I've read, in any case, that there  
9 was a concern with issues with regard to  
10 chain of title and paper moving to the  
11 market and that sort of thing. Is that  
12 fair?

13 MR. BROCHIN: Well, is it fair  
14 that you read that?

15 Q. I mean, is that -- was that the concern, or  
16 was there some other concern?

17 MR. BROCHIN: Object to the form  
18 of the question.

19 A. I don't -- I don't think of anything as  
20 being a concern from that period.

21 Q. So was this a profit-driven concept?

22 A. No.

23 Q. And truly never has been profit-driven to

1           the extent of MERS or the parent or the  
2           subsidiary, has it?

3       A.    Correct.

4       Q.    Is it fair to say that MERS was created not  
5           as a -- not necessarily as a corporation  
6           for profit but as a corporation which would  
7           hope to sustain itself by covering its cost  
8           of existence?

9                       MR. BROCHIN:  Object to the form  
10                      of the question.  If you  
11                      understand it.

12      A.    Yes.

13      Q.    And was that the -- at least a portion of  
14           the reason that the company chose to  
15           initially form as a member corporation  
16           rather than a stock corporation?

17      A.    I wouldn't characterize it that way, but it  
18           did start as a membership corporation.

19      Q.    And for people that are unfamiliar with  
20           that term, could you briefly tell them the  
21           difference between a membership corporation  
22           and a stock corporation?

23      A.    Well, rather than get into the legal



1 differences, it's -- membership corporation  
2 would be essentially one company, one vote.

3 Q. And so every company that became a member  
4 of old MERS, which is a member corporation,  
5 would in effect have one vote regarding the  
6 governance of that corporation?

7 A. Shareholders.

8 Q. Shareholders.

9 A. Every company shareholder would have one  
10 vote.

11 Q. Right. As opposed to a stock corporation  
12 where there might be 10,000 stockholders,  
13 but two of them might own 70 percent of the  
14 shares; right?

15 MR. BROCHIN: Object to the form.

16 A. In theory, yes.

17 Q. And I guess a stock corporation, the extent  
18 of ownership would be determined more by  
19 the shares of stock?

20 A. Yes.

21 Q. And I don't want to get too far off track  
22 of where we started, but I'm just trying to  
23 fill in some blanks.

1           This group of four that began the  
2           company that we refer to as old MERS, which  
3           is a member corporation, how long did the  
4           four of you meet to formulate your plan  
5           about implementing this concept?

6           A.   Well, we never really stopped formulating  
7           the concept.  We met --

8           Q.   I'm sorry.

9           A.   -- intensively.

10          Q.   All right.  And over what period of time  
11          did those meetings take place?

12          A.   Well, before until Jim Dowell exited.

13          Q.   All right.  With -- well, with respect to  
14          when the original four came on board -- you  
15          said they should have all been in place by  
16          approximately January of 1996?

17          A.   Yes.

18          Q.   And you said y'all began to meet  
19          intensively about this concept --

20          A.   Yes.

21          Q.   -- and how to most effectively implement  
22          it?

23          A.   Yes.

1 Q. Is it your testimony that none of the four  
2 of you maintained any records about how to  
3 do this or the legalities of it or how to  
4 make sure that it functioned correctly and  
5 as intended? There were no records of any  
6 of those types of conversations or meetings  
7 or anything?

8 MR. BROCHIN: Object to the form  
9 of the question.

10 A. Yeah. I couldn't speak for every -- every  
11 possible piece of paper, but writing was  
12 not -- was not one of the -- one of the  
13 characteristics of our meetings.

14 Q. And once those meetings began, I guess, in  
15 earnest in January of 1996, how long did  
16 those meetings take place before you began  
17 to take action outside of your group?

18 A. I guess I'm not sure I understand what  
19 you're asking. The -- we had to establish  
20 a technology relationship with another  
21 company.

22 Q. Was that the first step in the process?

23 A. That and the concept. The concept and the

1           technology were probably the two things  
2           that took up the time.

3       Q.    And I want to drop back for a second and  
4           just clarify something so that anybody who  
5           hears your testimony understands it in  
6           context.

7                    You are a licensed attorney; right?

8       A.    Yes.

9       Q.    And do you still maintain an active law  
10          license?

11      A.    Yes.

12      Q.    Is it purely for the state of Virginia or  
13          is it any other state?

14      A.    It's not Virginia.  It's Oklahoma and  
15          Texas.

16      Q.    Right.  And you practiced law for a period  
17          of time before you ultimately obtained this  
18          position; correct?

19      A.    Yes.

20      Q.    And are there any other members of this  
21          group of four who are also attorneys?

22      A.    No.

23      Q.    With respect to the implementation of the

1           concept, what you were -- I think you  
2           mentioned before you wanted to create a  
3           situation where you didn't have to record  
4           assignment when the promissory note changed  
5           hands; is that correct?

6           A.    No.

7                           MR. BROCHIN:  Object to the  
8   form -- excuse me.  Object to  
9   the form of the question.

10          A.    That's not correct.

11          Q.    All right.  Explain, then, in your own  
12                words what the concept was.

13          A.    The concept or the purpose?

14          Q.    Well, both.  Let's start with the concept.

15          A.    Well, the purpose was to eliminate  
16                unnecessary assignments.

17          Q.    And when you say unnecessary assignments,  
18                tell me how you define an unnecessary  
19                assignment.

20          A.    Well, it had nothing to do with notes at  
21                all.

22          Q.    Okay.  When you went to law school, did you  
23                take classes in real property and that sort

1 of thing?

2 A. Yes.

3 Q. And you discussed mortgages and you worked  
4 in that area some as you practiced. Is  
5 that fair?

6 A. Yes.

7 Q. I'm not asking you about any state in  
8 particular. I'm just talking about as a  
9 general concept, general legal principle.  
10 Typically when the transfer of a promissory  
11 note which is secured by a mortgage takes  
12 place, generally speaking, typically  
13 there's a contemporaneous assignment of the  
14 mortgage for the public record; is that  
15 correct?

16 MR. BROCHIN: Object --

17 A. That is not correct.

18 MR. BROCHIN: Excuse me. Object  
19 to the form of the question.  
20 That is not correct, and  
21 you're asking for a legal  
22 conclusion.

23 MR. WOOTEN: Asked for what, sir?

1 MR. BROCHIN: Legal conclusion.

2 MR. WOOTEN: Okay. Just want to  
3 make sure I understand you.

4 Q. So is it your contention, then, that the  
5 public recording records -- typically the  
6 assignment of a mortgage is not undertaken  
7 to give notice to the world that the  
8 ownership of the debt has changed hands?

9 MR. BROCHIN: Object to the form  
10 of the question to the extent  
11 it calls for a legal  
12 conclusion and generalizes  
13 some 50 states.

14 Q. Well, we'll talk specifically later. I'm  
15 just talking about generally what you  
16 learned in law school, the big thick books  
17 like that that they give us.

18 A. Yeah. It's more than a contention. It's  
19 just not right. It's -- assignments are  
20 not recorded, never were, when notes move.

21 Q. And is that one of the premises that  
22 underlay your company's consideration in  
23 its implementation of this idea?

1       A.    It's one of the fundamental underpinnings  
2            of negotiable instruments and the entire  
3            mortgage industry.  Notes have never been  
4            recorded, and assignments are not recorded  
5            in connection with notes.

6       Q.    Let's don't do like we did in some other  
7            places and conflagurate the two terms.  
8            When I talk about a promissory note, I'm  
9            talking about the obligation that the  
10           borrower signs that is the debt  
11           instrument.  I will pay you "X" amount of  
12           money per month for 30 years for my home  
13           mortgage, the loan that you give me to buy  
14           my home.  That is contained in the  
15           promissory note; right?

16                       MR. BROCHIN:  Object to the form  
17                       of the question.

18       A.    It's universally called a note.

19       Q.    Right.  And that is the debt instrument?

20       A.    Yes.

21       Q.    Okay.  The mortgage is the lien which the  
22            borrower grants on their real estate to  
23            secure payment of that promissory note;



1 right?

2 A. Yes.

3 Q. So I don't want you to be confused. I  
4 didn't say that a promissory note had to be  
5 recorded or that an assignment of a  
6 promissory note had to be recorded; okay?

7 A. Uh-huh (positive response).

8 Q. What I'm saying is, is that when an  
9 originator sells that note to an aggregator  
10 or a warehouse lender or some other entity  
11 that intends to securitize it on Wall  
12 Street, that typically they endorse that  
13 note by some agreed-upon method; correct?

14 MR. BROCHIN: Object to the form  
15 of the question. Calls for  
16 speculation.

17 A. Yeah. The agreed form -- agreed-to form is  
18 the endorsement of the note --

19 Q. Right.

20 A. -- under Article 3.

21 Q. Sure. And it can be in blank or to order;  
22 right?

23 A. Yes.

1 Q. And when we say in blank, it says pay to  
2 the order of, and then they sign off;  
3 right?

4 A. Well, that's not blank.

5 Q. Just sign off just like signing the back of  
6 a check; right?

7 A. That's blank.

8 Q. Okay. But when you endorse to order, you  
9 endorse from, you know, the originator  
10 directly to the entity that's purchasing;  
11 right?

12 A. Specific.

13 Q. Right. It's to -- from the company that  
14 the note is made to to the company that it  
15 is sold to; correct?

16 A. Yes.

17 Q. So if you and I had a check between us,  
18 which is a form of a negotiable instrument,  
19 and I had a check made out to me and it  
20 said cash, pay to Nick Wooten, \$300 -- if I  
21 wanted to endorse that note to you, I could  
22 do it two ways. I could turn it over on  
23 the back and I could sign Nick Wooten;

1 right?

2 MR. BROCHIN: Object to the form

3 of the question.

4 A. That's a check.

5 Q. Right.

6 A. But that's a negotiable instrument.

7 Q. And that would be a blank endorsement;

8 right?

9 MR. BROCHIN: Object to the form

10 of the question.

11 Q. Just signing my name on the back of it so  
12 that anybody that had it could take it and  
13 cash it; right?

14 MR. BROCHIN: Object to the form

15 of the question.

16 A. Under Article 3.

17 Q. Sure. And when you say Article 3, you're  
18 talking about the UCC --

19 A. Yes.

20 Q. -- Uniform Commercial Code?

21 But if I said -- on the back of that  
22 check if I wrote Nick Wooten to  
23 R.K. Arnold, that's a specific endorsement;

1 right?

2 A. Yes.

3 Q. And so when entities transfer promissory  
4 notes which are secured by mortgages, they  
5 transfer those notes in a similar fashion,  
6 either in blank or specifically between  
7 those two entities; right?

8 MR. BROCHIN: Object to the form  
9 of the question.

10 A. Yes.

11 Q. And with respect to the mortgage lien --  
12 the lien, not the note -- if the company  
13 who received the note wants to make the  
14 world aware that they now own the debt,  
15 they would typically file an assignment of  
16 the mortgage as a debt owner; right?

17 MR. BROCHIN: Object -- no.  
18 Object to the form of the  
19 question. And it's asking for  
20 legal conclusions and is  
21 calling for speculation and  
22 mischaracterizes his  
23 testimony.

1 A. And it's incorrect. It's not the case and  
2 it's never been the case.

3 Q. So your contention is that all the  
4 assignments are filed in land records  
5 throughout Alabama that evidence change in  
6 the ownership of the debt -- they don't  
7 matter. Is that your contention?

8 MR. BROCHIN: Objection. Object  
9 to the form of the question.  
10 You're mischaracterizing his  
11 testimony.

12 Q. Why would a mortgage assignment be  
13 recorded? What does it do? What's the  
14 purpose of a mortgage assignment?

15 A. To move the lien interest.

16 Q. Right. And who does it move it to?

17 MR. BROCHIN: Object to the form  
18 of the question.

19 A. Whoever's name is in the land records.

20 Q. Well, if you assign the original mortgage,  
21 the name in the land records is going to be  
22 the name on the mortgage; right?

23 MR. BROCHIN: Object to the form

1                                   of the question.

2       A.    I don't understand the question.

3       Q.    Well, let's just talk about a MERS as  
4            mortgagee mortgage.  There are 53 million  
5            of them roughly today in the country?

6       A.    62 million.

7       Q.    62 million.  And of those 62 million, they  
8            all say that MERS is the mortgagee?

9       A.    Yes.

10      Q.    So if you wanted to transfer that to a  
11            non-MERS member, how, then, would you do  
12            that, sir?

13      A.    Record an assignment in the land records.

14      Q.    Okay.  And what would be the purpose of  
15            that assignment?

16      A.    To take MERS out of the land records.

17      Q.    Okay.  And would that be because the owner  
18            of the debt was no longer a MERS member?

19                           MR. BROCHIN:  Object to the  
20                           form --

21      A.    No.

22                           MR. BROCHIN:  -- of the question.

23      Q.    What other reason would that occur?

1 A. The owner of the debt --

2 MR. BROCHIN: Object to the form.

3 A. -- doesn't have to be a MERS member.

4 Q. Okay. You would agree with me, would you  
5 not, that MERS cannot act on behalf of an  
6 entity that it does not have a membership  
7 agreement with, can it?

8 MR. BROCHIN: Object to the form.

9 A. Not -- you know, I wouldn't -- I wouldn't  
10 concede that. We've got our membership  
11 structure.

12 Q. And your membership structure is the  
13 nominee structure; right?

14 MR. BROCHIN: Object to the form  
15 of the question.

16 A. We have members of MERS.

17 Q. Sure. I agree with you. And we've got  
18 bunches of documents to go through. We're  
19 going to get to that in a minute. But I'm  
20 just trying to talk about what you've  
21 conceded numerous times either through your  
22 attorneys or through yourself or through  
23 Mr. Hultman or through Ms. Horstkamp in

1           either an affidavit or written testimony  
2           that you don't act on behalf of parties who  
3           are not members of MERS; right?

4       A.    Not -- not through the membership  
5           agreements.

6       Q.    Right.  Because your right to act flows  
7           through that membership agreement; right?

8       A.    With somebody on the loan, sure.

9       Q.    Right.  Because you're a -- I mean, you're  
10          a nominee.  You're acting more or less as  
11          an agent of some sort; is that right?

12      A.    Yes.

13      Q.    So, you know, an agency agreement -- you're  
14          pretty much bound by the written terms of  
15          that agency agreement, aren't you?

16      A.    Sure.

17                       MR. BROCHIN:  Object to the form.

18      Q.    So if you don't have an agency agreement  
19          for someone, you certainly shouldn't be  
20          able to act on their behalf; right?

21                       MR. BROCHIN:  Object to the form  
22                       of the question.

23      A.    Yeah.  I don't really understand the



1 question. We have a membership  
2 relationship with the loan.

3 Q. With the loan?

4 A. The servicer.

5 Q. Mr. Arnold, I understand that this is kind  
6 of a complex area for a layman, so I try to  
7 be pretty precise about my terminology.  
8 But you just said that you have a  
9 membership relationship with the loan.

10 Okay. The loan consists of the  
11 promissory note and the lien; right?

12 A. Yes.

13 Q. And those are intangible things; right?

14 A. Well, that's a legal term. I mean, they're  
15 documents.

16 Q. Sure. But you just said you had a  
17 membership agreement with a loan -- not a  
18 member, but a loan. I just want to be real  
19 clear about that.

20 A. Well, then I'll -- I'll say that we have a  
21 membership agreement with somebody involved  
22 in the loan.

23 Q. Okay. And that I can deal with. But you

1 don't have any agreement that says loan  
2 number 12345678 nominates MERS as nominee,  
3 do you?

4 A. No.

5 MR. BROCHIN: Object to the form.

6 Q. Okay. Well, I mean, that's literally what  
7 you testified to; right?

8 MR. BROCHIN: No. Objection to  
9 the form. The record will  
10 reflect what he testified to.

11 Q. Now, I can understand having a membership  
12 agreement with a party to a loan.

13 A. Okay.

14 Q. And you do have numerous agreements of that  
15 nature; right?

16 A. Yes.

17 Q. Okay. But I think my initial question that  
18 triggered that was much simpler in that  
19 you're not going to testify that you have  
20 the right to act on behalf of someone that  
21 you are not the nominee or agent of through  
22 one of your written agreements, are you?

23 MR. BROCHIN: Object to the form

1                                   of the question.

2       A.    With respect to the loan, we will act  
3            within the context of our authority to act  
4            under the member agreements.

5       Q.    True.  And the member agreements are only  
6            with MERS members?

7       A.    Yes.

8       Q.    So there is no right of MERS to act for  
9            anyone that they do not have a written  
10           agreement with?

11                               MR. BROCHIN:  Object to the form  
12                                   of the question.

13       A.    Well, we're mortgagee of record on the  
14            loan.

15       Q.    Well, we'll get around to that in a moment;  
16            okay?  I understand that's your position,  
17            but what I'm talking about is much more  
18            esoteric.

19       A.    Maybe that's why I'm having some difficulty  
20            with it.

21       Q.    Okay.  Well, let's say that I bought a  
22            mortgage loan from someone.  There are lots  
23            of people buying distressed loans today.

1           And I don't have a MERS membership  
2           agreement, but you have a MERS mortgage.  
3           You don't have any authority to act on my  
4           behalf because we don't have a membership  
5           agreement?

6           A.    That's incorrect.

7           Q.    So what authority would you have to act on  
8           my behalf if you don't have a membership  
9           agreement?

10          A.    We're the mortgagee of record.

11          Q.    Sure.  And you've written extensively in  
12          pleadings and taken positions in court the  
13          general rule that the lien follows the  
14          note; right?

15          A.    Generally.

16          Q.    So if someone who is not a MERS member  
17          becomes owner of the debt, the note, then  
18          as a general proposition they would have  
19          the right to enforce that lien irrespective  
20          of the fact that you were named mortgagee  
21          of record; right?

22          A.    Yes.

23          Q.    Okay.  So there would be no reason for you

1 to act on their behalf if you had no  
2 agreement with them; right?

3 MR. BROCHIN: Object to the form  
4 of the question.

5 A. Yeah. I wouldn't concede that.

6 Q. And is that because of your position with  
7 respect to the lien which nominates you as  
8 mortgagee of record?

9 A. Yes.

10 Q. Because, in fact, what you're claiming is  
11 in fact ownership of the lien; right?

12 MR. BROCHIN: Object to the form  
13 of the question.

14 A. No. We're -- we are the mortgagee in the  
15 land records, and we have duties that go  
16 along with that. And we carry out those  
17 duties according to what we've agreed to  
18 do.

19 Q. Okay. Is it not your testimony that MERS  
20 owns the lien?

21 MR. BROCHIN: Object to the form  
22 of the question.

23 A. I don't know what that means. We are the

1 mortgagee in the land records. We were  
2 made mortgagee by the borrower on a  
3 security instrument.

4 Q. Well, let's talk about that for a moment,  
5 if we can.

6 You would agree that the mortgagee on  
7 the MERS mortgage is not a  
8 fill-in-the-blank, is it?

9 MR. BROCHIN: Object to the form  
10 of the question.

11 A. It's a pre -- prefab document.

12 Q. Right. I mean, it's not a multiple-choice  
13 question as to who's the mortgagee, is it?

14 A. No.

15 Q. And you would agree that there's no time at  
16 any time during the negotiation or  
17 solicitation of any mortgage loan where  
18 it's ever discussed with the consumer who  
19 will serve as the mortgagee of record?

20 A. I can't vouch for what discussions take  
21 place.

22 Q. Well, you know, typically consumers see  
23 things on a good-faith estimate, like

1 closing costs, interest rate, that type of  
2 thing; right?

3 MR. BROCHIN: Object to the form.

4 Q. You're familiar with a good-faith estimate;  
5 right?

6 A. Yes.

7 Q. And you're familiar with the typical  
8 contents of those documents?

9 A. Yes.

10 Q. And there's not a check-the-box for who  
11 you'd like to serve as mortgagee of record,  
12 is there?

13 A. No.

14 Q. No. So as far as you know, when a consumer  
15 goes to a broker or lender and asks for a  
16 mortgage, they don't hand them a copy of  
17 your form mortgage and say, hey, look this  
18 over and tell me if you got any problems  
19 with it, do they?

20 MR. BROCHIN: Object to the form.

21 A. Well, the consumer is entitled to the  
22 documents ahead of time.

23 Q. They're entitled to a good-faith estimate;

1 right?

2 A. And they're entitled to the documents.

3 Q. Okay. And you would agree that the lender

4 is going to place whoever they deem

5 appropriate in the slot as the mortgagee

6 through the use of a preprinted form;

7 right?

8 A. Well, it's a condition of the loan.

9 Q. Right. It's not a negotiable issue, is it?

10 MR. BROCHIN: Object to the form.

11 A. I don't know.

12 Q. You ever had any documents come through

13 your system where a mortgagee was scratched

14 off and somebody else was written in?

15 A. We wouldn't have a document that didn't

16 make MERS the mortgagee.

17 Q. Right. So to the extent that that's an

18 issue, again, it's a preprinted form that's

19 presented to the consumer for signature

20 typically at closing; right?

21 A. Yes.

22 MR. BROCHIN: Asked and answered.

23 Q. Okay. So they might shop around for



1 interest rates or payment amounts or  
2 closing costs or that kind of thing or  
3 approval even?

4 A. Or companies.

5 Q. Or companies. But typically they don't  
6 negotiate about who is the mortgagee of  
7 record, do they?

8 MR. BROCHIN: Objection. Calls  
9 for speculation. Asked and  
10 answered.

11 A. They shopped around for the company.

12 Q. So if the companies all use MERS as  
13 mortgagee, is there any choice for the  
14 consumer?

15 MR. BROCHIN: Object to the form.

16 A. Companies don't all use MERS.

17 Q. 60 percent. Is that about right?

18 A. Probably.

19 Q. Maybe two-thirds now?

20 A. I doubt it.

21 Q. But sneaking up on it maybe?

22 MR. BROCHIN: Object to the form.

23 A. It may -- it may even be creeping back.

1 Q. And, I mean, your stated goal is that every  
2 mortgage would be a MERS mortgagee --

3 A. That's our mission.

4 Q. Right?

5 I mean, that's what you're trying to  
6 get to?

7 A. Yes.

8 Q. You're still sitting there with that  
9 transcript in front of you. If you will,  
10 flip over to page 39 of that transcript,  
11 please, sir.

12 A. Which page?

13 Q. 39.

14 Well, and before I even ask you that  
15 question, let me step back and ask a more  
16 general question.

17 Your company spends a lot of time  
18 talking about interest in a mortgage loan;  
19 right?

20 A. (Witness nods head.)

21 Q. And I notice that y'all speak in terms of  
22 beneficial interest and things of that  
23 nature.

1 A. Yes.

2 Q. Can you tell the judge and the jury every  
3 interest that your company recognizes in a  
4 mortgage loan?

5 MR. BROCHIN: I'm sorry. Could  
6 you read the question?

7 MR. WOOTEN: I can restate it if  
8 you'd like.

9 Q. Can you tell me every interest that your  
10 company recognizes in a mortgage loan?

11 MR. BROCHIN: Object to the form.

12 A. Yeah. I don't understand what you mean by  
13 interest.

14 Q. Well, let's talk about the mortgagee  
15 interest. Define that for me.

16 A. I think of the mortgagee interest as being  
17 just bare legal title.

18 Q. When you say bare legal title, is that  
19 merely being the name in the land records?

20 A. Yes.

21 Q. That is not ownership of the lien which  
22 secures the payment of the promissory note?

23 MR. BROCHIN: Object to the form.

1 A. No, not in my mind.

2 Q. Have you ever testified to such or allowed  
3 anyone to testify as such on behalf of your  
4 company?

5 MR. BROCHIN: Object to the form  
6 of the question, asking a  
7 witness to recall testimony,  
8 and particularly to the part  
9 of the question that is asking  
10 the witness whether he's  
11 allowed somebody to testify.  
12 That's -- doesn't make much  
13 sense.

14 A. Well, there's a lot of jargon and slang in  
15 this industry.

16 Q. Well, let's try to avoid that.

17 A. Let's try.

18 Q. I am talking about the owner of the lien.

19 A. And I don't know what that means.

20 Q. Okay. What about the interest in  
21 servicing? Is that an interest that your  
22 company recognizes, in servicing rights of  
23 a particular loan?

1                   MR. BROCHIN: Object to the form  
2                   of the question.

3           A.    We track servicing rights.

4           Q.    Okay. And I notice that you make a big  
5           deal about the fact that those transfer  
6           between parties by contract and that those  
7           are not recordable interests?

8           A.    Correct.

9           Q.    Those exist purely between the parties who  
10          own mortgage loans, the notes, and the  
11          parties who service those loans on their  
12          behalf; right?

13          A.    I -- I couldn't agree with that.

14          Q.    Servicing interest.

15          A.    The servicing interest is the company that  
16          has an obligation to collect the payments  
17          on the loan.

18          Q.    But servicing accomplishes -- or  
19          encompasses more than simply collecting  
20          payments; right?

21          A.    Yes, it does.

22          Q.    And typically servicing rights with respect  
23          to the secondary mortgage market are

1 contained in several types of agreements;  
2 right?

3 MR. BROCHIN: Object to the form  
4 of the question.

5 A. Can be.

6 Q. In a typical securitization a pooling and  
7 servicing agreement would set out servicing  
8 rights, wouldn't it?

9 MR. BROCHIN: Object to the form  
10 of the question.

11 A. Yeah. I don't -- I don't think that the  
12 two are directly related. For one thing,  
13 when we talk about jargon and slang, even  
14 the term servicing rights is -- it's a  
15 weird term. That's a contract right that's  
16 sold, and then there's a secondary market  
17 that developed in that.

18 Q. Sure. And there are 34 or so national  
19 mortgage servicers today as we sit here  
20 roughly. Is that about right?

21 A. Just -- way more than that.

22 Q. National mortgage servicers, not just --

23 A. I don't --

1 Q. -- regional or area.

2 A. I don't know about the demarcation, but  
3 there are hundreds and hundreds of  
4 servicers.

5 Q. Right. And they -- when you say a  
6 servicer, you're talking about not only the  
7 person who collects payments for a normal  
8 performing mortgage loan and everybody pays  
9 on time, you're talking about subservicers  
10 who handle default servicing, subservicers  
11 who handle foreclosures, subservicers who  
12 handle real-estate-owned property,  
13 subservicers who handle property  
14 preservation?

