

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, DISTRICT JUDGE

4 ---o0o---

4 LACY J. DALTON, et al., :
5 Plaintiffs, : No. 3:09-CV-534-RCJ(VPC)
6 -vs- : October 9, 2009
7 CITIMORTGAGE, INC., et al., : Reno, Nevada
8 Defendants. :
9 :

10
11 TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION

12 APPEARANCES:

13 FOR THE PLAINTIFFS: ROBERT R. HAGER and TREVA J. HEARNE
14 Attorneys at Law

15 FOR THE DEFENDANTS: BRUCE BEESLEY, ROBERT M. BROCHIN,
16 HOWARD CAYNE, J. MATTHEW GOODIN,
17 DAVID R. HALL, MICHAEL LARGE,
18 JILL L. MURCH, THOMAS V. PANOFF,
19 MATTHEW PREVIN, ARIEL E. STERN,
20 CHAD FEARS, ALEX FLANGAS, THOMAS
HEFFERON, JEREMY GLADSTONE, RYAN
HERRICK, KARL TILLEMANN, and
PAUL MATTEONI
Attorneys at Law

21 Reported by: Margaret E. Griener, CCR #3, RDR
22 Official Reporter
23 400 South Virginia Street
24 Reno, Nevada 89501
25 (775) 329-9980

COMPUTER-ASSISTED TRANSCRIPTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RENO, NEVADA, FRIDAY, OCTOBER 9, 2009, 10:00 A.M.

---o0o---

THE COURT: Good morning. That's quite a crowd.
Please be seated.

I'm Judge Robert Jones, of course, I have this
calendar replacing Judge Sandoval. We have Dalton versus
Citimortgage, et al.

Does Madam Clerk need on the record appearances in
addition to this written appearance list?

THE CLERK: No, sir.

THE COURT: Okay, very good. So I have your
appearances. Anybody who did not enter their appearance by
signing in on the list, please.

All right. Let's start then. Let me give a few
parameters or prefaces. It's a very interesting case. This
is a request for a preliminary injunction, and I'm going to
give you time to do that.

I'm not anticipating the presentation of any
evidence separate and apart from any declarations or whatever
you may have heretofore filed, but if you have the need for
that, you will tell me, please, if you believe that it is
required that you present evidence, otherwise I'll take simply
oral argument this morning.

I do have a few jurisdiction questions, and I'll

1 start those with the plaintiff. This is plaintiffs' request.
2 Let's start, please, with plaintiffs' appearance and argument.
3 Good morning, Mr. --

4 MR. HAGER: Mr. Hager, your Honor.

5 THE COURT: Mr. Hager, good morning.

6 MR. HAGER: Good morning, your Honor.

7 Your Honor, as to this motion today, as to all but
8 seven homes, the subject of this motion and the analysis is
9 clear and simple under Nevada law. We need not look to the
10 law of agency, nor the UCC on those homes other than these
11 seven homes. Every other home, the analysis is clear.

12 THE COURT: May I stop you briefly?

13 MR. HAGER: Yes.

14 THE COURT: I don't want to take the wind out of
15 your sails, and I want you to proceed on the merits, but I
16 have a few -- federal judges are known for being a little
17 ticklish about jurisdiction so I have a little jurisdiction
18 background I need to inquire first.

19 You have requested in the complaint certification as
20 a class. You're seeking a class action here?

21 MR. HAGER: Your Honor, actually, we have moved
22 for class certification in two different cases, Lopez and
23 Goodwin, before Judge Reed, and we anticipate that we'll be
24 moving for a damage class as well.

25 At this point we have a motion for certification of

1 an injunction class, and -- I don't know if the Court can hear
2 me -- and a motion for certification of an injunction class in
3 another case.

4 One injunction, preliminary injunction, would be to
5 stop foreclosures on MERS deeds of trust in 28 states and
6 Washington, D.C., the nonjudicial foreclosure jurisdictions.

7 In the Goodwin case, we have a similar combination
8 of a class motion and a preliminary injunction motion on
9 behalf of that class on file to prevent the sale of bank REOs
10 acquired from foreclosure sales on MERS deeds of trust.

11 THE COURT: Then what are we doing here in this
12 case before me?

13 MR. HAGER: Today we're dealing with these
14 individual homes, your Honor.

15 THE COURT: Judge Reed has a class action,
16 proposed class action?

17 MR. HAGER: We have two motions pending for
18 injunction classes before Judge Reed in this court, and we --

19 THE COURT: I don't understand, I'm sorry. In
20 different cases?

21 MR. HAGER: Yes, your Honor.

22 THE COURT: Why are we here, then, in this case?
23 Why have you filed -- you've filed a separate nonclass
24 certification case here, and you've filed class certification
25 before Judge Reed in the District of Nevada and also a class

1 action proposed case in Washington, D.C., is that what I heard
2 you say?

3 MR. HAGER: No, your Honor.

4 THE COURT: I don't understand.

5 MR. HAGER: The cases here in Reno, we have --

6 THE COURT: The cases here in Reno.

7 MR. HAGER: Yes, they're before Judge Reed.

8 THE COURT: Why are they before Judge Reed, and
9 then why am I sitting here? This is 3:09-534-RCJ.

10 MR. HAGER: Yes, your Honor.

11 THE COURT: Why would Judge Reed be sitting on a
12 certification request?

13 MR. HAGER: Because we filed motions for
14 certification in May and June for injunction classes to stop
15 foreclosures and prevent the sale of bank REOs in those --

16 THE COURT: Do other counsel understand my
17 question? Can anybody answer that question, please?

18 MR. STERN: Yes, your Honor. I believe the
19 question is, if there's been a request for a class
20 certification in Lopez -- I'm sorry, Ariel Stern for the
21 record.

22 If there's been request for a class certification in
23 the Lopez and Goodwin cases which were the other cases --

24 THE COURT: Can you cite the numbers, please.

25 MR. STERN: I will. Unfortunately, I don't have

1 them in front of me.

2 THE COURT: It's not my case, right?

3 MR. BEESLEY: Those are not your cases, those
4 are Judge Reed's cases.

5 As I understand the Court's question is why are the
6 plaintiffs seeking class certification in this case, and --

7 THE COURT: And, secondarily, why are they
8 seeking preliminary injunction in individual name cases if you
9 have pending motions for injunctive relief in potentially
10 certified class cases pending before another judge? What are
11 we doing here?

12 MR. HAGER: I can answer that, your Honor. The
13 reason is --

14 THE COURT: I tried to ask you, but you couldn't
15 answer.

16 MR. HAGER: Everyone who is in this case is
17 about to lose their home, and the processing of the motions
18 with regard to the class injunction would not save their
19 homes.

20 THE COURT: Why not?

21 MR. HAGER: Because the timing --

22 THE COURT: Are they named plaintiffs in Judge
23 Reed's cases?

24 MR. HAGER: No, they are not, your Honor.

25 THE COURT: So you filed with named plaintiffs a

1 case before Judge Reed, number one.

2 MR. HAGER: Yes.

3 THE COURT: And where else? Just before Judge
4 Reed?

5 MR. HAGER: They're before Judge Reed, the
6 ones --

7 THE COURT: And you're referring to that as the
8 Lopez case?

9 MR. HAGER: And that's CV -- 3:09-CV-180.

10 THE COURT: 3:09-CV-180.

11 MR. HAGER: And 3:09-CV -- I believe 309 is the
12 Goodwin case.

13 MR. STERN: And, your Honor --

14 THE COURT: Those are both pending before Judge
15 Reed, and one seeks certification as a class action for
16 injunctive relief and the other for damages.

17 MR. HAGER: No, they both seek separately in
18 each case on behalf of different classes. One is to stop
19 foreclosures on MERS deeds of trust, the other case is to
20 stop -- because the other case is the first one that involved
21 REOs -- is to prevent the sale of REOs acquired from
22 foreclosure sale on MERS deeds of trust.

23 THE COURT: And you requested injunctive relief
24 before Judge Reed.

25 MR. HAGER: Yes.

1 THE COURT: Why shouldn't I just transfer this
2 case to Judge Reed then? Why are you seeking -- are you just
3 playing judges off one against the other or what?

4 MR. HAGER: Absolutely not, your Honor.

5 The problem is that everybody here and everybody in
6 this case is about to lose their home, and --

7 THE COURT: But they are potential class members
8 of actions you already filed and assigned to Judge Reed. Why
9 do you need my opinion here?

10 MR. HAGER: Because if you don't enter an order
11 stopping these sales, they will lose their homes before a
12 class injunction can be entered.

