



Process loans, not paperwork



The Building Blocks of MERS

MERS Law Department



Corporate Structure



- **MERSCORP, Inc.** – The operating company that owns the MERS® System. Owned by 25 leading mortgage industry companies
- **Mortgage Electronic Registration Systems, Inc. (“MERS”)**: A bankruptcy-remote subsidiary of MERSCORP, Inc., whose sole purpose is to serve as mortgagee in the land records for loans registered on the MERS® System

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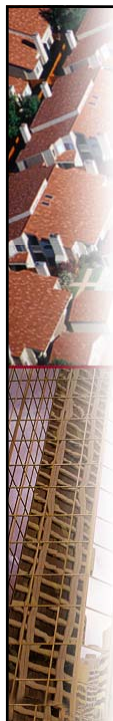


Governing Documents

MERS®

- Each member enters into a Membership Agreement with MERSCORP, Inc.
- Agreement consists of Membership Application that incorporates Terms and Conditions, Rules of Membership and the Procedures Manual
- All documents can be downloaded from MERS website: www.mersinc.org
- Member agrees that MERS shall serve as their mortgagee and nominee in the land records in exchange for the Member registering the mortgage on the MERS® System

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What is MERS?

MERS®

- Electronic registry: Electronic registry for tracking servicing rights and beneficial ownership interests in mortgage loans
- Mortgagee: MERS is the mortgagee in a nominee capacity for the beneficial owner of a mortgage loan in the land records

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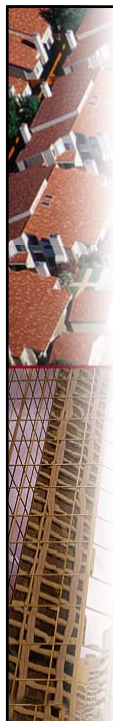


MERS Basics



- Registration vs. Recording. MERS is not a system of legal record nor a replacement for the public land records. Mortgages must be recorded in the county land records
- MERS is a tracking system. No interests are transferred on the MERS® System, only tracked

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Two Ways for MERS to Become Mortgagee



- MERS as Original Mortgagee ("MOM"). Use Deeds of Trust or Mortgages with MERS as Original Beneficiary or Mortgagee using standard language approved by Fannie Mae, Freddie Mac, FHA and VA
- Assignment to MERS. Use an assignment to MERS for an existing non-MOM mortgage

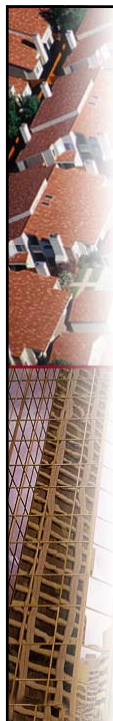
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MERS as Original Mortgagee **MERS®**

- Changes to Security Instrument
 - Definition section: “MERS” is defined in subsection as the Mortgagee/Beneficiary
 - Granting clause: Borrower mortgages, grants and conveys the Property to MERS
 - Disclosure section: Borrower agrees that MERS holds legal title and acknowledges that MERS has right to exercise rights of mortgagee/beneficiary, including foreclosing
 - State specific changes: New Mexico and Pennsylvania

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Certifying Officer **MERS®**

- What is a Certifying Officer?
- Corporate Resolution v. Power of Attorney
- How to update list

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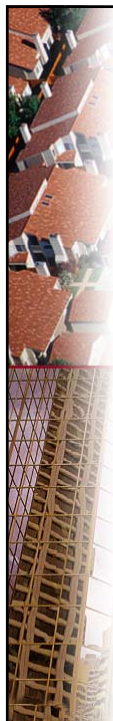


Issuing a Title Policy

MERS®

- We recommend that MERS be a named insured on title policies when a MOM is used
- Note owner is always an insured party
- MERS cannot fix problems in the chain of title that occurred prior to becoming mortgagee

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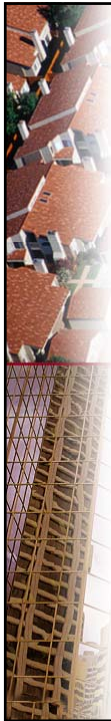


Payoffs

MERS®

- Only the loan servicer can provide a payoff figure
- Sample letter explaining relationship between MERS, servicer and note owner
- Best way for title professionals to contact the current servicer: MERS® Link

