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IN THE CIRCUIT COURT

FOR

MONTGOMERY COUNTY, ALABAMA

DEBRA A. HENDERSON,

Plaintiff,

vs.

CIVIL ACTION NO.

CV-08-900805.00

MERSCORP, INC., et al.,

Defendants.

*1-102
103-210*

VIDEO DEPOSITION OF R.K. ARNOLD,

taken pursuant to stipulation and agreement before

Tracye Sadler Blackwell, Certified Court Reporter

and Commissioner for the State of Alabama at Large,

in the Offices of The American Association for

Justice, 777 6th Street, NW, Suite 200, Washington,

D.C., on September 25, 2009, commencing at

approximately 10:10 a.m.

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22	
	ALSO PRESENT:
23	Mr. Fred Walker, Videographer

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STIPULATIONS

1 It is hereby stipulated and agreed by and
2 between counsel representing the parties that the
3 video deposition of R.K. ARNOLD is taken pursuant
4 to the Alabama Rules of Civil Procedure and that
5 said deposition may be taken before Tracey Sadler
6 Blackwell, Certified Court Reporter and
7 Commissioner for the State of Alabama at Large,
8 without the formality of a commission, that
9 objections to questions other than objections as to
10 the form of the question need not be made at this
11 time but may be reserved for a ruling at such time
12 as the said deposition may be offered in evidence
13 or used for any other purpose by either party
14 provided for by the statute.
15 It is further stipulated and agreed by and
16 between counsel representing the parties in this
17 case that the filing of said deposition is hereby
18 waived and may be introduced at the trial of this
19 case or used in any other manner by either party
20 hereto provided for by the statute regardless of
21 the waiving of the filing of the same.
22 It is further stipulated and agreed by and
23

1 between the parties hereto and the witness that the

2 signature of the witness to this deposition is

3 hereby not waived.

4 * * * * *

5 THE VIDEOGRAPHER: This is Disk 1

6 in the video deposition of

7 R.K. Arnold in the matter of

8 Debra Henderson versus

9 MERSCORP, Incorporated, and

10 Mortgage Electronic

11 Registration Systems, Inc.,

12 filed in the Circuit Court of

13 Montgomery County, Alabama.

14 Today's date is September

15 25th, 2009, and the time is

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

17 located at the offices of

18 American Association for

19 Justice at 777 6th Street,

20 Northwest, Washington, D.C.

21 Will counsel identify

1 themselves beginning with the
2 attorney giving notice.
3 MR. WOOLEN: My name is Nick
4 Wooten, and I represent Debra
5 Henderson. I'm here with my
6 co-counsel, Lynn Jinks.
7 MR. BROCHIN: My name is Bobby
8 Brochin, Morgan-Lewis. I
9 represent the deponent, R.K.
10 Arnold.
11 MR. RAMEY: Shaun Ramey with
12 Sirote and Permutt. I
13 represent the defendant
14 MERSCORP and MERS, Inc.
15 MS. HORSTKAMP: Sharon Horstkamp.
16 And I'm general counsel with
17 MERS.
18 THE VIDEOGRAPHER: Also present,
19 the court reporter, Tracey
20 Blackwell, representing
21 Haislip, Ragan, Green, Starke
22 & Watson Reporting. And
23 videographer and notary

1 public, Fred Walker,
2 representing Capital
3 Reporting.
4 I will now swear in the
5 witness.
6 (Witness sworn.)
7 MR. WOOLEN: Shaun, you have that
8 agreement. Did you want to
9 mark it, or do you just want
10 to reference it?
11 I can mark it if you want
12 me to.
13 MR. BROCHIN: Yeah. I just want
14 to mark the discovery and
15 confidentially agreement
16 which deals with the
17 dissemination of the videotape
18 of this deposition as an
19 exhibit to the transcript.
20 THE COURT REPORTER: Thank you.
21 Do you all want usual
22 stipulations?
23 MR. RAMEY: I think the only

1 difference is I don't think
2 Mr. Arnold is going to waive
3 reading and signing.
4 MR. BROCHIN: Yeah. If that's
5 what stipulation means. We
6 don't -- we do not waive
7 reading.
8 THE COURT REPORTER: Okay.
9 (Plaintiff's Exhibit 1 was marked
10 for identification.)
11 MR. WOOLEN: All right. And I
12 marked this agreement as
13 Plaintiff's Exhibit 1 to the
14 deposition just so we'll have
15 that out of the way. And this
16 is the negotiated agreement
17 with respect to the parties'
18 agreement not to disseminate
19 this video outside of this
20 litigation without -- except
21 according to the terms of this
22 agreement.
23 And, again, just for the

1 record, that has nothing to do

2 with the transcript. This is

3 purely with the video today.