13 MR. STERN: If I could add to this, Judge, there
14 is actually more cases than just the Lopez and the Goodwin
15 case, there's a total in Nevada, including this case, of four
16 cases. There's also a case, the lead plaintiff is Green.
17 There are two cases in Arizona, one of which has already been
18 disposed --

19 THE COURT: All filed by this same counsel?

20 MR. STERN: Yes, your Honor.

21 MR. HAGER: That's correct, your Honor.

22 MR. STERN: And there's one case pending in
23 California so there's actually a total of seven cases.

24 THE COURT: I see no reason why I shouldn't
25 decline jurisdiction here and transfer this to Judge Reed.

1 MR. HAGER: Your Honor, there's one sale that's
2 scheduled for today that is before your Honor in this motion,
3 and the Green case that counsel just referred to was filed
4 after the class motions in the other case --

5 THE COURT: And if I enter an order, of course,
6 you can appeal denial or granting of preliminary injunction,
7 is that not binding on Judge Reed and the other judges when
8 they get around to considering the same question?

9 So, in other words, are you not simply filing in a
10 number of different forums just seeking a judge who will give
11 you the relief?

12 MR. HAGER: No, absolutely not, your Honor.
13 These clients that I represent in this case will lose their
14 homes --

15 THE COURT: You've said that about four times,
16 but you've never answered my question. Why is this before
17 four or five different judges? Same question.

18 MR. HAGER: These clients --

19 THE COURT: Same binding ruling.

20 MR. HAGER: These clients are not before any
21 other judges.

22 THE COURT: They are not potential class members
23 before Judge Reed?

24 MR. HAGER: They are.

25 THE COURT: They are.

1 MR. STERN: Judge, just so that the record is
2 clear on this, your Honor, this case was actually initially
3 assigned to Judge Reed. There was an order transferring it to
4 you.

5 THE COURT: That's not possible. It was --
6 there was an order transferring it to Judge Sandoval?

7 MR. STERN: I believe --

8 THE COURT: Or did Judge Reed directly recuse
9 and I accepted reassignment?

10 MR. STERN: I believe it's the latter. I don't
11 believe he recused himself. I think there was simply an order
12 transferring it, and I think it was after Judge Sandoval had
13 announced his resignation.

14 THE COURT: When Judge Sandoval resigned, the
15 next day I received assignment of all of his cases. Are you
16 aware of that?

17 So it either had to come through that reassignment
18 order the day after he resigned, or it had to come by way of a
19 recusal order provided to the clerk requesting reassignment,
20 and I would have accepted reassignment being drawn next out of
21 the hat by the clerk.

22 MR. STERN: I don't have the docket in front of
23 me, Judge, but my recollection is that Judge Hunt issued an
24 order transferring the case from Judge Reed to you.

25 THE COURT: Directly.

1 MR. STERN: I don't recall it ever having gone
2 through --

3 THE COURT: Then that would have been a recusal
4 type transfer.

5 MR. HAGER: There was no recusal, it was just a
6 transfer, your Honor.

7 THE COURT: Just doesn't happen, counsel. It
8 doesn't happen that way in our district that way; doesn't
9 happen.

10 MR. HAGER: I'm familiar with when a judge
11 recuses himself, I practice a lot in this district, your
12 Honor.

13 THE COURT: Okay.

14 MR. HAGER: And --

15 THE COURT: All right. So I am on the verge of
16 declining jurisdiction in this matter. I'm going to hear
17 briefly the merits, but very likely I'm going to decline
18 jurisdiction.

19 Let me ask a few other venue and jurisdiction
20 questions.

21 So you have cases pending before other judges. Are
22 you aware, also, that the bankruptcy judges have been
23 following an order -- in other words, Judge Riegler entered an
24 order, and I'm assuming you're aware of that, and the other
25 judges have been following it -- basically on the issue of

1 standing.

2 That's not the issue here, I appreciate. You go
3 much further than that, you say that whenever MERS is
4 involved, basically, there's an invalidity of the deed of
5 trust.

6 But Judge Riegle entered an order which said MERS
7 does not have standing to bring a motion to lift stay in
8 bankruptcy court, not declaring the deed of trust invalid,
9 and, of course, the rationale and reasoning was
10 understandable, it was because MERS could never answer the
11 question who holds the note, who are we supposed to agree with
12 regarding the lift stay motion or payments.

13 That order is on appeal, and the district court has
14 set oral argument, I believe some time in November. I'm one
15 of the judges. We're hearing it in almost *en banc* fashion.
16 There's about four or five district court judges that have --
17 were you aware of this, sir?

18 MR. HAGER: I am.

19 THE COURT: -- have set an *en banc* appeal. They
20 are their separate cases, they have not been consolidated but
21 oral argument and briefing has been consolidated. The judges
22 will all sit together and ask their thorny questions and then
23 will issue their own opinions.

24 But, of course, there will be -- and you should all
25 know, there will be an attempt to coordinate those opinions,

1 but they are separate cases, and that's set in November, and
2 that's on the issue of whether MERS has standing to request a
3 lift of stay in bankruptcy court.

4 The remedy, of course, one very strong remedy your
5 clients and others have, is to file a bankruptcy because the
6 bankruptcy judges are giving relief, and when MERS is the
7 party requesting relief, the bankruptcy judges, as I
8 understand it, are not recognizing their standing to request
9 that relief.

10 So there is a remedy in bankruptcy court, which will
11 be one of the questions here in a few minutes as well, whether
12 I should proceed where you do have another remedy.

13 So you're aware of that appellate proceeding.

14 MR. HAGER: I am, your Honor.

15 THE COURT: And you have informed me of at least
16 three or four, maybe five other cases pending before other
17 judges where you're seeking relief for potentially either the
18 same named parties or the same named parties as potential
19 members, prospective members of a class to be certified before
20 Judge Reed.

21 MR. HAGER: That's correct.

22 THE COURT: Okay. And the last question not yet
23 answered for me is why I have one of Judge Reed's cases. In
24 other words, if all of these were originally assigned to him,
25 why would they carve out just one and send it to me? And

1 nobody can answer that one. Okay.

2 MR. HAGER: I will say, your Honor, that the
3 Green case that counsel just referred to was filed in this
4 court on behalf of, I believe, 27 named plaintiffs after the
5 motion for class injunction was filed, and each of the
6 plaintiffs in that case received a temporary restraining order
7 and is protected now by an order of the court preventing
8 foreclosure or sale of their REOs. So --

9 THE COURT: And it's not class certified so it
10 only protects the named plaintiffs.

11 MR. HAGER: And that's what we're seeking to do
12 here today, your Honor.

13 THE COURT: That was going to the last
14 jurisdiction question. Why have you joined so many named
15 plaintiffs here in this case?

16 I can perceive one very strong common question, and
17 that is the involvement of MERS, but otherwise I'm not sure I
18 see common questions.

19 There are various grounds asserted, but it seems to
20 me that they all turn on factual questions that are central to
21 an individual plaintiff's case, you know, was there wrongful
22 foreclosure in that case other than by way of MERS's
23 involvement, was there unjust enrichment, conspiracy to commit
24 wrongful foreclosures and frauds other than MERS.

25 Of course, to the extent you're saying MERS

1 instigated a conspiracy, I understand that, but otherwise that
2 individual lenders -- not lenders to the whole group of named
3 plaintiffs here, individual lenders are alleged to be part of
4 that conspiracy, there are questions that pertain only to that
5 individual plaintiff's case.

6 MERS as a beneficiary is a common question.
7 Separation of the promissory note from deed of trust, that
8 seems to be a common question. The role as lenders, no.

9 Let's see. The documentation of rights under deed
10 of trust, you know, I don't know why you would have joined so
11 many plaintiffs for that question.

12 So that's a second question, why do we have, under
13 federal pleading rules and joinder rules, all of these
14 plaintiffs named in the same complaint.

15 MR. HAGER: Because they all have MERS deeds of
16 trust, and you're going to see that there is one pattern with
17 regard to foreclosures in connection with those MERS deeds of
18 trust that applies to all domestic foreclosures --

19 THE COURT: All right. Let's let you go ahead
20 with the merits argument, and I want everybody to
21 understand -- I apologize for stopping you, it's what every
22 federal judge has to do. We are courts of limited
23 jurisdiction, we're not the general state courts, and cases
24 are only supposed to come to us when it involves federal law,
25 and we always ask these questions, are you in the right court.

1 So I do apologize, but that's the introduction I
2 have to -- I still don't have complete answers to those
3 questions, but, of course, we have to consider them at the
4 first of the argument.

5 Let's proceed, now, to the merits, and I'll let you
6 present the issue, please.

7 MR. HAGER: Thank you, your Honor.

8 As I was saying, as to all but seven homes,
9 everybody is similarly situated, and it's a simple analysis
10 under state law that they do not -- these defendants do not
11 have the power to foreclose.

12 THE COURT: Now, similarly situated, some of
13 these plaintiffs have not yet been foreclosed upon, some have
14 been foreclosed upon, some have not yet had notice of
15 foreclosure?

16 MR. HAGER: Everyone in this motion is in
17 foreclosure or has already lost their house allegedly as an
18 REO.

19 THE COURT: Okay. So foreclosure has already
20 been concluded and their title destroyed, of course, for some
21 of the cases subject to lis pendens or your right to have the
22 declaration that the foreclosure was wrongful.