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Lien Releases

MERS®

- When servicer receives payoff, an officer of MERS executes lien release
- Two exceptions: Colorado and Louisiana
- Status of lien releases in New York

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State Specific Lien Release Requirements

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- Colorado: FHA Number and Lost Note Affidavit
- New York: CEMA
- Massachusetts : Massachusetts Vote

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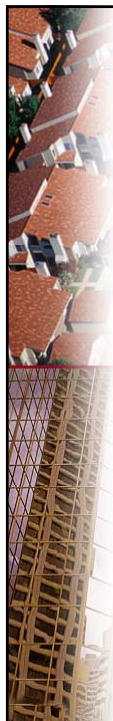


Service Of Process



- What does MERS receive?
 - Legal pleadings, notices, demand letters, subpoenas
- How does MERS receive mail?
 - Service in Michigan or Florida, registered agents, or at corporate headquarters, by way of a process server or certified mail
- What does MERS do with it?
 - Documents are scanned and promptly forwarded electronically to the central point of contact at the Member servicing the loan

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Indemnification and Notification



- Membership Rules 13 and 14
- Retention of counsel is member's responsibility
- Notifying MERS of suits and threatened suits
- Working with the MERS Law Department and outside counsel
- Promptly raise any questions regarding indemnification or lack of interest in the suit

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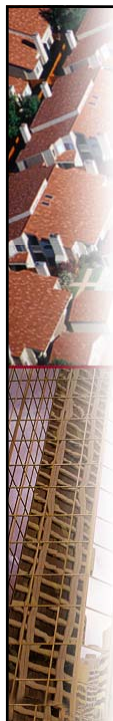


Subpoenas

MERS®

- MERS receives third-party subpoenas, most commonly in divorce, criminal and bankruptcy
- Use a certifying officer of MERS to respond
- Member should respond that it is producing documents in member's name
- Certifying officer can testify
- Failure to respond could lead to costly contempt order

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Filing Corrective Documents

MERS®

- Mortgagee affidavit
 - Use to correct MIN
 - California, New Jersey (file an assignment)
- Erroneous MOMs
 - Disclaimer of Interest
 - Registration on MERS® System

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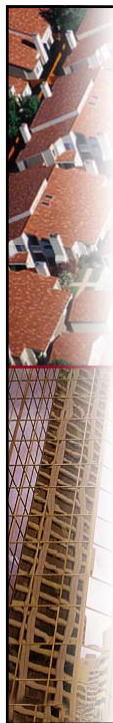


Master Mortgages



- Fannie Mae and Freddie Mac Uniform Master Form Security Instruments.
 - Guidelines to adding MERS to Master and Short Form Mortgages can be accessed at:
<https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/>

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State Qualification & Licensing



- MERSCORP, Inc:
 - Alabama, California, Delaware, Florida, Georgia, Iowa, Illinois, Massachusetts, North Carolina, New Jersey, New York, Pennsylvania, Texas, Virginia
- Mortgage Electronic Registration Systems, Inc:
 - Alabama, Arkansas, Delaware, Florida, Illinois, Massachusetts, New Jersey, New York, Ohio, Virginia

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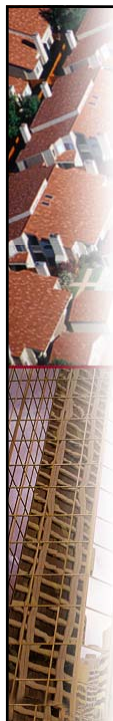


Bankruptcy

MERS®

- Proof of Claims and Motions for Relief from Automatic Stay
- Trustees' oppositions to Motions for Relief

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Foreclosures

MERS®

- MERS provides Recommended Foreclosure Procedures as a guideline
- Status of foreclosing in MERS name with recent case law
- Upon completion of foreclosure, do not put title into MERS name

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Q & A

MERS®



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The Building Blocks of MERS

I. INTRODUCTION TO MERS

What is MERS?

History:

In 1991, an Inter Agency Technology Task Force (IAT) comprised of representatives from Mortgage Bankers Association (MBA), Fannie Mae, Freddie Mac and Ginnie Mae began evaluating the potential for an industry-sponsored central repository to electronically register and track ownership of mortgage rights. Two years later, in 1993, a White Paper was published that concluded that a book entry system had tremendous potential to reduce costs associated with transferring mortgage rights. In July 1994, it was decided that the MERS project should be funded and developed.