4 MR. RAMEY: Correct.

5
6 * * * * *

7
8 R.K. ARNOLD

9 The witness, after having first been duly sworn

10 to speak the truth, the whole truth and nothing but

11 the truth testified as follows:

12 EXAMINATION

13 BY MR. WOOLEN:

14 Q. Mr. Arnold, if you would, would you state

15 your full name for the record, please,

16 sir.

17 A. R.K. Arnold.

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

19 A. I work for MERSCORP, Inc.

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

21 A. I'm president and CEO.

22 Q. Okay. Do you remember what you were doing

23 three years ago today?

1 MR. BROCHIN: Object to the form

2 of the question.

3 Q. It's not a trick question. Do you remember

4 what you were doing three years ago today?

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

6 (Plaintiff's Exhibit 2 was marked

7 for identification.)

8 Q. I ask you to take a look at that and ask

9 you if you recognize that. It's marked as

10 Plaintiff's Exhibit 2.

11 (Brief interruption.)

12 MR. BROCHIN: Just for the record,

13 it appears that you've handed

14 the witness a transcript of a

15 copy of a deposition with all

16 sorts of highlighted notes and

17 et cetera on it.

18 Q. And I'll represent to you, Mr. Arnold,

19 that's a transcript of your testimony from

20 the matter of Trent versus MERS that was a

21 case in the District Court for the United

22 States in Florida. Does that appear to be

23 what that actually is?

1 A. Yes.

2 Q. Okay. And does it appear that on this date

3 three years ago you gave that deposition?

4 A. Yes.

5 Q. And have you ever reviewed that transcript

6 other than signing it for the purpose of

7 certifying your testimony?

8 A. Most of it.

9 Q. Okay. And I actually have two copies. I'm

10 going to swap with you, if you will, the

11 unmarked copy. If you'll hand me that copy

12 I marked back, please, sir.

13 With respect to -- and I'm trying to

14 save us a little time. But with respect to

15 the background information that you

16 provided during the course of that

17 deposition regarding your education,

18 experience, and training, any of that

19 information different today than it was

20 when you gave that deposition?

21 MR. BROCHIN: Object to the --

22 excuse me. Let me object to

23 the form of that question. I

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

2

3

4

5 A. Are you asking about my --

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

7 A. No additional degrees.

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

9 A. Probably just experience.

10 Q. Okay. And the information that you provided during that deposition with respect to your background and history, employment history, your education and qualifications is all still accurate?

11

12

13

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19

20

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

22

23

1 testimony given three years

2 ago in a general nature.

3 Q. Well, let's do that this way, then,

4 Mr. Arnold, so we can just make sure we

5 don't have any disputes about the

6 admissibility of this.

7 You're currently employed as the CEO of

8 MERSCORP; is that correct?

9 A. Yes.

10 Q. Were you so employed when you gave the

11 Trent deposition?

12 A. Yes.

13 Q. Are you affiliated with any other company

14 other than MERSCORP?

15 A. I'm an officer of Mortgage Electronic

16 Registration Systems, Inc.

17 Q. Is that the subsidiary of MERSCORP which

18 serves as the nominee of record in public

19 land records throughout America?

20 MR. BROCHIN: Object to the form

21 of the question.

22 A. It's a subsidiary of MERSCORP.

23 Q. Okay. And are both of these corporations

1 private corporations?
 2 A. Yes.
 3 Q. Are there any individual shareholders of
 4 either of these corporations that are not
 5 institutions or entities related to the
 6 mortgage, banking, and lending industry?
 7 MR. BROCHIN: Object to the form
 8 of the question.
 9 A. They're all corporations.
 10 Q. Certainly. Do you serve on the board of
 11 directors of any other corporations other
 12 than MERSCORP and Mortgage Electronic
 13 Registration Systems?
 14 A. No.
 15 Q. Are you compensated by any other business
 16 or corporation other than the two entities
 17 you've identified?
 18 A. No.
 19 Q. Currently how many directors serve on
 20 Mortgage Electronic Registration Systems,
 21 Inc.'s board?
 22 A. 16.
 23 Q. And how many directors serve on MERSCORP's

1 board?

2 A. Six.

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

6 A. In 1999.

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

9 A. That is a subsidiary.

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

12 A. In 1998.

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

20 A. He works for MERSCORP, Inc.

21 Q. And what is his employment title?

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

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

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

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

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

5 A. Correct.

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

7 A. Yes.

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

9 A. Yes.

10 Q. And of those directors are five of those directors members -- also directors of the parent corporation?

11

1 A. Yes.

2 Q. Who is the independent director of the

3 subsidiary?

4 MR. BROCHIN: Object to the form

5 of the question.

6 A. Bruce Posey.

7 Q. It's my understanding that your corporate

8 structure of the subsidiary requires that

9 the independent director have no

10 affiliation with the parent corporation; is

11 that correct?

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

13 Q. When you structured the subsidiary from a

14 parent, you structured the subsidiary with

15 the idea of creating a bankruptcy-remote

16 entity; is that correct?