23 Are there any other categories of parties in
24 different circumstance? Some have filed bankruptcy or no?

25 MR. HAGER: No.

1 THE COURT: None of them.

2 All are in default in their payments.

3 MR. HAGER: All are behind in the terms of the
4 note.

5 THE COURT: All are not subject to or have not
6 had availed to them a modification agreement by the lender.

7 MR. HAGER: No.

8 THE COURT: None, none of them.

9 MR. HAGER: No.

10 THE COURT: And none have entered into a --
11 either a stand-still agreement with the lender, we won't --
12 or, through you, we will not foreclose, we will not proceed to
13 foreclosure.

14 MR. HAGER: I don't believe so, your Honor.

15 THE COURT: Okay. All right.

16 MR. HAGER: Your Honor, NRS 107.080(2)(b)
17 authorizes the beneficiary, the successor in interest to the
18 beneficiary, or the trustee, to commence nonjudicial
19 foreclosure in the State of Nevada by issuing a notice of
20 default and election to sell the property and providing proper
21 notice of that notice of default.

22 The trustee, the alleged trustee on all but seven of
23 the homes that are the subject of this motion is not the
24 trustee in the deed of trust, and there is no documentation in
25 the record that they are authorized to act as a trustee for

1 anyone.

2 THE COURT: Now, we're talking about MERS here.

3 MR. HAGER: No, we're talking about under Nevada
4 state law, your Honor, 17.080(2)(b), nonjudicial foreclosure
5 statute --

6 THE COURT: Right.

7 MR. HAGER: -- it specifies who can initiate a
8 nonjudicial foreclosure.

9 THE COURT: Right.

10 MR. HAGER: The beneficiary, the successor
11 beneficiary or the trustee. The trustee is designated on the
12 deed of trust.

13 None of these defendants, with the exception of
14 seven homes, and I'll talk about that later, it requires more
15 analysis, but with regard to all the other homes that are the
16 subject of this motion today, none of these defendants are
17 designated as a trustee or have presented anything in the
18 record to reflect that they are authorized to act in any
19 fashion as a trustee or to commence a foreclosure.

20 The entity alleging to be the servicer or
21 subservicer is also a stranger to the deed of trust and the
22 loan documents. The entire factual record herein fails to
23 reflect that they have any authority whatsoever to act in
24 connection with any of these loans.

25 Judge Reed and Judge Sandoval both previously ruled

1 that the two issues to be heard at preliminary injunction
2 hearings on these cases, these foreclosure cases in this
3 court -- and Judge Reed and Judge Sandoval issued a combined
4 eight temporary restraining orders enjoining foreclosures on
5 MERS deeds of trust since October of last year.

6 THE COURT: In this case, Judge Reed issued a
7 temporary restraining order?

8 MR. HAGER: No, not in this case.

9 THE COURT: 3:09-534.

10 MR. HAGER: Are you talking about this Dalton
11 case we're here on today?

12 THE COURT: That's what we're here on, yes.

13 MR. HAGER: No, I'm referring to what the issues
14 have been that those two judges have identified for --

15 THE COURT: Was there a TRO request made and
16 considered in this case, 534?

17 MR. HAGER: Only to you, your Honor, and you
18 denied it.

19 THE COURT: Okay.

20 MR. HAGER: The two issues specifically
21 identified by Judges Reed and Sandoval before the Court at a
22 preliminary injunction hearing such as this one today wherein
23 the plaintiffs sought to stop foreclosures or prevent the sale
24 of REOs involving MERS deeds of trust are, one, whether the
25 appropriate parties are seeking to foreclose on the various

1 properties, and whether those parties gave the necessary
2 notice, and, two, whether the originating lenders
3 unscrupulously targeted people who could not repay the offered
4 loans just to obtain the loan origination fee.

5 In this case, in document number 91, I attached some
6 of those TROs issued by Judge Reed and Judge Sandoval. I
7 don't know if I attached an order that was issued by Judge
8 Hicks with regard to two REOs, but those TROs that I just
9 referred to set forth those issues as being the issues that
10 Judge Reed -- Judges Reed and Sandoval said would be the
11 issues addressed at a preliminary injunction hearing such as
12 this.

13 Nevada law as it applies to the record in this
14 motion and as it relates to the first issue, whether the
15 appropriate party is -- that seeks -- whether the appropriate
16 party is foreclosing, is seeking to foreclose on the various
17 properties, is dispositive of the motion today with the
18 exception of seven homes which, again, I'll get to later in my
19 argument.

20 Nevada law has not changed since the creation of
21 MERS. The statute I just referred to with regard to who is
22 the entity that has the power to initiate a nonjudicial
23 foreclosure is the same as it was before the existence of
24 MERS. Banks and their foreclosure mills cannot argue --
25 cannot agree among themselves to take people's homes in

1 violation of Nevada law.

2 There is no mention of MERS in the NRS that governs
3 nonjudicial foreclosures, but there are specific provisions
4 regarding the appropriate parties who are authorized to
5 foreclose and the notice that those parties, and only those
6 parties, are required to give.

7 So as to all but the seven homes I'll talk about in
8 a minute, the subject of today's hearing on the face of the
9 entire record before this Court, the alleged trustee seeking
10 to foreclose is a stranger to the loan, is not the trustee of
11 record before the Court and is not, quote, an appropriate
12 party to foreclose.

13 Furthermore, the parties seeking to foreclose on all
14 of those homes I just mentioned, not being an appropriate
15 party to foreclose under NRS 107.080(2)(b), the necessary
16 party -- the necessary notice by the appropriate party has
17 never been given.

18 So both the appropriate party to foreclose provision
19 of the Nevada law with regard to nonjudicial foreclosures has
20 not been met, and the notice requirement by the appropriate
21 party has not been met. Those are the two issues that Judges
22 Reed and Sandoval said would be the first issue considered at
23 these preliminary injunction hearings.

24 A determination that the foreclosure on every loan
25 the subject of this hearing today in which the same trustee is

1 named on the deed of trust as in the notice of default, the
2 record herein provides no evidence to the contrary that the
3 appropriate parties are not seeking to foreclose, and
4 therefore the appropriate parties did not give the necessary
5 notice.

6 As to all the deeds of trust in which Recontrust was
7 not named as the trustee, we need not look to the law of
8 agency or UCC or the analysis in *In Re: Hawkins*, the arguments
9 of the qualifications of experts, or the criticisms that we
10 did not file a more lengthy motion that some of the defendants
11 allege, or the competency of the declarants for Countrywide,
12 Wells Fargo and others to assert facts based on what they
13 heard around the office. All we need to do is look at the
14 record in this case to determine that these parties claiming
15 to be the trustees have no connection whatsoever to the loans.

16 Apparently realizing that they cannot prevail on the
17 first issue of whether the appropriate parties are --

18 THE COURT: If that's the case, why do you need
19 an injunction? In other words, let them do their foreclosure
20 and then file a lawsuit in state court dealing with state law
21 that the foreclosure had no effect.

22 MR. HAGER: Because my clients would be
23 homeless, and, under Nevada law, the loss of real estate is
24 irreparable harm.

25 THE COURT: But that's not a reason for filing a

1 petition with the president of the United States or with the
2 diplomat from France, that's an argument for filing a
3 bankruptcy petition, for filing an action in state court or
4 allowing the foreclosure to go ahead and suing then for
5 wrongful foreclosure. Why is that a justification for filing
6 in federal court?

7 You have a remedy. In other words, bankruptcy gives
8 an automatic stay. You don't even have to come in here and
9 listen to all of the crazy questions of a judge. You get an
10 automatic stay like that. Why should I entertain this
11 preliminary injunction when you have a remedy?

12 MR. HAGER: Because you have jurisdiction, your
13 Honor, under diversity jurisdiction. Because the appropriate
14 remedy for a homeowner to take when somebody with no authority
15 to foreclose on their home says I'm going to sell your house
16 on the courthouse steps is to come to court and prove and say
17 prove you have the right to foreclose, that's why.

18 This is exactly what I'm obligated to do on behalf
19 of my clients and exactly what they should do is come to court
20 and say this rogue entity that is seeking to take my house has
21 no authority to do so, stop this.

22 THE COURT: Okay.

23 MR. HAGER: Apparently realizing that they
24 cannot prevail on the first issue of whether the appropriate
25 parties are seeking to foreclose, the defendants now after --

1 by my count, 48 homes being protected by this court by court
2 orders right now that they cannot foreclose --

3 THE COURT: By "this court," meaning in the
4 other cases?

5 MR. HAGER: In the other cases, your Honor.

6 -- now have alleged that instead of in those cases
7 where 47 of the homes there is no bond posted, in one of the
8 homes there's a \$500 bond posted, now the defendants appear to
9 have shifted their position that they took before Judge Reed,
10 Judge Sandoval and Judge Hicks who issued those orders
11 protecting them, 44 of those homes, four of them your Honor
12 has protected by stipulation with Citibank, their tactics now
13 appear to be to submit declarations to ask your Honor to
14 require the posting of a bond in such a huge amount that even
15 though they have not shown any right -- they have any right
16 whatsoever to foreclose, the defendants will, nonetheless, be
17 able to take and sell the homes because the plaintiffs do not
18 have enough money to post a huge bond to stop them.

