

MERS LITIGATION EXAMPLE 01

Beneficiary MERS

What NOT to do!

“the people i signed with are not here nor are they being represented here“

- this document is not a substitute for the advice of an attorney -

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Please feel free to contact any one of us for help. Our expertise is in the examination and evaluation of mortgage loans. Moreover, we will expose the fraud in any case. We have a huge database that can supply any needs. We can provide custom charts to fit your case. We will work with you or your attorney of choice to help to make your case a success. The data collected from the mortgage company can and will be used detrimentally against them in your defense.

This is the way towards a winning plan!

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**From the St. Petersburg Times
Good article here concerning some of the more notorious offenders ...**

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READ ON

Beneficiary

MERS

“Deed of Trust”

“Excerpt from”

MDL 2119 Pleading 32

OCT 28 2009

FILED
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MDL 2119

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re:

MERS LITIGATION

MDL Docket No. 2119

**REPLY MEMORANDUM OF DEFENDANTS CITIMORTGAGE, INC.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., MERSCORP,
INC., NATIONAL CITY BANK, NATIONAL CITY MORTGAGE, NATIONAL
CITY CORPORATION, PNC FINANCIAL SERVICES GROUP, INC., AND
UNITED GUARANTY CORPORATION IN SUPPORT OF THEIR MOTION
FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR
CONSOLIDATED OR COORDINATED PRETRIAL PROCEEDINGS**

INTRODUCTION

Moving Defendants demonstrated in their Opening Memorandum (at 8-15) that Plaintiffs' overarching conspiracy theory of liability in each of the seven actions (the "Putative Class Actions") is the same. Plaintiffs also bring the same common law (*e.g.*, unjust enrichment, intentional infliction of emotional distress, etc.) and statutory counts (TILA, HOEPA, FHA, etc.) in many of the seven cases. As such, the Putative Class

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IMAGED OCT 28 2009

PLEADING NO. 32

18 MR. BROCHIN: Good morning, your Honor. Bobby
19 Brochin on behalf of MERS.

20 I guess I would first note that in terms of the
21 motion for preliminary injunction, to the extent that it is
22 based on the wrong trustee or not having the right trustee,
23 that would not be an issue that would involve MERS at all and
24 doesn't pertain to it, although the notion, as Mr. Hefferon
25 indicated, of a stranger to the transaction seems like an

1 extraordinary coincidence given the fact that there's no
2 dispute that the many, many, many borrowers that are
3 plaintiffs here, all of them have defaulted on their monthly
4 payments to some extent.

5 THE COURT: Well, getting to the heart of that
6 question, would you concede, or not, MERS is named as
7 beneficiary and as nominee?

8 MR. BROCHIN: MERS was -- when the loan was
9 taken out was, yes --

10 THE COURT: Assuming for the sake of argument
11 that they are not in truth and fact the beneficiary, nor do
12 they own -- I mean, you can contest that, of course -- nor do
13 they own any part of the note, I don't know whether that
14 question -- it changes, if, in fact, you have some kind of fee
15 interest under the fees permitted under the note, but assuming
16 for the sake of argument that you're not a beneficiary in
17 truth and fact, as nominee, I'm sure your argument is you can
18 be an agent of the trustee or beneficiary, but would you
19 concede that under state law, either a trustee or beneficiary
20 must at least designate to an agent the right to give notice
21 of default, that under state law, Nevada state law, only the
22 beneficiary or the trustee have the authority to declare
23 default or at least to authorize an agent to declare default,
24 only those two parties?

25 MR. BROCHIN: I think that is correct, indeed.

1 THE COURT: Okay. So how is MERS acting in
2 these cases?

3 MR. BROCHIN: Well, first, this notion of
4 beneficiary and nominee being either exclusive or at odds with
5 each other is just not true.

6 When the loans are taken out, the borrower signs a
7 deed of trust with the lender and designates in that deed of
8 trust that MERS is the beneficiary. So MERS is the
9 beneficiary on that deed of trust. Nominee is the capacity in
10 which it acts.

11 THE COURT: How can I go along with that? In
12 truth and fact MERS did not advance the funds. A beneficiary
13 in all of our parlances, day one in law school, was the party
14 who owns the beneficial interest, not the title, and is
15 supported by having advanced the funds. MERS didn't advance
16 the funds here.