17 A. That's correct.

18 Q. And one of the requirements of doing that

19 was that you have at least one independent

20 director; correct?

21 A. Yes.

22 Q. And according to your understanding, what

23 are the requirements of independents to

1 meet that test so that that entity
2 qualifies for bankruptcy remoteness?
3 A. Well, at a very basic level can't be a
4 shareholder or a director of the parent.
5 Q. And how is it determined -- well, let me
6 rephrase.
7 Outside of Mr. Posey's service on the
8 board of the subsidiary corporation, do you
9 know if he's otherwise employed?
10 A. Yes.
11 Q. And how is he employed?
12 A. He's the CEO of Streeter Brothers Mortgage.
13 So is Streeter Brothers Mortgage what the
14 industry would commonly refer to as an
15 originator?
16 A. An originator?
17 Q. A company that originates mortgage loans?
18 A. Yes.
19 Q. So although he has no ownership interest
20 with the parent corporation, he is -- his
21 company is involved in the mortgage lending
22 industry?
23 MR. BROCHIN: Object to the form

1 of the question.

2 A. Streeter Brothers is an originator.

3 Q. All right. I noticed in reviewing the

4 documents -- at least some of the documents

5 I've seen regarding your company that some

6 of the original members were Fannie Mae and

7 Freddie Mac; is that correct?

8 A. Yes.

9 Q. And at the time they became members is it

10 fair to say that they had a significant

11 influence on the mortgage industry as a

12 whole?

13 A. Yes.

14 Q. Is it fair to say that the mortgage

15 industry generally looks to those two

16 entities for industry standards regarding

17 things like mortgage servicing and document

18 custodianship arrangements and that sort of

19 thing?

20 A. I don't understand the question.

21 Q. Are the Fannie Mae and Freddie Mac

22 published guidelines with respect to

23 mortgage servicing typically considered to

1 be an industry standard?
 2 A. Among others.
 3 Q. Are they also considered to be an industry
 4 standard with respect to document custodial
 5 agreements between mortgage securitization
 6 participants?
 7 A. I don't know.
 8 Q. But you would agree that at the time they
 9 became members of MERS they did have a
 10 significant influence in the mortgage
 11 industry?
 12 A. Yes.
 13 Q. Is it your opinion that the MERS concept
 14 could have taken root without their
 15 participation?
 16 MR. BROCHIN: Object to the form
 17 of the question to the extent
 18 it calls for an opinion and
 19 speculation.
 20 A. I don't know.
 21 Q. Were they afforded any special
 22 considerations for becoming members of MERS
 23 when MERS was originally formed?

1 A. No.

2 Q. Did they make an equity contribution to

3 MERS when it was formed?

4 A. Yes.

5 Q. Do you remember the amount of that

6 contribution?

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

8 previous company.

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

10 right?

11 A. Old MERS?

12 Q. The original company that was formed when

13 they made their equity contribution was to

14 the new company that was formed that is the

15 present company?

16 A. In 1995 they made equity contributions.

17 Q. Okay. And do you remember the dollar

18 amounts of those contributions?

19 A. In 1995?

20 Q. Uh-huh (positive response).

21 A. No.

22 Q. Are there any documents available through

23 any public resource that would indicate the

1 dollar amount of those contributions by

2 those two entities?

3 MR. BROCHIN: Object to the form

4 of the question. Calls for

5 speculation.

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

7 are.

8 Q. Mr. Arnold, you testified in the Trent case,

9 that you were a member of the first

10 executive team that was hired by MERS; is

11 that correct?

12 A. Yes.

13 Q. And I guess before we go any further, I

14 guess you and I and your lawyers should

15 agree on how we're going to delineate

16 between these two companies as we talk

17 about it.

18 I have been referring to the parent

19 corporation as MERSCORP. Is that correct?

20 A. That's correct.

21 Q. Okay. And so if I say MERSCORP, I am

22 discussing the parent.

23 The subsidiary I have typically

1 referred to simply as MERS, M-E-R-S. Is

2 that how you typically refer to the

3 subsidiary?

4 A. No.

5 Q. How do you refer to the subsidiary?

6 A. Mortgage Electronic Registration Systems,

7 Inc.

8 Q. For the sake of my voice, can we agree to

9 refer to the subsidiary as MERS, Inc.? Is

10 that sufficient to delineate the two for

11 the purpose of this deposition?

12 A. As opposed to MERS?

13 Q. As opposed to simply MERS, the

14 subsidiary -- for the purposes of this

15 deposition, if you and your lawyers can

16 agree to it, I'd like to just refer to the

17 subsidiary as MERS, Inc. Is that okay?

18 A. Okay.

19 Q. You testified in the Trent case that you

20 were part of the original executive team

21 for -- that was hired by MERSCORP; is that

22 correct?