19 This and other arguments by the defendants is
20 essentially as follows: Even if we have no right to
21 foreclose, we want such a large bond to be required that the
22 homeowners are unable to post that bond, and we get to take or
23 sell the home because we started a foreclosure.

24 The other argument that is similar is we declare
25 that we are the servicers although there are no documents in

1 the record to support that assertion, none. We declare we are
2 the servicers, and, as the self-proclaimed servicers, we have
3 the power to commence foreclosure although, again, there are
4 no documents in the record to support that assertion either.

5 It is not too much to ask that before taking
6 people's homes, making them homeless, before taking millions
7 of homes, the entity seeking to do so present documentation to
8 the Court that they are who they say they are and that they
9 have the right to foreclose.

10 These are not verbal contracts, these are written
11 agreements, which leads to the next issue I'll address. Have
12 these loans been transferred by the original lender on the
13 deed of trust, and what is the effect of the transfer of that
14 security interest, what is the effect of that transfer on the
15 security interest.

16 As I understand the defendants' oppositions to the
17 motion being heard here, only one loan of all the loans at
18 issue today, your Honor, is alleged to still be held by an
19 entity identified as the lender on the deed of trust.

20 THE COURT: You're asking, of course, for
21 invalidation of the security interest, right?

22 MR. HAGER: With regard to all the homes but
23 seven that name Recontrust on the deed of trust, we don't even
24 need to get to that issue, your Honor. The entity seeking to
25 foreclose is a complete stranger to the transaction.

1 THE COURT: Well, you're here for equitable
2 relief.

3 MR. HAGER: Yes.

4 THE COURT: A preliminary injunction is
5 equitable relief. The Court sits in equity when that happens.
6 And you certainly appreciate the tremendously inequitable
7 position you're presenting, don't you?

8 MR. HAGER: I don't, your Honor.

9 THE COURT: You don't. Well, these people
10 received loans --

11 MR. HAGER: They did.

12 THE COURT: They didn't buy the homes with total
13 cash. If they had, of course, they wouldn't have the problem.
14 We all buy our homes with credit. And they gave deeds of
15 trust, and moneys, hard-dollar moneys, were put into the deeds
16 of trust and the notes not so that the lender could own the
17 home or have any interest in the home or its profit or loss,
18 but a deed of trust taking a portion of the title. That's
19 what a deed of trust is.

20 You're asking as part of this lawsuit not only to
21 declare that they have no ability, present ability, to
22 foreclose or to recognize their interest, you are also asking
23 in the lawsuit to invalidate their security interest, make
24 their loans totally unsecured.

25 Do you appreciate, I'll ask once more, the

1 inequitable result you're requesting?

2 MR. HAGER: I don't believe that it's
3 inequitable, your Honor. If the party seeking to foreclose
4 has no right to foreclose, then it would be like me
5 foreclosing on somebody's house merely because --

6 THE COURT: You're absolutely right. If John
7 Doe came off the street and said he wanted to foreclose on my
8 house, you're absolutely right, but my response would be to
9 laugh at him. If you have no interest in the deed of trust,
10 give me any notice you want, I could care less. Don't try to
11 evict me from the home, and that would be my response.

12 But what you're saying goes further than that. What
13 you're asking is every deed of trust which cited MERS,
14 wrongfully or rightfully, they are forever barred from
15 designating another agent, they're forever barred from
16 foreclosing on their deed of trust interest, and, more
17 importantly, also part of the complaint, their security
18 interest is gone, and, again, you don't perceive an
19 inequitable result in that request?

20 MR. HAGER: The law is clear with regard to how
21 a security interest remains intact. If -- and if we look at
22 the landmark decision by the Kansas Supreme Court, not a
23 particularly activist court, a very conservative court, and we
24 look at their analysis where they say when the loan is
25 transferred, there has to be an agreement between that

1 transferee and MERS for MERS to act as a nominee in order for
2 that security interest to remain intact, that doesn't mean
3 that somebody can come before a court and say I put up this
4 money, these people intended this to be secure, I want the
5 Court to impose an equitable secured interest on that
6 property, we agree that would be appropriate, absolutely, but
7 we don't have that here.

8 What we have here is exactly what your Honor
9 indicated, a John Doe, a rogue entity, saying I want to
10 foreclose on this house, in fact, I am going to foreclose on
11 your house, and I'm going to sell it on the courthouse steps
12 potentially to a BFP so you can never get it back.

13 THE COURT: The reason why I've asked over and
14 over about your bankruptcy remedy is because in the bankruptcy
15 court we balance the equities house by house.

16 Okay, John Doe has filed a bankruptcy petition, he
17 or she is five months in arrears. The bank is asking me to
18 lift the stay so that the bank can foreclose.

19 Now, let me consider the equities on both sides.
20 The debtor has absolutely no ability in one case to make any
21 payments going into the future. Sounds to me like I ought to
22 lift the stay and let them foreclose.

23 In another case, the debtor says, Judge, I can't
24 make the back payments, but I can make half the payment for
25 two months and then the full payment going forward as soon as

1 I get another job, and the judge weighs the equities and says,
2 yeah, the stay ought to remain in place, I'll give you a
3 chance to reorganize your debt and tell the bank forcefully at
4 the judge's direction, you'll take the payments over time
5 instead of immediately and now.

6 In other words, case by case the judge can look at
7 the equities and decide this one needs to foreclose -- to be
8 foreclosed, this one, the debtor deserves another chance.

9 Under the standards specified here, you're giving me
10 one great big ball of wax because MERS was named on all these
11 deeds of trust, regardless of the equities in the various
12 cases, one case already foreclosed, one case two months in
13 arrears, no big deal, one case two years in arrears, a big
14 deal, all of them are in the same basket. Judge, because MERS
15 was designated on the deed of trust, we want you to stop the
16 foreclosure sales pending the lawsuit going, what, two years
17 into the future plus two years appeal time, and we want you to
18 invalidate the security interest in some cases.

19 So the old saying, in order to get equity, you must
20 come in with equitable presentation, applies, and I'm not sure
21 I perceive the equity of your request.

22 MR. HAGER: Your Honor, the scenario you just
23 described --

24 THE COURT: Why don't you offer it with a bond?
25 Why don't you offer it with a proposal for each of these

1 folks? Judge, disregard the past payments, please, but we
2 will make present payments going into the future while this
3 case is pending. Why don't you present any equitable solution
4 along with your request, stop all these foreclosures for an
5 indefinite period?

6 MR. HAGER: Let me respond to the Court's first
7 comment first. The scenario you described where the bank
8 comes in, the court looks at -- the bankruptcy court looks at
9 the equities, we don't have that here.

10 We don't have a party before the Court that has a
11 right to foreclosure. We don't have a party before the Court
12 that stands to lose a dollar on this deal that these
13 plaintiffs, these movants, owe any money to. There's nothing
14 in the record to reflect that. That's why they're all
15 similarly situated, and that's why it can all be dealt with --

16 THE COURT: I would totally agree with you if
17 that's the case, if that's the law and the ultimate decision
18 of the judge or the jury, terrific, but, in which case, you
19 don't need a preliminary injunction.

20 At the end of this case, if you're right, the Court
21 will declare in any foreclosure that's already occurred, or
22 that occurs during the pendency of the case, is invalid, it
23 did not effect a transfer of the title of the property from
24 the debtor, and you'll have your relief.

25 If you're wrong, and they do have the right to

1 participate or give notice or designate somebody else to give
2 notice of a foreclosure, then, of course, you should not have
3 received the preliminary injunction in the first place anyway
4 unless you provided bond or other undertaking to secure
5 against the damage they sustained during the pendency of the
6 case.

7 Do you understand that?

8 MR. HAGER: Well, but the problem is, under NRS,
9 a purchaser at a foreclosure sale is a bona fide purchaser,
10 and so I don't know that those bona fide purchasers would
11 necessarily agree at the time of trial when the Court --

12 THE COURT: Not in a totally invalid foreclosure
13 sale. If XY John Doe walks off the street and says to you I'm
14 foreclosing on your home, here's a notice, and then he
15 conducts a sale on the courthouse steps, and somebody buys it,
16 a court has the right to say, sorry, bona fide purchaser, you
17 bought nothing. Right?

18 MR. HAGER: Well, I guess we could take that
19 approach, your Honor, and then have other people that are
20 harmed out there rather than preventing these entities who
21 have no right to foreclose from taking these houses at this
22 time.

