Case No. 16-1127

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL W. ROBINSON, et al.,

Petitioners

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and MERSCORP HOLDINGS, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

Carl D. Hughes, Jr.
Counsel of Record
CARL HUGHES, P.C.
P. O. Box 610326
Dallas, TX 75261
(214) 761-9342
carlhughes@aol.com
Counsel for Petitioners

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ARGUMENT IN REPLY

I. This Case Provides a Particularly Good Vehicle for Resolving the Split in Authority Concerning MERS' Standing and Due Process Rights

In its response, MERS[1] argues that this case is a poor vehicle for resolving the conflict concerning MERS' Article III standing and due process rights, because the Ninth Circuit's opinion was unpublished and contains no analysis of the due process or beneficiary issues raised in the Petition. Resp. at 16.

While the Ninth Circuit's opinion was unpublished and did not address all of the constitutional issues raised by the Petitioners, those matters were briefed before the Ninth Circuit, and the factors addressed below weigh heavily in support of certiorari relief.

Additionally, while the Ninth Circuit erred in its application of California law, the basis for certiorari relief in this case extends beyond mere error correction. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

The sheer number of conflict cases that involve MERS' standing and due process rights supports certiorari relief. These issues continue to be litigated in state courts, federal district courts and federal bankruptcy courts across the country.

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[1] As described in the underlying Petition, Respondent MERSCORP owns the MERS system. Throughout this Reply, the Respondents are collectively referred to as "MERS".

At the time of this filing, the Petitioners' research reveals over 5,000 federal cases, and approximately 3,600 state reported cases that have addressed, in some fashion, MERS' standing and due process rights. In many of those cases, courts have struggled to determine MERS' standing and the scope of its agency. See Pet, p. 9-10.

The disparity among those decisions, and the resulting state of legal and market uncertainty, makes it clear that the current state of affairs is undesirable for all involved. Guidance from this Court would assist courts across the country in ruling on the numerous constitutional issues concerning MERS' standing and due process rights.

Additionally, while the country's mortgage foreclosure crisis may have slowed, there is every reason to believe that litigants will continue to challenge MERS' standing and due process rights in future state and federal cases. Simply put, the issues raised in the Petitioners' brief are not going away any time soon.

In short, this case provides a particularly good vehicle for resolving important constitutional questions concerning the standing and due process rights of a large, national corporation, on which federal and state courts are divided.

II. The Ninth Circuit's Analysis of California's Quiet Title Statutes Was Flawed

In its response, MERS argues that the conflict in this case is illusory, because MERS' statutory claim arises under state law – which supports the Ninth Circuit's holding. According to MERS, California law affords MERS with numerous rights as "nominee" or "beneficiary" under the Deed of

Trust, including the right to notice of a quiet title action. Resp. at 7. More specifically, MERS argues that under Section 760.010, it possessed a statutory right to be joined in the quiet title action. *Id.* In support, MERS relies heavily on the cases of *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal. App. 4th 1149, 1157 (4th Dist. 2011) and *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256 (1st Dist. 2011).

In *Gomes*, the court found that the plaintiff had agreed in the deed of trust that MERS could proceed with foreclosure and nonjudicial sale in the event of a default. *Gomes*, 192 Cal. App. 4th at 1157. Because the deed of trust did not require MERS to provide further assurances of its authorization prior to proceeding with foreclosure, the plaintiff was not entitled to demand such assurances. *Id.*

In *Fontenot*, the court addressed the plaintiff's claims that MERS wrongfully assigned the Note and Deed of Trust to HSBC, because MERS lacked the authority to make an assignment of the underlying promissory note. *Fontenot,* 198 Cal. App. 4th at 269. The complaint in that action alleged that MERS bore the burden of proving a proper assignment occurred. *Id.* at 269-70. The court dispelled such a burden, holding that a nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut that presumption. *Id.*

The *Fontenot* court also addressed the deed of trust language, which named MERS as the beneficiary and the nominee for the lender. The court concluded there is nothing inconsistent in MERS being designated both as the beneficiary and as a nominee, i.e., agent, for the lender. *Id.* at 273. The

legal implication of the designation is that MERS may exercise the rights and obligations of a beneficiary of the deed of trust, a role ordinarily afforded the lender, but it will exercise those rights and obligations only as an agent for the lender, not for its own interests. *Id*. The court found that other statements in the deed of trust regarding the role of MERS were consistent with this interpretation, and there was nothing ambiguous or unusual about the legal arrangement. Id.*;* see also *Calvo v. HSBC Bank USA, N.A*., 199 Cal. App. 4th 118, 125 (2d Dist. 2011) (concluding MERS had the right to initiate foreclosure and instruct the trustee to exercise the power of sale because it served as an agent).

While these decisions found that MERS could enforce or otherwise act under a Deed of Trust, they did so on the premise that MERS was acting as an agent, for and on behalf of a lender – since it is undisputed that MERS itself does not stand in that capacity. See *Thompson v. Bank of Am., N.A*., 773 F.3d 741, 748 (6th Cir. 2014) ("MERS is a company that provides mortgage recording services to lenders and allows lenders to trade the mortgage note and servicing rights on the market, with MERS maintaining electronic recordings of each transaction."); *Mortg. Elec. Registration Sys. v. Ditto*, 488 S.W.3d 265, 269 (Tenn. 2015)(noting that no mortgage rights are transferred on the MERS system).

Gomes and *Fontenot* are inapplicable in this case, because here, MERS never met the legal requirements to be considered an agent of the lender/principal (UPM). The Ninth Circuit misapplied California law on this issue.