17 MR. BROCHIN: No, MERS did not.

18 THE COURT: There is a true beneficiary, X, Y, Z
19 Bank or X, Y, Z Fund. There is a true beneficiary. How can I
20 acknowledge that MERS is in truth and fact a beneficiary?

21 MR. BROCHIN: Well, I think we have to break
22 down what you mean by beneficiary. If you're talking about
23 the beneficial owner of the note, or the beneficiary in terms
24 of the entity who will ultimately receive the proceeds on
25 repayment of the note, MERS is not that entity; MERS is not.

1 What MERS is was granted the security interest, the
2 legal -- holds the legal title on the secured interest in the
3 property which is called, in deeds of trust, the beneficiary.
4 In other words, that beneficiary by definition --

5 THE COURT: They were granted the equitable
6 interest or the title interest?

7 MR. BROCHIN: Title, legal title to the
8 security.

9 THE COURT: Now, under state law, the term for
10 that is trustee, the trustee holds legal title in trust.
11 That's the way our foreclosure system works out west.

12 MR. BROCHIN: Right, but in the deed of trust
13 they were conveyed as a party and designated as the party --

14 THE COURT: They were identified as a
15 beneficiary.

16 MR. BROCHIN: By being granted -- this is the
17 words right out of the deeds of trust, by the grant being
18 granted the security interest in the property. All the
19 security interests were --

20 THE COURT: You're just going around the bush
21 with semantics, and I'm not obligated to accept your meaning
22 for any terms stated in the deed of trust, nor is any court.

23 Beneficiary under state law means the equitable
24 interest. Trustee means the holder of the legal interest.

25 MR. BROCHIN: Right. MERS --

1 THE COURT: So if you're contending that MERS is
2 either the true beneficiary holding equitable interest,
3 obviously, that's not the case, or that they are true title
4 owner, that's also obviously not the case. Under state law,
5 trustee, who is also designated in each of these deeds of
6 trust, holds the legal title. They're the ones who receive
7 legal title holding it in trust.

8 MR. BROCHIN: I do not --

9 THE COURT: Anything different there?

10 MR. BROCHIN: No, your Honor, not at all.

11 THE COURT: So you agree --

12 MR. BROCHIN: I agree with everything you said.

13 THE COURT: -- that in truth and fact MERS is
14 not a beneficiary nor a holder of legal title.

15 MR. BROCHIN: No, I agree that MERS does not
16 hold a beneficial interest in the note.

17 THE COURT: Okay.

18 MR. BROCHIN: And I agree that MERS is not
19 performing the role as the trustee.

20 THE COURT: Nor does the language of the deed of
21 trust convey title to them.

22 MR. BROCHIN: Doesn't convey title, it conveys
23 title to the trustee.

24 THE COURT: Okay. We're all on the same wave
25 length then.

1 MR. BROCHIN: And, in fact, the deed of trust
2 conveys whatever security interests are in the property to
3 MERS as the beneficiary, and when that --

4 THE COURT: No, it doesn't. No, it doesn't.

5 MR. BROCHIN: Well, when the deed of trust is
6 recorded, when it's recorded, it lists MERS as the holder of
7 those -- secured title holder of those secured interests, not
8 the title holder of the property.

9 THE COURT: No, it doesn't.

10 MR. BROCHIN: That's what the deed of trust
11 says.

12 THE COURT: No, it doesn't, as a matter of state
13 law. There can only be conveyance to one party unless you're
14 holding them as tenants in common. It's conveyed -- title is
15 conveyed to the trustee.

16 MR. BROCHIN: The title of the property, but the
17 secured interest, the holder of the security is in the -- is
18 the beneficiary of MERS.

19 THE COURT: Okay. I reject all of your oral
20 argument for the last five minutes. You're just going around
21 the bush using semantics, and I think we were on the same wave
22 length for a moment ago when we agreed on the semantics under
23 state law, and you're just going around the bush again --

24 MR. BROCHIN: Well --

25 THE COURT: So I reject that argument, and move

1 on to the next point.