23 It seems to me the most efficient way and the
24 fairest way to deal with this is, if somebody who has no right
25 to foreclose, as your Honor just indicated, we see that today

1 in this record, it appears to me a relatively simple matter to
2 say this foreclosure should be stopped. That's what courts
3 are for.

4 And, your Honor, with regard to they could just go
5 file bankruptcy, that's a -- that imposes a hardship and also
6 a stigma on my clients that, if there's an entity that's
7 seeking to foreclose on them, they shouldn't have to suffer
8 that experience and incur that expense and have a bankruptcy
9 on their record and have that affect their credit.

10 If they are being foreclosed on --

11 THE COURT: Their credit is already affected.
12 They're two months, six months in default on payments, most of
13 the time not at their fault, I would add. I served 20 years
14 on the bankruptcy court in this federal district, and I
15 listened to those cases all the time. My leanings are towards
16 the debtor, and case by case I considered those issues.

17 Where it was just totally impossible, of course, I
18 lifted the stay and let the creditor foreclose. In those
19 cases where they had a chance to reorganize, I said no, I'm
20 sorry, bank, you're stuck here with me for awhile.

21 So I know the equities involved, but my concern is
22 you're not presenting an equitable request. It's not like --
23 like I always received on the bankruptcy bench, case by case,
24 I always received an equity-to-get-equity proposal. It was a
25 proposal, Judge, we can't make the payments for two or three

1 months, but then we can make the full payment. Okay, let's
2 give you a chance, or, Judge, we can't make any payments going
3 into the future, in which case I said, okay, I appreciate
4 that, bank, you have to be allowed to foreclose.

5 There's no -- these folks, I'm sorry to say, and I'm
6 not -- I'm not even the messenger here, they've already
7 suffered the stigma of missing payments, again, I certainly
8 would agree probably mostly not at their fault because of loss
9 of jobs, medical expense, whatever else it is.

10 So that's why I keep asking the question, and that's
11 where I'm coming from, right, 20 years as a bankruptcy judge,
12 I always ask that question, all right, you want to keep the
13 house, what can you tender by way of an equitable offer.

14 But I -- but you're not perceiving that, and I'm not
15 perceiving your position, and that's the problem.

16 MR. HAGER: And I think one of the reasons may
17 be, your Honor, because whenever you explained to me your
18 experience and your position, you keep referring to "the
19 bank." This is not "the bank," this is -- these are rogues
20 that have no connection to the loan.

21 THE COURT: Then that's purely a legal question,
22 and, of course, I'll address that, and I appreciate your
23 arguments on that one.

24 MR. HAGER: It's not just a legal question, it's
25 a matter of the entire record in this motion, your Honor.

1 They're not on the deed of trust as the trustee. There's no
2 documentation supporting that they have any authority
3 whatsoever to act on that deed of trust, yet they're trying to
4 take these homes.

5 It's not the situation you just described, it's
6 not -- it's not vis-à-vis that the -- the lienholder, the
7 holder of the note, that's not the situation at all, or even
8 somebody who has any evidence in this record showing that
9 they're authorized to act as the agent of the bank, none.
10 There is none in this record.

11 So in that scenario, your Honor, and I -- I
12 understand what you're saying, and I'm factoring that into
13 what I'm saying here, but that's what's completely different
14 about what we're here on today than what you're talking about
15 in terms of when you're dealing with the actual parties in
16 interest, the bank and the borrower. There is no bank here,
17 there is nobody on behalf of the bank here, there's nobody
18 authorized to act on behalf of the lien --

19 THE COURT: Realistically speaking, it's not the
20 bank, it's the thousand people that have shares in a fund that
21 own this loan, right?

22 MR. HAGER: And if it is, where's the authority
23 for these entities to act on their behalf? I mean, we can't
24 just overlook that.

25 THE COURT: Then what is sufficient for the

1 authority, a signed document by all 1,000 shareholders?

2 MR. HAGER: Some document, some document, but we
3 have none. We can deal with that at another day, your Honor,
4 and we may very well have to, but today with my clients who
5 are about to lose their homes, there is nothing in the record.

6 And I -- I'm not trying to avoid your question, your
7 Honor, I'm trying to deal with --

8 THE COURT: No, that's okay, they'll have a
9 chance to respond to that. They'll tell me what documentation
10 exists, and you can reply to that.

11 MR. HAGER: But it's not in the record, and
12 that's what we're dealing with.

13 And I know we had intended to call an expert
14 witness, and we were told this is not an evidentiary hearing,
15 and so, based on that, we came prepared to argue based on what
16 the record reflects, and that's what I'm doing, and what I'm
17 saying is there that is nothing in the record with regard to
18 these foreclosures with the exception of those loans, those
19 deeds of trust that name Recontrust as the trustee, seven
20 homes.

21 With regard to the rest of them, there is no
22 connection, no documentation reflecting any authority to act
23 other than the self-proclaimed I'm the servicer and the notice
24 of default, notice of sale or trustee's deed upon sale signed
25 by an alleged trustee that is not connected to this loan in

1 any fashion.

2 As I said before, there is only one allegation, one
3 loan that is alleged to be owned by anybody in this case, that
4 is the First Horizon deed of trust, First Horizon loan where
5 First Horizon is named as the lender in the deed of trust, but
6 it is not First Horizon that states it is the record owner of
7 that loan, it's MetLife, and MetLife doesn't say how they know
8 that First Horizon owns that loan.

9 You would think that if First Horizon has a
10 financial stake in this and actually owns the loan, then they
11 would come forward and say MetLife is authorized as our agent
12 to say something, or they own the loan, but for MetLife to
13 make that kind of representation would be like me saying that
14 the Grand Sierra is owned by MGM because I remember back in
15 the '70s it was and I didn't know it was sold since then.
16 MetLife is not competent to testify whether First Horizon
17 transferred the loan.

18 Now, on that loan and that foreclosure, it is
19 irrelevant whether First Horizon does or not own the loan
20 because the record reflects that the foreclosure was commenced
21 by an alleged trustee not named on the deed of trust and a
22 trustee, alleged trustee, in which there's nothing in the
23 record to showing that they're authorized to act as a trustee
24 to commence a foreclosure which is a requirement of NRS.

25 What is telling about the oppositions is that none

1 of the defendants claim that they own any of the loans, none
2 of them do.

3 Bank of America for its affiliate Countrywide says
4 it services 8,950,407 loans in the United States, but it does
5 not allege to own one loan.

6 Wells Fargo says it services I don't know how many
7 million loans, and it says it owns some.

8 Bank of America, Wells Fargo, Countrywide and the
9 other defendants in their joint oppositions state that the
10 requested preliminary injunction, quote,

11 "Is not in the public interest because the
12 requested preliminary injunction could adversely
13 impact the loan owners many of whom are third parties
14 not before the Court."

15 Well, the parties before the Court are the parties
16 trying to foreclose so what they're saying is that the people
17 who own the loan are not involved in the litigation, and they
18 could be harmed if the preliminary injunction is issued. They
19 don't say they would, they say they could, hypothetically.

20 So those parties seeking to foreclose are only able
21 to foreclose if they are authorized agents of the owners of
22 the loan. It is the principle that designates an agent and
23 authorizes the agent to act. Only the principal can create
24 agency status. An entity cannot become an agent merely
25 because it says it's so.

1 One would think that the principal or owner of the
2 loan has a financial incentive to produce documentation in
3 this case, in this motion, establishing that the defendants
4 are authorized agents to commence foreclosure.

5 One would think that the self-proclaimed agents
6 would put something in the record to prove that the principal
7 has appointed them as an agent and authorized them to
8 foreclose. Instead, what we have is a record that reflects
9 nothing to prove that the defendants are the self-proclaimed
10 servicers or subservicers or trustees that they say they are.

11 I'll address the issue of the transfer of these
12 loans -- of these notes as it relates on those MERS deeds of
13 trust.

14 THE COURT: One factual question I have there
15 is, in every single one of these cases, MERS is designated as
16 a beneficiary and as, what, agent?

17 MR. HAGER: Nominee.

18 THE COURT: Nominee.

19 MR. HAGER: Of the lender.

20 THE COURT: Okay. So that's the technical
21 status they're given in the deed of trust.

22 MR. HAGER: Yes.

23 THE COURT: Beneficiary and nominee of the
24 lender; not agent, the word used is nominee.

25 MR. HAGER: It's nominee, your Honor.

1 THE COURT: Okay. And in every one of these
2 cases MERS -- I am assuming to avoid the bankruptcy ruling and
3 problem, MERS has redirected, for example -- what are they
4 called, the reconstruct -- reconstruct, for example, to
5 designate them to notice the sale? Is that what's happening
6 in each of these cases, or are they all different?

7 MR. HAGER: There's nothing in the record here
8 to reflect that even happened. But you're correct, your
9 Honor, in terms of how these foreclosures have morphed over
10 time as a result of MERS being found to not be a beneficiary
11 in Missouri, that the Arkansas Supreme Court -- Kansas Supreme
12 Court, of course, says that not only are they not the
13 beneficiary, but, as the nominee, once the note is
14 transferred, absent an agreement between that transferee and
15 MERS, that MERS is acting as the nominee for that transferee,
16 the security interest is destroyed. That's the law in Kansas
17 now under that Kansas Supreme Court case.