23 A. There wasn't a MERSCORP.

1 Q. At that time?

2 A. At that time.

3 Q. Right. And that would -- I mentioned a

4 moment ago old MERS. That was the original

5 incarnation of this company in the state of

6 Delaware; correct?

7 A. In 1995.

8 Q. In 1995. And, just briefly, because I

9 think the judge and the jury would want to

10 understand this issue, can you briefly

11 outline the corporate history from 1995

12 until we reach this present structure where

13 we have MERSCORP and MERS, Inc.?

14 Just -- and I'm not asking you for

15 specific days. I know you'll have produced

16 some documents relative to some of that.

17 But just in general can you lay out for the

18 jury and the judge the transformation of

19 this corporation till it reached its

20 present state, please?

21 A. It was -- old MERS, as you referred to it,

22 was created in 1995 with temporary

23 officers. It was capitalized maybe up to

1 50-percent level, and that was a
2 combination of equity and debt.
3 Q. And is that -- I'm sorry, I didn't mean to
4 interrupt you. But is that the
5 contribution we mentioned awhile ago from
6 Fannie and Freddie?
7 A. Yes. And it was a combination of equity
8 and debt, and you asked about equity.
9 Q. Sure. All right. Go ahead. I'm sorry.
10 A. So the first task, of course, was to hire
11 permanent officers. And that was the
12 original executive team that you referred
13 to. And that happened in December of 1995.
14 Q. Other than yourself, do you recall who else
15 was hired as a member of the executive
16 team?
17 A. Paul Killings.
18 Q. Is he still employed by either the parent
19 or the subsidiary?
20 A. No.
21 Q. Is his last name spelled M-U-L-L-I-N-G-S?
22 A. Yes.
23 Q. And do you know what his employment had

1 A. Jim Dowell.

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

3 A. I believe so.

4 Q. What was his position?

5 A. Chief technology officer.

6 Q. Is he still employed by either the parent

7 or the subsidiary?

8 A. No.

9 Q. Do you have any relationship with

10 Mr. Dowell?

11 A. Cocktail every three years.

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

13 A. No.

14 Q. Who else was hired?

15 A. Dan McLaughlin.

16 Q. And do you recall his position?

17 A. He was the operations officer.

18 Q. Is he still employed by either the parent

19 or the subsidiary?

20 A. Yes.

21 Q. And how is he presently employed?

22 A. He's executive vice president over the

23 product division.

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

2

3 A. Parent.

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

5 A. No one.

6 Q. So -- other than yourself?

7 A. (Witness nods head.)

8 Q. Right?

9 A. Yes.

10 Q. And how were you initially employed?

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

12 Q. And those persons all came on board

13 December of 1995?

14 A. Paul and I.

15 Q. And how far behind the two of you

16 were Jim and Mr. McLaughlin, Jim Dowell and

17 Jim -- Dan McLaughlin?

18 A. A month.

19 Q. Okay. So more or less contemporaneously?

20 A. (Witness nods head.)

21 Q. I assume, then, from -- that all four of

22 you were a member of that initial

23

1 Implementation team; is that correct? A. Yes.

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

3 A. Yes.

4 Did you maintain records of those meetings? Q.

5 A. I don't know.

6 You were the secretary; correct? Q.

7 A. Yes.

8 Would that have been within your job Q. function?

9 A. No.

10 Would you have had an assistant who would have had that function? A. No.

11 Did you write any interoffice memoranda or summaries of these meetings or anything like that? A. Not -- no, not really.

12 What was the purpose for this concept? Q.

13 mean, why did you -- why did your company 23

1 feel it was necessary?

2 MR. BROCHIN: Object to the form

3 of that question.

4 Q. Well, and let me re-ask it because that

5 might be considered a compound question.

6 What exactly was the concept you were

7 trying to implement?

8 A. We were setting up a system to eliminate

9 unnecessary assignments and track mortgage

10 loans.

11 Q. And the timing of this entity -- had you

12 been involved with any discussions prior to

13 this initial formation of the company we'll

14 call old MERS about the need or the

15 perceived need for this type of entity or

16 concept?

17 A. Prior to old MERS?

18 Q. Uh-huh (positive response).

19 A. No.

20 Q. So prior to being hired you had not taken

21 part in any of this?