2 MR. BROCHIN: Okay, but to that point, the
3 beneficiary that MERS --

4 THE COURT: If you're going to keep arguing that
5 MERS is a holder of legal title, stop, please.

6 MR. BROCHIN: I'm not suggesting that they hold
7 the legal title.

8 THE COURT: Thank you.

9 MR. BROCHIN: Now, on the complaint, though, on
10 the complaint that's been brought, the claims -- there are six
11 claims that have been brought in this action.

12 THE COURT: By the way, adding to that, I see
13 nothing wrong with saying that MERS is a designated agent.
14 Right in the -- even though the language is beneficiary, even
15 though the language is nominee, I see nothing wrong with
16 claiming that MERS is the authorized agent to act on behalf of
17 beneficiary and/or trustee. I see nothing wrong with that.

18 MR. BROCHIN: That's what the deed of trust
19 says. I mean, when it said -- when I was suggesting nominee
20 and beneficiary, they're not exclusive terms because the
21 nominee in the deed of trust discloses that it is acting as
22 the nominee or in the stead of or on behalf of the lender and
23 of the lender's successors and assigns.

24 THE COURT: That's fine, as long as you're not
25 arguing too much. When I nominate X, Y, Z fund or X, Y, Z

1 broker to act on my behalf in holding 100 shares of -- in my
2 case, it would have to be penny stock, I haven't said you are
3 the owner, sir, I've simply said you are the nominee, you act
4 on my behalf, you vote the shares, you receive the dividends,
5 whatever, and it's nothing more than that.

6 MR. BROCHIN: I believe that's exactly the
7 structure that's here in the relationship between the lender
8 and MERS as the nominee for the lender.

9 THE COURT: All right.

10 MR. BROCHIN: Which is disclosed on the deed of
11 trust which is signed by the borrowers and acknowledged by the
12 borrowers.

13 THE COURT: Now, counsel says MERS, having
14 received one such designation, even if they're -- of course,
15 he says they don't even have a designation as servicer, these
16 terms are fictions, nominee and beneficiary, but assuming that
17 they do have reality to them, that is, that you are at least
18 agent for both beneficiary and trustee, he argues further you
19 have no right to further transfer that agency status.

20 So you can't further -- assuming for the sake of
21 argument you are a valid agent of both beneficiary and
22 trustee, you have no right to further designate or transfer to
23 a further agent the right to foreclose. Is that a true
24 statement of law or not?

25 MR. BROCHIN: I do not believe so because, as

1 the designated party, that just establishes the relationship
2 between MERS and the lender, but MERS is the party who is the
3 beneficiary designated.

4 So as the legal beneficiary designated, let's assume
5 it is simply as the agent or the authorized agent for the
6 lender, it certainly has the legal authority, then, to take
7 the granting that was given as a beneficiary and assign that
8 or convey that to any party it may wish to choose.

9 THE COURT: You recognize that there is no
10 splitting of the deed of trust from the note. You can't stand
11 here and argue to me, Judge, we don't know where the note is,
12 and we don't have to know because we hold the security
13 interest, whether or not we're a beneficial owner of the note
14 proceeds themselves, we hold -- in my opinion, and I have long
15 since answered that one in prior published cases, you cannot
16 split a deed of trust from a note without invalidating the
17 security interest. You can't do that.

18 MR. BROCHIN: I agree, and I don't think the
19 note and the deed of trust are split in that sense. What I
20 think has happened is that there is a note holder, and the
21 beneficiary serving on the deed of trust is a different
22 entity. That entity is an authorized nominee or agent on
23 behalf of the lender.

24 THE COURT: By the way, as a side question, in
25 this wonderful MERS system invented by Wall Street, I assume,

1 in an attempt to securitize these big packages of loans, what
2 is the practice as to who keeps in their hands the note?

3 MR. BROCHIN: It is not MERS, it is the lender
4 or the servicers.

5 THE COURT: Is it usually the original lender
6 and servicer who holds a big package? They sell a hundred of
7 these loans in a package to X, Y, Z Insurance or to X, Y, Z
8 Fund, and I -- again, respectfully, I apologize, this
9 wonderful MERS system, that that assignor continues to hold
10 the note or packages of notes?

11 MR. BROCHIN: I don't know the specific answer.
12 I think that practice would depend on to whom the note is sold
13 and to what legal structure that note is sold.