The MBA played a key role in keeping MERS on track until MERS incorporated in October of 1995.

MERS became operational in April 1997. However, it was not smooth sailing as forecasted, and much more work needed to be done to become the successful company MERS is today.

One critical change to the original MERS structure was becoming a privately held stock corporation in 1998 as well as moving to a two-tiered corporate structure, MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc.

MERS constantly strives to serve our members and the industry better by creating new and innovative products. Two additions to our product line are MERS[®] Commercial and the MERS[®] e-Registry. Each went live in 2003 and 2004, respectively. MERS[®] Commercial is specifically designed to bring the benefits of the MERS[®] System to the CMBS marketplace, by eliminating the repurchase risk and costs associated with preparing, recording, and tracking assignments. MERS[®] e-Registry is a system of record that identifies the owner (Controller) and custodian (Location) for registered eNotes. It allows lenders to register Notes electronically, and provides greater liquidity, transferability, and security in the creation and transfer of Notes.

Corporate Structure:

MERSCORP, Inc. is currently owned by 25 companies, including Fannie Mae, Freddie Mac, the Mortgage Bankers Association of America, the American Land Title Association, First American Title, Stewart Title, MGIC, PMI, Chase, CitiMortgage, Countrywide, Merrill Lynch, SunTrust and various other mortgage companies. A complete list can be found on the MERS Corporate Website, www.mersinc.org. MERSCORP, Inc. is the operating company that owns and operates the MERS[®] System. It is a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are

registered on the registry. It is also the parent company of Mortgage Electronic Registration Systems, Inc., a bankruptcy remote corporation whose sole purpose is to be the mortgagee of record and nominee for the beneficial owner of the mortgage loan.

This two-tiered structure is approved by the three major rating agencies: Standard & Poor's, Moody's, and Fitch. The rating agencies have eliminated the requirement to have an assignment to a securitization trustee prepared and recorded when MERS is the mortgagee of record. MERS registered loans have been included in rated securities issued by Lehman Brothers, Bank of America, RFC, Countrywide, Bank One and Wells Fargo.

Governing Documents:

Each Member of MERS enters into a Membership Agreement with MERSCORP, Inc. This Agreement consists of a Membership Application signed by the Member and incorporates the Terms and Conditions, the Rules of Membership and the Procedures Manual. All documents can be downloaded from the MERS web site: www.mersinc.org.

Basic MERS:

- **Recording versus Registration.** The security instrument is RECORDED in the applicable county land records. The mortgage information is REGISTERED on the MERS[®] System. The mortgage, deed of trust or assignment to MERS must be recorded in the land records in order to perfect the mortgage lien. Registering the mortgage loan information on the MERS[®] System is separate and apart from the function that the county recorders perform.
- **Transfers of Mortgage Interests versus Tracking the Changes in Mortgage Interests:** No mortgage rights are transferred on the MERS[®] System. The MERS[®] System only tracks the changes in servicing rights and beneficial ownership interests. Servicing rights are sold via a purchase and sale agreement. This is a non-recordable contractual right. Beneficial ownership interests are sold via endorsement and delivery of the promissory note. This is also a non-recordable event. The MERS[®] System tracks both of these transfers. MERS remains the mortgage lien holder in the land records when these non-recordable events take place. Therefore, because no recordable event is taking place, there is no need for any assignments to be recorded. It is not true that the non-recordable events that are tracked on MERS are really electronic assignments. If in fact servicing is sold to a non-MERS member, then a paper assignment is generated because the mortgage lien will need to be transferred to the non-MERS member. MERS cannot remain holding the mortgage lien for a non-MERS member.

How Does MERS Become the Mortgagee of Record?

This occurs in one of two ways, either by an Assignment to Mortgage Electronic Registration Systems, Inc. (MERS) or by MERS being named as the Original Mortgagee of Record (MOM).

Using Assignments:

This is typically used with seasoned loan bulk transactions or is used when the originator is not a MERS member, but is selling to a MERS member who requires the originator to assign the loan to MERS. The assignment is recorded in the local county land records making MERS the mortgagee of record. The MERS member registers the mortgage on the MERS® System. No further assignments are needed if the servicing rights are sold from one MERS member to another MERS member because the mortgage lien remains with MERS.

Original Mortgagee of Record:

In 1998, it was determined that recording an assignment to MERS is not the only way that MERS can become the mortgagee. The concept of MERS as Original Mortgagee (MOM) was developed. It involves naming Mortgage Electronic Registration Systems, Inc. (MERS) on the mortgage as the mortgagee in a nominee capacity for the Lender, who is the promissory note owner.