18 But getting back to what the Court just said, and
19 that's the next point I was going to make, MERS is
20 simultaneously stating in its deeds of trust that it is a
21 nominee and it is a beneficiary. A beneficiary is a
22 principal. A nominee is, at best, an agent. You can't be
23 both, but they try to cover all bases.

24 THE COURT: Well, sure, you can be both, and
25 there's lots of cases where you are both, for example, in

1 joint loans where -- you know, I'm handling a big case down
2 south, bless their hearts, where 6,000 people own just an
3 interest in a note.

4 So you can be both beneficiary or partial
5 beneficiary and nominee or agent or servicer. But your point
6 is well taken, and I understand it, here they are not
7 beneficiary at all even though they are so named in the deed
8 of trust.

9 MR. HAGER: And that's what *In Re: Hawkins* which
10 your Honor indicated familiarity with specifically found, and
11 reading from *In Re: Hawkins*, it says,

12 "MERS does not have standing merely because
13 it is the alleged beneficiary under the deed of
14 trust. It is not a beneficiary, and, in any event,
15 the mere fact that an entity is named beneficiary of
16 a deed of trust is insufficient to enforce the
17 obligation."

18 Your Honor, just because this is a nonjudicial
19 foreclosure state does not prevent the plaintiffs from raising
20 claims and defenses in court. That's the way to do it is to
21 come to court and challenge an unlawful attempt to take
22 somebody's home, and that's what we're doing today by this
23 request for an injunction.

24 The law of promissory notes governs the enforcement
25 of these notes. There is a requirement that transfer of

1 negotiable instruments must occur in specific ways governed by
2 the UCC.

3 As we see in this case, only one loan is alleged to
4 be owned by the originating lender, the rest, there's no
5 allegation that they're owned by the originating lender or who
6 owns them. So we know that they've been transferred, but we
7 don't know who the owner is.

8 And, you know, in all likelihood -- I don't know if
9 it's of record in this particular motion, but, in all
10 likelihood it is that they're been securitized, your Honor,
11 they're held by a number of investors in a mortgage-backed
12 security pool.

13 Nonetheless, for the purposes of today's hearing,
14 these entities seeking to foreclose must prove that they have
15 some authority to act on behalf of those owners of the note,
16 on behalf of the owners of the loan, before they can foreclose
17 on my clients' houses, before they can make them homeless,
18 your Honor.

19 A holder is entitled to enforce a negotiable
20 instrument. Holder is defined in the UCC. These defendants,
21 if they seek to enforce the rights of a holder, they must have
22 some documentation, present something in the record to show
23 that they have that right as an agent of the holder, and
24 there's nothing in this record to reflect that.

25 One of the effects of these MERS deeds of trust, and

1 if, in fact, some were to say that MERS is a beneficiary, is
2 you have two chains of ownership. You have the one that's
3 transferring with the note as it's transferred, and then you
4 have the one that MERS would hold as a beneficiary which is
5 why I said before they can't be both a nominee of the lender
6 when the note is transferred separately and remain
7 beneficiary. The security instrument, the deed of trust,
8 travels with the note.

9 The owner of a note owns the lien if the lien is
10 still valid. In order for an agent or servicer to enforce the
11 lien, that agent must prove it has authority delegated from
12 the principal. The principal has to reveal itself and
13 demonstrate the agency or servicer has authority, that's the
14 principal that has to establish the agency relationship, not
15 the agent declaring it, and we don't have any of that in the
16 record.

17 Your Honor, random people are showing up and
18 claiming unilaterally they have the right to foreclose on my
19 clients' homes without demonstrating that the principal has
20 delegated the power to them to enforce the security
21 instrument.

22 As nominee on the deed of trust, as agent for a
23 lender, MERS then attempts or purports to designate another
24 agent for foreclosure purposes. Well, if you're the agent of
25 the principal, you can't designate another agent for

1 foreclosure purposes, the principal has to do that.

2 So in its nominee-as-the-lender capacity, MERS
3 doesn't have the authority to designate another entity for
4 foreclosure purposes. They're an agent, they're not a
5 principal. Agents don't get to create agency status for
6 another principal, only the principal can do that.

7 Why don't they show the owner of the loans and that
8 they have the authority from the owner to foreclose? It's not
9 that hard, your Honor. It's not -- it's not too much to ask
10 for these defendants who want to take my clients' homes, sell
11 them on the courthouse steps, make them homeless, to produce
12 evidence that they have the authority to do so.

13 The defendants argue that since the defendants --
14 since the defendants allege that the movants are in default,
15 not the principal, not the bank, the defendants, it's not like
16 your bankruptcy court experience, your Honor, these strangers,
17 bystanders commenting from the sidelines who say, yes, they're
18 in default, not the party, not the bank, as your Honor
19 indicated in connection with your bankruptcy court experience,
20 the defendants argue that since the defendants allege the
21 movants are in default, the movants cannot ask the Court to
22 enjoin a foreclosure.

23 First, the allegation is that the movants are in
24 default, and it's only made by the defendants, and there is
25 nothing in the record to show that the defendants are anything

1 other than bystanders who have no authority to declare a
2 default, nor any information from the principal regarding an
3 accounting of the moneys received on the loans.

4 Third-party funds, \$11 trillion in federal funds so
5 far for toxic assets, these types of loans, the principal is
6 the one that can account for that, whether the Fed has already
7 paid them off, whether TARP or TALEF has already paid them off
8 if they're the property of the federal government, that would
9 be the principal, that would be the bank that would have that
10 information, not some bystander, not somebody that was merely
11 in a position to accept payments on behalf of a loan or claim
12 that they had a right to accept payments. But there's nothing
13 in the record to show that they did. That's what we have here
14 today.

15 Second, even if a homeowner is in default, which we
16 do not concede, that does not mean that an entity with no
17 right to foreclose gets the home. That's the issue before you
18 today, your Honor. Does an entity with no right to foreclose
19 get to take the home?

20 Does an entity that cannot account on behalf of the
21 principal for what amount, if any, is due on the loan get to
22 foreclose and say, oh, they're in default, your Honor, they
23 are not entitled to equity. The answer is no. It violates
24 principles of fairness, and it's also unlawful.

25 The argument they make is basically this: Since our

1 records show -- their records, whoever they are, strangers to
2 the loan -- that you are behind on your payments, even though
3 we cannot prove we have any rights to foreclose, we get to
4 take your home, and the Court can't stop us because we say you
5 are behind in your payments.

6 These are not the parties, if any, that have a right
7 to foreclose on these deeds of trust. These are not "the
8 bank," to use the Court's phrase. That's what happens with
9 MERS. That's what's common with them, but what you see is the
10 same pattern. Come foreclosure time, somebody who has no
11 connection to the loan is the one that's doing the
12 foreclosure, and that's what the record reflects in this case,
13 your Honor.

14 Your Honor, we ask that the Court grant a
15 preliminary injunction. Since the motion was filed, when
16 foreclosure has been completed there was allegedly conducted,
17 despite the fact that my law partner was there that day at the
18 courthouse, and they said that the house was not going to be
19 sold, the plaintiff then received a notice that, in fact, it
20 became an REO that day.

21 So it was not on the list, but since it's the honor
22 system at the courthouse, at the courthouse steps, there's no
23 one from the sheriff's department, or anybody else that's
24 involved in it, this is the third time we've seen this. Since
25 the motion was filed, since the complaint was filed, one house

1 has been sold, we ask that the Court issue a preliminary
2 injunction.

3 These other issues, your Honor, if they want to come
4 in and move to set aside the preliminary injunction, I
5 understand that, but the reason there's only a portion of the
6 plaintiffs involved this motion is because these are the
7 plaintiffs who are -- either their house could be sold right
8 now as REO, or are facing imminent threat of foreclosure.

9 THE COURT: Now, you addressed one single case
10 where you said there was a continuance stated on the
11 courthouse steps?

12 MR. HAGER: There was, your Honor.

13 THE COURT: But a trustee's deed, nevertheless,
14 was entered.

15 MR. HAGER: Yes.

16 THE COURT: And which case is that?

17 MR. HAGER: Polanski, your Honor.

18 THE COURT: Polanski?

19 MR. HAGER: Polanski, yes. They are in this
20 motion. At the time of the motion it was to stop the
21 foreclosure. Today it would be --

22 THE COURT: Have you filed an affidavit to that
23 effect?

24 MR. HAGER: No, I haven't, your Honor.

25 THE COURT: Okay. You recognize you need to .

1 MR. HAGER: I do.

2 THE COURT: So you're saying that with regard to
3 the Polanski case, there was a continuance stated on the
4 courthouse steps, you have a witness --

5 MR. HAGER: I do.

6 THE COURT: -- who will sign a declaration under
7 oath.

8 MR. HAGER: I do, my law partner.

9 THE COURT: And, nevertheless, there's a
10 trustee's deed entered on the basis of the sale that allegedly
11 occurred at that date and time.