14 THE COURT: So there was no common structure
15 even before the MERS system?

16 MR. BROCHIN: Right.

17 THE COURT: When banks bought or transferred big
18 packages of loans, there was no common practice, sometimes the
19 original lender kept the whole bundle of notes, and sometimes
20 the assignee kept the whole bundle of notes.

21 MR. BROCHIN: And I think that's still the
22 practice in a sense.

23 And back to, I think, your question and what your
24 concern is, I don't disagree that there's a splitting. The
25 secured interest travels with wherever that note may go. So

1 wherever that note goes, that secured interest travels with
2 it, it is not split.

3 And therefore -- and I don't disagree with this
4 either, it is the holder of that note who has this authority,
5 and that's where courts -- when you come to standing on who
6 may foreclose, it has to show that you do have -- not just
7 being the beneficiary, but that you have either the note, or
8 you have some authority to exercise this power on behalf of --

9 THE COURT: You are either the beneficiary,
10 true, or you are the trustee, or you are their designee or
11 agent.

12 MR. BROCHIN: Right, and those interests don't
13 split, and there's no concept that they are split. .

14 What has happened at the origination of that loan is
15 that on that deed of trust, instead of the --

16 THE COURT: Now, he argues, finally, you have no
17 proof here on this record that MERS or the Recon -- what is it
18 Recontrust that you designate now is a designee or agent,
19 there's simply no proof you have to the ability to come
20 forward with that. Is that true? Is the common practice
21 currently simply an oral statement, MERS to Recontrust, will
22 you conduct the foreclosure on the 1, 2, 3 property?

23 MR. BROCHIN: No, it would not be.

24 THE COURT: There is a written designation.

25 MR. BROCHIN: Well, there would be a written

1 assignment, and presumably that written assignment would, as
2 the trustee or successor trustee, would be recorded in the
3 land records.

4 THE COURT: There should be a written assignment
5 of trustee status.

6 MR. BROCHIN: Right.

7 THE COURT: But there would not be a written
8 assignment of --

9 MR. BROCHIN: The note.

10 THE COURT: -- an assignment to an agent to send
11 notice of default.

12 MR. BROCHIN: No, no, there wouldn't, but your
13 question was is there some written or oral instruction from
14 MERS.

15 THE COURT: Right. Is there a letter or a
16 recorded assignment of deed of trust, trustee status?

17 MR. BROCHIN: No.

18 THE COURT: Is there a letter that says you are
19 our agent, you are the new servicer, et cetera?

20 MR. BROCHIN: Not from MERS. From the lender
21 there would be, of course, under probably the RESPA
22 guidelines, and when servicers change, they're required to
23 give that notice and so forth. But MERS simply is serving as
24 the -- let's say the lienholder of the record.

25 THE COURT: Right. I got that point. Go on,

1 I'm sorry.

2 MR. BROCHIN: And I did want to address the
3 claims that were being brought that serve as the basis for the
4 injunctive relief because what I hear the plaintiff saying
5 here is that the wrong trustee is showing up, and that is not,
6 as Mr. Hefferon indicated, the basis for the complaint or the
7 basis for the motion for preliminary injunction.

8 There are before you six counts in that complaint,
9 three of which matter for the preliminary injunction. Two of
10 those three complaints are based on conspiracy involving MERS,
11 conspiracy to commit fraud, conspiracy to wrongfully foreclose
12 and wrongful foreclosure.

13 And there are, just so you know, seven of these
14 class actions that are pending. You asked about how many
15 there were. There are seven, seven having these common
16 conspiracy allegations involving MERS and seven being class
17 actions which, while not identical classes, are similar.

18 I should also point out to the Court for
19 information, that there is also a motion pending to transfer
20 all these seven to MDL, multi-district litigation, which is --

21 THE COURT: You filed that petition with the MDL
22 panel?

23 MR. BROCHIN: We did, your Honor. Several of
24 the defendants, including MERS, filed the motion with the MDL
25 panel which accepted it, and I think the responses are due

1 this month in terms of consideration. So when you're talking
2 about --

3 THE COURT: They then normally calendar an oral
4 argument which would be November or December.

5 MR. BROCHIN: We expect that in November.

6 THE COURT: Okay. Just so everybody knows,
7 that's a panel nationwide that serves to take cases pending
8 trial because the cases come back to the original judge, but
9 all interim proceedings go to one designated judge who handles
10 them nationwide.