15 A. Yes.

16 Q. Those are all servicers; right?

17 A. Those are all servicers.

18 Q. And all those rights pass by contract?

19 MR. BROCHIN: Object to the form.

20 A. There are -- there are contracts, and those  
21 contracts can be sold by their nature.

22 Q. Right. Like pretty much any other  
23 contract; right?

1 A. Not really like any other contract. I  
2 mean, it's got -- it's a specific type of  
3 contract. Servicers know how to deal with  
4 borrowers on a daily or monthly basis.

5 Q. Right. But those interests would exist  
6 with or without MERS; right?

7 A. Yes.

8 Q. And servicers would change and servicing  
9 rights would change whether MERS was ever  
10 created; right?

11 MR. BROCHIN: Object to the form.

12 A. Yes.

13 MR. WOOTEN: I'm sorry,

14 Mr. Brochin.

15 MR. BROCHIN. Object to the form.

16 Q. So when you start talking about MERS'  
17 impact on servicing rights, if something  
18 happened and MERS no longer existed,  
19 servicing rights are still going to change  
20 hands in mortgages; right?

21 A. I don't know about the future.

22 Q. Well, judging by the last 30 years,  
23 servicing rights are bought and sold every



1 day, aren't they?

2 A. Judging by the last year, we don't know  
3 what the future holds.

4 Q. Right. And with respect to the beneficial  
5 interest in a mortgage loan, when you talk  
6 about a beneficial interest, what are you  
7 talking about?

8 A. The -- generally the party that is  
9 ultimately entitled to the funds.

10 Q. Would that be the owner of the debt?

11 MR. BROCHIN: Object to the form.

12 A. Closer.

13 Q. Okay. Well, just as a general rule, if  
14 someone who was a MERS member had -- and we  
15 really haven't talked about this term  
16 yet -- but someone who had been designated  
17 a certifying officer of MERS went out  
18 without anybody's authority and transferred  
19 a MERS mortgage into some other entity's  
20 name and that other entity foreclosed,  
21 without ownership of the debt they would  
22 have no right to foreclose, would they?

23 MR. BROCHIN: Object to the form

1                   of the question. Calls for  
2                   speculation and a legal  
3                   conclusion based on  
4                   speculation.

5       A.    Yeah. I don't understand the question.

6       Q.    Is it fair to say that the right to  
7            foreclose flows from the right to payment  
8            of the debt?

9                   MR. BROCHIN: Object to the form  
10                  of the question.

11      A.    Depends on state law.

12      Q.    And, again, we'll talk more specifically.  
13            I'm talking about generally.

14                  MR. BROCHIN: Object to the form  
15                  of the question.

16      Q.    Is it fair to say that the person who owns  
17            the debt is the person who has the right to  
18            payment of the debt?

19      A.    Yes.

20      Q.    So if a person -- a New York securitized  
21            trust has paid value for a mortgage loan so  
22            that it could securitize it, create REMIC  
23            interest, and sell bonds, they have a

1 superior interest in that note over someone  
2 who has paid nothing and does not own that  
3 note; right?

4 MR. BROCHIN: Object to the form  
5 of the question in that it  
6 calls for speculation and a  
7 legal conclusion based on that  
8 speculation.

9 A. It'd depend on the documents. At that  
10 point it's been atomized into many, many,  
11 many interests.

12 Q. Right. And those are things that we've all  
13 become familiar with, like trenches and  
14 swaps and CDOs and things like that; right?

15 MR. BROCHIN: Object to the form  
16 of the question.

17 A. It's just a security. So it's in  
18 everybody's 401(k)s and all that.

19 Q. Right. And that's the cash flow  
20 represented by the payments on that  
21 mortgage loan; right?

22 A. Cash flow is part of it.

23 Q. But the right to foreclose, the right to

1           come and take Ms. Henderson's home, that  
2           flows to the owner of the note; right?

3       A.    It depends on state law.

4       Q.    And when you say it depends on state law,  
5           are you making that qualification based  
6           upon the right -- the fact that the owner  
7           might designate someone else to take that  
8           action on their behalf?

9                       MR. BROCHIN:  Object to the form.

10      A.    There are places where that happens.

11      Q.    Sure.  Before your company came into  
12           existence, it wouldn't be uncommon to see  
13           seven, eight, nine, ten, 15 mortgage  
14           assignments over a ten- or 15-year period  
15           where a loan flowed amongst various owners,  
16           would it?

17                       MR. BROCHIN:  Is that a question?

18                       MR. WOOTEN:  Yeah.

19                       MR. BROCHIN:  Object to the form  
20                               of the question.  Calls for  
21                               speculation.

22      A.    Yeah.  And the loan might not have been  
23           what's flowing.  That could have been the

- 1 servicing rights.
- 2 Q. Sure. But it wouldn't have been uncommon
- 3 to see a document in the probate records
- 4 evidencing that change, would it?
- 5 A. With the servicing change?
- 6 Q. With the change in ownership of the debt.
- 7 A. That's never recorded.
- 8 Q. Are you saying that the change in servicing
- 9 rights would have been recorded?
- 10 MR. BROCHIN: Object to the form.
- 11 A. That was what caused a lot of unnecessary
- 12 assignments. It had nothing to do with
- 13 notes.
- 14 Q. So you're saying that the transfer of the
- 15 servicing interest in loans caused a lot of
- 16 unnecessary assignments?
- 17 A. I'm not calling servicing an interest in
- 18 the loan. That's a contract --
- 19 Q. Right.
- 20 A. -- to service the loan.
- 21 Q. And a servicer is not the owner of the
- 22 debt, is it?
- 23 MR. BROCHIN: Object to the form.

- 1 A. Can be.
- 2 Q. Typically a servicer is acting on behalf of  
3 the owner of the debt, is it not?
- 4 A. The servicer could own a debt.
- 5 Q. Could --
- 6 A. (Witness nods head).
- 7 Q. -- but typically a servicer is acting on  
8 behalf of the owner?
- 9 A. Yes.
- 10 Q. And that's why I said -- you indicated that  
11 changes in servicing caused a lot of  
12 unnecessary assignments; is that right?
- 13 A. Yes.
- 14 Q. Why would a change in servicing trigger any  
15 assignment of a mortgage?
- 16 MR. BROCHIN: Object to the form.
- 17 A. Because the servicer was the mortgagee.
- 18 Q. So are you speaking in the context of the  
19 situation where a company like Wells Fargo  
20 originates a mortgage loan and they are  
21 named as mortgagee, because they were the  
22 lender. And then at some point they  
23 securitized that loan and some other entity

1           became a servicer, and so there would be an  
2           assignment evidencing a change in that  
3           interest?

4                       MR. BROCHIN: Object to the --

5       A.    It's not evidence --

6                       MR. BROCHIN: Excuse me. Object  
7                       to the form of the question.

8       A.    Yeah. Being mortgagee doesn't mean that  
9           somebody made the loan.

10      Q.    Well, not with respect to MERS; right?

11      A.    Or anybody else.

12      Q.    But, I mean, your whole MERS as mortgagee  
13           system is built upon the premise that you  
14           never make a loan?

15      A.    We never make a loan.

16      Q.    And you never have the right to collect any  
17           money on any mortgage loan?

18      A.    Do not.

19      Q.    And you exist as mortgagee of record so  
20           that assignments do not have to be recorded  
21           when transfers occur between MERS members;  
22           right?

23      A.    Servicing transfers.

1 Q. Okay. What about transfers of the  
2 ownership of the debt?

3 A. It's never recorded, never was.

4 Q. Okay. So your testimony is, is that no  
5 matter how many times a promissory note is  
6 endorsed and transferred for value between  
7 various purchasers, for whatever reason,  
8 that there was never contemporaneous  
9 assignments of those mortgages which  
10 secured the payment of that note?

11 MR. BROCHIN: Object to the form.

12 That's not his testimony. The  
13 record will reflect his  
14 testimony.

15 A. Can you repeat the question?

16 MR. WOOTEN: Can you read it  
17 back?

18 (Requested portion of the record  
19 was read by the court reporter.)

20 A. Yeah. I guess the problem is the word  
21 never. But as a matter of course, when the  
22 note moves, there's -- it's never been the  
23 case that there were generally assignments



1           that reflected that.

2           Q.    Would you agree that that's something that  
3           we lawyers would call a legal issue?

4                         MR. BROCHIN:  Object to the form.

5           A.    Well, notes are freely transferrable, so  
6           there's --

7           Q.    I don't disagree with that.  My question  
8           was, the purpose of a mortgage assignment  
9           is typically a legal issue on a  
10          state-by-state basis; right?

11          A.    Sure.

12          Q.    And did your company undertake to research  
13          the law of the several states with respect  
14          to why those states say that a mortgage  
15          assignment should be filed in the public  
16          land records?

17          A.    Yes.

18          Q.    Okay.  Did you personally review that  
19          research?

20          A.    Yes.

21          Q.    And you, as we said earlier, are a lawyer  
22          and have had legal training?

23          A.    Yes.

1 Q. And are you satisfied that there is no  
2 state that requires -- or that the purpose  
3 of the mortgage assignment is to provide  
4 notice to the world that the ownership of  
5 the debt is transferred between two  
6 different parties?

7 A. Yes.

8 MR. BROCHIN: Excuse me. Are you  
9 asking him if that -- if he's  
10 satisfied that that is the  
11 current law?

12 MR. WOOTEN: I am asking him in  
13 reviewing that research that  
14 his company relied on was he  
15 satisfied that --

16 MR. BROCHIN: At that point?

17 MR. WOOTEN: At the point he  
18 reviewed the research.

19 MR. BROCHIN: Okay.

20 A. Yes.

21 (Plaintiff's Exhibit 3 was marked  
22 for identification.)

23 Q. I show you this document I marked as

1 Plaintiff's Exhibit 3. I represent to you  
2 that that is two pages from Black's Law  
3 Dictionary, one dealing with beneficial  
4 interest, the other dealing with nominee.

5 Are those definitions accurate  
6 definitions of your corporation's  
7 interpretation of the beneficial interest  
8 and nominee with respect to your actions?

9 MR. BROCHIN: Object to the form  
10 of the question, and I  
11 instruct the witness not to  
12 answer.

13 MR. WOOTEN: Mr. Brochin --

14 MR. BROCHIN: Brochin.

15 MR. WOOTEN: Brochin.

16 -- I'm -- I bend over  
17 backwards to be as polite as I  
18 could be, but I've been  
19 through one of these  
20 depositions before where the  
21 opponent felt like that they  
22 had a right to instruct the  
23 witness not to answer.

1 I'll be glad to take a  
2 minute if you'd like to  
3 consult with Mr. Ramey, who's  
4 here from Sirote who's an  
5 Alabama lawyer. But the law  
6 in Alabama is quite clear that  
7 you don't have the right to  
8 instruct your client not to  
9 answer the question.

10 MR. BROCHIN: I believe your  
11 question calls for privileged  
12 information.

13 MR. WOOTEN: Okay.

14 MR. BROCHIN: And I believe I have  
15 every right to instruct him  
16 not to answer when you ask him  
17 questions about the legal  
18 position of a company and ask  
19 for legal opinions based on  
20 that, so --

21 MR. WOOTEN: Well, Mr. Brochin,  
22 are you licensed in the state  
23 of Alabama?

1 MR. BROCHIN: My objection and  
2 instruction stands.

3 MR. WOOTEN: Okay. Shaun, before  
4 I break to call the judge, do  
5 you want to try to work this  
6 out?

7 MR. RAMEY: I don't know if there  
8 is anything to work out if  
9 it's a -- I mean, we're  
10 talking about an  
11 attorney-client privilege  
12 issue.

13 MR. WOOTEN: That's not what I  
14 asked him.

15 MR. RAMEY: Well, I guess, what is  
16 the question?

17 MR. WOOTEN: I mean, the question  
18 is does he agree with those  
19 definitions of beneficial  
20 interest and nominee with  
21 respect to the interests that  
22 he indicates are his company's  
23 interests in these loans.

1 MR. BROCHIN: That's not what your  
2 question was.

3 MR. WOOTEN: Well, I'll be glad to  
4 restate the question if you  
5 have -- if you believe that I  
6 was asking about information  
7 that he obtained from his  
8 attorney, which I didn't ask  
9 for. I'm asking for his  
10 opinion.

11 MR. BROCHIN: I think the question  
12 is you asked -- it called for  
13 him to disclose information  
14 that was obtained through his  
15 counsel and the counsel of his  
16 company.

17 MR. WOOTEN: Well, that wasn't  
18 your objection. So I'll be  
19 glad to rephrase my  
20 question --

21 MR. BROCHIN: That was my  
22 objection, so --

23 MR. WOOTEN: -- to make it not

1 objectionable.

2 MR. BROCHIN: Go ahead. If you  
3 want to rephrase it, go ahead  
4 and rephrase it.

5 Q. If you will, pass that document back,  
6 Mr. Arnold. I just want to make sure I  
7 phrase this correctly.

8 I highlighted three definitions. One  
9 was beneficial interest, one was beneficial  
10 owner, and the other was nominee. And  
11 those directions, I'm representing to you,  
12 were pulled -- or those definitions were  
13 pulled from Black's Law Dictionary. And my  
14 question to you, first of all, with respect  
15 to beneficial interest is, does the  
16 definition from Black's Law Dictionary  
17 agree with your understanding of the  
18 beneficial interest as your company  
19 recognizes it in these mortgage loans?

20 MR. BROCHIN: That is different.

21 Now, do you understand  
22 the question? Because I'm not  
23 sure I do.

1 A. Well, the definitions use Latin. And, you  
2 know, my Latin is not my first language.  
3 So, you know, as a general proposition make  
4 a distinction between the beneficial  
5 interest and the legal interest, which is  
6 generally in line with our concept.

7 Q. All right. Then explain to me what your  
8 company defines as the beneficial  
9 interest.

10 A. It's the interest that goes along with  
11 entitled to receive payments.

12 Q. So the beneficial interest is the right to  
13 receive payments, not the ownership of the  
14 note?

15 A. No. I would say proceeds. I should say  
16 proceeds. So the beneficial interest is  
17 the interest that coincides with the right  
18 to the proceeds.

19 Q. And the right to the proceeds generally  
20 belongs to the person who has the right to  
21 enforce the note?

22 A. That would depend on state law.

23 Q. It would also depend upon agreements



1           between the parties; right?

2           A.    Yes.

3           Q.    So you could possess a note but not be  
4           entitled to payment of any of the proceeds?

5           A.    Absolutely.

6           Q.    And that occurs all the time?

7                         MR. BROCHIN:  Object to the form.

8           A.    Often.

9           Q.    And you're generally familiar with the  
10           notions of securitization with respect to a  
11           secondary mortgage market; right?

12          A.    Less so than the primary market.

13          Q.    Sure.  But you're familiar with the concept  
14           of a document custodian?

15          A.    Yes.

16          Q.    And document custodians may hold billions  
17           of dollars' worth of notes that they have no  
18           right to payment on; is that correct?

19          A.    Yes.

20          Q.    And, in fact, a company could hold a note  
21           endorsed in blank but have no right to  
22           payment of any sum represented by that  
23           note?

1 A. Yes.

2 MR. BROCHIN: Object to the form.

3 Q. Did --

4 A. Yes.

5 Q. The definition of a nominee contained in  
6 Black's is the one who's been nominated or  
7 proposed for an office. One designated to  
8 act for another in his or her place. Is  
9 that a fair description of what MERS'  
10 position is with respect to a MERS as  
11 mortgagee loan?

12 A. Well, again, I think there's some Latin in  
13 that definition. But I think, you know,  
14 we're talking about as a general  
15 proposition that -- yes, agency  
16 representative.

17 Q. And is it, in fact, a limited agency that's  
18 based upon your agreement with your member?

19 MR. BROCHIN: Object to the form.

20 Membership agreement will  
21 speak for itself as to terms  
22 of the limitations.

23 Q. Is that correct?

- 1 A. Yes.
- 2 Q. You won't go beyond what your membership  
3 agreement says you can do, will you?
- 4 A. No. No.
- 5 Q. I mean, in fact, you say that you will take  
6 your instructions from the owner of the  
7 debt; right?
- 8 A. Yes. But we also -- we have  
9 responsibilities to the public, and so  
10 we -- you know, we have an obligation to do  
11 what mortgagees have to do.
- 12 Q. When you say you have a responsibility to  
13 the public, what exactly is that?
- 14 A. Well, it's just not the case that there  
15 aren't other factors that have to be  
16 considered in our actions.
- 17 Q. What are those factors?
- 18 A. We have -- we have obligations as  
19 mortgagee.
- 20 Q. And what are those obligations?
- 21 A. At -- you know, at the end of the day it  
22 might be to maintain the property.
- 23 Q. I seem to have read something one time

1           where you said something in some media  
2           piece about you couldn't identify who the  
3           holder of the note was. Your company had  
4           to go out and cut the grass or something  
5           like that.

6           A. Yes.

7           Q. Now, I understand it might have been a  
8           little tongue-in-cheek. But what you're  
9           saying is, is that if there's a home that's  
10          been foreclosed on by someone in MERS' name  
11          and the mortgage -- or the ownership now  
12          rests in MERS' name and the house is  
13          sitting there with the windows broke out  
14          and, you know, the copper stolen and grass  
15          not cut, that ultimately it falls to you  
16          because you're the owner in the land  
17          records by virtue of the foreclosure to fix  
18          that up and make it comply with the city  
19          code; right?

20          A. Yes. But that could also be the case as  
21          mortgagee.

22          Q. Sure.

23          A. And it --

1 Q. Well, after a foreclosure, it would be  
2 because of title vested; right?

3 MR. BROCHIN: Object to the form.

4 A. Could be. It could also be with regard to  
5 being a mortgagee. And, you know, your  
6 question was very categorical. And one of  
7 the benefits of MERS is that if a servicer  
8 just disappears, MERS is still there. MERS  
9 has still got the responsibilities. So  
10 they could be in prison, and we're not  
11 going to take instructions from that  
12 direction. We're going to -- we're going  
13 to perform our obligations as mortgagee.

14 Q. Sure. Well, it's a fact, isn't it, sir,  
15 that your system will identify the owner of  
16 every interest in any loan at any given  
17 moment; right?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. Yeah. Interest, I guess, is a word I've  
21 had a problem with from the start of the  
22 deposition. We track -- or our system  
23 tracks certain information about the loan.

1 Q. Other than those obligations that you just  
2 mentioned about cutting grass and that sort  
3 of thing, being there if the servicer  
4 evaporates, what other obligations does  
5 MERS have to the general public?

6 A. We have to comply by the laws of the  
7 respective state.

8 Q. Well, that's a pretty generic term. I  
9 mean, what do you mean comply by the laws?  
10 What laws are you complying with?

11 A. The laws of the respective state.

12 Q. Is that with respect to the --

13 A. Anything.

14 Q. -- status of the mortgagee of record or  
15 zoning ordinances?

16 A. Whatever the law is we have to comply  
17 with. MERS doesn't have --

18 Q. Now, that's a -- that's a duty to comply  
19 with laws. Allegedly all citizens and  
20 corporations are responsible to comply with  
21 the law, and you testified that you had  
22 obligations to the general public. What  
23 are those obligations?

1       A.    Yeah.  I don't really understand the  
2            question.  Your -- your -- this whole line  
3            of questioning, it basically started with  
4            you saying that we couldn't do anything  
5            that's not spelled out in the membership  
6            agreement.  And I named numerous situations  
7            where we've got obligations that go beyond  
8            the membership agreement.

9        Q.    Okay.  What I said was -- and I'll just  
10            re-ask the question so we don't have any  
11            misunderstandings.

12                    When you're acting on behalf of your  
13            principal by virtue of your membership  
14            agreement with them, you are not going to  
15            exceed the authority you have in that  
16            membership agreement to act on behalf of  
17            that principal, are you?

18        A.    It's subject to what the state law would  
19            be.  It's subject to what other obligations  
20            we might have.

21                    I guess my debate is about the  
22            categorical nature of your statement.  As a  
23            general proposition, the membership

1           agreement dictates our actions. That's  
2           subordinate to our obligations as a citizen  
3           and subordinate to whatever kind of  
4           specific law might be the case.

5       Q.    Okay. Well, let's talk about that with  
6           respect to your obligations as to the  
7           general public.

8                    As a percentage of your business, what  
9           percentage of your business is conducting  
10          foreclosure activities for the members?

11       A.   The revenue?

12       Q.    Sure.

13       A.    Zero.

14       Q.    Okay. And as a percentage of time and  
15          effort of your staff and employees, what  
16          percentage of the time and effort of your  
17          staff and employees is involved in  
18          foreclosing in the name of MERS?

19       A.    Without getting specific about a  
20          percentage, it is -- it is huge.

21       Q.    And you've testified -- well, I won't say  
22          you've testified. But you say on your  
23          Website that you have the right to



1           foreclose in all the states in the country  
2           based on your membership agreement and the  
3           documents; right?

4                         MR. BROCHIN: Object to the form.

5         A.    It's based on our status with regard to the  
6           mortgage loan and the state law.

7         Q.    Okay. But you stopped foreclosing in  
8           Florida?

9         A.    Yes.

10        Q.    And why did you stop foreclosing in your  
11           name in Florida?

12        A.    Well, there was a trial court ruling that  
13           created confusion about whether we could or  
14           not. And so we instituted a moratorium  
15           until we could get that clarified, which we  
16           did through the appellate process and won  
17           both cases unanimously.

18        Q.    And both of those cases held that when you  
19           were the note holder that you had the right  
20           to foreclose; right?

21        A.    Yes.

22                         MR. BROCHIN: Object to the form.

23        Q.    And you're talking about the Cabrera case

1 and Judge Logan's case; right?

2 MR. BROCHIN: I'm sorry. Would  
3 you repeat that. I didn't  
4 hear it.

5 Q. You're talking about the Cabrera case --

6 MR. BROCHIN: Cabrera?

7 Q. -- and Judge Logan's case; right?

8 MR. BROCHIN: Object to the form.

9 A. I think of it as Logan and Gordon.

10 Q. Right. The judges.

11 Now, you just testified that you won  
12 both of those cases unanimously on appeal;  
13 right?

14 A. Yes.

15 Q. Why aren't y'all back in business  
16 foreclosing down there, then?

17 A. We just haven't turned it back on.

18 Q. And so you haven't turned it back on. You  
19 don't think there's any other legal  
20 impediment to your right to turn it back  
21 on, as you phrased it, in Florida?

22 A. No.

23 Q. In reading, preparing for today, I have

1           seen either writings or testimony from your  
2           company indicating -- we talked earlier  
3           about the servicing interest and/or  
4           servicing rights to any loan. So that's  
5           part of what your company tracks?

6           A.    Yes.

7           Q.    And we've talked about the beneficial  
8           interest, which you indicated is the person  
9           who has the right to payment. Is that fair  
10          to say?

11          A.    Generally.

12          Q.    And you've indicated the mortgagee  
13          interest, which is what your company holds?

14          A.    Yes.

15          Q.    Is it fair to say that in every case of  
16          63 -- 62 million loans that are recorded --  
17          where mortgages are recorded MERS as  
18          mortgagee, that the lender in those loans  
19          has not recorded a lien solely in their  
20          name?

21                           MR. BROCHIN: Object to the form.

22          A.    Yes.

23          Q.    All the liens for those 62 million loans

1           are in the name of MERS as mortgagee?

2                       MR. BROCHIN: Object to the form.

3       A.    They are in the name of MERS.  When you  
4           say -- you said earlier MERS, Inc.

5       Q.    Okay.  Right.  And let's be clear.  You  
6           call the MERS as original mortgagee  
7           mortgage form -- I think y'all refer to it  
8           as a MOM mortgage?

9       A.    Yes.

10      Q.    And when we talk about the mortgagee of  
11           record, you're talking about the subsidiary  
12           company, MERS, Inc.; is that correct?

13      A.    MERS, Inc.

14      Q.    Right.

15      A.    Yes.

16      Q.    And you agree with me that in every one of  
17           those mortgage loans the lien is in the  
18           name of MERS, Inc.?

19                       MR. BROCHIN: Object to the form.

20      A.    Yes.  MERS, Inc., being Mortgage Electronic  
21           Registration Systems, Inc.

22      Q.    Right.  And you also agree with me in all  
23           62 million of those loans that MERS has

1           never made a single loan to a borrower or  
2           acted as a lender?

3           A.    Yes.

4           Q.    And you agree with me with respect to those  
5           62 million loans that although the lien is  
6           in the name of MERS, Inc., that MERS, Inc.,  
7           is never entitled to a penny of the money  
8           that is owed on the note which is secured  
9           by the lien that exists in MERS, Inc.'s  
10          name?

11          A.    Yes.

12          Q.    Prior to your company's formation, has  
13          there ever existed in the history of this  
14          country a company who attempted to do what  
15          your company is doing?

16          A.    I don't know.

17          Q.    Do you have any other company who is  
18          attempting to implement a system similar to  
19          or competitive with your company?

20                         MR. BROCHIN: Object to the form.

21          A.    I don't know.

22          Q.    Are you aware of any company?

23          A.    Rumors?

1 Q. No announcements?

2 A. No.

3 Q. Page 39 in that transcript we were talking  
4 about earlier and we kind of got off track.

5 MR. BROCHIN: Can I just make a  
6 note for the record --

7 MR. WOOTEN: Sure.

8 MR. BROCHIN: -- that you  
9 substituted an exhibit for  
10 what was originally marked as  
11 the transcript, pulling one  
12 copy that had markings on it  
13 and substituting another. But  
14 the copy that is in front of  
15 the witness also has various  
16 markings and highlighting and  
17 underlining and --

18 MR. WOOTEN: Sure.

19 MR. BROCHIN: -- perhaps notes on  
20 it.

21 MR. WOOTEN: And I'll just  
22 represent to you, Mr. Brochin,  
23 for your -- so you understand

1                   that, that it's just where I  
2                   read this transcript and made  
3                   highlights.

4                   MR. BROCHIN: I just want the  
5                   record to reflect it's not a  
6                   clean copy of the transcript.

7                   MR. WOOTEN: Sure. It's got my  
8                   highlights on it.

9           Q.     But the actual testimony in this transcript  
10           is yours; right? There's no -- you don't  
11           deny that you gave that deposition three  
12           years ago today in that case, do you?

13                   Mr. Arnold?

14           A.     Yes.

15           Q.     You don't deny that you gave that  
16           deposition three years ago today in that  
17           case, do you?

18           A.     No, I don't.

19           Q.     And in this deposition is it true that  
20           you're acting in the capacity as a 30(b)(6)  
21           witness for your corporation?