Under California law, merely declaring oneself to be an agent in a Deed of Trust does not make one an agent, particularly if the principal has no right to control the agent's activities. See *Centerpoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101, 1118 (Cal. 2007). Actual agency occurs "when the agent is really employed by the principal." Cal.Civ. Code § 2299. The "formation of an agency relationship is a bilateral matter. Words or conduct by both principal and agent are necessary to create the relationship...." *Van't Rood v. County of Santa Clara*, 6 Cal. Rptr.3 d 746, 113 Cal. App. 4th 549, 571 (Cal. 2003) (internal quotation and citation omitted). See *Armoto v. Baden*, 71 Cal. App. 4th 885, 898-99 (Cal. 1999), ("Generally, the law indulges in no presumption that an agency exists but instead presumes that a person is acting for himself and not as agent for another.")

In this case, there was no evidence from the principal suggesting that it considered MERS to be its agent. Nor was there any evidence from MERS in the form of an agreement with a principal taking on the role of agency. Nor was there any evidence that the Petitioners ratified the claimed agency relationship between MERS and its principal. In fact, MERS was not even registered to do business in California in 2005 when the Deed of Trust was signed. See *Pilgeram v. Greenpoint,* 373 Mont. 1, 9 (2013) ("the deed of trust only states that 'Borrower understands and agrees' that MERS was a nominee of the lender(s), not that the lender(s) … granted MERS authority").

MERS' position that it served as an agent in this case is inaccurate - because MERS had no principal controlling its actions. This is certainly the

case here, as UPM—the principal—was a defunct entity.

Courts have described MERS' agent claims in different fashions. As one court described, MERS is a "principal-less" agent. *Culhane v. Aurora Loan Services of Nebraska,* 826 F. Supp. 2d 352, 377 (D.Mass. 2011). See, e.g., *Landmark Nat'l Bank v. Kesler,* 216 P. 3d 158, 166 (Kan. 2009) ("The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing…the rights given a buyer"); *Bain v. Metropolitan Mortgage Group*, 175 Wash. 2d 83, 107 (Wash. 2012)(where the Washington Supreme Court held that MERS was not an agent just because it claimed it was, especially where it had no principal that controlled its actions).

MERS' own membership rules also establish that it is not an agent. See *In re Agard*, 444 B.R. 231, 252 (Bankr. E.D.N.Y. 2011) ("MERS is not an agent because its membership agreement with lenders contained no grant of authority to MERS"). Further, the Petitioners presented evidence that UPM, through its former president, denied that UPM had any agency relationship with MERS.

III. Section 762.010 Did Not Require Notice to MERS of the Petitioners' Quiet Title Action Because MERS Never Had a Viable Claim.

In its response, MERS also argues that the decision reached below was correct, because California law required that the Petitioners give notice to MERS of their quiet title action. Resp. at 11.

Under California's quiet title statute, the Petitioners were required to "name as defendants in

the action the persons having adverse claims to the title of the plaintiff against which a determination is sought." Cal Code Civ P. §762.010. In this case, since MERS was not a valid agent of UPM, MERS had no personal stake or adverse claim on the Property. It was simply not entitled to notice under §762.010.

Additional evidence in this case supported a finding that MERS was never an agent of UPM and never had a claim against the Petitioners' property. For instance, at the time the Deed of Trust was executed, when MERS claims it became nominee and agent of the lender, MERS was a foreign corporation unlawfully conducting business in California. At the time, MERS was not properly registered with the State of California.

It is well established that a contract entered into by a corporation not authorized to do business is voidable by the other party. See Cal. Rev. & Tax. Code § 23304.1(a); *Myrick v. O'Neill*, 33 Cal. App. 2d 644, 647-48 (Cal. 1939). Long before California enacted these Revenue and Taxation codes, this Court recognized a common law right of states to sanction foreign corporations that violate its laws of incorporation and corporate taxation, having the right "[t]o impose conditions upon foreign corporations doing business in the state to the extent of holding the contracts of the corporation void which were entered into in violation of the conditions." *National Mut. Building & Loan Ass'n v. Brahan*, 193 U.S. 635, 650 (1904).

In *Chattanooga Nat'l Bldg & Loan Ass'n v. Denson*, 189 U.S. 408, 413-15 (1903), this Court voided an Alabama deed of trust where the foreign corporation was not licensed to do business in Alabama at the time the deed of trust was signed.

See also *Accurate Const. Co. v. Washington*, 378 A.2d 681, 683 (D.C. 1977) (Construction corporation, whose articles of incorporation had been revoked for failure to file annual reports at time deed of trust was executed, determined to lack capacity to contract, and thus the deed of trust was void).

In this case, MERS did not register with the State of California until 2010. Even if MERS registered and paid its delinquent corporate taxes and related penalties, that does not alter the fact that MERS lacked capacity to act in 2005 when the Petitioners' transactions occurred. See *Damato v. Slevin*, 214 Cal.App.3d 668, 671-72 (Cal. 1989) (Restoration of a domestic corporation's powers after it paid delinquent franchise taxes did not override contracting party's statutory right to treat a contract executed during the period of the corporation's suspension as voidable).

Both the District Court and Ninth Circuit erred in not voiding MERS' purported interest in the Petitioners' Deed of Trust. Since MERS did not have an enforceable claim against the property, either in its own right or as an agent of the lender, it was not entitled to notice of the Petitioners' quiet title action under Section 762.010.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl D. Hughes, Jr.
Counsel of Record

CARL HUGHES, P.C.
P. O. Box 610326
Dallas, TX 75261
(214) 761-9342
carlhughes@aol.com
Counsel for Petitioner

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