11 MR. BROCHIN: Right. And so we have seven of
12 these cases, and the first one that was filed is the one in
13 Arizona in the Federal District Court called Cervantes, and in
14 all of these cases --

15 THE COURT: Judge?

16 MR. BROCHIN: Judge Teilborg.

17 And also in the other cases that are before the
18 Court, that is, Lopez, Goodwin and Green, there are pending
19 motions to dismiss the complaint which has the identical or
20 virtually identical conspiracy allegations that the
21 preliminary injunction is based upon here, in other words, you
22 have to have a viable cause of action alleged below before
23 this Court can entertain entering a preliminary injunction on
24 that.

25 And the reason I bring that up is because the very,

1 very identical conspiracy allegations made in the Cervantes
2 case in Arizona are the ones that are before this Court, and
3 Judge Teilborg issued an order on that just two weeks ago
4 finding that it was -- the complaint was insufficient for
5 failure to plead conspiracy with the requisite particularity
6 and the failure to plead an agreement to participate in the
7 fraud.

8 THE COURT: Have you provided me a copy of his
9 order?

10 MR. BROCHIN: Indeed, we have. We attached a
11 copy of it to our memorandum opposing the injunction.

12 THE COURT: The name of that case?

13 MR. BROCHIN: It is Cervantes,
14 C-e-r-v-a-n-t-e-s.

15 And the reason this is relevant is because Judge
16 Teilborg stated the following:

17 "Plaintiffs have not stated how or even when
18 the alleged conspiracy was formed. Plaintiffs have
19 not included any factual allegations pertaining to
20 how the defendants targeted the plaintiffs."

21 THE COURT: This is an order denying preliminary
22 injunction or dismissal with right to amend?

23 MR. BROCHIN: This is an order that granted a
24 motion to dismiss under Rule 12(b)(6).

25 THE COURT: With right to amend.

1 MR. BROCHIN: With no right to amend. Right to
2 amend was sought, leave to amend was sought.

3 THE COURT: Okay. Go ahead.

4 MR. BROCHIN: The Court determined that leave to
5 amend would be futile because the plaintiff can not add any
6 allegations to it to cure it, and entered judgment in favor of
7 MERS and the 20 alleged coconspirators, that's the very same
8 allegations that are before this Court, finding that,

9 "The plaintiffs have failed to provide any
10 specific factual allegations inferring a tacit
11 conspiracy agreement. Plaintiffs have failed to
12 state a viable claim for relief for conspiracy."

13 Quote, "the Court fails to see how the MERS
14 system commits a fraud upon the plaintiffs," end
15 quote.

16 Quote, "Plaintiffs' argument that MERS is a
17 sham beneficiary is unconvincing. The fact that MERS
18 does not obtain such rights as to collect mortgage
19 payments or obtain legal title to the property in the
20 event of a default does not transform MERS's status
21 into a sham."

22 Quote, "Plaintiffs also do not allege that
23 they were somehow induced into entering into their
24 loans based upon a misunderstanding of the MERS
25 system."

1 Quote, "The court finds that defendants'
2 misrepresentations [sic] to the plaintiffs that MERS
3 would serve as the beneficiary under the deed of
4 trust was not a false representation, and, even if it
5 was a false representation, it was not material."

6 The court concludes, quote, "At most,
7 plaintiffs find the MERS systems to be disagreeable
8 and inconvenient to them as consumers. Such
9 complaints, however, do not rise to the level of
10 fraud much less a conspiracy to commit fraud."

11 Plaintiffs will try to distinguish that order in
12 Cervantes is not applicable because it was decided under the
13 foreclosure laws of Arizona and not the law of Nevada for
14 which injunctive relief is sought, but that is disingenuous in
15 this respect, the claims were dismissed in Cervantes based on
16 common law claims of conspiracy and common law claims of
17 conspiracy to commit fraud, the very same common law
18 conspiracy claims that are alleged here, and the law involving
19 common law conspiracy in Arizona and common law of conspiracy
20 in Nevada and conspiracy to commit fraud do not vary.