22           A.     This one?

23           Q.     Yeah.

- 1 A. Yes.
- 2 Q. And today you're here not as a 30(b)(6)
- 3 witness but under 30(b)(1) as a fact
- 4 witness; right?
- 5 A. That's my understanding.
- 6 Q. I want to ask you again, is it your
- 7 position that your company owns the lien?
- 8 MR. BROCHIN: Object to the form.
- 9 Asked and answered.
- 10 A. Yeah. I'd have -- you know, ownership of
- 11 the lien is not really -- it doesn't really
- 12 fit.
- 13 Q. Why is that?
- 14 A. We hold the lien interest.
- 15 Q. What is --
- 16 A. We're the mortgagee --
- 17 Q. I'm sorry. What is the lien interest?
- 18 A. It's the mortgage interest. We're the
- 19 mortgagee of record.
- 20 Q. What is the mortgagee? I mean, is that the
- 21 person who has the lien?
- 22 A. It's bare legal title.
- 23 Q. So what you're saying, then, is -- when you



1           say you hold the mortgagee interest or the  
2           lien interest, you're saying simply that  
3           this mortgage lien is in your name in the  
4           public land records?

5           A.    That's right.

6           Q.    And you have no right to enforce that lien  
7           as owner?

8                         MR. BROCHIN:  Object to the form  
9                                 of the question.  That's not  
10                                what he said.

11          A.    Yeah.  And I wouldn't agree with that  
12           either.  The security instrument gives MERS  
13           the right to foreclose.

14          Q.    The form mortgage says that you have the  
15           right to foreclose?

16          A.    Yes.

17          Q.    What are the qualifications of that right?

18                         MR. BROCHIN:  Object to the form  
19                                 of the question.

20          A.    I don't know what you mean by  
21           qualifications.

22          Q.    Aren't you familiar with the mortgagee  
23           clause in the MOM mortgage?

1 A. Yes.

2 Q. And doesn't it say that you're acting as  
3 nominee for the lender, their successor,  
4 and their assigns?

5 A. Yes.

6 Q. And it says your right is subject to  
7 limitations imposed by law basically?

8 MR. BROCHIN: Objection to the  
9 form of the question. First  
10 of all, the document will  
11 speak for itself, and I think  
12 it's an overgeneralization of  
13 a probably 30-page document.

14 Q. Well, we can agree that the mortgagee  
15 clause where your company's name is  
16 inserted is not 30 pages, is it?

17 MR. BROCHIN: Object to the form.  
18 We'll agree to that.

19 A. The grantor clause is just a reasonable  
20 size paragraph.

21 Q. And is it your testimony that there are no  
22 limitations on your right to foreclose as  
23 nominee for the lender?

1 A. I didn't say that.

2 MR. BROCHIN: Object to the form  
3 of the question. That's not  
4 his testimony. You continue  
5 to mischaracterize what he's  
6 saying.

7 Q. Well, what are the qualifications of your  
8 right to foreclose under that paragraph?

9 MR. BROCHIN: Object to the --

10 A. Well, if you're --

11 MR. BROCHIN: Excuse me. Object  
12 to the form of the question.  
13 Again, the document would  
14 speak for itself as to what  
15 limitations or enabling  
16 provisions are in that  
17 mortgage. Maybe you want to  
18 show it to him.

19 A. When you say qualifications, I don't -- I  
20 don't know what that means. And then you  
21 say limitations. That's -- I understand  
22 that.

23 Q. Okay. I'm using the terms

1 interchangeably. Is there any limit on  
2 your right to foreclose contained in the  
3 MERS as mortgagee document?

4 MR. BROCHIN: Same objection.

5 A. Yes.

6 Q. And what are those limitations?

7 MR. BROCHIN: Same objection to  
8 the extent the document speaks  
9 to its -- speaks for itself.

10 A. Yeah. I'd have to say the same thing. The  
11 document -- you know, there -- I'm  
12 comfortable with saying there are  
13 limitations.

14 Q. So your equation of ownership of the  
15 mortgagee interest is merely your company's  
16 name in the public land records?

17 MR. BROCHIN: Object to the form  
18 of the question.

19 A. We are the mortgagee on the security  
20 instrument, and we have to be recorded as  
21 such in the land records.

22 Q. Okay. Do you have the right to foreclose  
23 absent ownership of the underlying debt?

1 MR. BROCHIN: Objection. Asked

2 and answered.

3 A. It would depend on the state law.

4 Q. With respect to my client, you began a  
5 foreclosure in the name of MERS. How does  
6 MERS determine that it's time to go  
7 foreclose on someone?

8 A. That's determined by the servicer.

9 Q. And with respect to my client, who is the  
10 servicer?

11 A. Isn't it GMAC?

12 Q. I think so. What is the process by which  
13 GMAC notifies MERS to go and foreclose?

14 A. Well, GMAC will handle the foreclosure, and  
15 they report that over the MERS system.

16 Q. And how is that accomplished? What are the  
17 mechanics of that process?

18 A. Electronically.

19 Q. Do you have any firsthand personal  
20 knowledge whether Debra Henderson was  
21 behind on her mortgage payment when this  
22 foreclosure began?

23 A. No.

1 Q. Would MERS have any firsthand knowledge of  
2 whether she was behind when this  
3 foreclosure began?

4 A. No.

5 MR. BROCHIN: Objection. Calls  
6 for speculation.

7 Q. Does it call for speculation?

8 A. The answer is no.

9 Q. You don't have any records, do you --

10 MR. BROCHIN: I'm sorry?

11 Q. -- with respect to her payment history?

12 A. No.

13 Q. You don't get that information from a  
14 servicer ever, do you?

15 A. No.

16 Q. And you wouldn't have any idea if she paid  
17 the loan off and they were still trying to  
18 foreclose, would you?

19 MR. BROCHIN: Excuse me. Are you  
20 talking about Mr. Arnold, or  
21 are you talking about MERS?

22 MR. WOOTEN: Either.

23 A. We get notified if the loan is paid off.

- 1 Q. Assuming that it's recorded by the  
2 servicer; right?
- 3 A. Yes.
- 4 Q. But with respect to any action with any  
5 foreclosure that's taken in the name of  
6 MERS, at the time the foreclosure is  
7 instituted MERS has no idea what the legal  
8 status of that mortgage account is, does  
9 it?
- 10 MR. BROCHIN: Object to the form  
11 of the question.
- 12 A. You know, like you said, I'm -- you know,  
13 I'm a 30(b)(1) witness. And you asked  
14 earlier about personal knowledge. And I  
15 don't have any personal knowledge about  
16 that.
- 17 Q. Did you review the information contained in  
18 the MERS system for Ms. Henderson's loan  
19 before you came here today?
- 20 A. I glanced through the file.
- 21 Q. And is it fair to say that nothing in the  
22 MERS system provides you any information  
23 about the status of her loan, what payments

1           have been made, what payments have been  
2           missed, anything like that?

3       A.     That's a fair statement.

4       Q.     And so when a foreclosure is undertaken in  
5           the name of MERS, MERS has no information  
6           about the validity of the act being  
7           undertaken --

8                         MR. BROCHIN: Object to the form  
9                         of the question.

10      Q.     -- simply being told that a foreclosure is  
11           being taken in its name; right?

12                         MR. BROCHIN: Object to the form  
13                         of the question.

14      A.     Well, we have -- we have rules, and it's  
15           all part of the membership agreement.

16      Q.     Right. But --

17      A.     There are limitations, as you say.

18      Q.     Right. But with respect to any particular  
19           foreclosure act, MERS never receives any  
20           information where MERS could determine  
21           whether or not there's even a right to  
22           begin a foreclosure; is that correct?

23      A.     Well, the member has a certifying officer.



1 Q. Right. And when you say certifying  
2 officer, just so nobody misunderstands,  
3 that's any employee that the member  
4 designates that they would like to have  
5 execute documents in the name of MERS?

6 A. It's not any employee.

7 Q. Who are they?

8 A. Well, they have to be an officer of the  
9 member.

10 Q. And an officer of the member, do you mean  
11 an executive officer who has a right to  
12 bind the company?

13 A. Any officer has the right to bind the  
14 company.

15 Q. So in contemplating that requirement, was  
16 it your company's intention that persons  
17 designated as certifying officers would be  
18 persons with sufficient authority to bind  
19 the corporation?

20 A. MERS, Inc.?

21 Q. The membership agreement authorizes the  
22 member to designate certifying officers;  
23 right?

1 A. Well, designate -- they report to us and we  
2 approve that.

3 Q. But the member tells MERS who they would  
4 like MERS to designate as a certifying  
5 officer?

6 A. Yes.

7 Q. Fair?

8 A. Fair.

9 Q. And your membership agreement says that  
10 those persons will be officers of the  
11 member?

12 A. Yes.

13 Q. And if the member is a corporation, is  
14 there an expectation that they would be a  
15 corporate officer?

16 A. An officer?

17 Q. Right.

18 A. Yes.

19 Q. And you would expect that if they were  
20 certified as a certifying officer that they  
21 would be able to bind the member when the  
22 member requested that they be designated as  
23 certifying officer by you, MERS -- by MERS?

1 A. Well, the certifying officers have only  
2 limited authority.

3 Q. With respect to their limited authority,  
4 what is it limited to?

5 A. I think there's seven categories.

6 Q. Okay. What are the seven categories?

7 A. Can execute releases, execute assignments,  
8 execute modifications, matters regarding  
9 foreclosure --

10 Q. And let me pause you there. When you say  
11 matters regarding foreclosure, would that  
12 be like an affidavit of default?

13 A. Yes.

14 Q. And that could be undertaken in the name of  
15 MERS?

16 A. Not necessarily.

17 Q. They could; right?

18 A. Actions in a foreclosure that are  
19 necessary, one of their authorities.

20 Q. All right. That means that they have to  
21 certify the amount of the default through  
22 sworn testimony?

23 A. Whatever -- whatever the state law

- 1 requirements are.
- 2 Q. And they can certify that in the name of  
3 MERS?
- 4 A. I don't think it's in the name of MERS.  
5 MERS is not -- MERS is not certifying that  
6 anybody is in default. An affidavit may  
7 come from somebody with personal knowledge.
- 8 Q. And if they sign that affidavit as a  
9 certifying officer of MERS, then they would  
10 be giving the impression to the receiver of  
11 that affidavit that MERS is certifying the  
12 amount of the default; right?
- 13 MR. BROCHIN: Object to the form  
14 of the question.
- 15 A. Yeah. I think an affidavit is going to  
16 come from a person with personal knowledge  
17 of that, so ...
- 18 Q. Do you have a specific prohibition against  
19 a certifying officer certifying the amount  
20 of a delinquency or default under oath in  
21 any judicial proceeding?
- 22 A. It depends on what the state law is and  
23 whether they have personal knowledge of it.

1 Q. MERS would have no corporate records of any  
2 type and no business records of any type  
3 with respect to the existence or the amount  
4 of a default on any mortgage loan, would  
5 it?

6 MR. BROCHIN: Object to the form.

7 A. At the corporate headquarters?

8 Q. MERS period.

9 A. Well, if there's the certifying officer  
10 with personal knowledge of that, then so be  
11 it.

12 Q. You've heard of a company called LPS,  
13 haven't you?

14 A. Yes.

15 Q. And does MERS certify employees of LPS as  
16 certifying officers?

17 A. I don't know.

18 Q. You're aware of LPS's position in the  
19 industry; correct?

20 A. No.

21 MR. BROCHIN: Object to the form.

22 Q. Do you know that LPS is the owner,  
23 proprietor, licensor of the software system

1           called Mortgage Servicing Platform, or MSP  
2           for short?

3       A.    Yes.

4       Q.    Are you aware that that software program is  
5           used by approximately 80 percent of all the  
6           mortgage servicers in the country?

7       A.    No.

8                       MR. WOOTEN:  Let's take a moment's  
9                       break.  He needs to change the  
10                      tape.  Do y'all need a break?

11                     We've been going for a  
12                     while.

13                    THE VIDEOGRAPHER:  We are going  
14                    off the record.  The time is  
15                    now 12:06 p.m.

16                    (A brief recess was taken.)

17                    THE VIDEOGRAPHER:  This is Disk 2  
18                    in the continuing deposition  
19                    of R.K. Arnold, and the time  
20                    is now 12:22 p.m.

21       Q.    (Mr. Wooten continuing:)  Mr. Arnold, we  
22           took a short break to take care of a few  
23           things.  We were talking about some various

1 testimony that's occurred over the years  
2 with respect to different cases your  
3 company has been involved in, testimony  
4 you've given. Is it your company's  
5 intention to supplement or assist the  
6 public land records of the several states  
7 with the MERS system to make it more clear  
8 about who owns what?

9 A. No.

10 Q. Is it your company's intent to supplant the  
11 mortgage land records of various states  
12 with its system?

13 A. No. We layer it on top is the way to think  
14 of it.

15 Q. When you say layer it on top, explain that,  
16 please.

17 A. Well, the MERS system couldn't exist if the  
18 recording system didn't exist.

19 Q. But the recording system can exist without  
20 MERS?

21 A. Certainly. So we are the mortgagee of  
22 record, and there has to be a place for us  
23 to establish that. And then we track the





1                                   of the question.

2       A.    Our system tracks the beneficial interest.

3       Q.    And the beneficial interest is the entity  
4            entitled to payment of the money on the  
5            note?

6       A.    Beneficial interest is generally entitled  
7            to the proceeds of the debt.

8       Q.    My understanding is during the foreclosure  
9            process, at some point the beneficial  
10           interest holder, as your term is, will  
11           physically place in the possession of the  
12           servicer or the servicer's attorney the  
13           actual promissory note; is that correct?

14                               MR. BROCHIN:  Object to the form.

15       A.    We have a requirement that the actual  
16            promissory note be available at the right  
17            point as dictated by state law in a  
18            foreclosure.

19       Q.    Is it fair to say that at the point in time  
20            a foreclosure is initiated by publication  
21            in Alabama, which is a nonjudicial  
22            foreclosure state, in the name of MERS,  
23            that MERS does not possess the promissory

1 note?

2 MR. BROCHIN: Object to the form  
3 of the question.

4 A. Depends on the situation.

5 Q. I'm speaking of physical possession.

6 MR. BROCHIN: Object to the form  
7 of the question.

8 A. And I'm saying I -- you know, it depends on  
9 the requirements of state law.

10 Q. Okay. Is it your understanding that  
11 Alabama requires the holder of the  
12 promissory note to be the one to enforce  
13 it?

14 A. I don't know Alabama law.

15 Q. Is that a general rule of the UCC?

16 MR. BROCHIN: Object to the form  
17 of the question.

18 A. It's certainly not part of the UCC.

19 Q. Okay. Is it your testimony that the UCC  
20 does not require a holder to enforce a  
21 note?

22 MR. BROCHIN: Object to the form  
23 of the question.

1 A. The UCC wouldn't cover any of that.

2 Q. The UCC would cover who is entitled to  
3 enforce an instrument, wouldn't it?

4 A. No.

5 MR. BROCHIN: I'm sorry. I  
6 can't -- couldn't hear you.

7 Q. I said the UCC would cover who is entitled  
8 to enforce an instrument, wouldn't it?

9 A. No.

10 MR. BROCHIN: Object to the form.

11 A. I don't think so. I think the UCC  
12 establishes what a holder is.

13 Q. Okay. Is it your testimony that every  
14 mortgage note -- every promissory note  
15 which secures -- or which is secured by a  
16 MERS as mortgagee loan -- lien is endorsed  
17 in blank as part of complying with the MERS  
18 membership agreement?

19 A. I don't know.

20 Q. You will agree with me that MERS requires a  
21 promissory note to be endorsed in blank at  
22 the time that it presents it during a  
23 foreclosure proceeding; right?

1 MR. BROCHIN: Object to the form.

2 A. Yeah. It wouldn't have to be in blank.

3 It -- it has to be available in the  
4 foreclosure. That's one of our  
5 requirements. And a note doesn't have to  
6 be endorsed in blank. It can move without  
7 endorsement.

8 Q. It can move by transfer of possession;  
9 right?

10 A. Yes. It does move by transfer of  
11 possession.

12 Q. Without an endorsement?

13 A. It can.

14 Q. Now, typically the person with possession  
15 is entitled to enforce the note; right?

16 MR. BROCHIN: Object to the form  
17 of the question.

18 A. It would depend on what the state law  
19 requirements are.

20 Q. Is that what your rules with respect to  
21 foreclosures call for?

22 MR. BROCHIN: Object to the form  
23 of the question. The

1 documents speak for  
2 themselves.

3 A. One of the requirements is that state law  
4 has to be followed. Another requirement is  
5 that the note has to be available.  
6 Different courts, different states. It  
7 just depends on what the particular  
8 jurisdiction requires. But you always have  
9 to go by state law and the note has to be  
10 available.

11 Q. And you would agree that under no  
12 circumstances is any mortgage note ever  
13 endorsed to MERS by a MERS member?

14 A. I wouldn't say that.

15 Q. If you will, flip over to page 76 of that  
16 transcript, please, sir.

17 Beginning at line six you were asked,  
18 let me ask about mortgage notes. Does MERS  
19 ever take an assignment of a mortgage  
20 note?

21 And your response was, no, sir. We  
22 become the holder of the mortgage note.

23 With respect to your position that you

1           become the holder of the mortgage note, are  
2           you using the term holder in the sense of  
3           the Uniform Commercial Code and its  
4           definition, or are you using the term  
5           holder in the sense of bare physical  
6           possession?

7                       MR. BROCHIN: Just so I understand  
8                       the question, you're asking  
9                       him -- are you asking him how  
10                      he's using the term holder in  
11                      the answer to this deposition?

12                     MR. WOOTEN: That's right.

13                     MR. BROCHIN: Okay. I object to  
14                      the form of that question. I  
15                      think it's inappropriate to  
16                      ask one Q and A out of a  
17                      deposition transcript and ask  
18                      a witness to interpret what it  
19                      means without the entire  
20                      context. So I think that that  
21                      question is inappropriate.

22           Q.    Well, let me rephrase that question; okay?

23                     MR. BROCHIN: I object to the form

1                   of that.

2       Q.    That question and answer, lines -- page 76,  
3            lines six through nine, is that a fair  
4            statement of your position, that MERS  
5            becomes a holder of a mortgage note in the  
6            foreclosure process?

7                   MR. BROCHIN:  Object to the form  
8                   of the question on the same  
9                   basis as it is not appropriate  
10                  to ask a witness a question  
11                  about previous testimony and  
12                  then say is that his position  
13                  by just referring to one  
14                  question and answer.

15       Q.    Well, let me ask you this, Mr. Arnold:  How  
16            do you define holder?

17       A.    Well, it would depend on the state law,  
18            specifically the Uniform Commercial Code as  
19            adopted, Article 3, and whatever cases have  
20            interpreted that in that state.

21       Q.    So your definition of holder rests upon the  
22            UCC definition of holder?

23       A.    Yes.

1 Q. You are not contending that being in mere  
2 physical possession is what you mean by  
3 holder?

4 MR. BROCHIN: Object to the form.

5 A. You know, that's part of being holder.

6 Q. I said mere physical possession.

7 A. Yeah. And that's the word that I don't  
8 understand.

9 Q. Because we talked earlier about the fact  
10 that document custodians hold billions of  
11 dollars' worth of mortgages that they have  
12 no rights to -- or mortgage notes they have  
13 no right to any payments on; right?

14 A. Right.

15 Q. And anyone who would represent merely  
16 possessing a promissory note entitles them  
17 to payment, that's not the definition of  
18 the UCC holder, is it?

19 A. Well, you asked about the definition of the  
20 holder, and it depends on the state law,  
21 specifically the UCC, Article 3, in that  
22 state, cases. And then you're referring to  
23 a situation that's got documents,



1 contracts, and those contracts would  
2 dictate within the confines of state law.

3 Q. Right. And your membership agreements  
4 state that even though you may obtain  
5 possession of a note, you are never  
6 entitled to payment under the note?

7 A. Yes.

8 Q. So, again, I want to make sure that you're  
9 not contending that merely having a note  
10 endorsed in blank makes you or anyone else  
11 a UCC holder.

12 MR. BROCHIN: Object to the form  
13 of the question to the extent  
14 it calls for a contention and  
15 a legal conclusion.

16 A. Yeah. I think you're trying to draw a  
17 legal line there that's -- that doesn't  
18 work. All holders are not entitled to the  
19 proceeds of a note.

20 Q. And isn't it true that every time that MERS  
21 presents a note, even if it is endorsed in  
22 blank, that it is presenting that note on  
23 behalf of the person who is entitled to

- 1 payment?
- 2 A. Yes.
- 3 Q. And so the mere physical possession of the  
4 note endorsed in blank does not entitle  
5 MERS to the payment of those proceeds?
- 6 A. Correct. But you're the holder.
- 7 Q. I'm going to let that lay for a minute.
- 8 If the beneficial owner of a promissory  
9 note that is secured by a MERS as mortgagee  
10 mortgage chooses to foreclose in a name  
11 other than MERS, your company does not  
12 oppose that practice, does it?
- 13 A. When you say beneficial owner of a  
14 promissory note ...
- 15 Q. The person identified on the MERS system as  
16 having the right to payment on the  
17 promissory note; right?
- 18 A. Okay.
- 19 Q. If they determine that they would like to  
20 foreclose in a name other than MERS, you  
21 don't have a problem with that, do you?
- 22 A. In a name other than MERS?
- 23 Q. (Nods head.)

- 1 A. No problem.
- 2 Q. How do you effectuate or assist that  
3 beneficial owner in accomplishing that?
- 4 A. Well, there would need to be an assignment  
5 out of MERS.
- 6 Q. How would that be accomplished?
- 7 A. A MERS certifying officer of the member  
8 would execute an assignment out of MERS and  
9 that would be recorded in the land records.
- 10 Q. And that certifying officer who made that  
11 assignment, he would be -- he would be  
12 assigning everything that MERS owned;  
13 right?
- 14 A. But he would be assigning the mortgage  
15 interest.
- 16 Q. And who owns that?
- 17 A. Well, the ownership of that is something  
18 that I've had a problem with since the  
19 start of the deposition. It's -- it's a --  
20 it's a status. It is the mortgagee. It's  
21 a legal interest.
- 22 Q. Is it -- is it your understanding that a  
23 party could theoretically assign an

1 interest that they do not own?

2 MR. BROCHIN: Object to the form  
3 of the question. Calls for  
4 theory.

5 Q. I mean, isn't it a fundamental law -- a  
6 fundamental principle that you can only  
7 assign what you actually own?

8 MR. BROCHIN: Object to the form.

9 A. Yes.

10 Q. So a recorded MERS assignment is an  
11 assignment of whatever MERS owns?

12 A. Well, you're -- you want to say that MERS  
13 owns the legal interest. And, you know,  
14 MERS -- MERS assigns the legal interest.  
15 Ownership -- I'm not really sure what that  
16 word means in this context.

17 Q. You're certainly familiar with the  
18 pleadings and briefs and transcripts from  
19 the Jeweleen Jackson versus MERS case up in  
20 Minnesota, aren't you?

21 THE WITNESS: Is that --

22 MR. BROCHIN: Are you asking him  
23 if he's familiar with it?

1 A. You have to give me more than that.

2 Q. You're aware that there was a lawsuit up  
3 there that said that you weren't recording  
4 assignments; right?

5 MR. BROCHIN: Object to the form  
6 of the question.

7 A. That went to the State Supreme Court?

8 Q. Right.

9 A. Yes.

10 Q. And you're familiar with the fact that that  
11 state had adopted a special statute dealing  
12 with nominees that they were referring to  
13 as the MERS statute; right?

14 A. Yes.

15 Q. And, I mean, isn't it a fact that in that  
16 case MERS argued both to a Federal District  
17 Court and to the State Supreme Court that  
18 MERS was the owner of the mortgage and that  
19 the notes could be sold repeatedly without  
20 any effect on the actual lien?

21 MR. BROCHIN: Object to the form  
22 of the question to the extent  
23 you're trying to ask the

1                   witness what positions were  
2                   argued in the Minnesota  
3                   Supreme Court.  But if you  
4                   know ...

5       A.    Yeah.  I'm not familiar with everything  
6            that was -- that was said and done in the  
7            lawsuit.

8       Q.    Although you're here as a fact witness, I  
9            mean, you're still the CEO of MERS; right?

10      A.    Yes.

11      Q.    And this lawsuit basically challenged the  
12            validity of your right to foreclose in  
13            Minnesota; right?

14                   MR. BROCHIN:  Object to the form  
15                   of the question.

16      A.    Yes.

17      Q.    And I'm assuming that you would have had  
18            discussions at some point among your team  
19            or your executive officers about the  
20            potential impact of that case?

21      A.    Yes.

22      Q.    We talked about the fact that you're an  
23            attorney who practiced law.  You understand

1           the significance of a ruling that you have  
2           no right to foreclose in a state; right?

3       A.    I do.

4       Q.    It would be detrimental to your business  
5           model, wouldn't it?

6       A.    I wouldn't concede that.

7       Q.    So, I mean, is it your testimony that you  
8           have not reviewed the pleadings and  
9           affidavits that were filed on behalf of  
10          your company in that case?

11      A.    Yes.

12      Q.    Have you reviewed any of the transcripts of  
13          that case?

14      A.    I was there at the argument.

15      Q.    Is that the argument between Ms. Hawkins  
16          and Mr. Pratt?

17      A.    There were two.

18      Q.    Were you at the trial court transcript or  
19          the Supreme Court hearing?

20      A.    Both.

21      Q.    As I understand it, Mr. Pratt, your  
22          attorney up there seemed to be pretty  
23          accomplished. He actually helped craft

1           your MERS statute and helped to get it  
2           passed; right?

3                         MR. BROCHIN: Object to the form  
4                         of the question.

5         Q.    Isn't that true?

6         A.    What's the question?

7         Q.    Your attorney in the case in Minnesota  
8               actually helped draft the MERS statute for  
9               Minnesota; correct?

10        A.    Yes, he did.

11        Q.    And that MERS statute specifically  
12               authorized the nominee to undertake certain  
13               actions; right?

14        A.    It clarified -- Minnesota is a Torrens  
15               state. So the county clerks wanted  
16               clarification of what a nominee was.

17        Q.    And when you say Torrens, you're talking  
18               about a recording system; right?

19        A.    Yes.

20        Q.    And a Torrens state requires that only  
21               certain specific instruments may be  
22               recorded; right?

23        A.    Well, I don't think of it that way.



1 Q. Okay.

2 A. It's more the clerk is establishing the  
3 validity of the document.

4 Q. Okay. And in the case at issue, what the  
5 plaintiffs and Ms. Hawkins were complaining  
6 about was partially the allegation that the  
7 note had changed hands many times, but  
8 there was no record of who the true owner  
9 of the note was that could be ascertained  
10 from the recording statute; right?