At the time the loan is closed, MERS is named as the mortgagee as nominee for the originating lender, its successors and assigns. The originating lender is named as the payee on the promissory note. The loan is registered on the MERS® System and the mortgage is recorded in the local county land records.

Changes were made by Fannie Mae and Freddie Mac to the Uniform Security Instrument to accommodate MERS as Original Mortgagee (MOM). The use of MOM has been approved by Fannie Mae, Freddie Mac, the Department of Veteran's Affairs, Department of Housing and Urban Development, Federal Home Loan Bank System, State of New York Mortgage Agency (SONYMA) and California Housing Finance Agency, among others.

Three principal changes were made:

- To ensure that the note and mortgage are tied together, MERS is named in a nominee capacity for the Lender, because the Lender is named on the note.
- It is made clear that the Borrower in the granting clause grants the mortgage to MERS.
- Language was added to make clear that MERS as the mortgagee has the power to foreclose and release the security instrument.

Sample Florida MERS Uniform Security Instrument

MERS language has been highlighted

After Recording Return To:

_____ [Space Above This Line For Recording Data] _____

MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **“Security Instrument”** means this document, which is dated _____, together with all Riders to this document.

(B) **“Borrower”** is _____. Borrower is the mortgagor under this Security Instrument.

(C) **“MERS”** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. **MERS is the mortgagee under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) **“Lender”** is _____. Lender is a _____ organized and existing under the laws of _____. Lender’s address is _____.

(E) **“Note”** means the promissory note signed by Borrower and dated _____. The Note states that Borrower owes Lender _____ Dollars (U.S. \$ _____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(F) **“Property”** means the property that is described below under the heading “Transfer of Rights in the Property.”

(G) **“Loan”** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) **“Riders”** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> I-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> Planned Unit
Development Rider | <input type="checkbox"/> Other(s): [specify]
_____ | |

(I) **“Applicable Law”** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) **“Community Association Dues, Fees, and Assessments”** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) **“Electronic Funds Transfer”** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) **“Escrow Items”** means those items that are described in Section 3.

(M) **“Miscellaneous Proceeds”** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) **“Mortgage Insurance”** means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) **“Periodic Payment”** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) **“RESPA”** means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(Q) **“Successor in Interest of Borrower”** means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby

mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the _____ of _____:
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

which currently has the address of _____
[Street]
_____, Florida _____ ("Property Address"):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Sample California Deed of Trust

MERS language has been highlighted

After Recording Return To:

_____ [Space Above This Line For Recording Data] _____

DEED OF TRUST

DEFINITIONS

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(A) **“Security Instrument”** means this document, which is dated _____, together with all Riders to this document.

(B) **“Borrower”** is _____. Borrower is the trustor under this Security Instrument.

(C) **“Lender”** is _____. Lender is a _____ organized and existing under the laws of _____. Lender’s address is _____.

(D) **“Trustee”** is _____.

(E) **“MERS”** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) **“Note”** means the promissory note signed by Borrower and dated _____, _____. The Note states that Borrower owes Lender _____ Dollars (U.S. \$ _____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(G) **“Property”** means the property that is described below under the heading “Transfer of Rights in the Property.”

(H) **“Loan”** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) **“Riders”** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|--|--|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> I-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> Planned Unit
Development Rider | <input type="checkbox"/> Other(s): [specify] _____ | |

(J) “Applicable Law” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) “Community Association Dues, Fees, and Assessments” means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) “Electronic Funds Transfer” means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) “Escrow Items” means those items that are described in Section 3.

(N) “Miscellaneous Proceeds” means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) “Mortgage Insurance” means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) “Periodic Payment” means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) “RESPA” means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(R) “Successor in Interest of Borrower” means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the _____ of _____:

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

which currently has the address of _____
[Street]
_____, California _____ (“Property
Address”):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the “Property.” Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

State Specific Changes to Instruments Naming MERS as Mortgagee:

New Mexico:

In January 2008, Fannie Mae and Freddie Mac updated the Uniform Instrument for New Mexico. The changes to the instrument were in response to state statutory changes. Below are the first few pages of the updated Uniform Instrument for naming MERS as mortgagee (See Form 3032 1/01 (rev. 3/08)) in New Mexico.