21 Indeed, they must allege facts that state a
22 conspiracy, they must allege facts that show conspiracy that
23 had an agreement between and among the conspirators, and for
24 this legal issue, the law in Nevada and, of course, the law in
25 Arizona are the same, and the pleading requirements are the

1 same because both this court and the district court in Arizona
2 are bound by the recent Supreme Court decisions in *Twombly* and
3 recently in *Hickvall* that says you have to state facts of a
4 specific conspiracy in order to make out a plausible legal
5 theory, and the Court in *Cervantes*, Judge Teilborg, left no
6 doubts that the plaintiffs did not make such allegations,
7 plaintiffs cannot make such allegations, and, as mentioned,
8 judgment was entered in favor of all the defendants.

9 Defendants will also deflect the Court's attention
10 on the *Cervantes* order claiming that this action has a third
11 count, and the reason why I mentioned it, for wrongful
12 foreclosure or common law of wrongful foreclosure and why that
13 order does not apply, but, as Mr. Hefferon pointed out, common
14 law claim for wrongful foreclosure is limited to claims where
15 borrowers have shown they're not in default on their repayment
16 to make the monthly payments for which none of the borrowers
17 here can discriminate, and I would cite the *Collins versus*
18 *Union Federal*, the Nevada case for that proposition, again,
19 set forth in great detail in our briefs.

20 So, in this case, with the very same allegations in
21 the complaint below for conspiracy, the complaint is not
22 likely to succeed on the merits, rather the complaint for
23 conspiracy is likely to be dismissed for failure to state a
24 claim whatsoever, and, as mentioned, it's axiomatic that if
25 you don't state a claim for relief on the complaint, there

1 could be no probability of success on the merits, and the
2 Court may not grant this injunctive relief citing to numerous
3 Ninth Circuit opinions, *McNeil versus Verizon*, *Karen versus*
4 *State Bar of California*, as well as *Hilaire versus Arizona*
5 *Department of Corrections*.

6 Now, I also did want to address, because I think the
7 Court alluded to it at the beginning of our hearing, about the
8 perceived claim that the plaintiffs were making, and that is
9 that these MERS deeds of trust are void *ab initio*, that
10 somehow they are to be declared illegal from the get-go, and
11 that, too, apparently under the pleadings that they've had in
12 the motion, is a linchpin for them to be able to be successful
13 here.

14 It is not a legal issue, as the Court, I think,
15 pointed out, it's not dependent on the facts of any of these
16 loans, it's not dependent on the representation to the
17 individual borrowers. In fact, these plaintiffs are claiming
18 in this District Court of Nevada that all MERS deeds of trust
19 should be declared void *ab initio* in more than 28
20 jurisdictions around the state court [sic], and that motion is
21 pending right now before Judge Reed.

22 But that proposition, that one party is the lender
23 and a different entity can be designated by MERS as a
24 beneficiary, as a matter of law has no meaning. There is no
25 support, no legal argument, there is no basis whatsoever for

1 the proposition that when the loan is taken out, the lender
2 can designate its agent, as you say, or as its nominee or as
3 its representative someone in its stead to serve as a
4 beneficiary. There is simply no law to suggest that there's
5 anything inappropriate or wrong with that.

6 Quite to the contrary, there is law that says the
7 opposite, that is, that a party other than the lender may be
8 named or designated as the beneficiary in deeds of trust or as
9 the mortgagee in a mortgage. That case law dates back
10 hundreds of years, and it's all cited in our memorandum.

11 *Ogden versus Barker*, quote,

12 "The mere fact that the mortgagee was not the
13 real owner of the notes, but was simply a trustee or
14 agent of the owner, does not affect the validity of
15 the mortgage."

16 *Adams versus Niemann*, "A mortgage to a third
17 person would be valid as a mortgage to a creditor."

18 In cases recently in the Kansas Supreme Court,
19 *Jackson versus MERS* decided in August of 2009, just two months
20 ago, talking about MERS, quote,

21 "Real ownership of the security instrument
22 may be in one person while legal title to the
23 security instrument is in another."

24 THE COURT: Can you characterize for me the
25 Kansas decision, whether it is a minority position or

1 majority?