11 MR. BROCHIN: Object to the form  
12 of the question to the extent  
13 you're asking this witness  
14 about facts of a case in  
15 Minnesota.

16 A. Well, we talked about this earlier. The  
17 notes were never recorded in the land  
18 records. So the argument didn't -- the  
19 argument lost.

20 Q. Right. And what we've talked about is, is  
21 what is recorded is the lien which secures  
22 the payment of the note by the right to  
23 sell the real property?

1 A. Fair enough.

2 (Plaintiff's Exhibit 4 was marked  
3 for identification.)

4 Q. I want to mark as Plaintiff's Exhibit 4 the  
5 Affidavit of William Hultman that was filed  
6 in the United States District Court for the  
7 District of Minnesota. And because I did  
8 not have the opportunity to make duplicates  
9 of that, I'm going to ask you to glance  
10 through it, and then I'll ask you some  
11 questions about it; okay?

12 A. Yes.

13 MR. WOOTEN: And, again, there are  
14 highlighted portions that I've  
15 highlighted in that as I read  
16 through it.

17 MR. BROCHIN: There's highlighted  
18 portions for the record.  
19 There's notations made on it,  
20 handwritten notations.

21 MR. WOOTEN: Sure.

22 MR. BROCHIN: There's underlining  
23 on it. And it's hardly the

1 document as filed in the  
2 court.

3 MR. WOOTEN: Certainly.

4 MR. RAMEY: And obviously our  
5 relevancy objections on this  
6 are all preserved.

7 MR. WOOTEN: Yeah.

8 A. So you have questions?

9 Q. Yeah. If you will, hand it back to me and  
10 I'll run those -- I'll run through those  
11 with you right quick.

12 Mr. Hultman has been with you guys  
13 since when?

14 A. February 1998.

15 Q. And has he basically been part of your team  
16 that entire time?

17 A. Yes.

18 Q. And you're aware that he filed an affidavit  
19 in the Henderson case also?

20 A. As part of his job.

21 Q. Is to file affidavits?

22 A. Yes.

23 Q. In paragraph three he says the MERS system

1 keeps track of such servicers and answers  
2 inquiries as to who currently services a  
3 given mortgage loan, providing critical  
4 information that was not available prior to  
5 the creation of MERS.

6 Isn't it a fact, Mr. Arnold, that the  
7 servicer is the entity to which the  
8 borrower pays their payments?

9 A. Yes.

10 Q. So that information is available to the  
11 borrower every month by virtue of a payment  
12 coupon; right?

13 A. Well, the payment coupon is issued at the  
14 time the loan is made, so it changes.

15 Q. There's a monthly mortgage statement sent;  
16 right?

17 A. Maybe.

18 Q. And it advises the borrower who to pay;  
19 right?

20 A. There's also a hello/goodbye letter.

21 Q. Which is a requirement under federal law --

22 A. Right.

23 Q. -- that notifies the borrower when there's

- 1 a change in the servicer?
- 2 A. Right.
- 3 Q. And that's under the RESPA law; right?
- 4 A. Right.
- 5 Q. So that information is available whether or  
6 not MERS exists?
- 7 MR. BROCHIN: Object to the form.
- 8 A. Not in the land records.
- 9 Q. But you testified earlier that assignments  
10 were filed to disclose who the servicer was  
11 prior to the MERS system; right?
- 12 A. The servicer was the mortgagee. So every  
13 time the servicer changed there had to be  
14 an assignment.
- 15 Q. And so even if MERS didn't exist, the  
16 servicer would still be in the land  
17 records; right?
- 18 A. Six months, 12 months, 18 months late,  
19 filed in the wrong order, lost,  
20 misrecorded, misspelled.
- 21 Q. And those are obligations of the parties  
22 performing those acts. Those are not the  
23 consumers' obligations; right?

1 MR. BROCHIN: Object to the form.

2 A. I don't understand the question.

3 Q. Well, you know, part of this argument that  
4 you guys are making around the country is,  
5 is that you provide these great benefits to  
6 consumers. And one of the things that you  
7 identify in this affidavit and the  
8 affidavit in the Henderson case is that you  
9 tell the world who the servicer is.

10 A. Instantaneously.

11 Q. However, we just talked about the fact that  
12 if you didn't exist, the servicers'  
13 information would be in the land records by  
14 virtue of an assignment; right?

15 A. Six months, 12 months, 18 months late,  
16 filed in the wrong order, wrong names,  
17 misfiled --

18 Q. And those issues --

19 A. -- stacked up in a closet somewhere.

20 Q. And those issues are lender-servicer  
21 issues. They're not consumer issues;  
22 right?

23 A. And clerk issues.

1 Q. Right. Those inure to the benefit of the  
2 lenders and servicers, not the consumers?

3 A. I couldn't agree with that at all. The  
4 borrower needs to know where to send their  
5 payment.

6 Q. Sure.

7 A. And there shouldn't be a question about  
8 that.

9 Q. And they're going to get that information  
10 in the form of hello/goodbye letters and  
11 mortgage statements; right?

12 MR. BROCHIN: Object to the form.

13 Asked and answered.

14 Argumentative.

15 A. It's not -- it's not that easy.

16 Q. Servicers have a strict liability duty to  
17 comply with RESPA; right?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. Servicers have to comply with RESPA.

21 Q. Right. And there are -- borrowers have  
22 private lawsuits. There are FTC actions.  
23 There are attorney general actions. There

1           are Department of Justice actions for  
2           servicers who don't comply with RESPA;  
3           right?

4                       MR. BROCHIN: Object to the form  
5                       of the question.

6           A. Yes.

7           Q. And if a borrower can't locate the person  
8           who's supposed to receive their payment,  
9           they have the right to file an action in  
10          court and have the court determine what  
11          they should do or pay money to the court  
12          pending the identification of a servicer;  
13          right?

14          A. If they want to hire a lawyer, probably.

15          Q. Well, typically they hire a lawyer when a  
16          servicer they've never heard of shows up to  
17          foreclose. But the point being, your  
18          indication is that this is a benefit to  
19          consumers when it truly provides benefit to  
20          the industry; right?

21          A. Well, it certainly --

22                       MR. BROCHIN: Excuse me. Object  
23                       to the form of the question.



- 1                           Go ahead.
- 2       A.    It certainly provides benefits to the  
3            industry.  That's --
- 4       Q.    Right.
- 5       A.    That's why the system was created.
- 6       Q.    And let's talk --
- 7       A.    And I don't think we've ever alleged that  
8            that's why that it was created, to benefit  
9            borrowers.
- 10      Q.    Sure.
- 11      A.    But it's a benefit to borrowers to know who  
12            the servicer is instantaneously.
- 13      Q.    Well, let's talk about the benefit to the  
14            industry for a second.
- 15            Your associate, Mr. Hultman, testified  
16            that as of 2-7 of 2008 there were  
17            53 million mortgage loans on the MERS  
18            system, and you said earlier today it's now  
19            62 million.  And he also testified that the  
20            average cost of filing an assignment is  
21            \$40; right?
- 22      A.    At least.
- 23      Q.    Right.  And so some states may be higher.

1           Some states may be lower.  But let's just  
2           take that number.

3                     If your system saves the industry one  
4           mortgage assignment on 62 million loans,  
5           the industry has saved approximately 2.4  
6           billion dollars in recording costs, hasn't  
7           it?

8           A.  Yes.

9           Q.  And are you familiar with the typical  
10          number of transfers of ownership in a  
11          securitization where a loan is sold through  
12          two or three or four or five true sales to  
13          reach an investment trust?

14          A.  Depends on the transaction.

15          Q.  Right.  But you know enough about it to  
16          know that a key portion of securitization  
17          is the concept of true sale; right?

18          A.  Yes.

19          Q.  Which is transfer of ownership?

20          A.  (Witness nods head.)

21          Q.  So under the prior MERS system, every time  
22          that ownership was transferred there would  
23          be some evidence; right?

1 MR. BROCHIN: Object to the form.

2 I don't know what you mean by  
3 prior MERS system.

4 Q. Before MERS existed every one of these  
5 assignments we're talking about would have  
6 been recorded; right?

7 A. Well, what assignments are you talking  
8 about?

9 Q. If the servicer became the mortgagee, they  
10 would record an assignment to that effect;  
11 right?

12 A. Well, before MERS the originator and the  
13 servicer and the investor many times were  
14 the same.

15 Q. Okay.

16 A. The industry has changed a lot.

17 Q. And that's part of private label  
18 securitization; is that right?

19 A. Well, that's just a name of -- for, you  
20 know, a type of product in the secondary  
21 market.

22 Q. And it also deals with securitizations  
23 involving companies that are securitizing

- 1           assets which are not subject to a  
2           government backing through a GSE also;  
3           right?
- 4        A.    Yeah.  The GSEs have limits on what they  
5           can buy, and that maintains a market for  
6           securitization that's called nonconforming.
- 7        Q.    And speaking of GSEs, what are the GSEs  
8           that are members of MERS?
- 9        A.    Fannie Mae and Freddie Mac.
- 10       Q.    What about Ginnie Mae?
- 11       A.    Ginnie Mae is a -- they're critical to  
12           MERS, but they don't have an ownership  
13           interest.
- 14       Q.    Are they a member?
- 15       A.    Ginnie Mae is a member.  They have a  
16           special membership agreement.  Ginnie Mae  
17           is the United States.
- 18       Q.    Okay.  We talked about the fact that if  
19           MERS saved one assignment on 62 million  
20           mortgages that the industry realized  
21           approximately 2.4 billion in unpaid  
22           recording costs; right?
- 23       A.    By that mathematic.

- 1 Q. And I understand it's imprecise.
- 2 A. Well, it's not just imprecise, because  
3 there's no way to tell how many assignments  
4 have been saved.
- 5 Q. Right.
- 6 A. And there's no such thing as an average  
7 assignment even though you may hear  
8 somebody say that. It's no different than  
9 knowing how many loans are made in the  
10 United States. Nobody knows that.
- 11 Q. So when we -- when Mr. Hultman generalized,  
12 he was generalizing based on his best  
13 understanding?
- 14 A. Yes.
- 15 Q. But he was not speaking with specific  
16 knowledge?
- 17 A. No, he wasn't.
- 18 Q. Now ...
- 19 A. But what Mr. Hultman did not say is that  
20 there is one assignment saved per loan.
- 21 Q. Absolutely. And I didn't either. I just  
22 said if it saves one, because in truth you  
23 and I know it probably would be multiple

1 per loan; right?

2 MR. BROCHIN: Object to the form.

3 Q. Over the life of the loan.

4 MR. BROCHIN: Object to the form.

5 A. Yeah. And many, many, many, many, many  
6 loans never change hands.

7 Q. But for those that were securitized, they  
8 typically would change hands three to four  
9 times in the securitization process,  
10 wouldn't they?

11 A. It would depend on the situation. I think  
12 that's an overgeneralization. I think it's  
13 an exaggeration of the number of  
14 transactions that are taking place. This  
15 is all in the context of what happened  
16 before MERS. And so there are unnecessary  
17 assignments that have been eliminated with  
18 MERS, but there's not really a way to  
19 figure out how many of those are --

20 Q. Sure. And I didn't say that there was. I  
21 just said that use of this process has  
22 saved the industry untold fortunes in  
23 recording costs?

1       A.   Well, that's your testimony.  You know,  
2            what I would say is that we eliminate  
3            unnecessary assignments.  And the number of  
4            those assignments is the same as how many  
5            loans are made.  It's a mystery.  So  
6            there's not anyplace that we can go to find  
7            out how many assignments have been  
8            eliminated.  And I think it's an  
9            exaggeration to say one has been eliminated  
10           for every loan that's been registered.

11       Q.   Well, here's one thing that's for sure.  
12            Every MERS as mortgagee mortgage in this  
13            country, there was an assignment eliminated  
14            there because you start out with your  
15            company as the mortgagee when some other  
16            company was actually the lender; right?

17                   MR. BROCHIN:  Object to the --

18       A.   But there wouldn't have been an assignment  
19            there.

20                   MR. BROCHIN:  Yeah.  Object to the  
21                   form.

22       Q.   All right.  And so what you're saying is,  
23            is that if MERS didn't exist, who would

1           have been the mortgagee on those loans?

2           A.    The servicer.

3           Q.    The servicer.

4           A.    Usually.

5           Q.    And the servicer was the same as the  
6           lender?

7           A.    Yeah.  Back in the old days.

8           Q.    Right.  And so when you first implemented  
9           this system, you gained market share or  
10          loans on the system by having MERS take an  
11          assignment of the lien into MERS' name;  
12          right?

13          A.    But we got no market share.  We got no  
14          registrations that way.  We went for over a  
15          year with no registrations.  That model did  
16          not work.

17          Q.    Why didn't that model work?

18          A.    Because that created an assignment instead  
19          of eliminating it.

20          Q.    So is it your testimony that there were no  
21          assignments of any mortgage lien to MERS  
22          where the mortgagee on the loan or on the  
23          mortgage instrument was someone other than



1 MERS?

2 MR. BROCHIN: Object to the form.

3 A. Can you repeat that?

4 Q. I'll try. I understand it was a long  
5 question.

6 We talked about the fact that on the  
7 security instrument, the mortgage, prior to  
8 MERS' existence, your testimony is, is that  
9 your understanding is the servicer would  
10 have been named as the mortgagee on the  
11 original mortgage executed by the borrower?

12 A. Probably. Because that was the originator  
13 as well.

14 Q. So it would have been the lender?

15 A. Very often. Didn't have to be.

16 Q. And is it your testimony that the lender is  
17 not the party entitled to the lien?

18 A. No. Those are apples and oranges. The  
19 lender is the one making the loan -- or  
20 originator as you referred to them.

21 Q. The person making the original mortgage  
22 loan?

23 A. Yes.

1 Q. And the mortgage document -- your MERS as  
2 original mortgagee document says that the  
3 lender is the company that provided the  
4 money for the loan?

5 A. Yes.

6 Q. Now, in securitization parlance that is the  
7 originator?

8 A. I believe so.

9 Q. Mr. Hultman said in his affidavit,  
10 paragraph nine, that over the life of a  
11 mortgage loan the servicing rights of a  
12 loan may be sold and resold many times.

13 A. Yes.

14 Q. That is based upon industry experience;  
15 right?

16 A. Maybe, yes.

17 Q. Is that based on your company's research?

18 MR. BROCHIN: Object to the form  
19 of the question. You're  
20 talking about is Mr. Hultman's  
21 testimony based on the  
22 company's research? That's  
23 what you're asking this

1 witness?

2 MR. WOOTEN: Right. I'm asking if  
3 he came up with that statement  
4 based on his knowledge of the  
5 company's experience in the  
6 industry.

7 A. I'd say that statement for him is based on  
8 his knowledge of the industry generally.

9 Q. Okay. And then he says in paragraph ten  
10 that consumers are benefited because  
11 originating lenders typically pass the  
12 costs of assignments on to the borrowers to  
13 the extent they know in advance that the  
14 loan will be sold immediately subsequent to  
15 the closing.

16 A. Yes.

17 Q. Now, once -- let's just -- for the sake of  
18 the argument, let's just give you that.  
19 Let's say that the lender charges a client  
20 \$50 because they're going to immediately  
21 assign the mortgage. Beyond that charge,  
22 any subsequent assignments which occur do  
23 not fall to the consumers' costs. They are

1           between the parties that have transferred  
2           those rights; correct?

3       A.    It doesn't directly fall on consumers.

4       Q.    Right.

5       A.    Indirectly it does.

6       Q.    So -- but the insinuation that all costs of  
7           all assignments are passed on once the  
8           original assignment takes place -- and,  
9           again, if that is done because the lender  
10          knows they're about to immediately  
11          transfer, once that assignment is passed,  
12          any subsequent assignments would fall  
13          between the parties that made that transfer  
14          of interest; right?

15                       MR. BROCHIN:  Object to the form  
16                       of the question.

17       A.    Yes.  But that would fall on the borrower  
18           indirectly.

19       Q.    He also says that the MERS system further  
20           benefits consumers by speeding up the flow  
21           of funds enabling the consumer to easily  
22           and instantly determine which lending  
23           institution owns or services his or her

1 mortgage loan by calling a toll-free number  
2 which is available 24 hours a day, seven  
3 days a week; right?

4 A. Yes.

5 Q. Isn't it true that your system will under  
6 no circumstances disclose the owner of a  
7 loan to a consumer?

8 A. You mean the beneficial interest?

9 Q. Let me ask that a better way.

10 There is no way to use the MERS system  
11 to determine who owns the promissory note?

12 MR. BROCHIN: Object to the form.

13 A. We actually have a product that does notify  
14 the borrower if the note moves.

15 Q. And that is a product that was developed in  
16 response to the recent crisis that we've  
17 been living through in the economic  
18 markets; right?

19 A. That and the fact that there's a statute.

20 Q. There's an amendment now to the Truth in  
21 Lending Act; right?

22 A. Yes.

23 Q. But the fact of the matter is, is that

1           prior to your implementation of that  
2           system, you could have made that  
3           information available from the information  
4           on your system, couldn't you?

5       A.    I suppose.

6       Q.    I mean, it's there, isn't it?

7       A.    It's there.

8       Q.    So just the same as you gave them the  
9           servicer's identification, you could have  
10          gave them the owners, couldn't you?

11      A.    Yes.

12      Q.    So if a borrower is having trouble with a  
13          servicer and thought they were being  
14          treated unfairly and they came to the MERS  
15          system and said tell me who the owner is,  
16          I'd like to complain about my servicer, you  
17          say, no, you got to talk to your servicer;  
18          right?

19      A.    Yes.

20      Q.    And -- but during the whole period of time  
21          you've been in existence you could have  
22          told them, oh, well, here's your owner,  
23          contact them and maybe they can help you

1 out?

2 MR. BROCHIN: Object to the form.

3 Q. Right?

4 A. That's -- you mean could we have done  
5 that?

6 Yes.

7 Q. Just as easily as you give the consumer the  
8 servicer's information; right?

9 A. Not as easily.

10 Q. And the reason you couldn't is because of  
11 the transfer of the interest to  
12 securitization vehicles; right?

13 MR. BROCHIN: Object to the form.

14 A. I wouldn't say that. It had never been  
15 done before.

16 Q. But there has never been a time that your  
17 system has been in implementation that you  
18 were not able to look at any loan by its  
19 MIN -- which we have not talked about  
20 that. But a MIN is a term of art your  
21 company uses for the term mortgage  
22 identification number?

23 A. Yes.

- 1 Q. And you give a unique MIN to every loan  
2 registered on your system?
- 3 A. Yes.
- 4 Q. And as part of tracing that MIN, you have  
5 available what company is registered as the  
6 owner of that note; right?
- 7 A. That's -- the company that's registered as  
8 the beneficial interest owner.
- 9 Q. And that information has been available to  
10 your company from day one; right?
- 11 A. Yes.
- 12 Q. So every loan that has ever been registered  
13 on your system, that information has been  
14 available from the very day this system was  
15 implemented?
- 16 A. But never in the land records.
- 17 Q. Right. What's in the land records is the  
18 person who's identified as the owner of the  
19 mortgage; right?
- 20 A. As the mortgagee.
- 21 Q. And Mr. Hultman goes on to say in that  
22 paragraph that if the MERS mortgage is not  
23 used, the borrower will pay approximately



1 40 or more dollars to record an assignment  
2 of a traditional mortgage from one lender  
3 to another lender as well as additional  
4 document preparation fees to prepare such  
5 assignments.

6 Again, that would only be permissible  
7 with respect to the initial transfer when  
8 it was contemplated as part of the funding;  
9 correct?

10 A. Well, the basis for that requirement is  
11 that RESPA forbids collection of payments  
12 for third parties that aren't dispensed.  
13 So the effect is what you've said. Unless  
14 you know that the loan is going to be  
15 transferred, you can't really collect the  
16 money.

17 Q. You're aware that in Minnesota there was an  
18 amicus brief filed by the American Land  
19 Title Association?

20 A. Yes.

21 Q. They also filed an amicus for you in Kansas  
22 in the Landmark versus Kesler case; is that  
23 right?

- 1 A. Yes.
- 2 Q. Are you aware of whether or not in either  
3 instance American Land Title disclosed to  
4 either court that it was a shareholder of  
5 MERS?
- 6 A. I don't know.
- 7 Q. You think that might have been relevant  
8 when the courts were considering their  
9 statuses in amicus?
- 10 MR. BROCHIN: Objection to the  
11 form of the question.
- 12 A. I don't know.
- 13 Q. Did you make a request or anyone to your  
14 knowledge make a request that the  
15 shareholders file an amicus brief in those  
16 cases?
- 17 A. Did we have a discussion with the American  
18 Land Title Association about that?
- 19 Q. Did you ask them to do it?
- 20 A. They offered.
- 21 Q. And, again, they are shareholders of MERS?
- 22 A. They are shareholders.
- 23 Q. Did you ever participate in preparing an

1           amicus when you were practicing?

2           A.    Not that I recall.

3           Q.    Do you know if the Supreme Court of  
4           Minnesota or the Supreme Court of Kansas  
5           would have allowed MERS to file two  
6           separate briefs in the same case?

7                       MR. BROCHIN:  Object to the form  
8                       of the question.

9           A.    I don't think that's what happened there.

10          Q.    You think it's relevant to the issues that  
11          American Land Title was an undisclosed  
12          shareholder of your company?

13                     MR. BROCHIN:  Is this -- are we --  
14                     is this a case -- are you  
15                     arguing about the Minnesota  
16                     case?  What is this about?

17          MR. WOOTEN:  I'm taking a  
18          deposition.

19          MR. BROCHIN:  I thought you were  
20          taking a deposition in a case  
21          that's pending in Alabama.

22          MR. WOOTEN:  I am.

23          MR. BROCHIN:  And this has

1 something to do with it?

2 MR. WOOTEN: Uh-huh (positive  
3 response).

4 MR. BROCHIN: Object to the form  
5 of the question. If you know  
6 the answers to the rules in  
7 Minnesota.

8 A. Yeah. I don't understand the question,  
9 undisclosed shareholder. It's -- I mean,  
10 they're a shareholder of MERS, and they  
11 filed an amicus as the American Land Title  
12 Association on behalf of their membership.

13 Q. And I guess my question to you is whether  
14 or not you're aware whether or not they  
15 made any effort to disclose to the court  
16 their financial interest in MERS.

17 A. I --

18 MR. BROCHIN: Excuse me. You're  
19 asking him does he know if  
20 ALTA made any effort in the  
21 case in Minnesota to disclose  
22 their financial interest in  
23 MERS. Is that your question?

1 MR. WOOTEN: That was my question.

2 MR. BROCHIN: Object to the form  
3 of the question. If you know.

4 A. I don't know.

5 Q. But it's your testimony that they asked you  
6 or offered to provide you the amicus, that  
7 MERS did not ask them?

8 A. I'm not -- I'm not going to sparse it that  
9 way. I -- they agree with the MERS  
10 concept. It saves them money. It saves  
11 the industry money. It saves the borrower  
12 money. It's good policy for the industry.  
13 Everyone benefits from it. So they're --  
14 I'm quite sure that they filed that because  
15 they felt that the legal issues justified  
16 it.

17 Q. Do you know how many states have filed or  
18 have passed a so-called MERS statute?

19 MR. BROCHIN: Object to the form  
20 of the question.

21 A. Well, there are states that have utilized  
22 the MERS system in their statutes.

23 Q. What I'm talking about is, do you know how

1           many states like Minnesota passed a  
2           specific piece of legislation that  
3           addressed by name MERS' right to act as  
4           nominee?

5                       MR. BROCHIN: Object to the form  
6                       of the question.

7           A.   Minnesota does not use MERS, Inc.'s name.

8           So there are statutes that rely on the MERS  
9           system for their implementation.

10          Q.   Today can a consumer go to the MERS Website  
11          and determine who the owner of their note  
12          is?

13          A.   No.

14                      MR. WOOTEN: Let's do this. Let's  
15                      break for lunch right now,  
16                      take about 30 minutes, if  
17                      that's all right with y'all.

18                      MR. BROCHIN: Okay.

19                      THE VIDEOGRAPHER: We're going off  
20                      the record at this time and  
21                      the time is now 1:19 p.m.

22                      (A lunch recess was taken.)

23                      THE VIDEOGRAPHER: We are now back

1                   on the record, and the time is  
2                   now 2:13 p.m.

3       Q.   (Mr. Wooten continuing:) Mr. Arnold, we  
4           took a short break so everybody could have  
5           a little lunch. Ask you a couple of  
6           questions about MERS, the business itself.

7                   It is true that your company has  
8           nothing to do with origination or  
9           underwriting any mortgage loan?

10       A.   Yes.

11       Q.   And it is true that your company never  
12           extended credit to any consumer?

13       A.   Yes.

14       Q.   And it's true that your company does not  
15           purchase or sell mortgage loans?

16       A.   True.

17       Q.   And it's true that your company is never an  
18           investor in a mortgage loan?

19       A.   True.

20       Q.   Your system does not actually create any  
21           beneficial interest in a mortgage loan,  
22           does it?

23       A.   True.

1 Q. And it does not transfer any beneficial  
2 interest in a mortgage loan, does it?

3 A. True.

4 Q. In fact, what your system does is tracks  
5 the paper documents, which are the subjects  
6 of these agreements and endorsements and  
7 things that we've been talking about most  
8 of the morning; right?

9 A. Yes. And it's the members that utilize the  
10 system to track it.

11 Q. Right. And the point being is, is that  
12 simply registering a transfer of an  
13 interest on your system does not mean that  
14 legally the transfer of that interest took  
15 place. That is dependent on the underlying  
16 documents; correct?

17 A. True. Although the parties might use that  
18 as an initiator.

19 Q. Sure. And that would be in your batch  
20 process system; is that right?

21 A. Well, any -- any registration and  
22 transaction over the system.

23 Q. Well, and that's what I'm saying. You're



1           saying they might use your system to  
2           initiate the transfer, one party provide to  
3           the other notice. We'd like to give you  
4           this interest or we'd like to take this  
5           interest pursuant to an agreement. But the  
6           actual change in ownership of that interest  
7           depends on documents that are not contained  
8           on the MERS system?

9           A. True. And what I meant was that the side  
10           documents might say -- when it moves in the  
11           MERS system, that's when the documents say  
12           something else kicks in.

13          Q. Sure. Is it also true that MERS is not a  
14           party to the mortgage indebtedness or the  
15           promissory note which underlies the  
16           mortgage that is recorded with MERS as  
17           mortgagee?