22 A. No.

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

1 concern or the perceived concern with
2 respect to public land records and
3 assignments of mortgages?
4 MR. BROCHIN: Object to the form
5 of the question.
6 Q. And if that's not a fair statement -- I
7 don't want to mischaracterize anything.
8 But what I've read, in any case, that there
9 was a concern with issues with regard to
10 chain of title and paper moving to the
11 market and that sort of thing. Is that
12 fair?
13 MR. BROCHIN: Well, is it fair
14 that you read that?
15 Q. I mean, is that -- was that the concern, or
16 was there some other concern?
17 MR. BROCHIN: Object to the form
18 of the question.
19 A. I don't -- I don't think of anything as
20 being a concern from that period.
21 Q. So was this a profit-driven concept?
22 A. No.
23 Q. And truly never has been profit-driven to

1 the extent of MERS or the parent or the
2 subsidiary, has it?
3 A. Correct.
4 Q. Is it fair to say that MERS was created not
5 as a -- not necessarily as a corporation
6 for profit but as a corporation which would
7 hope to sustain itself by covering its cost
8 of existence?
9 MR. BROCHIN: Object to the form
10 of the question. If you
11 understand it.
12 A. Yes.
13 Q. And was that the -- at least a portion of
14 the reason that the company chose to
15 initially form as a member corporation
16 rather than a stock corporation?
17 A. I wouldn't characterize it that way, but it
18 did start as a membership corporation.
19 Q. And for people that are unfamiliar with
20 that term, could you briefly tell them the
21 difference between a membership corporation
22 and a stock corporation?
23 A. Well, rather than get into the legal

1 differences, it's -- membership corporation
2 would be essentially one company, one vote.
3 Q. And so every company that became a member
4 of old MERS, which is a member corporation,
5 would in effect have one vote regarding the
6 governance of that corporation?
7 A. Shareholders.
8 Q. Shareholders.
9 A. Every company shareholder would have one
10 vote.
11 Q. Right. As opposed to a stock corporation
12 where there might be 10,000 stockholders,
13 but two of them might own 70 percent of the
14 shares; right?
15 MR. BROCHIN: Object to the form.
16 A. In theory, yes.
17 Q. And I guess a stock corporation, the extent
18 of ownership would be determined more by
19 the shares of stock?
20 A. Yes.
21 Q. And I don't want to get too far off track
22 of where we started, but I'm just trying to
23 fill in some blanks.

1 This group of four that began the
2 company that we refer to as old MERS, which
3 is a member corporation, how long did the
4 four of you meet to formulate your plan
5 about implementing this concept?
6 A. Well, we never really stopped formulating
7 the concept. We met --
8 Q. I'm sorry.
9 A. -- intensively.
10 Q. All right. And over what period of time
11 did those meetings take place?
12 A. Well, before until Jim Dowell exited.
13 Q. All right. With -- well, with respect to
14 when the original four came on board -- you
15 said they should have all been in place by
16 approximately January of 1996?
17 A. Yes.
18 Q. And you said you all began to meet
19 intensively about this concept --
20 A. Yes.
21 Q. -- and how to most effectively implement
22 it?
23 A. Yes.

1 Q. Is it your testimony that none of the four
2 of you maintained any records about how to
3 do this or the legalities of it or how to
4 make sure that it functioned correctly and
5 as intended? There were no records of any
6 of those types of conversations or meetings
7 or anything?
8 MR. BROCHIN: Object to the form
9 of the question.
10 A. Yeah. I couldn't speak for every -- every
11 possible piece of paper, but writing was
12 not -- was not one of the -- one of the
13 characteristics of our meetings.
14 Q. And once those meetings began, I guess, in
15 earnest in January of 1996, how long did
16 those meetings take place before you began
17 to take action outside of your group?
18 A. I guess I'm not sure I understand what
19 you're asking. The -- we had to establish
20 a technology relationship with another
21 company.
22 Q. Was that the first step in the process?
23 A. That and the concept. The concept and the

1 technology were probably the two things
2 that took up the time.
3 Q. And I want to drop back for a second and
4 just clarify something so that anybody who
5 hears your testimony understands it in
6 context.
7 You are a licensed attorney; right?
8 A. Yes.
9 Q. And do you still maintain an active law
10 license?
11 A. Yes.
12 Q. Is it purely for the state of Virginia or
13 is it any other state?
14 A. It's not Virginia. It's Oklahoma and
15 Texas.
16 Q. Right. And you practiced law for a period
17 of time before you ultimately obtained this
18 position; correct?
19 A. Yes.
20 Q. And are there any other members of this
21 group of four who are also attorneys?
22 A. No.
23 Q. With respect to the implementation of the

1 concept, what you were -- I think you
2 mentioned before you wanted to create a
3 situation where you didn't have to record
4 assignment when the promissory note changed
5 hands; is that correct?
6 A. No.
7 MR. BROCHIN: Object to the
8 form -- excuse me. Object to
9 the form of the question.
10 A. That's not correct.
11 Q. All right. Explain, then, in your own
12 words what the concept was.
13 A. The concept or the purpose?
14 Q. Well, both. Let's start with the concept.
15 A. Well, the purpose was to eliminate
16 unnecessary assignments.
17 Q. And when you say unnecessary assignments,
18 tell me how you define an unnecessary
19 assignment.
20 A. Well, it had nothing to do with notes at
21 all.
22 Q. Okay. When you went to law school, did you
23 take classes in real property and that sort