2 MR. BROCHIN: I'm sorry, whether it's a what
3 position?

4 THE COURT: A minority or majority position.

5 MR. BROCHIN: Well, first of all, what I would
6 like to do is train what the decision was about because that
7 is important in understanding its context because I don't
8 believe it has any applicability or effect here.

9 In the Kansas decision, MERS was one of many
10 lienholders on the property. MERS was a mortgagee, it was the
11 mortgagee recorded of record.

12 That case did not involve MERS foreclosing as a
13 mortgagee, it was not a suit in any way that involved a loan
14 for which MERS was involved, no borrower was involved who
15 signed a MERS deed of trust. MERS was simply a junior
16 lienholder who was getting foreclosed on by a tax lien. It
17 was a tax lien, and they went to foreclose on the tax lien,
18 and they did not give MERS notice of the foreclosure.

19 A judgment was entered on the foreclosure, and this
20 case came about in Kansas -- a foreclosure was entered, title
21 was transferred, and then in Kansas what came about was
22 motions filed to vacate that final judgment and, under Kansas
23 law, the decision to vacate by the trial court is subject to
24 an abuse of discretion standard, and to determine whether the
25 trial court abused its discretion, the Court looked to see if

1 MERS, as a junior lienholder, had a meritorious defense to the
2 foreclosing action.

3 In determining that there was no meritorious defense
4 because it was a junior lienholder, the Court deferred to the
5 trial court's decision that it did not abuse its discretion
6 because MERS did not have a meritorious defense to being
7 foreclosed out as a junior lienholder, and therefore --

8 THE COURT: Was the lack of meritorious defense
9 based upon their lack of standing or the fact that they were
10 junior and they had no right to stop that foreclosure?

11 MR. BROCHIN: It was the latter. This case had
12 nothing to do with standing. I'll read it to you.

13 "Even if MERS was technically entitled to
14 notice and service in the initial foreclosure action,
15 an issue that we do not decide at this time, we are
16 not compelled to conclude that the trial court abused
17 its discretion in denying the motions to vacate
18 default judgments and require joinder of MERS and
19 Sovereign. The record lacked evidence supporting a
20 claim that MERS suffered prejudice and would have had
21 a meritorious defense had it been joined as a
22 defendant to the foreclosure action."

23 That was the basis for the Kansas decision.

24 So I'm -- while the court in Kansas analyzed who
25 MERS was, it did so trying to see if the trial court abused

1 its discretion in not setting aside a final judgment that had
2 already been entered transferring title on the sale of the
3 property.

4 And that's why, by the way, I think it has no
5 relevancy whatsoever to the application for preliminary
6 injunction in this case. I mean, here we're talking about the
7 process of having declared at the inception of the loan the
8 very deed of trust that was signed by all of these borrowers
9 designating MERS as a beneficiary.

10 Now, there is no dispute in this case, none, and
11 there's none pled, and there are no facts whatsoever to
12 suggest otherwise, that the borrower borrowed money, that the
13 borrowers promised to repay those moneys on a monthly basis,
14 that borrowers have failed to meet that obligation to pay
15 those monthly payments, and, most importantly to this motion,
16 there's nothing before the Court to suggest that at the time
17 of this loan there was some duress in naming MERS as the
18 beneficiary instead of the lender.

19 And therefore, under contract principles, which a
20 deed of trust is, all of the parties -- and there is no
21 dispute about this, MERS, the lender, the trustee, the
22 borrowers, they all agreed that the loan was supposed to be
23 secured, so the idea that the deeds of trust should all be
24 declared void would run directly counter to the very basic
25 contractual principle that at the inception of that contract

1 all of the parties intended for MERS to be designated as the
2 beneficiary, but, more important, all of the parties intended
3 that the loan be secure.

4 THE COURT: How much longer do you have in your
5 argument, please?

6 MR. BROCHIN: Well, your Honor, I can move on
7 quickly if you would like.

8 I did want to point out one other thing regarding
9 injury, and it actually does touch a little bit on this
10 Court's Article III standing which we've briefed so I will
11 cover it in summary fashion.

12 It goes like this: The plaintiffs have really
13 failed to allege and show, which they must, injury for the
14 harm that they claim.