18          A. True.

19          Q. Even if a property were taken through  
20           foreclosure in the name of MERS and a  
21           foreclosure deed were entered in the name  
22           of MERS, MERS would not claim any interest  
23           in that property whatsoever, would it?

1                   MR. BROCHIN: Object to the form.

2           A. As far as proceeds are concerned?

3           Q. I'm talking about when a foreclosure sale  
4           is completed and a foreclosure deed is  
5           recorded and it lists MERS as the grantee  
6           of the foreclosure deed by virtue of the  
7           sale. MERS would never claim to be the  
8           owner of that piece of real property;  
9           right?

10                   MR. BROCHIN: Object to the form  
11                   of the question.

12           A. Yeah. You know, you're talking about  
13           matters of state law. We would never claim  
14           to be entitled to the final proceeds of  
15           liquidation of that property.

16           Q. In fact, you wouldn't claim right to  
17           ownership of that real property even though  
18           it was deeded in your name; right?

19                   MR. BROCHIN: Object to the form  
20                   of the question.

21           A. It just depends on the circumstances of  
22           the -- of the way that that's handled.

23           Q. Well, if a mortgage foreclosure deed was

1           issued with MERS as the grantee, that would  
2           be a violation of the rules of membership,  
3           wouldn't it?

4       A.    I wouldn't go that far.  It -- yeah.  I'd  
5           have to know the purpose of why they wanted  
6           to do it that way.  At no point would we  
7           claim to be entitled to the final proceeds.

8       Q.    Well, what about the event wherein the  
9           foreclosure takes place and the cry takes  
10          place at the courthouse steps and then the  
11          deed is transferred actually transferring  
12          the title in the public land records to  
13          MERS?  I mean, in that instance you still  
14          would be claiming to hold that as nominee  
15          for the party that truly had the right to  
16          that property; correct?

17                       MR. BROCHIN:  I object to the form  
18                       of the question.

19       A.    You're talking about the fee interest?

20       Q.    Right.

21                       MR. BROCHIN:  Same objection.

22       A.    We're -- we're not holding that as our own  
23           asset.

- 1 Q. That's right.
- 2 A. Right.
- 3 Q. You're holding it for the benefit of  
4 someone else?
- 5 A. Yes.
- 6 Q. If a foreclosure deed were recorded showing  
7 that MERS was the grantee, who would have  
8 the right to possession after that had  
9 taken place?
- 10 A. It would depend on all the circumstances  
11 and documents and -- with regard to the  
12 property.
- 13 Q. If a party issues a payment to MERS because  
14 MERS is shown in the land records as  
15 mortgagee, what is MERS' standard practice  
16 for that payment?
- 17 A. It's to get the check to the proper party.
- 18 Q. And your provisions in your membership  
19 agreement allow certifying officers to  
20 endorse a MERS check for deposit with the  
21 servicer; correct?
- 22 A. Yes. That's one of the seven authorities.
- 23 Q. And you would never under any circumstances

1 list those payments as income to the  
2 benefit of MERS; right?

3 A. Never.

4 Q. And you've never claimed such on any tax  
5 return, have you?

6 A. Never.

7 Q. All these 62 million mortgages in this  
8 country that are listed with MERS as  
9 mortgagee, none of those mortgages are  
10 listed anywhere as an asset of MERS, are  
11 they?

12 A. True.

13 Q. And if any of those properties are  
14 foreclosed on and there is a failure to  
15 collect any amount of money on any of those  
16 mortgages, none of those losses are  
17 accounted for on MERS' books; right?

18 A. No.

19 Q. And MERS has no risk as to the nonpayment  
20 of any mortgage for which it is a nominee?

21 A. No.

22 Q. Does MERS ever suffer a default when a  
23 mortgagee fails to pay or when a borrower

1 fails to pay the payment on a mortgage  
2 note?

3 A. No.

4 Q. And MERS suffers no injury of any type if a  
5 borrower fails to pay the mortgage note?

6 MR. BROCHIN: Object to the form.

7 A. It probably costs additional manpower.

8 Q. And that's because of the way MERS chose to  
9 structure the system; is that right?

10 A. Yes.

11 Q. And as I understand it, you did not  
12 originally intend to be in the foreclosure  
13 business when you set this system up, did  
14 you?

15 MR. BROCHIN: Object to the form.

16 A. I don't think I could agree with that.

17 Q. Would you agree that foreclosure is not  
18 the -- let me -- strike that, please. Let  
19 me restate that.

20 Would you agree that MERS was not  
21 principally formed to act as an agent  
22 conducting foreclosures for the beneficial  
23 owners of promissory notes?

1 A. Yes.

2 Q. And would you agree that that is not a  
3 principal purpose of MERS today?

4 A. Yes.

5 Q. Would you agree that it is merely  
6 antecedent to your stated corporate purpose  
7 of attracting interest in mortgage loans?

8 A. I don't know that I know what antecedent  
9 means, but it derives from that.

10 Q. Right. And MERS has no personal interest  
11 in whether or not any borrower ever pays  
12 any payment on any mortgage loan?

13 A. No.

14 Q. And you agree -- or one of the principal  
15 purposes of your system is to eliminate  
16 changes in the name of the lienholder while  
17 the promissory note and the servicing  
18 rights continue to change hands and are not  
19 recorded in the public record?

20 MR. BROCHIN: Object to the  
21 form --

22 A. I didn't say that.

23 MR. BROCHIN: Yeah. Object to the

1 form of the question.

2 Q. Maybe I ought to break that down some more.

3 One of the things you've previously  
4 stated or your company has previously  
5 testified to is that MERS immobilizes the  
6 mortgage lien; is that correct?

7 A. Yes.

8 Q. And you do not dispute that after you  
9 immobilize the mortgage lien, the  
10 promissory note can continue to be bought  
11 and sold repeatedly?

12 A. Yes.

13 Q. And servicing rights can continue to change  
14 hands by contractual agreements?

15 A. Yes.

16 Q. And that there is no entry in the public  
17 record reflecting anything with respect to  
18 either of those types of transactions?

19 A. Well, neither one of those transactions --

20 MR. BROCHIN: Object to the form.

21 A. -- were ever reflected in the land records.

22 Q. Sure. And I'm just saying that once MERS  
23 settles in as mortgagee, be it by an



1 assignment or be it by this MERS as  
2 original mortgagee system, no matter how  
3 many times a promissory note changes hands,  
4 the lien is always going to be in MERS'  
5 name?

6 A. Yes.

7 Q. In the ordinary course of business, MERS  
8 does not act as a UCC holder of promissory  
9 notes, does it?

10 A. I don't understand the question.

11 Q. Well, earlier we talked about the fact that  
12 when you testified that MERS would become  
13 the holder, that that would be a holder  
14 under the UCC.

15 A. That's what I mean.

16 Q. Okay. And what I'm saying is, is it's not  
17 part of your stated business purpose to be  
18 a holder of promissory notes?

19 A. Well, we routinely do become holder of  
20 promissory notes.

21 Q. You routinely obtain possession of  
22 promissory notes for the benefit of the  
23 beneficial owner; right?

1                   MR. BROCHIN: Object to the form  
2                                   of the question.

3       Q.    Is that correct?

4       A.    Holder.

5       Q.    And you agree that your rules do not  
6             require a certifying officer to be in  
7             possession of a promissory note when a  
8             foreclosure begins in a nonjudicial  
9             foreclosure state?

10                   MR. BROCHIN: I'm sorry. Could  
11                                   you reread the question,  
12                                   please?

13                                   (Requested portion of the record  
14                                   was read by the court reporter.)

15       A.    I wouldn't agree with that. The rules are  
16             subordinate to state law. And so whatever  
17             the state law requirement is, that's what  
18             we require.

19       Q.    Okay. You would agree that when MERS  
20             obtains physical possession of the mortgage  
21             note that there is no exchange of  
22             consideration between MERS and the owner of  
23             the beneficial interest of that note?

1 MR. BROCHIN: Object to the form  
2 of the question. Also calls  
3 for a legal conclusion.

4 A. I'm going to have to ask to hear that one  
5 again too.

6 Q. When you obtain possession of a note from a  
7 holder -- when I say you, I mean MERS --  
8 you do not pay any consideration to obtain  
9 that note, do you?

10 A. No consideration.

11 Q. And you do not receive any consideration  
12 for accepting that note, do you?

13 MR. BROCHIN: Object to the form  
14 of the question. Calls for a  
15 legal conclusion.

16 A. At that specific moment we derive  
17 compensation for all of this, but there's  
18 no exchange for that specific thing.

19 Q. That's a good point, so let me deviate for  
20 a moment.

21 What exactly are you paid by the  
22 beneficial owner of the promissory note for  
23 use of your system?

1 A. Well, first, I presume you're talking about  
2 MOMs?

3 Q. Right.

4 A. Specifically the beneficial interest owner  
5 would not necessarily be the one that pays  
6 us.

7 Q. Okay. Who would pay you?

8 A. It would -- someone would pay us at the  
9 time of registration.

10 Q. Okay. And that might be the originator or  
11 some intervening purchaser?

12 A. It -- it -- it's going to come early  
13 because our rules require that registration  
14 occur within ten days of closing, and then  
15 in the normal course of business we would  
16 expect payment to be made.

17 Q. And that is the fee that you charge for  
18 registration?

19 A. Yes.

20 Q. And is that the \$4.95 fee?

21 A. It's \$6.95 now.

22 Q. Okay. Beyond that fee that's paid as a  
23 result of registration, are you paid any

1           other compensation by any holder of a  
2           beneficial interest in a promissory note  
3           that is registered to your system?

4       A.    Well, you said beneficial holder.

5       Q.    And I say that because -- or beneficial  
6           owner. I say it because you use that  
7           terminology in your materials and your  
8           testimony.

9       A.    Well, there are two other forms of payment  
10          that we would receive.

11      Q.    Okay. What are those?

12      A.    One would be a membership agreement --  
13          membership fee, which is, you know, not a  
14          lot, for -- to be a member. And then there  
15          are transfer fees.

16      Q.    Okay.

17      A.    And that is charged when a -- there's a  
18          servicing transfer more than 270 days after  
19          the origination.

20      Q.    Is that what you refer to as a seasoned  
21          transfer?

22      A.    Yes.

23      Q.    All right. At the time that MERS obtains

1           possession of a promissory note for use in  
2           a foreclosure proceeding, is there any  
3           compensation or consideration received by  
4           MERS for obtaining possession of that  
5           promissory note?

6           A.   None that I have not mentioned.

7           Q.   Well, you mentioned the membership  
8           agreement.  That pays a fee for membership;  
9           right?

10          A.   Yes.

11          Q.   The transfer agreement is a fee for  
12          transferring servicing interest between  
13          services?

14          A.   Not the note.

15          Q.   Not the note.  And then the registration  
16          fee is for physically registering the loan  
17          and the note and the lien on the MERS  
18          system through the use of the MIN; right?

19          A.   You're registering the loan --

20          Q.   Right.

21          A.   -- and getting the MIN.

22          Q.   And that's the purpose of the 6.95?

23          A.   That's right.

1 Q. But with respect to the actual point in  
2 time where MERS gains physical possession  
3 of the note, they do not receive any  
4 compensation for obtaining possession at  
5 that time?

6 A. True.

7 Q. Right?

8 A. True.

9 Q. And they don't give any consideration at  
10 that time?

11 A. True.

12 MR. BROCHIN: Object to the form  
13 of the question to the extent  
14 it calls for a legal  
15 conclusion.

16 Q. There is no payment of any readily  
17 identifiable sum of money for either  
18 receiving the note or getting the note;  
19 right?

20 A. True.

21 Q. Let me ask you this: When MERS obtains  
22 physical possession of the note, is that  
23 documented in the MERS system for purposes

1 of foreclosure?

2 A. No.

3 Q. Okay. So in the MERS system it does not  
4 indicate any transfer of any beneficial  
5 interest away from the entity which has the  
6 beneficial interest in the promissory note  
7 at that time?

8 MR. BROCHIN: Object to the form  
9 of the question.

10 A. True.

11 Q. Your system is capable of tracking every  
12 time that the beneficial interest in the  
13 note changes hands?

14 A. Our system is capable of being used to  
15 track that if the members utilize it for  
16 that reason.

17 Q. In fact, the coding of your system is such  
18 that if you were doing research on the MIN,  
19 it would show you every time that the  
20 beneficial interest or the servicing rights  
21 changed; correct?

22 A. It depends on what kind of access you have.

23 Q. Sure. But in your system there is the



1 built-in inherent capability to keep a  
2 record of every time that the beneficial  
3 interest in that note changes hands?

4 A. If the members use it for that purpose.

5 Q. Right. And typically as part of their  
6 changes in ownership of that instrument,  
7 they would typically record that, wouldn't  
8 they?

9 MR. BROCHIN: Object to the form  
10 of the question as far as  
11 typically and record.

12 A. Yeah. I would -- those would be my two  
13 points, too, that -- you know, typically  
14 would depend on the business model for the  
15 company member that we're talking about.  
16 And then there's nothing recorded on the  
17 MERS system.

18 Q. Transfer of the beneficial interest is not  
19 recorded on the MERS system?

20 A. It's a transfer of the beneficial interest.

21 Q. Well, when I say recorded, in the sense of  
22 it is entered on the MERS system when the  
23 transfer of the beneficial interest takes

- 1 place; right?
- 2 A. Well, therein lies the jargon and slang  
3 that has caused a lot of confusion.  
4 There's no recording on the MERS system of  
5 anything.
- 6 Q. Well, what do you term the data that is  
7 entered on the MERS system, then?
- 8 A. It's either a registration or a transfer.
- 9 Q. Okay. So whenever a transfer occurs of any  
10 interest, be it beneficial interest in the  
11 promissory note or be it servicing  
12 interest, those you expect to be entered on  
13 the MERS system?
- 14 A. It's not so much that we expect it. We  
15 operate a system that offers that  
16 capability. So it's always the parties  
17 that transact by an electronic handshake.
- 18 Q. An electronic handshake. That's an  
19 interesting term. What exactly does that  
20 mean?
- 21 A. One company goes in and stages it  
22 electronically and it waits in a status  
23 until another company comes in and confirms

- 1           it.
- 2       Q.    And is that typically done through the
- 3           process of an upload or like a batch file?
- 4       A.    Preferably.
- 5       Q.    And y'all have internal coding that tells
- 6           you what each of those types of --
- 7           handshakes was your term -- what each of
- 8           those are; right?
- 9       A.    Yes.
- 10      Q.    And so if you have those codes, you know
- 11           exactly what was changed hands and at what
- 12           point in time according to those parties;
- 13           right?
- 14      A.    Yes.  And that's what makes the system
- 15           instantaneous.
- 16      Q.    Correct.  But the system relies upon the
- 17           actual execution of the underlying
- 18           agreements and documents?
- 19      A.    Yes.
- 20      Q.    So while your system may indicate the
- 21           intent to undertake a certain act, it is
- 22           not proof that that act actually was
- 23           undertaken, is it?

1                   MR. BROCHIN: Object to the form.

2       A. As far as its evidentiary nature, you know,  
3       I -- that would depend on whatever the  
4       circumstances were. But it's not intended  
5       to reflect the actual transaction. It's  
6       not the transaction. It's tracking that  
7       transaction.

8       Q. Sure. It is, in fact, a memorialization of  
9       the underlying paper that is allegedly in  
10      existence between the parties?

11                   MR. BROCHIN: Object to the form.

12      A. You know, the -- basically it's a -- we  
13      operate a system that lets the members  
14      through electronic handshakes tell us who  
15      we're working for. And that's the extent  
16      of it. So we serve in the land records for  
17      the members, and then the system tells us  
18      who we're serving for.

19      Q. Let me ask you this: In the absence of  
20      MERS, would those agreements transferring  
21      the beneficial interest -- how would they  
22      be memorialized between parties?

23      A. That -- what we're talking about here did

1 not exist.

2 Q. Right.

3 A. So they would not have been recorded in the  
4 land records. They would have been kept  
5 track of by those two companies.

6 Q. In the form of their respective contracts  
7 and if they were transferring ownership of  
8 promissory notes, there would be  
9 endorsements and transfer receipts and  
10 delivery confirmation and those types of  
11 things; right?

12 MR. BROCHIN: Object to the form  
13 of the question.

14 A. Well, there still are all those things.

15 Q. Right.

16 A. So MERS is additive.

17 Q. Are you familiar with the timing of the IRS  
18 ruling which allowed originators to  
19 instantaneously securitize assets?

20 A. I don't believe so.

21 Q. Do you have any idea if it occurred around  
22 1998 or 1999, approximately the same time  
23 your system sort of appeared on the scene?

1 MR. BROCHIN: I'm sorry. Did what  
2 occur?

3 MR. RAMEY: He said the system  
4 appeared on the scene.

5 MR. BROCHIN: Can you reread the  
6 question?

7 (Requested portion of the record  
8 was read by the court reporter.)

9 MR. BROCHIN: I ask that you  
10 rephrase it and tell him what  
11 "it" means.

12 MR. WOOTEN: Sure.

13 A. I don't know what it is.

14 Q. Okay. I will represent to you that near  
15 the end of the '90s there was a ruling by  
16 the IRS that allowed an entity that  
17 originated an asset, a contract, a  
18 mortgage, a credit contract, to securitize  
19 it once it had been originated. Do you  
20 have any familiarity if that ruling  
21 coincided with or was at or near the time  
22 that your system began to be implemented?

23 MR. BROCHIN: Object to the form

1                   of the question.

2       A.    I don't know anything about what you're  
3            talking about.

4       Q.    With respect to the conduction of any  
5            foreclosure, MERS takes all of its actions  
6            at the direction of the servicer; is that  
7            correct?

8       A.    Well, the servicer is conducting the  
9            foreclosure.

10      Q.    The servicer is conducting the foreclosure,  
11            but it's done in the name of MERS?

12      A.    Yes.

13      Q.    MERS has no interest whatsoever in the  
14            money that is due on the note?

15      A.    True.

16                   MR. BROCHIN:  I'm just going to  
17                   object.  I don't know how many  
18                   times you've asked that same  
19                   question.  And it's been asked  
20                   and answered, but ...

21      Q.    So MERS allows another entity to use its  
22            name to conduct a foreclosure?

23                   MR. BROCHIN:  Object to the form

1                                   of the question.

2       A.   Well, we're the mortgagee, so the  
3           foreclosure is done in our name.  And the  
4           security instrument gives MERS the  
5           authority to do that.

6       Q.   After a default; right?

7       A.   After a default.

8       Q.   And MERS never experiences a default;  
9           right?

10                               MR. BROCHIN:  Object to the form  
11                               of the question.

12      A.   True.

13      Q.   Because, in effect, the only person that  
14           can experience a default on a note is the  
15           person that owns or has the beneficial  
16           interest in the note; right?

17                               MR. BROCHIN:  Object to the form.

18      A.   I -- true.

19      Q.   MERS does not incur attorneys' fees or  
20           litigation costs in the conduct of a  
21           foreclosure, does it?

22                               MR. BROCHIN:  Object to the form  
23                               of the question.



1 A. Well, we certainly have in this case.

2 Q. Yes, sir. But assuming that some consumer  
3 doesn't happen to know some lawyer like  
4 myself and MERS just conducts a foreclosure  
5 without interruption, the fees associated  
6 with undertaking that foreclosure and the  
7 costs associated with undertaking that  
8 foreclosure are not borne by MERS, are  
9 they?

10 A. True.

11 MR. BROCHIN: Object to the form  
12 of the question.

13 Q. Let me ask you this, Mr. Arnold: You said  
14 that the servicer is conducting the  
15 foreclosure. The servicer is not the owner  
16 of the note. It has not experienced a  
17 default, has it?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. That's going to depend on the relationship  
21 between the servicer and the note owner.

22 Q. Right. Have you examined Ms. Henderson's  
23 documents in this case?

- 1 A. No, I have not.
- 2 Q. Were you aware that she was a veteran of  
3 our Armed Forces?
- 4 A. I was not.
- 5 Q. Were you aware that she had received a  
6 rating of a 100-percent disability from the  
7 Department of Veterans Affairs?
- 8 A. No.
- 9 Q. You are aware that the Department of  
10 Veteran Affairs guarantees mortgages for  
11 veterans who qualify; right?
- 12 A. Yes.
- 13 Q. And you are aware that if that veteran  
14 defaults, that Veterans Affairs will step  
15 in and pay its mortgage insurance to the  
16 owner of that note; right?
- 17 A. According to the terms of the insurance.
- 18 Q. Right. So even if there were actually a  
19 default on the note, there was a remedy  
20 short of foreclosure available to the owner  
21 of the note; right?
- 22 MR. BROCHIN: Excuse me. Which  
23 case are you talking about?

1 MR. WOOTEN: Talking about Debra  
2 Henderson's case.

3 MR. BROCHIN. Object to the form  
4 of the question because, as  
5 he's already said, he has not  
6 reviewed the papers in this  
7 matter.

8 A. Yeah. I wouldn't agree with that.

9 Q. What exactly does the VA guarantee protect,  
10 then?

11 MR. BROCHIN: Object to the form  
12 of the question.

13 A. I'm no expert on that.

14 Q. Do you have a general familiarity with it?

15 A. There's -- it's similar to FHA in the sense  
16 that there is a government guarantee.

17 Q. And what does it do?

18 A. Again, I'm not an expert on payment under  
19 that plan.

20 Q. Are you aware as to whether or not the  
21 persons who are acting as certifying  
22 officers for MERS in this case are actually  
23 officers of GMAC?

- 1 A. It's a requirement.
- 2 Q. Who enforces that requirement?
- 3 A. Well, it's part of our rules.
- 4 Q. Who enforces your rules?
- 5 A. MERS.
- 6 Q. Do you have a MERS policeman that audits  
7 these folks that get these titles to see if  
8 they actually are complying with these  
9 recommendations?
- 10 A. There is a process.
- 11 Q. Can you explain that to me?
- 12 A. Well, we went over it a bit earlier.
- 13 Q. Well, let me narrow your focus a little  
14 bit.
- 15 Tell me everything that MERS does to  
16 ensure that persons who are identified as  
17 certifying officers are actually officers  
18 of the corporation that they work for.
- 19 A. Well, it starts with a requirement.
- 20 Q. And that is in the form which they download  
21 from the Internet requesting appointment as  
22 certifying officers?
- 23 A. Yes.

- 1 Q. And that form is available today?
- 2 A. Yes.
- 3 Q. And anybody who's a member can go on line,  
4 fill out a form, and request that MERS make  
5 them a certifying officer?
- 6 A. No.
- 7 (Plaintiff's Exhibit 5 was marked  
8 for identification.)
- 9 Q. I show you what I've marked as Plaintiff's  
10 Exhibit 5 in this case and ask you to take  
11 a look at that and tell me if it is a  
12 specimen copy of your agreement for having  
13 persons designated as certifying officers.
- 14 A. Yeah. This is not -- this is not the  
15 certifying officer form that you're talking  
16 about.
- 17 Q. Okay. What is that form?
- 18 A. Well, this is where -- in this exhibit,  
19 this is where WAMU is getting authority for  
20 Fidelity to take certain actions.
- 21 Q. And that's because they provide services to  
22 servicers as part of their outsource  
23 provider of contracts?

- 1 A. In their business model.
- 2 Q. And that company is -- and that document is  
3 Fidelity National Foreclosure & Bankruptcy  
4 Solutions; right?
- 5 A. Yes.
- 6 Q. And that document is an example of MERS  
7 authorizing persons to sign as MERS  
8 certifying officers, who are employees of  
9 at that time Fidelity, now known as LPS, to  
10 act on behalf of Washington Mutual; right?
- 11 A. Yes.
- 12 Q. And does that document require that those  
13 persons certify to MERS that they are  
14 officers of that corporation?
- 15 MR. BROCHIN: Object to the form.  
16 The document speaks for  
17 itself.
- 18 A. Whatever it says.
- 19 Q. And the form is downloaded from the Web.  
20 These persons who request that you identify  
21 them as certifying officers, they all give  
22 you this information and say, yes, these  
23 people are our corporate officers; right?

- 1 A. WAMU.
- 2 Q. Well, I'm talking more generally about your  
3 form that's on line that requests  
4 certifying officers; right?
- 5 A. Well, all our documents are on line.
- 6 Q. Right.
- 7 A. We're a very open company. So you can go  
8 on line and look at practically every  
9 document that exists.
- 10 Q. Right. And, again, my point being, when a  
11 service or a member asks MERS to designate  
12 certifying officers, they represent to MERS  
13 that the persons they're asking you to  
14 designate are corporate officers; right?
- 15 MR. BROCHIN: Object to the form  
16 of the question.
- 17 A. Whatever this says.
- 18 Q. Okay. So if it says that, you would agree  
19 with it?
- 20 MR. BROCHIN: Object to the form  
21 of the question. I don't know  
22 what you're talking about.
- 23 Q. And it says that -- with respect to those

1           issues, once a person is certified by MERS  
2           as a certifying officer, does MERS ever  
3           undertake any action to verify that those  
4           persons are actually corporate officers of  
5           the company, that they have certified  
6           themselves to be so?

7           A.   Well, first off, it has not always been a  
8           requirement that they would be officers of  
9           the member.

10          Q.   Right.  And so you've certified whomever  
11          they've asked; right?

12          A.   Yes.

13          Q.   And irrespective of how many persons there  
14          were; right?

15          A.   It -- the bigger the company, the more  
16          certifying officers they're probably going  
17          to want to have.

18          Q.   Especially nowadays; right?

19                       MR. BROCHIN:  Object to the form  
20                       of the question, if that's a  
21                       question.

22          Q.   A lot more foreclosures going on today than  
23          lately; right?



1 A. Actually it plateaued off. So it's held  
2 pretty steady for the last year.

3 Q. At more or less historically high levels?

4 A. Yes.

5 Q. Not seen since the Great Depression?

6 A. I'm only 54. I don't know.

7 Q. Again, when did you implement this  
8 requirement that these persons with signing  
9 authority be officers of the corporation?

10 A. Within the last couple of years.

11 Q. Is it your contention that anyone who is  
12 signing as a certifying officer who is not  
13 an officer of the corporation is not  
14 validly acting on behalf of MERS?