12 MR. HAGER: That's correct.

13 THE COURT: Okay. You'll have to file the
14 affidavit, of course, but I'll ask counsel to respond to that.

15 MR. HAGER: I will, your Honor. Thank you.

16 THE COURT: Thank you very much.

17 (Discussion held off the record.)

18 THE COURT: All right, counsel, go ahead.

19 MR. STERN: Thank you, Judge. Once again, Ariel
20 Stern. I don't believe I made a full appearance on the
21 written submissions so I would like to briefly restate my
22 appearance, and then give you a little bit of a roadmap as to
23 how the defendants want to present our argument.

24 THE COURT: Who did you represent?

25 MR. STERN: Bank of America, Countrywide Home

1 Loans, Recontrust, La Salle Bank, First Franklin Financial
2 Corporation, First Horizon Home Loan Corporation, Sun Trust
3 Mortgage, National City Bank, National City Mortgage, National
4 City Corporation and PNC Financial Services Group.

5 THE COURT: Okay.

6 MR. STERN: What we would like to do, Judge,
7 keeping in mind that we're cognizant of the fact that the
8 plaintiffs have presented you with a ball of wax, and it's
9 difficult to disentangle, we've decided to allocate and allot
10 the argument in a way that hopefully keeps the argument
11 streamlined and makes sense for the Court.

12 So what we would like to do is have Mr. Hefferon,
13 who is seated right directly to my left and whose pro hac vice
14 application is pending before the Court, Mr. Hefferon would
15 like -- will present the response on the merits with respect
16 to the principal part of the defendants' argument as it
17 pertains to the propriety of the foreclosures in the case.

18 Mr. Brochin, to his left, will present the argument
19 with respect to MERS as counsel for MERS, and they'll all make
20 their appearances.

21 I would like to present an argument on the standing
22 with respect to the National City defendants, then the other
23 defendants, depending on how the hearing goes and whether the
24 judge -- whether, Judge, you have questions, may present
25 additional argument as well.

1 We anticipate somewhere between five and seven of us
2 will talk, but we've done it in a way that won't be
3 repetitive.

4 THE COURT: I'll ask you some of the same venue
5 questions. Why should I rule on this case? The 180 case is
6 assigned to who? That's 09-180, right?

7 MR. STERN: Yes, Judge, I believe that's the
8 Lopez case, that's Judge Reed.

9 THE COURT: That's Judge Reed.

10 The 309 case, that's, again, civil 309?

11 MR. STERN: That is correct.

12 THE COURT: Who has that one?

13 MR. STERN: That one is also Judge Reed.

14 THE COURT: What does Judge Hicks have?

15 MR. STERN: I'm not sure Judge Hicks has
16 anything.

17 THE COURT: So counsel is -- we may --

18 MR. HAGER: He entered an order in the Green
19 case which is the next case in order that --

20 THE COURT: What's the number of the Green case?
21 And it has multiple plaintiffs, I'm assuming, too.

22 MR. HAGER: Twenty-seven, I believe, your Honor.

23 MS. MURCH: Your Honor, Green is 09-CV-00374.

24 THE COURT: 374, and I have 09-534.

25 Why should I entertain at all -- did you object to

1 the transfer of this case to me? I've got the most recent
2 number, and we all know that when we get multiple cases that
3 are related, nobody is supposed to pull the wool over the
4 judge's eyes, why shouldn't I just assign this back to Judge
5 Reed? He's got the low number, 180.

6 MR. STERN: Well, Judge, there's a couple of
7 thoughts or a couple issues there, and I think some of the
8 other parties may also have some thoughts on it.

9 Preliminarily, I would say that the plaintiff is the
10 master of the complaint, and this is how the plaintiff has
11 chose to bring the case before you.

12 THE COURT: By a number of plaintiffs in each of
13 these.

14 MR. STERN: Serial filings with each of these
15 cases.

16 Now, I will point out to you that there are
17 differences among the cases, and so the class --

18 THE COURT: Differences on merit claims?

19 MR. STERN: There are some -- well --

20 THE COURT: Clearly, there are differences
21 individual by individual. Is that what you're talking about,
22 or differences in the --

23 MR. STERN: There are differences in the
24 composition of the proposed classes from case to case. There
25 are also differences among the particular circumstances of

1 each of the named plaintiffs as you alluded to in your
2 questioning of Mr. Hager. There are considerable
3 differences --

4 THE COURT: So why haven't you objected to a
5 lack of consolidation? Why haven't you filed a motion to
6 consolidate?

7 Are you doing the same thing I asked counsel about,
8 and that is, just forum shopping? You're looking for a judge
9 who will deny the preliminary injunction as opposed to another
10 one?

11 MR. STERN: Well, Judge, it goes without saying
12 that we would prefer the Court to deny the preliminary
13 injunction.

14 THE COURT: Sure.

15 MR. STERN: I would disagree with the suggestion
16 that we're forum shopping. This case was originally assigned
17 by Judge Reed. We did not ask for Judge Reed to recuse
18 himself, the order came from the court. We're not sure why.

19 THE COURT: Everybody is aware of the local rule
20 that requires all counsel to notify the court if this is
21 related to another case pending in the court. You're all
22 aware of that.

23 MR. STERN: We are aware of that rule, your
24 Honor.

25 THE COURT: Did anybody give us that notice?

1 MR. HAGER: We did, your Honor, and if -- there
2 was no recusal. We were just looking at the minutes, and at
3 docket --

4 THE COURT: Then there's no prohibition on
5 myself just reassigning this case back to Judge Reed.

6 MR. HAGER: No, there isn't.

7 MR. STERN: Just what I would say in further
8 response to your questions, your Honor, we believe this
9 question is separate. There hasn't been any determination
10 from Judge Reed as to whether a class should be certified. We
11 believe that he's eventually going to deny those motions.

12 THE COURT: He entered findings and conclusions,
13 however, on the granting of a preliminary injunction.

14 MR. STERN: Only with respect -- no, that's not
15 exactly correct, your Honor. He entered temporary restraining
16 orders pending hearings, and then the plaintiffs and the
17 defendants met and conferred and stipulated to injunctions
18 pending further motion from the defendants or a decision from
19 the Court.

20 So the suggestion that --

21 THE COURT: So Judge Reed has not entered a
22 finding which is required on the entry of a preliminary
23 injunction of likelihood of success on the merits.

24 MR. STERN: That is correct. It has been all
25 done via stipulation that the judge signed because it was

1 presented as a stipulation. The only orders that Judge Reed
2 has entered were temporary restraining orders which were done
3 without notice and without an opportunity for defendants to
4 respond.

5 THE COURT: Then why don't we have a stipulation
6 in this case? Why are we going to the full length of the
7 preliminary injunction?

8 MR. STERN: Well, as you can imagine, Judge, the
9 circumstances have changed. Decisions that were made when we
10 were only dealing with a small number of plaintiffs made
11 sense, and it's the defendants' prerogative in discussions
12 with the plaintiffs to decide whether or not a stipulation is
13 appropriate.

14 In this particular case, given that there are so
15 many plaintiffs, that they're making so many claims that are
16 at odds with each other and at odds from the other cases,
17 we've --

18 THE COURT: I got it. So, again, I'll give you
19 the same apology as well as all the folks who are interested
20 in this. You know, this is a federal court, a court of
21 limited jurisdiction, and parties cross the counsel play games
22 all the time in getting the right judge, they file a case in
23 the right court trying to get the right judge.

24 So these questions, of course, sound like
25 challenging questions or antagonistic questions, but they're

1 not, I'm just trying to make sure that an injustice doesn't
2 occur by virtue of the fact that you've got now a third judge,
3 actually, a seventh or eighth judge because five judges in
4 Las Vegas are dealing with the MERS question by way of appeal
5 so --

6 MR. STERN: That is correct, your Honor, and I
7 just -- for my part, I want to emphasize that we understand
8 and respect the fact that the federal courts are courts of
9 limited subject matter jurisdiction, and I again point out it
10 was originally Judge Reed's case, there was an order assigning
11 it to you, and we just kind of went forward on that basis.

12 At this point, unless you have other questions for
13 me, I would like to --

14 THE COURT: I am going to rule on the
15 preliminary injunction, but then I'm notifying both sides I'm
16 transferring it back to Judge Reed. There's no reason why
17 different judges should handle the same issues.

18 MR. STERN: Okay.

19 THE COURT: It's inappropriate. So --

20 MR. STERN: Unless you have other questions for
21 me, Judge, I would like to turn the argument over to
22 Mr. Hefferon.