1 of thing? A. Yes. 2

3 Q. And you discussed mortgages and you worked
4 in that area some as you practiced. Is
5 that fair? A. Yes. 6

7 Q. I'm not asking you about any state in
8 particular. I'm just talking about as a
9 general concept, general legal principle.
10 Typically when the transfer of a promissory
11 note which is secured by a mortgage takes
12 place, generally speaking, typically
13 there's a contemporaneous assignment of the
14 mortgage for the public record; is that
15 correct? MR. BROCHIN: Object -- 16

17 A. That is not correct. MR. BROCHIN: Excuse me. Object 18

19 to the form of the question. That is not correct, and 20

21 you're asking for a legal conclusion. 22

23 MR. WOOLEN: Asked for what, sir? 23

1 MR. BROCHIN: Legal conclusion.

2 MR. WOOTEN: Okay. Just want to

3 make sure I understand you.

4 Q. So is it your contention, then, that the

5 public recording records -- typically the

6 assignment of a mortgage is not undertaken

7 to give notice to the world that the

8 ownership of the debt has changed hands?

9 MR. BROCHIN: Object to the form

10 of the question to the extent

11 it calls for a legal

12 conclusion and generalizes

13 some 50 states.

14 Q. Well, we'll talk specifically later. I'm

15 just talking about generally what you

16 learned in law school, the big thick books

17 like that that they give us.

18 A. Yeah. It's more than a contention. It's

19 just not right. It's -- assignments are

20 not recorded, never were, when notes move.

21 Q. And is that one of the premises that

22 underlay your company's consideration in

23 its implementation of this idea?

1 A. It's one of the fundamental underpinnings
2 of negotiable instruments and the entire
3 mortgage industry. Notes have never been
4 recorded, and assignments are not recorded
5 in connection with notes.
6 Q. Let's don't do like we did in some other
7 places and conflagurate the two terms.
8 When I talk about a promissory note, I'm
9 talking about the obligation that the
10 borrower signs that is the debt
11 instrument. I will pay you "X" amount of
12 money per month for 30 years for my home
13 mortgage, the loan that you give me to buy
14 my home. That is contained in the
15 promissory note; right?
16 MR. BROCHIN: Object to the form
17 of the question.
18 A. It's universally called a note.
19 Q. Right. And that is the debt instrument?
20 A. Yes.
21 Q. Okay. The mortgage is the lien which the
22 borrower grants on their real estate to
23 secure payment of that promissory note;

1 right?

2 A. Yes.

3 Q. So I don't want you to be confused. I

4 didn't say that a promissory note had to be

5 recorded or that an assignment of a

6 promissory note had to be recorded; okay?

7 A. Uh-huh (positive response).

8 Q. What I'm saying is, is that when an

9 originator sells that note to an aggregator

10 or a warehouse lender or some other entity

11 that intends to securitize it on Wall

12 Street, that typically they endorse that

13 note by some agreed-upon method; correct?

14 MR. BROCHIN: Object to the form

15 of the question. Calls for

16 speculation.

17 A. Yeah. The agreed form -- agreed-to form is

18 the endorsement of the note --

19 Q. Right.

20 A. -- under Article 3.

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

22 right?

23 A. Yes.

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

2

3 right?

4 A. Well, that's not blank.

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

6 A. That's blank.

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

8 A. Specific.

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

10 A. Yes.

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

1 right?

2 MR. BROCHIN: Object to the form

3 of the question.

4 A. That's a check.

5 Q. Right.

6 A. But that's a negotiable instrument.

7 Q. And that would be a blank endorsement;

8 right?

9 MR. BROCHIN: Object to the form

10 of the question.

11 Q. Just signing my name on the back of it so

12 that anybody that had it could take it and

13 cash it; right?

14 MR. BROCHIN: Object to the form

15 of the question.

16 A. Under Article 3.

17 Q. Sure. And when you say Article 3, you're

18 talking about the UCC --

19 A. Yes.

20 Q. -- Uniform Commercial Code?

21 But if I said -- on the back of that

22 check if I wrote Nick Wooten to

23 R.K. Arnold, that's a specific endorsement;

1 right?

2 A. Yes.

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

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

10 A. Yes.

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

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

1 A. And it's incorrect. It's not the case and
 2 it's never been the case.
 3 Q. So your contention is that all the
 4 assignments are filled in land records
 5 throughout Alabama that evidence change in
 6 the ownership of the debt -- they don't
 7 matter. Is that your contention?
 8 MR. BROCHIN: Objection. Object
 9 to the form of the question.
 10 You're mischaracterizing his
 11 testimony.
 12 Q. Why would a mortgage assignment be
 13 recorded? What does it do? What's the
 14 purpose of a mortgage assignment?
 15 A. To move the lien interest.
 16 Q. Right. And who does it move it to?
 17 MR. BROCHIN: Object to the form
 18 of the question.
 19 A. Whoever's name is in the land records.
 20 Q. Well, if you assign the original mortgage,
 21 the name in the land records is going to be
 22 the name on the mortgage; right?
 23 MR. BROCHIN: Object to the form

1 of the question.