15 MR. BROCHIN: Object to the form  
16 of the question.

17 A. No, I wouldn't agree with that.

18 Q. Do you have any idea how many people are  
19 certified as certifying officers of MERS in  
20 the country today?

21 A. Me personally? Me personally?

22 Q. Through you personally or through your  
23 company, what you know as CEO of MERS.

- 1 A. Well, you say any idea.
- 2 Q. I mean, ballpark?
- 3 A. We've got a very good idea.
- 4 Q. Do you know exactly how many?
- 5 A. We -- we have every name.
- 6 Q. Okay. And do you track every transaction  
7 that they undertake in MERS' name?
- 8 MR. BROCHIN: Object to the form  
9 of the question.
- 10 A. No.
- 11 Q. Do you have any idea how many transactions  
12 are conducted daily by persons who are  
13 identified as certifying officers of MERS?
- 14 A. I don't understand the question, any idea.
- 15 Q. Do you keep any record of the number of  
16 transactions undertaken by persons who are  
17 designated as certifying officers of MERS  
18 on a daily basis in this country?
- 19 A. There is certain things that the system is  
20 required to be updated to reflect, so, yes.
- 21 Q. What are those things?
- 22 A. When a loan is paid off, when a foreclosure  
23 begins.

1 MR. WOOTEN: How close are you on  
2 the tape?

3 How close are you on the  
4 tape?

5 THE VIDEOGRAPHER: Okay. We're  
6 going to go off the record for  
7 a moment. The time is now  
8 three o'clock p.m.

9 (A brief recess was taken.)

10 THE VIDEOGRAPHER: This is Disk 3  
11 in the continuing video  
12 deposition of R.K. Arnold, and  
13 the time is now 3:08.

14 Q. (Mr. Wooten continuing:) Mr. Arnold, when  
15 we took that break to change the tape, we  
16 were talking about the certifying  
17 officers. Is it your testimony that MERS  
18 has a record of every person that is  
19 certified as a certifying officer in its  
20 system?

21 A. Yes.

22 Q. And so if we asked you to give us the name  
23 of every person who's been nominated or

1           made by resolution a certifying officer for  
2           GMAC, somewhere there would be a button you  
3           could push and print that information off?

4       A.    Well, I'm sure it's more complicated than  
5           that.

6       Q.    But it's available in your computer system;  
7           right?

8       A.    We know who the certifying officers are.

9       Q.    And do you know what the total number of  
10          certifying officers are as of today?

11      A.    Again, you're asking me?

12      Q.    Well --

13      A.    MERS knows.

14      Q.    Sure.  And -- but as CEO have you been  
15          privy to that information?  Have you seen  
16          that number?

17      A.    Oh, I've -- you know, I hear that number.

18      Q.    Yeah.  But -- and I'm not trying to hold  
19          you to anything specific.  I'm just trying  
20          to get a ballpark.  Do you not have a  
21          ballpark of how many people that is?

22      A.    Thousands.

23      Q.    Thousands.  And you said that certain

1 transactions that were required to be  
2 entered on the MERS system, you would have  
3 a record of the number of those  
4 transactions that were effected by your  
5 certifying officers; right?

6 A. Well, we know how many changes in records  
7 take place.

8 Q. As a result of actions by certifying  
9 officers?

10 A. Not necessarily by certifying officers.

11 Q. Okay. I guess that's what I'm trying to  
12 get at. Is there any way that MERS tracks  
13 or attempts to track the actions of those  
14 persons it has designated as certifying  
15 officers?

16 A. Well, they have limited authority. And  
17 we're comfortable with them operating in  
18 the name of MERS under that limited  
19 authority.

20 Q. And I don't want to oversimplify this. But  
21 the reason that you're comfortable with  
22 that is, is that your membership agreement  
23 provides an indemnity running to MERS from

1 the member for those types of acts; right?

2 MR. BROCHIN: Object to the form.

3 A. That's one thing that gives us comfort.

4 Q. Right. And the other reason that you feel  
5 comfortable, I would presume, or another  
6 reason is, is because, what you indicated,  
7 that the servicer is actually really acting  
8 in his own stead. He's just using your  
9 name?

10 MR. BROCHIN: Object to the form.

11 A. As mortgagee.

12 Q. Right. As an incident to the work that  
13 these servicers do, you're familiar with  
14 them filing documents related to both  
15 foreclosures and bankruptcies where  
16 mortgagers -- borrowers have filed  
17 bankruptcy because they couldn't make their  
18 mortgage payment?

19 A. That's another category of authority.

20 Q. Right. And they file documents in  
21 bankruptcy court called proofs of claim in  
22 the name of MERS?

23 A. Yes.

1 Q. And they file documents evidencing the  
2 amount of default with those proofs of  
3 claim?

4 A. They can.

5 Q. And if that takes a form of an affidavit  
6 done in the name of MERS, you're okay with  
7 that because what the certifying officer is  
8 certifying is actually the servicer's  
9 records and the certifying officer is  
10 actually the servicer; right?

11 MR. BROCHIN: Object to the form  
12 of the question.

13 A. Well, if the affiant has personal knowledge  
14 or institutional knowledge, then we're  
15 comfortable with the affidavit.

16 Q. And, again, if there's a problem with it,  
17 they're going to indemnify you; right?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. That's one thing.

21 Q. There's no vehicle by which you can  
22 electronically track the number of  
23 affidavits or documents that certifying

1           officers might have executed once they have  
2           been given that designation by your  
3           company; right?

4           A.    Within the bounds of the limitations of  
5           their authority, they can execute as many  
6           documents as are necessary within those  
7           categories, those seven categories that I  
8           mentioned, as long as they're true and  
9           correct.

10          Q.    What happens if they're not true and  
11          correct?

12                         MR. BROCHIN:  Object to the form.

13          A.    Then that is either pointed out and  
14          corrected or not.

15          Q.    How would MERS find out that a certifying  
16          officer's action wasn't true and correct  
17          when it ends up in front of a lawyer like  
18          me?

19                         MR. BROCHIN:  Object to the form.

20          A.    It is -- isn't that what you're doing?

21          Q.    Well, yeah.  I mean, what I'm saying is, is  
22          that short of being sued or short of being  
23          held in a court by a judge who's mad about



1 a document, is there any way for MERS to  
2 know that a certifying officer has done  
3 something improper?

4 A. Well, if nobody challenges it, then it's  
5 probably true.

6 Q. Well, let's talk about that instance where  
7 a certifying officer does something  
8 improper but nobody bothers to tell MERS.  
9 I mean, you have no way to find out on your  
10 own, do you?

11 MR. BROCHIN: Object to the form  
12 of the question.

13 A. Yeah. I wouldn't say that.

14 Q. Does MERS have employees or staff dedicated  
15 to auditing the actions of certifying  
16 officers?

17 A. Well, we have quality reviews on our loans  
18 from time to time.

19 Q. And what is exactly entailed in a quality  
20 review?

21 A. I don't know.

22 Q. Who would know that?

23 A. My team.

- 1 Q. Huh?
- 2 A. My team.
- 3 Q. Who would be on your team that would know  
4 that?
- 5 A. I don't know that.
- 6 Q. Do you have a department, a quality review  
7 department?
- 8 A. We've got a performance department. We've  
9 got a law department.
- 10 Q. Okay. Who heads your performance  
11 department?
- 12 A. Well, I don't -- I'm not exactly sure what  
13 your question is about -- about the  
14 certifying officers, the -- there is a list  
15 of certifying officers.
- 16 Q. Okay.
- 17 A. And so what is your question about those  
18 certifying officers?
- 19 Q. Well, my question, Mr. Arnold, is this:  
20 MERS really doesn't even make an effort to  
21 keep up with the actions of certifying  
22 officers once they're designated, do they?
- 23 MR. BROCHIN: Object to the form.

1       A.    Yeah.  I wouldn't agree with that.  I mean,  
2            we've got a very strict membership  
3            structure.  We've got limitations on their  
4            authority, and they can operate within  
5            those seven categories of authority.  And  
6            if a problem comes to our attention, then  
7            we take corrective action up to and  
8            including terminating the member's  
9            membership.  So --

10       Q.    Sure.

11       A.    -- there's a lot of incentive for the  
12            members to go by the rules in executing  
13            these documents within the seven categories  
14            of authority.  That's the whole purpose of  
15            certifying officers.  And like you --

16       Q.    And I agree.  I mean, that's the purpose,  
17            but I'm asking you is that a practice.

18       A.    And the knowledge about whether the loan is  
19            in default is right there with the  
20            servicer.  So you reference pre-MERS.  
21            Pre-MERS, it was always that way pre-MERS.  
22            So it's that way post-MERS.  Officers  
23            execute documents on behalf of

1           corporations.

2           Q.    Sure.

3           A.    So the only difference between me and the  
4           certifying officers are they have limited  
5           authority and I have general authority.

6           Q.    Right.  And with respect to that, again, my  
7           issue basically is the same as what you're  
8           saying.  If you have a general officer of  
9           MERS -- I think you've referred to them  
10          previously as executive officers -- and  
11          they go off the reservation and go out and  
12          start doing things, you have a system at  
13          MERS to identify that problem and address  
14          it; right?

15                       MR. BROCHIN:  Object to the form  
16                       of the question.

17          A.    Well, I'm not sure I do in the way that you  
18          seem to want to make the distinction.  I  
19          mean, all officers have different degrees  
20          of authority.

21          Q.    Sure.

22          A.    I'm the chief executive officer, so I have  
23          more authority than the next level down.

1           And as far as our representatives are  
2           concerned, lawyers that work for us have  
3           limited authority too. So --

4       Q.   Well, they serve at the leisure of the  
5           client; right?

6       A.   And certifying officers do as well. So  
7           certifying officers within the cat -- those  
8           seven categories that I mentioned, they  
9           have latitude to execute documents within  
10          those seven categories. And the knowledge  
11          about whether those are true or not are  
12          right there at the company that they're  
13          employed by.

14      Q.   Sure. And I think you're making this much  
15          more difficult than the question I'm  
16          asking.

17                What I'm saying is, is that MERS does  
18                not track the acts of those persons that it  
19                has designated as corporate officers?

20      A.   Well, you -- you know, that's your  
21          testimony. I'm not --

22      Q.   No. It's a question. Does it? Do you?

23      A.   Yes.

- 1 Q. Okay. So you track --
- 2 A. They have limited authority. We have  
3 limited their authority.
- 4 Q. Okay.
- 5 A. Officers are -- certifying officers have to  
6 stay within these seven categories, and  
7 within these seven categories they have the  
8 latitude to execute whatever documents are  
9 necessary to perform under those seven  
10 categories.
- 11 Q. Okay. Now, with respect to the documents  
12 they execute, do you have any record of  
13 those acts?
- 14 A. Certain of those would require updates to  
15 the MERS system.
- 16 Q. Beyond those that require updates, do you  
17 have any record of the acts of your  
18 certifying officers?
- 19 A. I don't understand the question.
- 20 Q. Well, you've heard of a notary book, hadn't  
21 you?
- 22 A. Yes.
- 23 Q. Where a notary says today I'm notarizing

1           this affidavit of R.K. Arnold. And so it's  
2           September 25, 2009, at 4 p.m. I'm -- this  
3           is what I'm doing.

4       A.    Uh-huh (positive response).

5       Q.    And every time they take an act in their  
6           office as notary, they keep a record;  
7           right?

8       A.    Yes.

9       Q.    And so that record, if it's kept properly,  
10          tells you everything they've ever done as a  
11          notary; right?

12      A.    (Witness nods head.)

13      Q.    Is that fair?

14      A.    I guess it depends on --

15      Q.    As a hypothetical, assuming they do it the  
16          right way.

17      A.    It depends on the state.

18      Q.    Sure.

19      A.    But, you know, it's a fair question.

20      Q.    And, you know, I'm a lawyer with a trust  
21          account. I'm supposed to keep up with  
22          every deposit and, you know, every  
23          withdrawal, who it was for and what it

1           was -- you're familiar with those rules;  
2           right?

3                     It's an obligation. I'm an officer of  
4           the court; right?

5                             MR. BROCHIN: Object to the form  
6                             of these questions.

7           Q.    But with respect to your officers,  
8           Mr. Arnold, these people that you designate  
9           that you have thousands of, you don't know  
10          what these people do on a daily basis, do  
11          you?

12                            MR. BROCHIN: Object to the form.  
13                            Asked and answered.

14          A.    Does Ms. Henderson know what you're doing?

15          Q.    She knows I'm representing her.

16          A.    And I know that the certifying officers  
17          have limited authority within these seven  
18          categories.

19          Q.    Okay. And what I'm asking you,  
20          Mr. Arnold -- because what your company  
21          deals with is taking people's homes from  
22          them in the context of foreclosure. Do you  
23          do anything to monitor the actions of these



1 people that your company has authorized to  
2 use your name to take people's homes?

3 MR. BROCHIN: Object to the form  
4 of the question.

5 A. Yes.

6 Q. Okay. And tell me everything your company  
7 does to monitor and be aware of those  
8 actions.

9 MR. BROCHIN: Asked and answered.

10 A. They have to update the MERS system as to  
11 certain of their actions.

12 Q. Okay.

13 A. They have to perform within these seven  
14 specific categories. And within those  
15 categories, they are the ones with personal  
16 knowledge, and they -- as you mentioned,  
17 we're talking about affidavits. Those are  
18 under oath filed with the court. I presume  
19 that those are true. And that's the  
20 structure that we have.

21 Q. Okay. And do you know every time an  
22 officer executes an affidavit?

23 A. No, I do not.

1 Q. Do you know every time an officer testifies  
2 as an officer of MERS?

3 A. No.

4 Q. Would you ever agree to have an employee of  
5 a servicer testify as a 30(b)(6)  
6 representative of MERS?

7 MR. BROCHIN: Object to the form  
8 of the question.

9 A. Depends on the circumstance. They're  
10 officers of MERS.

11 Q. Would you -- well, let's talk about  
12 Florida, for instance. Y'all have this  
13 prohibition on foreclosures in your name in  
14 Florida; right?

15 A. It's a moratorium.

16 Q. Moratorium. But as in the membership  
17 agreement, you state specifically that  
18 members shall not foreclose in your name in  
19 Florida; right?

20 A. Yes.

21 Q. And you charge them how much if they do  
22 that?

23 A. \$10,000.

1 Q. And how would you know, other than by being  
2 sued, if a servicer sued in the name of  
3 MERS in Florida on a foreclosure?

4 A. If we became aware of it through the normal  
5 course of business.

6 Q. I mean, would they update the system and  
7 say, hey, we're foreclosing in your name,  
8 select -- what is it, option one, when they  
9 foreclose in your name? Is that right?

10 A. It's actually option two.

11 Q. Option two. Option one is when they  
12 transfer it out of your name; right?

13 A. Right.

14 Q. And that's an internal coding in your  
15 system?

16 A. Yes.

17 Q. And they're supposed to put that  
18 information in there when they start a  
19 foreclosure; right?

20 A. Yes.

21 Q. And so you can know if they're foreclosing  
22 in your name or if they're foreclosing by  
23 virtue of an assignment; right?

1 A. Yes.

2 (Plaintiff's Exhibit 7 was marked  
3 for identification.)

4 Q. I show you a copy of a deposition that I  
5 received -- and let your lawyer take a look  
6 at that also -- dated April 22nd, 2009.  
7 I'll give you a minute to take a look at  
8 that.

9 MR. BROCHIN: Okay. I mean, I  
10 haven't seen this, and I'm  
11 just -- but I do want to note  
12 for the record, it appears to  
13 be a deposition from a case in  
14 Palm Beach County, Florida,  
15 the deposition of some Jill  
16 Orrison, taken in Raleigh,  
17 North Carolina. And like  
18 other exhibits, it, too, has  
19 markings on it, highlights and  
20 the like.

21 Q. Would you take a moment and just read  
22 through the first few pages of that  
23 deposition about that young lady's

1           certifications to what she was there to  
2           testify to and for. I don't even mind --  
3           if the others need a break, we can take  
4           five or ten minutes and let you sit and  
5           read it and come back on the record if you  
6           want to.

7           A.    Okay.

8           Q.    You had no idea that foreclosure was filed  
9           in MERS' name in Florida, did you?

10                       MR. BROCHIN:  You're asking if he  
11                               personally knew?

12           Q.    Did you know that?

13           A.    Whether MERS knew?

14           Q.    Well, did you personally know that that  
15           foreclosure action was filed in MERS' name  
16           in Florida?

17           A.    Did I personally know?

18                       No.

19           Q.    As the CEO of MERS, do you have some system  
20           in place to be notified if there's a  
21           foreclosure filed in the name of MERS in  
22           Florida?

23                       MR. RAMEY:  Is that in Florida?

1 MR. WOOTEN: Uh-huh (positive  
2 response).

3 MR. RAMEY: Okay. Sorry. It was  
4 a North Carolina --

5 MR. WOOTEN: The deposition was  
6 taken by telephone, and the  
7 lady is employed by HomeEq.  
8 And she's in Charlotte.

9 A. So what's the question?

10 Q. Do you have any mechanism in place to be  
11 notified if a foreclosure is instituted in  
12 the name of MERS in Florida?

13 MR. BROCHIN: Object to the form  
14 of the question.

15 A. We have a moratorium on foreclosure in  
16 Florida.

17 Q. In your name?

18 A. In our name.

19 Q. And we've talked about that; right?

20 A. Yes.

21 Q. And you --

22 A. Several times.

23 Q. And you have an issue where in your system

1           your servicer is supposed to indicate that  
2           they transferred that mortgage out of MERS'  
3           name for the purpose of that foreclosure;  
4           right?

5           A.    Uh-huh (positive response).

6           Q.    Do you have a system in place to determine  
7           if a foreclosure is instituted in Florida  
8           in MERS' name?

9           A.    I don't know -- I don't understand what the  
10          question is.  We -- we have a moratorium on  
11          foreclosure in our name in Florida.

12          Q.    Okay.

13          A.    To institute a foreclosure in the name of  
14          MERS, you pick option two.

15          Q.    Right.  Let me take a look at that  
16          transcript for you.  I want to pull out  
17          something and let you take a look at it.

18                   MR. RAMEY:  And, Nick, just as far  
19                   as an objection for the  
20                   record, since we don't know  
21                   what this deposition is or  
22                   when this action occurred,  
23                   we're just taking some of your

1 statements right now as if  
2 this was filed at a certain  
3 time and that MERS itself, the  
4 entity, had no knowledge of  
5 it, et cetera. So I just  
6 wanted that stated for the  
7 record.

8 MR. WOOTEN: Well, it says  
9 April 22nd, 2009.

10 MR. RAMEY: Is that when the  
11 deposition was taken?

12 MR. WOOTEN: Uh-huh (positive  
13 response).

14 MR. RAMEY: Okay. I was asking  
15 when the action was filed.

16 MR. WOOTEN: Well, that would  
17 probably be ...

18 Q. Because you guys had taken care of all the  
19 pending foreclosures that you knew about in  
20 the name of MERS when these other lawsuits  
21 were going on, Trent and some of the other  
22 cases; right?

23 MR. BROCHIN: Object to the form



1                   of the question. I don't even  
2                   understand it, but --

3       Q.    You had assigned them out of MERS' name or  
4            something like that to deal with them?

5                   MR. BROCHIN: Object to the  
6                   form --

7       A.    Not necessarily.

8                   MR. BROCHIN: Excuse me. Object  
9                   to the form of the question.

10                   I assume this line of  
11                  questioning has some relevancy  
12                  to the case pending in  
13                  Alabama.

14                  MR. WOOTEN: Well, if it doesn't,  
15                  you can object.

16                  MR. BROCHIN: And I assume there's  
17                  some good -- well, I know.

18                  But there should be some  
19                  good-faith basis here to be  
20                  asking questions related to  
21                  the purpose of the deposition.

22                  MR. WOOTEN: Yeah. The good-faith  
23                  basis is, is that there are

1 thousands and thousands and  
2 thousands of people certifying  
3 activities on behalf of this  
4 company every day and this  
5 company has no idea that it's  
6 going on. And people are  
7 losing their houses because  
8 people are lying in the name  
9 of MERS to take their houses.  
10 So that's the good-faith basis  
11 of offering a deposition.

12 MR. BROCHIN: Well, I still don't  
13 understand what it has to do  
14 with this transcript and that  
15 testimony with the case --

16 MR. WOOTEN: What it has to do  
17 with this transcript is --

18 THE COURT REPORTER: Hold on.

19 MR. BROCHIN: -- that you have  
20 pending in Alabama.

21 MR. WOOTEN: What it has to do  
22 with the transcript,  
23 Mr. Brochin, is this.

1 MR. BROCHIN: But ask -- but ask  
2 your questions.

3 MR. WOOTEN: What it has to do  
4 with this transcript is this:  
5 You have a person who is  
6 employed by HomeEq giving a  
7 deposition as a 30(b)(6)  
8 representative of MERS when  
9 MERS does not even know that  
10 the lawsuit is going on --

11 MR. RAMEY: Assuming that's the  
12 case.

13 MR. WOOTEN: -- or that this  
14 person is acting in that  
15 capacity.

16 MR. RAMEY: And, once again, I  
17 mean --

18 MR. BROCHIN: I know that's your  
19 testimony and I appreciate it,  
20 but I still want to try to  
21 understand what the relevancy  
22 is for the witness here that  
23 you're supposed to be taking

1 the deposition of.

2 And I'm sure it's not  
3 because you're upset over what  
4 MERS is doing. I'm sure it  
5 has something to do with the  
6 lawsuit you have.

7 MR. WOOTEN: It does.

8 MR. BROCHIN: Yeah, okay.

9 Hopefully that will become  
10 clear.

11 Q. Would you ever agree to designate an  
12 employee of a servicer who is a litigation  
13 management liaison to act as your 30(b)(6)  
14 representative in a foreclosure action in  
15 the state of Florida?

16 MR. BROCHIN: Object to the form  
17 of the question. Calls for  
18 speculation. Hypothetical.

19 A. Depends on the circumstance. Are you  
20 saying there's lies?

21 You did.

22 Q. Huh?

23 A. You said there are lies.

1 Q. Well, she's testifying as an employee of  
2 MERS -- a 30(b)(6) representative of MERS  
3 when she's not.

4 MR. BROCHIN: Object to the form,  
5 if that's a question.

6 A. Are you saying that's a lie?

7 That seems to be the word of the day,  
8 but --

9 Q. I mean, is she -- is Ms. Orrison an  
10 employee of MERS?

11 MR. RAMEY: And with all due  
12 respect, it's my understanding  
13 that a company can designate  
14 another person of the  
15 different companies, that  
16 (inaudible) --

17 MR. WOOTEN: Sure. That's why I  
18 asked the question.

19 MR. RAMEY: Right.

20 Q. I mean, I asked the question would you  
21 designate a paralegal at HomeEq to be your  
22 30(b)(6) representative.

23 A. It depends on the circumstance.

1 MR. BROCHIN: And he answered it.

2 Q. Okay.

3 A. And witnesses can make mistakes. I may  
4 have made one today.

5 Q. Maybe so.

6 (Plaintiff's Exhibit 6 was marked  
7 for identification.)

8 Q. Let me show you this document. You said  
9 that your documents were pretty much freely  
10 available on the Website.

11 I apologize, Mr. Arnold. I shouldn't  
12 have thrown that toward you. I didn't mean  
13 to. I just wanted to make sure it got to  
14 you.

15 A. That's fine.

16 Q. The document before you is currently on the  
17 Website as the foreclosure practices for  
18 the state of Alabama. And, as you said,  
19 your company is very transparent. That  
20 document highlighted a couple of entries.  
21 But, in particular, down at the bottom of  
22 the front page it indicates that MERS would  
23 like to obtain possession of the note

1           endorsed in blank; correct?

2                       MR. BROCHIN: Object to the form  
3                               of the question. The document  
4                               will speak for itself.

5       Q.   Certainly. So why don't you read that last  
6           paragraph I've got highlighted down there,  
7           Mr. Arnold.

8       A.   The last beginning paragraph?

9       Q.   The one that begins right before the end of  
10          the page.

11      A.   The agencies?

12      Q.   Yes, sir.

13      A.   The agencies, paren, Fannie Mae, Freddie  
14          Mac, and Ginnie Mae, require the promissory  
15          note to be endorsed in blank when the  
16          seller/servicer sells a mortgage loan to  
17          them. Therefore, the note should remain  
18          endorsed in blank when the foreclosure is  
19          commenced in the name of MERS. However, we  
20          have been advised that sometimes there is  
21          an endorsement of the promissory note to  
22          the servicer prior to foreclosure. We  
23          recommend that the agencies' policies be

1 followed.

2 Q. Okay. Part of your preferred rules are  
3 that the mortgage note -- promissory note  
4 be endorsed in blank --

5 MR. BROCHIN: Object --

6 Q. -- preferably; right?

7 MR. BROCHIN: Objection. Asked  
8 and answered several times.  
9 And, again, these documents  
10 speak for themselves.

11 A. I don't think we're specific about the type  
12 of endorsement.

13 Q. Has your firm considered the situation  
14 where there is a specific endorsement to  
15 either an agency or a securitized trust and  
16 the servicer then attempts to foreclose  
17 with a promissory note that is endorsed to  
18 someone other than the servicer or in  
19 blank?

20 MR. BROCHIN: Object to the form.

21 A. Do I have knowledge of that?

22 Q. Have you considered that? Have y'all  
23 talked about that? Has that occurred --



1 MR. BROCHIN: Object to the form.

2 Q. -- to your knowledge?

3 MR. BROCHIN: Object to the form,  
4 if that's a question.

5 A. I don't remember.

6 Q. You would agree with me that if a non-MERS  
7 member owns the note, that there would be  
8 no right of a MERS member to endorse that  
9 note?

10 MR. BROCHIN: Object to the form.

11 A. I disagreed with that earlier.

12 Q. The note.

13 MR. BROCHIN: Object to the form.

14 A. Yeah. As far as our authority to do  
15 something, that's going to depend on the  
16 circumstances.

17 Q. With respect to the assignment of mortgages  
18 out of the name of MERS, membership Rule 3  
19 addresses that right of your certifying  
20 officers; correct?

21 A. Rule 3?

22 Q. Uh-huh (positive response).

23 A. I can't remember the rule number.

1 Q. Do you remember that that is one of the  
2 powers you grant your certifying officers?

3 A. Yes. Well, you're talking about the  
4 resolution appointing the certifying  
5 officer?

6 Q. I'm talking about Rule 3 of your membership  
7 agreement.

8 A. Okay.

9 Q. It says that your certifying officers have  
10 the right to assign the lien; right?

11 MR. BROCHIN: Object to the form.

12 The document will speak for  
13 itself. If you know.

14 A. What's the title --

15 MR. BROCHIN: If you want to show  
16 him the document, but --

17 A. What's the title of Rule 3?

18 Q. Membership, I believe.

19 Let me show you that. And I'll  
20 represent to you that that is an attachment  
21 to the affidavit of Mr. Hultman that was  
22 filed in this case.