15 I want the Court to be mindful that in those deeds
16 of trust what it says is that plaintiffs -- excuse me, that
17 MERS is the beneficiary on the secured instrument, in fact,
18 its bolded in the very deed of trust that was signed.

19 This Court, your Honor, has entered orders, and this
20 court has entered orders in *Osloff*, in *Vasquez*. Recently,
21 September 28th, in *Crochin*, the Court entered an order
22 basically holding that the plaintiffs -- that MERS has
23 standing to foreclose, saying that the plaintiffs have
24 demonstrated no controlling authority to show that MERS does
25 not have any authority to initiate a foreclosure.

1 In fact, this court, your Honor, has cited case
2 after case after case stating that under the right showing,
3 MERS, as a nominee, beneficiary, someone who has been
4 designated as a beneficiary, may have standing and a right to
5 foreclose.

6 The plaintiffs' complaint, which they allege is
7 essentially that they have been injured because there's been
8 some misrepresentation as to who the beneficiary is, doesn't
9 trace back to the relief that they request.

10 So, in other words, let's take the rhetoric of the
11 plaintiffs at face value. Let's say they went to the thing,
12 they said MERS is going to be the beneficiary. Assume that
13 the plaintiffs, the borrowers, relied on that representation,
14 assume that the plaintiffs justifiably relied on it, what they
15 would actually be saying is that they're injured because MERS
16 is not the beneficiary, that you lied to us telling us MERS
17 was the beneficiary when, in fact, it's not, it's just a
18 shell, it's some sort of phantom, straw man operation. That
19 would mean, to its logical conclusion, that they're alleging
20 that they've been injured because MERS was not the valid
21 beneficiary it's suggested to be.

22 That doesn't make any sense. There's no injury from
23 that. There's no connection between that alleged void deed of
24 trust -- connecting that alleged void deed of trust with the
25 idea that there's been some sort of wrongful foreclosure, and

1 the reason for that, the reason there's no connection is
2 because there's no dispute that these loans are to be secured,
3 and therefore, if there's no dispute that the loans are to be
4 secured, when there is a default on that, there is no dispute
5 that the property is to come back as security for the payment
6 of that loan.

7 Whether it is MERS who is the beneficiary designated
8 or the lender is of no moment because all the parties have
9 agreed that there was to be a foreclosure or a property used
10 as security.

11 That lack of traceability, that lack of injury does
12 not confer upon this Court -- does not confer standing upon
13 the plaintiffs, and if the plaintiffs don't have standing,
14 they certainly can't seek injunctive relief that this Court
15 does not have Article III standing to consider that case.

16 Again, that's been briefed extensively by us, and I
17 believe Mr. Stern will address that further, but it's an issue
18 that shows no injury comes about as a result of the claims
19 being made.

20 THE COURT: I understand the last statement, but
21 I don't understand at all the lack of standing argument, but
22 that's fine.

23 MR. BROCHIN: There's case law and --

24 THE COURT: Clearly, they have standing.

25 MR. BROCHIN: No, no, but not in this sense.

1 THE COURT: You're saying Article III case or
2 controversy because there is no harm.

3 MR. BROCHIN: Because there's some alleged harm,
4 exactly. They have not alleged in their complaint --

5 THE COURT: I understand what you're saying. It
6 seems to me obvious that there is case or controversy.

7 MR. BROCHIN: I'm really not talking about in
8 the sense that they've been harmed.

9 THE COURT: You're just saying one of the
10 elements of their claim isn't present, injury.

11 MR. BROCHIN: Injury exactly.

12 THE COURT: That's fine, that's all I'm --

13 MR. BROCHIN: And the case law suggests if that
14 element is not present, standing lacks, and this court doesn't
15 have Article III --

16 THE COURT: I don't buy that one, but that's
17 okay.

18 MR. BROCHIN: The cases we've presented in our
19 brief to support that.

20 THE COURT: Okay. Thank you very much.

21 MR. STERN: Thank you, your Honor. Once again,
22 Ariel Stern.

23 I will be presenting brief argument on behalf of
24 four defendants, National City Bank, National City Mortgage,
25 National city Corporation and PNC Financial Services Group,

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