2 A. I don't understand the question.

3 Q. Well, let's just talk about a MERS as

4 mortgagee mortgage. There are 53 million

5 of them roughly today in the country?

6 A. 62 million.

7 Q. 62 million. And of those 62 million, they

8 all say that MERS is the mortgagee?

9 A. Yes.

10 Q. So if you wanted to transfer that to a

11 non-MERS member, how, then, would you do

12 that, sir?

13 A. Record an assignment in the land records.

14 Q. Okay. And what would be the purpose of

15 that assignment?

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

17 Q. Okay. And would that be because the owner

18 of the debt was no longer a MERS member?

19 MR. BROCHIN: Object to the

20 form --

21 A. No.

22 MR. BROCHIN: -- of the question.

23 Q. What other reason would that occur?

1 A. The owner of the debt --

2 MR. BROCHIN: Object to the form.

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

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

5 MR. BROCHIN: Object to the form.

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

7 Q. And your membership structure is the nominee structure, right?

8 MR. BROCHIN: Object to the form

9 of the question.

10 A. We have members of MERS.

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

1 either an affidavit or written testimony

2 that you don't act on behalf of parties who

3 are not members of MERS; right?

4 A. Not -- not through the membership

5 agreements.

6 Q. Right. Because your right to act flows

7 through that membership agreement; right?

8 A. With somebody on the loan, sure.

9 Q. Right. Because you're a -- I mean, you're

10 a nominee. You're acting more or less as

11 an agent of some sort; is that right?

12 A. Yes.

13 Q. So, you know, an agency agreement -- you're

14 pretty much bound by the written terms of

15 that agency agreement, aren't you?

16 A. Sure.

17 MR. BROCHIN: Object to the form.

18 Q. So if you don't have an agency agreement

19 for someone, you certainly shouldn't be

20 able to act on their behalf; right?

21 MR. BROCHIN: Object to the form

22 of the question.

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

1 question. We have a membership
2 relationship with the loan.
3 Q. With the loan?
4 A. The servicer.
5 Q. Mr. Arnold, I understand that this is kind
6 of a complex area for a layman, so I try to
7 be pretty precise about my terminology.
8 But you just said that you have a
9 membership relationship with the loan.
10 Okay. The loan consists of the
11 promissory note and the lien; right?
12 A. Yes.
13 Q. And those are intangible things; right?
14 A. Well, that's a legal term. I mean, they're
15 documents.
16 Q. Sure. But you just said you had a
17 membership agreement with a loan -- not a
18 member, but a loan. I just want to be real
19 clear about that.
20 A. Well, then I'll -- I'll say that we have a
21 membership agreement with somebody involved
22 in the loan.
23 Q. Okay. And that I can deal with. But you

1 don't have any agreement that says loan
2 number 12345678 nominates MERS as nominee,
3 do you?
4 A. No.
5 MR. BROCHIN: Object to the form.
6 Q. Okay, well, I mean, that's literally what
7 you testified to; right?
8 MR. BROCHIN: No, objection to
9 the form. The record will
10 reflect what he testified to.
11 Q. Now, I can understand having a membership
12 agreement with a party to a loan.
13 A. Okay.
14 Q. And you do have numerous agreements of that
15 nature; right?
16 A. Yes.
17 Q. Okay. But I think my initial question that
18 triggered that was much simpler in that
19 you're not going to testify that you have
20 the right to act on behalf of someone that
21 you are not the nominee or agent of through
22 one of your written agreements, are you?
23 MR. BROCHIN: Object to the form

1 of the question.

2 A. With respect to the loan, we will act

3 within the context of our authority to act

4 under the member agreements.

5 Q. True. And the member agreements are only

6 with MERS members?

7 A. Yes.

8 Q. So there is no right of MERS to act for

9 anyone that they do not have a written

10 agreement with?

11 KR. BROCHIN: Object to the form

12 of the question.

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

14 loan.

15 Q. Well, we'll get around to that in a moment;

16 okay? I understand that's your position,

17 but what I'm talking about is much more

18 esoteric.

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

20 with it.

21 Q. Okay. Well, let's say that I bought a

22 mortgage loan from someone. There are lots

23 of people buying distressed loans today.

1 And I don't have a MERS membership.

2 agreement, but you have a MERS mortgage.

3 You don't have any authority to act on my

4 behalf because we don't have a membership

5 agreement?

6 A. That's incorrect.

7 Q. So what authority would you have to act on

8 my behalf if you don't have a membership

9 agreement?

10 A. We're the mortgagee of record.

11 Q. Sure. And you've written extensively in

12 pleadings and taken positions in court the

13 general rule that the lien follows the

14 note; right?

15 A. Generally.

16 Q. So if someone who is not a MERS member

17 becomes owner of the debt, the note, then

18 as a general proposition they would have

19 the right to enforce that lien irrespective

20 of the fact that you were named mortgagee

21 of record; right?