23 MR. BROCHIN: Okay. Just so the

1 record is clear, since I don't  
2 think -- I don't know if you  
3 marked this as an exhibit.

4 MR. WOOTEN: I haven't, but I can  
5 if you want me to.

6 MR. BROCHIN: Well, I just want  
7 the record to reflect what's  
8 in front of him is --

9 MR. WOOTEN: It is the  
10 affidavit --

11 MR. BROCHIN: Appears to be the  
12 affidavit with the attachments  
13 and specifically pointing to  
14 Rule 3, which is titled  
15 obligations of MERS and,  
16 again, noting that there's  
17 highlighting and handwritten  
18 marks on it.

19 Q. The subsection there that I just pointed  
20 out to you, Mr. Arnold, sets forth the  
21 powers that you grant to your certifying  
22 officers, one of which is the right to  
23 assign the lien. There is a limitation on

1 the right to assign the lien, is there not?

2 MR. BROCHIN: You're asking him is  
3 there a limitation contained  
4 in this document?

5 MR. WOOTEN: Uh-huh (positive  
6 response).

7 MR. BROCHIN: Objection to the  
8 extent that the document  
9 speaks for itself.

10 A. Yeah. And this is not the actual grant of  
11 authority.

12 Q. Okay.

13 A. This is the -- this is the agreement with  
14 the member.

15 Q. Okay. And there's a section in that  
16 agreement that deals with assignment of the  
17 lien; right?

18 MR. BROCHIN: Objection. The  
19 document speaks for itself.

20 Q. What subheading, what subnumber under that  
21 paragraph is that?

22 A. Romanette two.

23 Q. Okay. And what is the actual verbiage of

- 1           that grant or that authority?
- 2       A.    To permit such member to assign the lien
- 3           with any mortgage naming MERS as the
- 4           mortgagee when the member is also the
- 5           current promissory note holder or if the
- 6           mortgage is registered on the MERS system
- 7           is shown to be registered to the member.
- 8       Q.    So what you're saying is when they either
- 9           have the note as a holder or when the
- 10          system shows them as the owner of the
- 11          beneficiary -- beneficial interest?
- 12       A.    Or registered to the member.
- 13       Q.    And that's -- beneficial interest is what
- 14          that's referring to; right?
- 15       A.    Or servicer.
- 16       Q.    Okay.  So you're saying that that should be
- 17          interpreted to mean that they're either the
- 18          note holder or the beneficial interest
- 19          holder or the servicer?
- 20                       MR. BROCHIN:  Object to the form
- 21                       of the question.
- 22       A.    Well, this is talking about our
- 23          relationship with the members.

- 1 Q. Uh-huh (positive response).
- 2 A. And it begins by saying upon request from  
3 the member --
- 4 Q. Right.
- 5 A. -- we will grant authority.
- 6 Q. Right.
- 7 A. And then there's a resolution where the  
8 secretary of the corporation grants that  
9 authority on behalf of the company.
- 10 Q. Is the authority granted by the resolution  
11 different from the authority stated there  
12 with respect to assigning the lien?
- 13 A. It's not intended to be.
- 14 Q. Okay. So what we're reading there is the  
15 authority that you intend to grant through  
16 the resolution?
- 17 A. Well, this is our agreement with the  
18 member. And then the resolution delineates  
19 the seven categories of authority. And  
20 whether that lines up with these Romanettes  
21 or not, I don't know.
- 22 Q. I'm just asking you, are the particular  
23 grants mentioned there identical to the

1 grants contained in the resolution or is it  
2 your intention that they be identical?

3 A. Generally. I wouldn't say identical.

4 Q. But that they convey the same authority?

5 A. The resolution is what limits the  
6 certifying officer's authority to act.

7 This deals with a request from the member  
8 that we would grant that authority.

9 Q. So you're telling them there what they can  
10 request that you grant to them and then the  
11 resolution grants it?

12 MR. BROCHIN: Object to the form.

13 A. Yes.

14 Q. And I guess because of the way that you  
15 answered the question earlier, I'm trying  
16 to clarify. This says assign the lien that  
17 a current promissory note holder or is  
18 shown on the system. Are you saying that  
19 if they have either the servicing rights or  
20 the beneficial interest they have the right  
21 to assign the lien?

22 A. Yes.

23 Q. And that, again, is subject to what the

1 actual documents show?

2 A. Yes.

3 Q. So irrespective of the fact that you grant  
4 them the right to change the name on the  
5 lien out of your name, they still need the  
6 legal right to do it based on the documents  
7 that underlie that registration?

8 A. Yes. And under state law.

9 Q. Right. So if someone attempts to assign a  
10 lien out of MERS' name that is not allowed  
11 to make that assignment, or state law, the  
12 fact that you've said it's okay for them to  
13 do that is not relevant; right?

14 MR. BROCHIN: Object to the form.

15 A. Our grant of authority for certifying  
16 officer would at all moments be subject and  
17 subordinate to state law.

18 Q. Okay. So any argument that the mere fact  
19 that you grant the power allows them to do  
20 it is not probative of the legal question  
21 of whether they have the separate right  
22 under the state's law?

23 MR. BROCHIN: Object to the form



1                   of the question in that it  
2                   asks for a legal conclusion  
3                   and compound and vague.  If  
4                   you understand it, you can  
5                   answer it.

6       A.   Everything is subordinate to state law.

7       Q.   So, in truth, we really don't need to  
8           concern ourselves with the MERS agreement.  
9           We need to concern ourselves with the  
10          documents that underlie the transactions to  
11          determine who truly has the right to change  
12          these interests under state law; right?

13                   MR. BROCHIN:  Object to the form  
14                   of the question and the term  
15                   concern ourselves.

16       A.   Everything matters.

17       Q.   Right.  Well, your -- the power you grant  
18           to GMAC is based upon the premise that they  
19           have the underlying right under state law  
20           to do what they claim to be doing in your  
21           name by the grant of that power?

22       A.   True.

23       Q.   The grant of the power from you does not

1           supersede the state law requirement that  
2           they have the right to take that action  
3           independently of your relationship with  
4           them?

5           A.    True.

6           Q.    Does your company ever audit any actions of  
7           any member or any person designated as a  
8           certifying officer of any member?

9           A.    We do member audits.

10          Q.    And what is contained in that audit,  
11          please, sir?

12          A.    I don't know.

13          Q.    Do you have an idea of who might know?

14          A.    My team.

15          Q.    Does your company pay any compensation to  
16          any person designated as a certifying  
17          officer?

18          A.    No.

19          Q.    Does any certifying officer have any right  
20          to participate in the governance of MERS?

21          A.    No.

22          Q.    Does any certifying officer have any  
23          interest in the daily control for direction

1 of the affairs of MERS?

2 A. No.

3 Q. Is it fair to say that persons who are  
4 designated corporate officers of -- or  
5 certifying officers of MERS are basically  
6 granted a right to execute documents as an  
7 accommodation of your agency agreement with  
8 the member?

9 MR. BROCHIN: Object to the form.

10 A. Accommodation -- I don't know about that  
11 word, but it's -- it's part of our business  
12 model in our relationship with our members  
13 that our members would conduct certain  
14 types of business transactions in the name  
15 of MERS through certifying officers.

16 Q. And that is because of your status as the  
17 mortgagee of record in the land records?

18 A. Yes.

19 Q. There is no other economic or legal reason  
20 for those acts to be conducted in your name  
21 other than the fact that you exist as  
22 mortgagee of record?

23 MR. BROCHIN: Object to the form

1 of the question.

2 A. True.

3 Q. With respect to -- if you'll flip over to  
4 Rule 8(a), that is your rule that addresses  
5 foreclosure. Is there a highlighted  
6 portion of that Rule 8(a)?

7 MR. BROCHIN: You highlighted a  
8 good deal of it.

9 Q. Could you read the highlighted portion of  
10 that rule?

11 A. In sub-A?

12 Q. Yes, 8(a).

13 MR. BROCHIN: Oh, 8(a). I'm  
14 sorry.

15 THE WITNESS: Yeah.

16 A. Section 1-8(a)?

17 Q. The highlighted portion under subpart A.  
18 If you'd just read the highlighted portion  
19 of that rule.

20 A. Section 1, subsection 8(a)?

21 Q. Uh-huh (positive response).

22 A. Foreclosure proceedings with respect to  
23 such mortgage loans shall be conducted in

1           the name of Mortgage Electronic  
2           Registration System, Inc., the name of the  
3           servicer, or the name of a different party  
4           to be designated by the beneficial owner.  
5           And that's with respect to each mortgage  
6           loan.

7           Q.    So that is simply a reaffirmation of the  
8           principles we've been talking about all day  
9           that the rights of parties that are members  
10          are defined by their agreements and their  
11          documents and their transactions?

12                       MR. BROCHIN:  Object to the form  
13                       of the question.

14          A.    True.

15          Q.    And if they conducted a foreclosure in the  
16          name of MERS, it would not be because MERS  
17          has anything at stake other than its name  
18          as mortgagee of record.  It would be for  
19          the convenience of those parties?

20                       MR. BROCHIN:  Object to the form  
21                       of the question.

22          A.    Yeah.  And you say anything at stake other  
23          than our name.  Our name is probably the

1 most important thing that would be at  
2 stake.

3 Q. Sure. I understand that you built this  
4 business model within the industry and  
5 you've got all these loans registered and  
6 your name is on all these liens. But, you  
7 know, if a court in Alabama ruled that you  
8 had no right to foreclose on any loan in  
9 Alabama -- I mean, if they didn't say you  
10 didn't have the right to serve as mortgagee  
11 of record, you just didn't have the right  
12 to foreclose, what harm would MERS suffer?

13 MR. BROCHIN: Object to the form  
14 of the question.

15 A. Yeah. I wouldn't -- I wouldn't be able to  
16 speculate about that. We don't anticipate  
17 that happening.

18 Q. Well, I'm sure you don't. I'm talking  
19 about hypothetically.

20 If you had the right to continue to be  
21 mortgagee of record but the right to  
22 foreclose was determined by the underlying  
23 documents, not merely that your name is in

1           the records, how would your company be  
2           harmed in that scenario?

3                       MR. BROCHIN: Object to the form.

4       A. Well, the intent of the parties, including  
5       the borrower, is that MERS can foreclose.

6       Q. Well, have you ever interviewed a borrower  
7       to ask them even if they knew who MERS was?

8       A. It's in the first paragraph of the security  
9       instrument.

10      Q. Sure. And like we talked about, MERS is  
11      the mortgagee. I mean --

12      A. Yes.

13      Q. So we're talking about from that  
14      perspective again. MERS is never going to  
15      suffer a default no matter what a client  
16      does; right?

17                       MR. BROCHIN: Object to the form  
18                       of the question to the extent  
19                       there is a legal question  
20                       there. That's my objection.

21      A. Well, the security instrument makes MERS  
22      the mortgagee, and that's executed by the  
23      borrower. And the security instrument

1 specifically says in another paragraph that  
2 MERS has the right to foreclose. And those  
3 documents under federal law are provided to  
4 the borrower well before closing.

5 Q. And if the borrower is dealing with a  
6 lender who uses the MERS as mortgagee form  
7 and that's the only form they use, then  
8 that borrower has no choice as to whose  
9 name is mortgagee of record in the records,  
10 does it?

11 MR. BROCHIN: Objection. Asked  
12 and answered. I thought we  
13 covered that this morning.

14 But you can answer it.

15 A. Well, they have a choice as to which lender  
16 they use.

17 Q. And exactly how deep do they have to go in  
18 the process to find out that that lender  
19 only uses the MERS as mortgagee form?

20 A. Maybe walk across the street. I don't  
21 know.

22 Q. Is it disclosed in a good-faith estimate or  
23 any warnings prior to closing if that's the



1 case?

2 MR. BROCHIN: Objection.

3 Compound. Asked and answered

4 this morning.

5 A. It's in the first paragraph of the security

6 instrument and federal law requires that

7 they be given a copy of those documents

8 well before closing.

9 Q. I just want to make sure I understand. You

10 are perfectly willing to allow any

11 beneficial owner of any mortgage note

12 registered on your system to transfer that

13 lien out of your name and conduct

14 foreclosure on their own?

15 MR. BROCHIN: Object to the form.

16 A. Yes.

17 Q. But you somehow claim to be harmed if a

18 court were to say that you had no

19 enforceable interest in the foreclosure

20 proceeding?

21 MR. BROCHIN: Objection to the

22 form. You're

23 mischaracterizing his

1                   testimony. And I also object  
2                   for the previous reasons I  
3                   objected when you asked it  
4                   last time.

5       A.    Yeah. I had trouble following that because  
6            the security instrument signed by the  
7            borrower gives us the right to foreclose.  
8            And if we hold the note like our rules  
9            require, it's hard to envision that we  
10           can't foreclose.

11       Q.   The right to foreclose is defined by state  
12            law; right?

13       A.    Always subject to state law.

14       Q.   And your MERS as mortgagee form is merely  
15            an extension of your agreement with your  
16            members; right?

17                   MR. BROCHIN: Object to the form.

18       A.    Well, that's the uniform document that's  
19            used by anyone that is going to register  
20            the loan on the MERS system.

21       Q.    Absolutely. But that form is a form that  
22            you require of the members to use who are  
23            going to register the loan; right?

1 A. Actually it would be required by the  
2 investor.

3 Q. Did you take any part in answering the  
4 interrogatories that were filed in this  
5 case?

6 A. In the Henderson case?

7 Q. (Nods head.)

8 A. No.

9 Q. Okay. Have you reviewed them?

10 A. No.

11 (Plaintiff's Exhibit 8 was marked  
12 for identification.)

13 Q. I show you a document I've marked as  
14 Plaintiff's Exhibit Number 8. Are you able  
15 to identify that document?

16 A. It's one of the -- one of the documents  
17 generated out of the MERS system.

18 Q. And what level of access would you have to  
19 have to receive that document?

20 A. This would be top-level access.

21 Q. So that would be somebody way up the food  
22 chain?

23 MR. BROCHIN: Object to the form

- 1                                   of the question.
- 2       A.    It would be somebody that is already in  
3            this file.
- 4       Q.    Okay.  So is that file frozen from access  
5            to people who are not already involved in  
6            it or something?
- 7       A.    Yes.
- 8       Q.    And is that because of this lawsuit?
- 9                                   MR. BROCHIN:  Object to the form.
- 10      A.    No.  It's because of the access level.
- 11      Q.    Okay.  And what could a person reviewing  
12            that document -- what could they learn from  
13            the contents of that document?  What does  
14            that document tell us?
- 15      A.    It's got all kinds of information on it,  
16            but it's very basic.
- 17      Q.    And what exactly is there?
- 18      A.    You mean every single piece of information  
19            on it?
- 20      Q.    Well, you can summarize it.  What's on that  
21            document just by reading it?  What am I  
22            supposed to be able to determine by that?
- 23      A.    Well, you determine who the parties to the

- 1            loan are.
- 2            Q.    Okay.
- 3            A.    The only thing it establishes is that this
- 4            is a MOM.
- 5            Q.    Okay. Anything else?
- 6            A.    It says it's in foreclosure.
- 7            Q.    Is that part of a standard form of course
- 8            that can be generated or is generated
- 9            routinely through your company?
- 10           A.    If you have the authority.
- 11           Q.    Is that authority available to GMAC?
- 12           A.    Yes.
- 13           Q.    Is it available to anyone else?
- 14           A.    By this document?
- 15           Q.    (Nods head.)
- 16           A.    No.
- 17           Q.    And when was that document effective?
- 18                            MR. BROCHIN: Object to the form
- 19                            of the question.
- 20           Q.    Is there any way to tell when that
- 21           situation came to be where only GMAC was
- 22           aligned with that particular loan?
- 23           A.    Whenever -- whenever the registration was

- 1           and then transfers, since then.
- 2       Q.    Would that be a MIN transfer audit?
- 3       A.    A MIN transfer?
- 4       Q.    A MIN transfer audit.  Would that give you
- 5           that same information?
- 6       A.    Oh, you mean a report like that?
- 7       Q.    (Nods head.)
- 8       A.    I don't know.
- 9       Q.    Have you reviewed the MIN transfer audit
- 10           for this particular loan?
- 11      A.    I don't recall.
- 12                           (Plaintiff's Exhibit 9 was marked
- 13                           for identification.)
- 14      Q.    Let me show you a document I've marked as
- 15           Plaintiff's Exhibit 9.  Have you reviewed
- 16           those documents as part of your employment
- 17           in the past?
- 18      A.    Not really.
- 19      Q.    Are you familiar with the contents of those
- 20           documents?
- 21      A.    Generally.
- 22      Q.    Are you able to testify as to what that
- 23           document represents?

1 A. Not really.

2 Q. What can you ascertain from looking at that  
3 document -- what information can you glean  
4 from that document?

5 A. I'd have to have one of my -- my team help  
6 me with that.

7 Q. Who would be the person that could  
8 interpret that document for you?

9 A. Somebody on my team.

10 Q. Got any idea who that would be?

11 A. Well, it's very -- it's very basic. So it  
12 would just need to be somebody that knows  
13 how to read it.

14 Q. Can I have that document for a moment,  
15 please, sir?

16 In looking at this document, reading  
17 from right to left, it says that  
18 December 20th, 2004, there was a batch  
19 uploaded by an organization that was ID'd  
20 as 1000249. And the next entry says that  
21 the transfer status says pending and then  
22 complete. Would that represent a handshake  
23 that we talked about earlier?

1 A. That sounds like it.

2 MR. BROCHIN: Object to the form.

3 I think the witness said he's  
4 not in a position to offer  
5 that testimony for this  
6 document.

7 MR. WOOTEN: All right. Well,  
8 we're -- I'm going to examine  
9 him on what he can tell from  
10 it based on what I can tell  
11 from it.

12 Q. And it indicates that all three of those  
13 transactions indicated a transfer status  
14 and a transfer success indicator occurred  
15 on 12-20 of 2004 and that the transfer  
16 success indicator was yes. Does that mean  
17 that the handshake was complete?

18 A. I don't know.

19 Q. All right. The column on the farthest  
20 right-hand side has a series of  
21 organizational ID numbers. Do you have a  
22 database which would provide you the  
23 identity of each of the entities by that



- 1 organization ID number?
- 2 A. Yes.
- 3 Q. And you can actually look up those entities  
4 on your Website by that ID number, can't  
5 you?
- 6 A. Do those numbers have seven digits?
- 7 Q. Yes, they do.
- 8 A. Yes.
- 9 Q. Okay. And in examining those documents on  
10 your Website, I represent to you -- and be  
11 glad to take a moment to look it up and  
12 show it to you if you'd like -- but that  
13 1,249 -- or 1000249 was a number for GMAC.  
14 Have you reviewed those numbers and are  
15 familiar with them?
- 16 A. I know they have seven digits and they keep  
17 track of our members.
- 18 Q. Okay. So if it indicated that on  
19 12-20-2004 GMAC transferred the note and  
20 there was a handshake for it, you would  
21 have no reason to doubt that that's at  
22 least allegedly what transpired; right?
- 23 A. I don't know whether it had to do with the

1 note or not.

2 Q. Okay. With respect to that particular  
3 document, there is a date entered of  
4 September 18th, 2009. And it says that the  
5 MIN transfer confirmation from the current  
6 investor and that it was confirmed. The  
7 current investor, according to the earlier  
8 transaction ...

9 The number for the current investor was  
10 1000375. And when I looked that number up,  
11 it came back to Ginnie Mae. Would you have  
12 any reason to doubt that that was who was  
13 the current investor at the time that the  
14 transfer took place --

15 MR. BROCHIN: Object to the form  
16 of the question.

17 Q. -- based on your records?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. Well, Ginnie Mae is a little different than  
21 any other investor.

22 Q. In what respect?

23 A. They're actually a guarantor. It's the

- 1 United States Government.
- 2 Q. Okay. And how are they different from the  
3 other investors?
- 4 A. They probably never actually have the note.
- 5 Q. But you don't know that?
- 6 A. I don't know that.
- 7 Q. And, again, you would defer to what the  
8 actual documents say; right?
- 9 A. Well, if those are documents out of the  
10 MERS system, I would certainly go by them.  
11 I just -- I don't read those in the normal  
12 course of my work.
- 13 Q. Well, you understand I've never seen them  
14 before either?
- 15 A. Yeah. And they're not -- not that  
16 difficult to read. I just would be  
17 guessing.
- 18 Q. Put that with the other ones.
- 19 This is a two-page --
- 20 (Brief interruption.)
- 21 (Plaintiff's Exhibit 10 was marked  
22 for identification.)
- 23 Q. I'm going to clip these separately. We'll

1 mark these as Plaintiff's Exhibit 10.

2 Do you know what a MIN audit is?

3 A. As opposed to a MIN transfer audit?

4 Q. Right.

5 A. I might if I look at it.

6 Q. All right. Let me let you take a look at  
7 that. And, again, I don't mean to throw  
8 that at you. I'm sorry. I'm just trying  
9 to make sure you can get your hands on it.

10 A. Uh-huh (positive response).

11 Yeah. These are documents that an  
12 expert could read. Straightforward, but  
13 you would have to have experience to be  
14 able to read them.

15 Q. Okay. Would you be able to take your  
16 procedures manual and those documents and  
17 pretty much be able to tell what was meant  
18 by most of those entries?

19 A. My team could.

20 Q. Sure. Let me take a look at that  
21 document.

22 At the bottom of this page there's an  
23 entry for 12-20-2004, and it gives an

1           agency number and says it's a part of a  
2           batch file. And then on 8-18-2007, as part  
3           of a batch file, it indicates that it's in  
4           foreclosure status pending under option two  
5           and says, comma, retained on MERS. So that  
6           would indicate to you that foreclosure was  
7           instituted in the name of MERS; right?

8           A.    Yes.

9           Q.    And the organization ID at that point in  
10           time says 1000375, which earlier I said  
11           when I looked it up was GMAC.

12          A.    It was GMAC?

13          Q.    GMAC -- GMAC Mortgage, LLC.

14                   MR. BROCHIN: I thought you said  
15                   Ginnie Mae.

16                   MR. RAMEY: Yeah. You said 375  
17                   said Ginnie Mae.

18                   MR. WOOTEN: 100249 is Ginnie Mae.

19                   MR. RAMEY: Oh, okay. You said it  
20                   backwards earlier.

21                   THE WITNESS: Yeah.

22                   MR. RAMEY: Because I did write it  
23                   down whenever it came out the

1 first time. So that may  
2 change how the testimony  
3 was --

4 MR. WOOTEN: I apologize if that  
5 was the case.

6 Q. But this follows a -- there's an entry of  
7 August 18th, 2007, indicating foreclosure  
8 status, September -- or October 23rd, 2007,  
9 indicating foreclosure status, and  
10 June 14th, 2008, indicating foreclosure  
11 status. But then there's an entry on  
12 September 18th, 2009, indicating an  
13 investor pool number, and it has a code or  
14 a value that says 634653XSF. Somewhere  
15 that value is defined in your system, isn't  
16 it?

17 A. I'm sure it is.

18 Q. And that was intended to identify an  
19 investor pool; right?

20 A. Whatever that value is shown in the system.

21 Q. Okay. And your policies and procedures  
22 manual requires servicers and investors to  
23 indicate the pool or the trust where the

1           asset -- the note is for the beneficial  
2           interest; right?

3       A.    I wouldn't say requires.  In all of these  
4           entries you're talking about, like you said  
5           earlier, there's corollary documents.

6       Q.    Right.  There are underlying documents.  
7           We're talking about for the purposes of  
8           your system.  Everything that's on this  
9           report as of this day, this information  
10          should have been available to GMAC and  
11          Ginnie Mae whenever they looked at this MIN  
12          number; right?

13      A.    Yes.

14      Q.    And right above that entry that indicates  
15           the investor pool number, there is an  
16           investor Org ID, which I read to be the  
17           investor organization ID; is that correct?

18      A.    Sounds like it.

19      Q.    Okay.  And it indicates 1000249 is the  
20           before value, which is the value for Ginnie  
21           Mae.  And then the after value is 1000375,  
22           which is the value for GMAC Mortgage, LLC.  
23           Is that also another handshake evidencing a

1 change in the interest of this loan?

2 A. It's an update.

3 (Plaintiff's Exhibit 11 was marked  
4 for identification.)

5 Q. I'm going to hand you another page I've  
6 marked as 11. It is also dated  
7 December 20th, 2004. It indicates that the  
8 investor organization ID is 1000375, which  
9 is GMAC, and the after value is 1000249,  
10 which is Ginnie Mae. And it also indicates  
11 the investor pool number which matches the  
12 investor pool number shown on  
13 September 18th, 2009; correct?

14 I mean, I'll show it to you. But you  
15 can take a look at that and you can compare  
16 it.

17 Okay. Compare it to the numbers on  
18 that document.

19 In reviewing those documents, that  
20 would indicate to you, would it not, that  
21 the interest in that note changed hands  
22 first from GMAC to Ginnie Mae on December  
23 the 20th of 2004 and went to a specific



1 pool and then it came back from that pool  
2 and Ginnie Mae to GMAC in September of  
3 2009. Would you agree with that based on  
4 those two documents?

5 A. I would say that the documents show what  
6 they show.

7 Q. Is that what those documents would indicate  
8 to you by those entries?

9 A. I -- I don't have experience in reading the  
10 MIN audit reports.

11 Q. Have you ever read a milestone?

12 A. A milestone?

13 Q. Uh-huh (positive response).

14 A. I know what -- I know what that is.

15 Q. Have you read any before?

16 A. I've seen milestones.

17 Q. Do you know what a milestone report is  
18 supposed to do or supposed to tell you?

19 A. I don't know that I could answer that.

20 Q. Well, maybe I can fill in the gaps for you  
21 a little bit.

22 (Plaintiff's Exhibit 12 was marked  
23 for identification.)

1 Q. I show you this document. It's Plaintiff's  
2 Exhibit 12.

3 MR. BROCHIN: Just so the record  
4 will reflect it, that the  
5 document has highlighted  
6 markings in it, multicolors.

7 MR. WOOTEN: Sure. That's what  
8 you do when you hadn't slept  
9 all night and you're trying to  
10 stay awake. You mark it in  
11 funny colors.