23 THE COURT: Please.

24 MR. STERN: Thank you.

25 MR. HEFFERON: Good morning, your Honor. Thomas

1 Hefferon for the Countrywide-Bank of America defendants, as
2 well as Wells Fargo.

3 Your Honor, on the last issue going, I would just
4 add a couple of thoughts to what Mr. Stern said. I think
5 probably both parties assumed that since Judge Reed had
6 actually noted that, under the minutes, sent it back to the
7 chief judge for reassignment, that I don't think either party
8 presumes -- since it had originally been listed as a related
9 case, either party presumes that there was any reason to
10 raise, I think, more question. I think that's just really
11 where we were, because the minutes reflected that it was, in
12 fact, assigned to Judge Reed, and Judge Reed sent it back to
13 the chief judge.

14 On the issue of the complaints, this complaint is
15 different from all of the others in a very important respect.
16 Whether it's important with respect to your Honor keeping it
17 or not is up to your Honor.

18 But in all of the other cases, there are a series of
19 fundamental claims by the borrowers that the loans are bad
20 loans, that they were made in violation of federal law, for
21 example, truth in lending or Fair Housing Act discriminatory
22 loans.

23 THE COURT: So you agree that there's federal
24 question in all of these individual cases?

25 MR. HEFFERON: In those other cases, that is,

1 the ones we talked about, Lopez, Green, all those, those
2 claims have been raised. Some are merely state law, Nevada
3 statutes for unfair practice, some are federal, including Fair
4 Housing Act.

5 What's different here is that plaintiffs --

6 THE COURT: But all of those have in common --
7 we'll talk about here in a moment -- all of those have in
8 common at least one federal question in addition to diversity
9 jurisdiction basis.

10 MR. HEFFERON: I think there is one that does
11 not have a Fair Housing Act --

12 THE COURT: Pure state question.

13 MR. HEFFERON: I think one has pure state
14 questions.

15 THE COURT: Okay.

16 MR. HEFFERON: This case, unlike all of those,
17 however, the plaintiffs do not contend that there was improper
18 conduct in connection with the origination of the loans. So
19 they're coming --

20 THE COURT: And they contend a RIFRA
21 violation --

22 MR. HEFFERON: No.

23 THE COURT: -- or failure of notice of
24 assignment or sale of the loans or of servicing rights?

25 MR. HEFFERON: No, your Honor, no.

1 THE COURT: Not in this case.

2 MR. HEFFERON: No, not in this case.

3 In this case, really, what the plaintiffs have
4 chosen -- what plaintiffs' counsel have chosen is to skinny
5 down what had originally been filed and really focused on the
6 MERS aspect of it, the deed of trust, and certainly that issue
7 is in other cases, but --

8 THE COURT: So counsel said diversity here. Do
9 you agree?

10 MR. HEFFERON: Yes, Class Action Fairness Act,
11 your Honor, over \$5 million at issue, certainly, if there's an
12 attack on the validity of the deeds of trust --

13 THE COURT: And not require complete diversity,
14 just --

15 MR. HEFFERON: That's correct, there's minimum
16 diversity, there's a defendant, a state resident on one side,
17 and there's at least one person who, on the other side, is not
18 a resident of this state. I mean, there's no exceptions
19 applicable because it's a nationwide class purported.

20 So, anyway, the cases do differ in that respect, and
21 that's relevant to the motion, as we point out, on the equity
22 issue which is that although there certainly is an underlying
23 attack of the deed of trust, that is, the security interest,
24 there's no underlying attack on the loans.

25 And so my clients, obviously, provided information

1 to your Honor indicating the amount of money which is owed on
2 various of the loans. There's no suggestion that that amount
3 is not owed.

4 The only suggestion is that amount is not secured,
5 and I think that's an important element to take into account
6 in thinking about whether it's equitable to be seeking that
7 there be an order that no foreclosures can go forward as well
8 as, obviously, the suggestion made by the plaintiffs in their
9 papers that there should be no bond or other financial
10 consideration given.

11 On the issue of the equities, I just, while we were
12 talking, looked back at a couple of the loans, and, obviously,
13 your Honor correctly pointed out that there are some that are
14 pretty striking.

15 We have one loan, for example, the Mason loan, where
16 over \$175,000 is owing, and there's no suggestion by the
17 Masons that they provide any consideration or any promise in
18 connection with an injunction they seek.

19 The Reese loan --

20 THE COURT: I'm sorry to interrupt you again, I
21 want you to complete that for the record because I am
22 interested, but are there any allegations here of fraud on
23 Countrywide's behalf? I get that all the time in the cases
24 I've received.

25 And, quite frankly, you know, in most of those cases

1 there is fraud, clearly a misrepresentation of income. It
2 doesn't appear from the record whether it's by the borrower
3 who signed the misrepresentation or by the broker for
4 Countrywide -- most of these loans came through brokers, and
5 it's alleged that the broker is the one who suggested the
6 fraudulent amount on the statement -- or whether it's by
7 Countrywide.

8 In all of those cases where that appears, just so
9 everybody knows, I'm referring those to the United States
10 Attorney and let the chips fall where they may on the basis
11 that these loans appear to be fraudulent loans.

12 So are there allegations here in this complaint of
13 fraud with respect to Countrywide loans?

14 MR. HEFFERON: No, your Honor.

15 THE COURT: Okay. All right.

16 MR. HEFFERON: The allegation, again, is that
17 the deed of trust is improper and that it was -- you know, the
18 plaintiff didn't understand it, don't understand the
19 relationship with MERS, and all those issues, certainly.

20 THE COURT: Misrepresentation of either
21 refinancing or of the payments or when the payments would kick
22 up or --

23 MR. HEFFERON: Yes, there's nothing suggesting,
24 again, that there's a problem with the origination, that
25 people didn't understand they were getting a loan, or they --

1 it was misrepresented how big it was, the type of loan where
2 they said, you know, they had certain income, and, in fact, it
3 was the wrong amount.

4 THE COURT: Are there TILA claims here in this
5 complaint?

6 MR. HEFFERON: No, your Honor.

7 THE COURT: All right. I'll let you complete,
8 I'm sorry.

9 MR. HEFFERON: Sure. I would always rather
10 answer questions than pick what I think is important.

11 To complete my thought on the individual plaintiffs,
12 just as examples, as I pointed out, the Masons owe over
13 \$175,000.

14 The Reese loan, which is another Countrywide-Bank of
15 America loan, no payments have been received since January
16 of '08 so we're working now on almost two years worth of
17 payments.

18 Your Honor correctly pointed out, and I do want to
19 echo it, you know, I don't think there's any suggestion on any
20 part of the defendants that people are not in difficult
21 financial straits, I understand that, and, obviously, it's an
22 extremely difficult economy and extremely difficult situations
23 people are facing.

24 But, you know, the question really for this case is
25 whether or not there should be a prevention of the foreclosure

1 process based upon the theories that plaintiffs have come up
2 with, and, as we point out in our papers, we really don't
3 think there is.

4 I want to talk a little bit about the record, and
5 this would then be responsive to my brother's comments about
6 trustees.

7 Your Honor correctly pointed out in looking at the
8 TRO papers that the affidavits submitted by the plaintiffs
9 were essentially summary in nature. They, in every respect, I
10 believe, simply attached the original deed of trust, the
11 notice of default, and then said if I get foreclosed, I'm
12 going to lose the property.

13 And what we attempted to do in response on behalf of
14 my clients is provide information about how much was in
15 default and how much is due each month, and, in certain
16 instances where it wasn't obvious from the record, identify
17 which loans were investment property loans.

18 There are some where it's obvious, there's some
19 people here who have more than 12 properties, others who have
20 multiple properties though a smaller number, but there are
21 also people who have only one loan but it's an investment
22 loan, so we thought that important to put before the Court.

23 By contrast, we would suggest to your Honor that the
24 record simply doesn't support preliminary injunctive relief
25 because all the plaintiffs have done is put in those form

1 affidavits which we don't contend support their theories.

2 There is an expert affidavit, purported expert
3 affidavit, from Mr. Garfield which we've addressed in our
4 papers, and a purported expert affidavit from Mr. Peterson
5 which, as an initial matter, we would object to the
6 consideration of that since it wasn't submitted until the
7 reply brief.

8 But, in any event, the two supposed experts, all
9 they did is talk in generalities, and, in fact, talk in
10 generalities and speculate about what might happen and what
11 might result from MERS and from securitization.

12 Your Honor correctly pointed out that in a situation
13 like this you really have to dig into the individual facts
14 having to do with individual plaintiffs, and we would suggest
15 very strongly the record really doesn't support that.

16 Now, I wanted to address very specifically what the
17 plaintiffs have said here today concerning the status of the
18 trustees, and my understanding of the suggestion was that with
19 respect to all but seven of the loans the assertion is made
20 that there's been no showing that the trustees who are
21 prosecuting the foreclosures have authority to do so because
22 the person prosecuting the foreclosures, the entity
23 prosecuting the foreclosures, is different than the one that
24 shows up on the deed of trust, and the suggestion therefore is
25 that that current trustee might have no authority.