22 A. Yes.

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

1 to act on their behalf if you had no

2 agreement with them; right?

3 MR. BROCHIN: Object to the form

4 of the question.

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

6 Q. And is that because of your position with

7 respect to the lien which nominates you as

8 mortgagee of record?

9 A. Yes.

10 Q. Because, in fact, what you're claiming is

11 in fact ownership of the lien; right?

12 MR. BROCHIN: Object to the form

13 of the question.

14 A. No. We're -- we are the mortgagee in the

15 land records, and we have duties that go

16 along with that. And we carry out those

17 duties according to what we've agreed to

18 do.

19 Q. Okay. Is it not your testimony that MERS

20 owns the lien?

21 MR. BROCHIN: Object to the form

22 of the question.

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

1 mortgagee in the land records. We were
2 made mortgagee by the borrower on a
3 security instrument.
4 Q. Well, let's talk about that for a moment,
5 if we can.
6 You would agree that the mortgagee on
7 the MERS mortgage is not a
8 fill-in-the-blank, is it?
9 MR. BROCHIN: Object to the form
10 of the question.
11 A. It's a pre -- prefab document.
12 Q. Right. I mean, it's not a multiple-choice
13 question as to who's the mortgagee, is it?
14 A. No.
15 Q. And you would agree that there's no time at
16 any time during the negotiation or
17 solicitation of any mortgage loan where
18 it's ever discussed with the consumer who
19 will serve as the mortgagee of record?
20 A. I can't vouch for what discussions take
21 place.
22 Q. Well, you know, typically consumers see
23 things on a good-faith estimate, like

1 closing costs, interest rate, that type of
2 thing; right?
3 MR. BROCHIN: Object to the form.
4 Q. You're familiar with a good-faith estimate;
5 right?
6 A. Yes.
7 Q. And you're familiar with the typical
8 contents of those documents?
9 A. Yes.
10 Q. And there's not a check-the-box for who
11 you'd like to serve as mortgagor of record,
12 is there?
13 A. No.
14 Q. So as far as you know, when a consumer
15 goes to a broker or lender and asks for a
16 mortgage, they don't hand them a copy of
17 your form mortgage and say, hey, look this
18 over and tell me if you got any problems
19 with it, do they?
20 MR. BROCHIN: Object to the form.
21 A. Well, the consumer is entitled to the
22 documents ahead of time.
23 Q. They're entitled to a good-faith estimate;

1 right?

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

3 Q. Okay. And you would agree that the lender
 4 is going to place whoever they deem
 5 appropriate in the slot as the mortgagee
 6 through the use of a preprinted form;
 7 right?

8 A. Well, it's a condition of the loan.
 9 Q. Right. It's not a negotiable issue, is it?

10 MR. BROCHIN: Object to the form.

11 A. I don't know.

12 Q. You ever had any documents come through
 13 your system where a mortgagee was scratched
 14 off and somebody else was written in?

15 A. We wouldn't have a document that didn't
 16 make MERS the mortgagee.

17 Q. Right. So to the extent that that's an
 18 issue, again, it's a preprinted form that's
 19 presented to the consumer for signature
 20 typically at closing; right?

21 A. Yes.

22 MR. BROCHIN: Asked and answered.

23 Q. Okay. So they might shop around for

1 interest rates or payment amounts or
2 closing costs or that kind of thing or
3 approval even?
4 A. Or companies.
5 Q. Or companies. But typically they don't
6 negotiate about who is the mortgagee of
7 record, do they?
8 MR. BROCHIN: Objection. Calls
9 for speculation. Asked and
10 answered.
11 A. They shopped around for the company.
12 Q. So if the companies all use MERS as
13 mortgagee, is there any choice for the
14 consumer?
15 MR. BROCHIN: Object to the form.
16 A. Companies don't all use MERS.
17 Q. 60 percent. Is that about right?
18 A. Probably.
19 Q. Maybe two-thirds now?
20 A. I doubt it.
21 Q. But sneaking up on it maybe?
22 MR. BROCHIN: Object to the form.
23 A. It may -- it may even be creeping back.

1 Q. And, I mean, your stated goal is that every
2 mortgage would be a MERS mortgage --
3 A. That's our mission.
4 Q. Right?
5 I mean, that's what you're trying to
6 get to?
7 A. Yes.
8 Q. You're still sitting there with that
9 transcript in front of you. If you will,
10 flip over to page 39 of that transcript,
11 please, sir.
12 A. Which page?
13 Q. 39.
14 Well, and before I even ask you that
15 question, let me step back and ask a more
16 general question.
17 Your company spends a lot of time
18 talking about interest in a mortgage loan;
19 right?
20 A. (Witness nods head.)
21 Q. And I notice that you'll speak in terms of
22 beneficial interest and things of that
23 nature.