12 Q. The milestone report, take a minute and  
13 read it over.

14 Does it indicate that that loan  
15 transferred from GMAC to Ginnie Mae in  
16 December of 2004?

17 It would be on your left -- or your  
18 right-hand column down at the bottom of the  
19 page.

20 A. In pink?

21 Q. There will be a number of colors, but it's  
22 the lower entries.

23 A. Well, this report is different in the sense

1           that it does use the term Government  
2           National Mortgage Association, which is  
3           Ginnie.

4       Q.    Right.

5       A.    So this report's a little more intuitive.

6       Q.    Right.  It gives you the information I gave  
7           you earlier with respect to the  
8           organizations' ID number and their name;  
9           right?

10      A.    It's got names.

11      Q.    It's also got their ID number, doesn't it?

12      A.    Yes.

13      Q.    And do those numbers and names match what I  
14           told you about the earlier exhibits?

15      A.    The second time around.

16                       MR. BROCHIN:  Object to the form.

17      Q.    So in reviewing that document, does it  
18           indicate that Ginnie Mae became an investor  
19           on that loan in December of 2004?

20      A.    Well, it's referred to as new investor.

21      Q.    Okay.

22      A.    And that is December 2004.

23      Q.    And that was done under a process that your

1           company calls option one for the  
2           registration of that loan on the system;  
3           correct?

4       A.    It says option one.

5       Q.    Do you know what option one means?

6       A.    In this context?

7       Q.    Uh-huh (positive response).

8       A.    Transfer beneficial rights, option one.

9       Q.    Do you know what option one is with respect  
10           to the transfer of beneficial rights?

11      A.    No.

12      Q.    Do you know how many options there are for  
13           transfer of beneficial rights?

14      A.    No.  I think it's got to do with Ginnie's  
15           special status.  I don't know.

16                           (Plaintiff's Exhibit 13 was marked  
17                           for identification.)

18      Q.    I show you this document I've marked as  
19           Plaintiff's Exhibit 13.  It's -- a portion  
20           of it I've highlighted.  Does it explain  
21           what option one is?

22      A.    It's their special status.

23      Q.    Right.  And what does that section say

1 option one is?

2 A. Option one requires no confirmation and  
3 they can remove any interim funder or  
4 warehouse/gestation lender interests from  
5 the loan.

6 Q. And by reading option one and looking at  
7 that milestone report, does it appear, at  
8 least as it was represented on your system,  
9 that Ginnie Mae became the investor on that  
10 loan in December of 2004?

11 A. Under option one.

12 Q. Okay. Going back to the previous  
13 exhibit -- I guess it was Number 12, the  
14 milestone report -- it indicates, going up  
15 the right-hand column, the transfers that  
16 took place on your system registration; is  
17 that correct?

18 A. It was registered on November 20th, 2004.

19 Q. November or December?

20 A. The registration?

21 November.

22 Q. Would that be the preregistration with an  
23 anticipated closing date?

- 1 A. That's possible.
- 2 Q. Right. If there was a commitment to lend  
3 and they knew they were going to use the  
4 MOM form, wouldn't they go ahead and  
5 preregister to get the MIN?
- 6 A. They can.
- 7 Q. Right. And that's so they can put the MIN  
8 on the documents; right?
- 9 A. Could be.
- 10 Q. Sure. Now, I know you started in November,  
11 but going forward in time from November of  
12 2004, is the next entry the December entry  
13 where Ginnie Mae was indicated to be the  
14 investor?
- 15 A. Yes.
- 16 Q. And that indicates they took from GMAC;  
17 right?
- 18 A. GMAC Mortgage is listed as the old  
19 investor.
- 20 Q. Okay. And the next transfer occurred,  
21 according to the milestone report, when?
- 22 A. October 2006.
- 23 Q. Okay. And is that the update regarding

1           foreclosure status?

2       A.    It looks like a seasoned servicing

3           transfer.

4       Q.    Okay.  That would have been something we

5           discussed earlier today where there was a

6           fee paid for a servicing change that

7           occurred on a loan that was more than 270

8           days old; is that right?

9       A.    I believe so.

10      Q.    And does that indicate who the new servicer

11           would have been?

12      A.    The old and the new are the same.

13      Q.    So it's Homecomings taking from

14           Homecomings?

15      A.    It's GMAC.

16      Q.    Or GMAC.  I'm sorry.  You're right.

17                    What is the next status change

18           indicated by date chronologically on that

19           form?

20      A.    Foreclosure status.

21      Q.    And what date is that?

22      A.    August 2007.

23      Q.    What is the next date entry that indicates

1 a change in the investor on that report?

2 A. Looks like September 2009.

3 Q. September 2009. And does that at that  
4 point change from Ginnie Mae to GMAC  
5 Mortgage, LLC?

6 A. Old investor to new investor, Ginnie to  
7 GMAC.

8 Q. And, again, you can take the pool number  
9 that is included on those exhibits and  
10 someone at MERS can tell us whatever  
11 information is in the system which  
12 identifies what that pool is supposed to  
13 be; right?

14 A. What do you mean by pool?

15 Q. There is -- if you'll let me see that  
16 milestone report, I'll point it out for  
17 you.

18 Thank you.

19 Well, actually, you know what. I guess  
20 you need to go back to Number 11. Because  
21 the -- Exhibit 11 would show you -- and  
22 there -- is it a series number that  
23 indicates on that in the upper transaction



1 or a pool number?

2 A. Investor pool number is what it says.

3 Q. Right. And is there a specific portion of  
4 your procedures manual that requires that  
5 that be indicated?

6 A. I don't know.

7 Q. You don't know.

8 (Plaintiff's Exhibit 14 was marked  
9 for identification.)

10 Q. Let me show you what I've marked as  
11 Exhibit 14. I represent to you that that  
12 came from your procedures manual. And does  
13 that procedures manual require that you  
14 identify the pool number or the investor  
15 with a Ginnie Mae loan?

16 A. If required by the investor.

17 MR. BROCHIN: Object to the form.  
18 The document speaks for  
19 itself.

20 A. If the investor requires it, it's required.

21 Q. Right.

22 MR. WOOTEN: I need to take a  
23 short break and look at a



- 1           does that occur? Do you know?
- 2           A. You just wouldn't be able to go in and  
3           change anything that had been done. You'd  
4           have to update it.
- 5           Q. So if -- is there a way to make an entry  
6           which would allege that the prior entry was  
7           an error and it be replaced on your system?
- 8           A. You could correct a prior entry with a new  
9           entry.
- 10          Q. Would the old entry be deleted if you  
11          correct it?
- 12          A. No.
- 13          Q. So even if, say, somebody decided that they  
14          didn't like the timing of some of these  
15          transfers in one of these reports, even if  
16          they tried to go back and change the dates  
17          with a correction, it would still show the  
18          previous entries?
- 19          A. Yes.
- 20          Q. Your technology provider, where are they  
21          located?
- 22          A. EDS?
- 23                 They're a worldwide company.

- 1 Q. Do they have a location that is dedicated  
2 towards your technology systems?
- 3 A. Well, there's -- I think of it as being the  
4 Plano headquarters.
- 5 Q. Plano?
- 6 A. Plano, Texas.
- 7 Q. That's what I was getting at. Is that  
8 the -- is that your national data center?
- 9 A. That's their national data center. But I  
10 know that there's work done in other  
11 places.
- 12 Q. Is there a physical location where your  
13 electronic data is centrally repositied?
- 14 A. Yes.
- 15 Q. Is that Plano?
- 16 A. I don't think so, but that's -- that's a  
17 guess.
- 18 Q. Has EDS created data integrity audits which  
19 will verify the reliability of the data  
20 entered in your system?
- 21 A. I don't know.
- 22 Q. With respect to the various certifications  
23 that your certifying officers make in your

1 name, the data that they are certifying as  
2 correct in your name is not MERS data, is  
3 it?

4 A. Well, they have either personal or  
5 institutional knowledge with regard to the  
6 loan itself.

7 Q. Sure.

8 A. And the member.

9 Q. Right. But they are certifying in the name  
10 of MERS data that actually belongs to the  
11 member; correct?

12 A. In some cases.

13 Q. Right. Because other than with respect to  
14 the entries like we've talked about in your  
15 system, the registrations, and the fact  
16 that the loan names your company as  
17 mortgagee of record, data with respect to  
18 the account, the documents that created the  
19 mortgage loan, the custodial files -- all  
20 that information would be in the possession  
21 of some other entity, most likely that  
22 member making that certification?

23 A. Yes.

1 MR. BROCHIN: Object to the form  
2 of the question.

3 MR. WOOTEN: Do I need to re-ask  
4 the question and make sure we  
5 don't have an objection about  
6 that?

7 MR. BROCHIN: I do object to the  
8 form of that question.

9 Q. When a MERS certifying officer makes a  
10 certification in MERS' name, based upon the  
11 mortgage account, the mortgage documents,  
12 the custodial documents, the mortgage file,  
13 those documents are not MERS documents;  
14 correct?

15 A. We have certain documents, but none of them  
16 are mortgage documents.

17 Q. So any document related to the servicing of  
18 a mortgage loan other than the MERS as  
19 mortgagee document, the lien that is being  
20 certified in MERS' name, is a certification  
21 of documents that belong to another entity?

22 A. When you say any, that seems a little  
23 categorical to me.

- 1 Q. Okay. Let me ask it this way: With  
2 respect to the mortgage servicing  
3 function --  
4 Okay?  
5 -- that is conducted by a mortgage  
6 servicer; correct?
- 7 A. Yes.
- 8 Q. And that servicer is most likely a member  
9 of MERS; correct?
- 10 A. Yes.
- 11 Q. The persons that you have designated as  
12 certifying officers of MERS who are  
13 employees of that mortgage servicer --  
14 those persons, when they certify on behalf  
15 of MERS the servicing activities of the  
16 servicer, they are certifying not MERS data  
17 and documents, but the servicer's data and  
18 documents?
- 19 MR. BROCHIN: Object to the form  
20 of the question.
- 21 A. Generally those servicing documents are  
22 from the member.
- 23 Q. Is the milestone report that we were

1 referring to earlier here, Number 12 -- is  
2 that a document or a report that is  
3 produced by MERS?

4 A. Yes. It's generated from the MERS system.

5 Q. Is MERS able to go onto the MERS system and  
6 request a milestone report for any MIN?

7 A. Yes.

8 Q. And a servicer may also do so?

9 A. Yes.

10 MR. RAMEY: Just to clarify, is  
11 that certify -- a servicer can  
12 go in on any loan that it can  
13 input -- can it put in the  
14 milestone report for any loan  
15 that it has an interest in?

16 A. I should clarify that. It's -- when you  
17 say member, it should be the member.

18 Q. Okay. So if a MIN is identified to a  
19 servicer or a beneficial owner --

20 A. Yes. And I misspoke. It's -- any servicer  
21 cannot get a milestone report on any loan.

22 Q. And I think you and I were talking about  
23 the same thing but maybe weren't clear.



1           What I was speaking about is, in this  
2           particular case MERS has the right to get a  
3           milestone report and GMAC?

4           A.    Yes.

5           Q.    And whoever the investor on the note is or  
6           was; right?

7           A.    Yes.

8           Q.    If MERS presents a note which it has  
9           obtained possession of that is endorsed in  
10          blank and a payment is made to satisfy that  
11          note as a result of MERS' presentation, may  
12          MERS simply take that money and do with it  
13          what it wishes?

14          A.    No.

15          Q.    Is that because of the express terms of  
16          your agency with your members?

17                   MR. BROCHIN: Object to the form.

18          A.    It's one of the reasons.

19          Q.    And it's also because you never have the  
20          right to any of the money under that note?

21          A.    That's another reason.

22          Q.    And you've testified previously that you  
23          would consider that almost to be a criminal

1           action; right?

2           A.    No.

3                           MR. BROCHIN:  Object to the form  
4                           of the question.

5           A.    No, I don't -- I don't think it would be a  
6           criminal act, but it would -- it would be a  
7           mistake that would need to be corrected.

8           Q.    In every membership agreement with every  
9           member you have that same agreement that  
10           you will never claim to be entitled to any  
11           of the money from any promissory note?

12          A.    Yes.

13                           (Plaintiff's Exhibit 15 was marked  
14                           for identification.)

15          Q.    I show you what I'll mark as Exhibit 15,  
16           which are documents 61 and 62 by your  
17           Bates-stamping.  That's a copy of the note  
18           in this case.  Does that note appear to be  
19           a copy of the note executed by Debra  
20           Henderson?

21                           MR. BROCHIN:  Object to the form  
22                           of the question.

23          A.    Appears to be.

1 Q. Does that note have a rider just above the  
2 signature line addressing the modification  
3 of the terms of that note due to the VA  
4 guarantee?

5 A. I don't understand the question.

6 Q. Is there a modification of the terms of the  
7 note with respect to a VA guarantee just  
8 above the signature page of that note?

9 MR. BROCHIN: Objection. The  
10 document speaks for itself.

11 A. I have not seen any reference to the VA.

12 Q. If you will, if you'll hand that to me,  
13 I'll tell you --

14 A. It says it's insured under the United  
15 States Code.

16 Q. Right. And at the top of the note it  
17 says -- it has a VA number and says that  
18 it's not assumable without the approval of  
19 the Department of Veterans Affairs or its  
20 authorized agent; right?

21 MR. BROCHIN: You're asking him if  
22 that's what it says?

23 Q. That's what it says; right?

1                   MR. BROCHIN: Object to the form  
2                   of the --

3       Q.     And I'll show that back to you.

4                   MR. BROCHIN: Object to the form  
5                   of the question.

6       Q.     The section under 11 says prepayment and  
7                   acceleration. In your experience in your  
8                   employment in the mortgage industry, are  
9                   you familiar with that terminology?

10      A.     The two concepts.

11      Q.     Right. And does that paragraph address  
12                   modifications to the terms of the mortgage  
13                   based on the guarantee that's recited in  
14                   that paragraph?

15                   MR. BROCHIN: Objection to the  
16                   extent the question calls for  
17                   a legal conclusion and the  
18                   document speaks for itself.

19      A.     Yeah. I don't see modification.

20      Q.     Read that paragraph into the record,  
21                   please, sir.

22      A.     Prepayment and acceleration paragraph?

23                   If the indebtedness secured hereby is

1           guaranteed or insured under Title 38,  
2           United States Code, such title and  
3           regulations issued thereunder and in effect  
4           on the date hereof shall govern the rights,  
5           duties, and liabilities of borrower and  
6           lender. Any provisions of the security  
7           instrument or other instruments executed in  
8           connection with said indebtedness which are  
9           inconsistent with said title or  
10          regulations, including, but not limited to,  
11          the provision for payment of any sum in  
12          connection with prepayment of the secured  
13          indebtedness and the provision that the  
14          lender may accelerate payment of the  
15          secured indebtedness pursuant to Section 18  
16          of the security instrument, are hereby  
17          amended or negated to the extent necessary  
18          to confirm such instruments -- such  
19          instruments to said title or regulations.

20        Q.    Are you familiar with any special  
21            protections afforded by -- to Ms. Henderson  
22            by virtue of this loan being guaranteed by  
23            the VA?

1 A. Well, this paragraph seems to say there  
2 can't be a prepayment penalty and there are  
3 certain restrictions on acceleration.

4 Q. Okay. Are you familiar with any of those  
5 changes because of the VA guarantee  
6 personally?

7 A. What do you mean?

8 Q. Do you know what the specific protections  
9 are which are afforded by that clause?

10 A. Well, I know you can't have a prepayment  
11 penalty.

12 (Plaintiff's Exhibit 16 was marked  
13 for identification.)

14 Q. Exhibit 16 is the Henderson mortgage. That  
15 is the standard form language for all  
16 62 million MERS mortgages in existence; is  
17 that right?

18 MR. BROCHIN: Object to the form  
19 of the question.

20 A. It's an Alabama mortgage.

21 Q. The clauses dealing with MERS and its  
22 rights --

23 A. Yes.

1 Q. -- are they any different in any other  
2 state than the explanation provided in that  
3 document?

4 A. Generally speaking, no.

5 Q. Okay. If you will, let me take a look at  
6 that for just a second.

7 I highlighted a portion of that  
8 document in pink, and that is the  
9 acknowledgement clause where the borrower  
10 acknowledges that MERS is the mortgagee of  
11 record on behalf of the lender; is that  
12 right?

13 MR. BROCHIN: Object to the form.

14 The document speaks for  
15 itself.

16 Q. I mean, is that -- that is, in effect,  
17 Mr. Arnold, the magic language that is  
18 inserted in all these mortgages, isn't it?

19 MR. BROCHIN: Object to the form  
20 of the question, the term  
21 magic language.

22 A. This is the granting clause, the words of  
23 conveyance.

1 Q. Right. That give you the right to sit as  
2 mortgagee of record; right?

3 MR. BROCHIN: Object to the form.

4 A. The borrower makes MERS the mortgagee of  
5 record.

6 Q. Right. That's what I'm saying. That  
7 portion of that clause is the language that  
8 you rely on to make you the mortgagee of  
9 record for the land record; right?

10 A. Yes.

11 Q. Okay. Let me have that document for just a  
12 second.

13 With respect to this clause, you've  
14 explained your concept of legal title as  
15 being the right to appear as mortgagee of  
16 record; right?

17 A. It's the bare legal title. We're in the  
18 land records as mortgagee.

19 Q. The name in the book; right?

20 MR. BROCHIN: Object to the form.

21 A. And the interest that goes with it.

22 Q. And the clause says that the borrower  
23 understands and agrees that MERS holds only



1           legal title to the interest granted by the  
2           borrower in this security instrument, but,  
3           if necessary to comply with law or custom,  
4           MERS, as nominee for lender and lender's  
5           successors and assigns, has the right to  
6           exercise any or all of those interests,  
7           including, but not limited to, the right to  
8           foreclose and sell the property.

9           Now, the clause says if necessary to  
10          comply with law or custom; right?

11                   MR. BROCHIN:  You're asking him if  
12                   that's what the document says?

13                   MR. WOOTEN:  Right.

14                   MR. BROCHIN:  Object to the form  
15                   of the question.  The document  
16                   speaks for itself.

17          Q.    I mean, this was your language.

18          A.    Yes.

19                   MR. BROCHIN:  Well, object to the  
20                   form of the question in terms  
21                   of what your language means.

22          Q.    If necessary --

23          A.    That's the language where the borrower

1 makes us the mortgagee.

2 Q. If necessary to comply with law or custom,  
3 MERS has the right. So if it's necessary  
4 to comply with law or custom, you have the  
5 right?

6 MR. BROCHIN: Object to the form  
7 of the question.

8 Q. Correct?

9 MR. BROCHIN: Do you understand  
10 the question?

11 A. It's the granting clause that the borrower  
12 conveys the interest.

13 Q. So if nothing in law or custom is necessary  
14 and would require you to foreclose, you  
15 don't have to; right?

16 MR. BROCHIN: He's -- are you  
17 asking him based on this  
18 document?

19 MR. WOOTEN: I'm asking him based  
20 on his document, yes.

21 MR. BROCHIN: Object to the form  
22 of the question.

23 A. It's the borrower's document.

- 1 Q. Who prepared it?
- 2 A. Whoever closed the loan.
- 3 Q. Okay. And this is a standard form
- 4 document, Fannie Mae, Freddie Mac, who are
- 5 shareholders of MERS, with the MERS
- 6 granting clause --
- 7 A. Yes.
- 8 Q. -- that you chose -- MERS chose; right?
- 9 MR. BROCHIN: Object to the form.
- 10 A. I wouldn't say that we chose it.
- 11 Q. Who came up with the granting clause, then?
- 12 A. Well, the member is the one that put it in
- 13 the document, and the borrower is the one
- 14 that executed it.
- 15 Q. The member is actually using a form
- 16 provided as a uniform instrument by Fannie
- 17 and Freddie; right?
- 18 A. Yes.
- 19 Q. So the actual granting language, the
- 20 verbiage, the terminology, that was MERS';
- 21 right?
- 22 A. I wouldn't say --
- 23 MR. BROCHIN: Object to the form.

- 1 A. -- that.
- 2 Q. If it were not MERS', who chose that  
3 language?
- 4 MR. BROCHIN: Object to the form.
- 5 A. Fannie and Freddie and the lender.
- 6 Q. And Fannie and Freddie are Class A  
7 shareholders of MERS?
- 8 A. Yes.
- 9 Q. And tell the ladies and gentlemen of the  
10 jury what a Class A shareholder is versus  
11 the rest of us.
- 12 A. A Class A shareholder is in a class all  
13 their own.
- 14 Q. And they are afforded special treatment  
15 within the classes of shareholders of MERS;  
16 right?
- 17 A. Not special treatment. They have a few  
18 additional rights.
- 19 Q. They form the management committee that has  
20 the right to act as the board of directors  
21 in certain circumstances; correct?
- 22 A. No.
- 23 Q. That's not in your bylaws?

- 1       A.    They're on that committee.
- 2       Q.    Right.  That's made up of Class A
- 3           shareholders; right?
- 4       A.    Well, half of -- half of that committee is
- 5           made up of Class A shareholders.  The other
- 6           half are not Class A.
- 7       Q.    Okay.  So when you say that the consumer --
- 8           obviously a consumer signed this mortgage,
- 9           Ms. Henderson.  But this mortgage was
- 10          presented to her in printed form.  She did
- 11          not write the language that's contained in
- 12          this preprinted form; right?
- 13       A.    True.
- 14       Q.    And irrespective of your agency grant by
- 15          your member, you are not testifying that
- 16          any court should look past the actual
- 17          documents that underlay this transaction to
- 18          determine your rights, are you?
- 19                    MR. BROCHIN:  Object to the form
- 20                           of the question.  If you can
- 21                           answer it.
- 22       A.    What the court looks like is -- I am
- 23          comfortable saying that they would have to

1           look at the mortgage. What else they look  
2           at is up to the court.

3       Q.    You testified earlier that the ownership of  
4           the promissory note, the right to enforce  
5           it, all of that is determined by state law?

6       A.    Yes.

7       Q.    Not by your mortgage or your membership  
8           agreement?

9                       MR. BROCHIN: Object to the form  
10                      of the question.

11      A.    Yeah. I -- you know, that's very  
12           theoretical, you know. The bottom line is  
13           you've got the note. You've got the  
14           mortgage. And under state law that's a  
15           secured transaction.

16      Q.    And that is assuming that you do not hold  
17           the note under a separate agreement that  
18           limits your rights to that note; correct?

19      A.    Well, if you hold the notes, you're holder  
20           of the note.

21      Q.    But you hold the note with specific  
22           restrictions by written agreement with your  
23           member?

1 A. Many holders do.

2 Q. Correct.

3 A. (Witness nods head.)

4 MR. WOOTEN: I think I'm done.

5 Thank you.

6 MR. BROCHIN: Just put back, you  
7 know, on the record so we're  
8 clear, we do not waive reading  
9 of the deposition.

10 And just -- I don't know  
11 if I put this on the record,  
12 but this will be attached as  
13 Exhibit Number 1 --

14 MR. WOOTEN: Sure.

15 MR. BROCHIN: -- which is a  
16 discovery and confidentiality  
17 agreement which has been  
18 signed -- it doesn't look by  
19 all, but certainly I would --

20 MR. WOOTEN: It's going to be  
21 countersigned by the other  
22 co-counsel. They've made the  
23 agreement. And as I've told

1 Shaun, we have no interest in  
2 disseminating the video.  
3 We're not going to do it.

4 MR. BROCHIN: Very good.

5 THE VIDEOGRAPHER: This concludes  
6 today's deposition. The time  
7 is now 5:19 p.m.

8 (Deposition concluded at  
9 approximately 5:19 p.m.)

10 \* \* \* \* \*

11 FURTHER DEPONENT SAITH NOT

12 \* \* \* \* \*

13 REPORTER'S CERTIFICATE

14 STATE OF ALABAMA:

15 MONTGOMERY COUNTY:

16 I, Tracye Sadler Blackwell, Certified  
17 Court Reporter and Commissioner for the State of  
18 Alabama at Large, do hereby certify that I reported  
19 the deposition of:

20 R.K. ARNOLD

21 who was duly sworn by me to speak the truth, the  
22 whole truth and nothing but the truth, in the  
23 matter of:



1 DEBRA A. HENDERSON,  
 2 Plaintiff,  
 3 vs.  
 4 MERSCORP, INC., et al.,  
 5 Defendants.  
 6 IN THE CIRCUIT COURT FOR  
 7 MONTGOMERY COUNTY, ALABAMA  
 8 Case Number CV-08-900805.00

9 on September 25, 2009.

10 The foregoing 288 computer-printed pages  
 11 contain a true and correct transcript of the  
 12 examination of said witness by counsel for the  
 13 parties set out herein. The reading and signing of  
 14 same is hereby not waived.

15 I further certify that I am neither of  
 16 kin nor of counsel to the parties to said cause nor  
 17 in any manner interested in the results thereof.

18 This 6th day of October 2009.

19  
 20 \_\_\_\_\_  
 21 Tracye Sadler Blackwell  
 ACCR No. 294  
 Expiration date: 9-30-2010  
 22 Certified Court Reporter  
 and Commissioner for the State  
 23 of Alabama at Large

\* \* \* \* \*

WITNESS SIGNATURE PAGE

\* \* \* \* \*

IN RE: HENDERSON vs. MERSCORP, INC., et al.

I, R.K. ARNOLD, hereby certify that I have read the foregoing transcript of my deposition given on September 25, 2009, and it is a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on a separate sheet of paper and attached hereto.

\_\_\_\_\_  
R.K. ARNOLD

SWORN TO AND SUBSCRIBED before me this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES:  
\_\_\_\_\_

1     October 6th, 2009

2

3     Mr. R.K. Arnold  
   c/o Mr. Shaun Ramey

4     SIROTE & PERMUTT  
   2311 Highland Avenue

5     Birmingham, Alabama 35205

6     IN RE: HENDERSON vs. MERSCORP, INC., et al.

7     Dear Mr. Arnold:

8     Enclosed is a copy of the transcript of your  
9     deposition taken on September 25, 2009. Please read  
10    the transcript and make any corrections on the  
   correction sheet provided specifying the page and  
   line number of each correction.

11    You will find the original signature page attached to  
12    the front of the transcript. Even if there are no  
   corrections, please sign the original signature page  
   and have your signature notarized.

13

14    Please return the signature page, correction sheet  
15    and transcript within thirty days. The list of  
   corrections will be attached to the original  
   deposition and all parties will be notified of any  
   changes.

16

17    Thank you for your prompt attention to this matter.

18

19    Sincerely,

20

21

22    Tracye Sadler Blackwell  
23    Certified Court Reporter

24

25    cc: Mr. Nicholas H. Wooten

26

   Mr. Shaun Ramey