MERS language has been highlighted

After Recording Return To:

_____ [Space Above This Line For Recording Data] _____

DEED OF TRUST

DEFINITIONS

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(A) **“Security Instrument”** means this document, which is dated _____, _____, together with all Riders to this document.

(B) **“Borrower”** is _____. Borrower is the mortgagor and trustor under this Security Instrument. The mailing address of the Borrower is _____.

(C) **“Lender”** is _____. Lender is a _____ organized and existing under the laws of _____. The mailing address of the Lender is _____.

(D) **“Trustee”** is _____. The mailing address of the Trustee is _____. The Trustee may be changed by Lender or its agent recording a Notice of Substitution of Trustee and providing notice to Trustee and Borrower.

(E) **“MERS”** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. **MERS is the mortgagee and beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS

(F) **“Note”** means the promissory note signed by Borrower and dated _____, _____. The Note states that Borrower owes Lender _____ Dollars (U.S. \$_____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____. This Security Instrument secures a maximum principal amount of up to 150% of the original amount of the Note.

(G) **“Property”** means the property that is described below under the heading “Transfer of Rights in the Property.”

(H) **“Loan”** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

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- | | | |
|---|--|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> I-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Other(s): [specify] _____ | |

(J) **“Applicable Law”** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) **“Community Association Dues, Fees, and Assessments”** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) **“Electronic Funds Transfer”** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) **“Escrow Items”** means those items that are described in Section 3.

(N) **“Miscellaneous Proceeds”** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) **“Mortgage Insurance”** means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) **“Periodic Payment”** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) “RESPA” means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(R) “Successor in Interest of Borrower” means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS, as the mortgagee and beneficiary of this Security Instrument, (solely as nominee for Lender and Lender’s successors and assigns) and to the successors and assigns of MERS, the following described property located in the

_____ of _____:
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

which currently has the address of _____
_____, New Mexico _____ (“Property Address”):
[City] [Street] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the “Property.” Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

New York:

In December 2007, MERS sent out a policy bulletin (Policy Bulletin 2007-2) notifying all members that a street address should be used on all documents submitted for recording in New York that identify MERS as the mortgagee. The street address to be used on the documents for Mortgage Electronic Registration Systems, Inc. is **3300 S.W. 34th Avenue, Suite 101, Ocala, FL 34474, P.O. Box 2026, Flint, Michigan 48501-2026**. A copy of the policy bulletin is available on the MERS website at <http://www.mersinc.com/MersProducts/bulletins.aspx?mpid=1>. Please share this bulletin with all departments and member affiliates responsible for compliance with the recording statutes in New York.

Pennsylvania:

Earlier this year, we circulated a Policy Bulletin advising members to include a MERS street mailing address along with our standard P.O. Box address for the state's Certificate of Residence requirement. The two addresses should be displayed as shown in the following highlighted example:

COMMONWEALTH OF PENNSYLVANIA,

County ss:

On this, the _____ day of _____, before me, the undersigned officer, personally appeared
XXXXXXX, XXXXXXXXXXXX

known to me (or satisfactorily proven) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged that he/she/they executed the same for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.
My Commission Expires:

Officer Title

Certificate of Residence

I, _____, do hereby certify that the correct address of the within-named Mortgagee is 3300 S.W. 34th Avenue, Suite 101, Ocala, FL 34474 or P.O. Box 2026, Flint, MI, 48501-2026.

Witness my hand, this _____ day of _____, 200__.

Agent of Mortgagee (or Assignee)

II. MERS® SYSTEM OVERVIEW

Logging on to MERS® OnLine

Logging on to MERS® OnLine is similar to logging on to any browser-based application using Internet Explorer 6.x or higher. To log on, you must have:

- A seven-digit organization identification (Org. ID) assigned by MERS.
- An individual user identification (User ID) assigned by your system administrator.
- A password assigned by your system administrator.

MERS OnLine - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Search Favorites Go Links

Address <https://www.mersonline.org/mers/security/loginframe.htm>

MERS OnLine
www.mersinc.org

Process Loans, Not Paperwork™

MERS® OnLine

Please enter your logon credentials below.

Organization ID:

User ID:

Password:

Logon

If you have forgotten your password, please enter your Organization ID and User ID and click "Forgot My Password".

Forgot My Password

The MERS® OnLine system hours are Monday through Saturday 7:00 am to 10:00 pm Eastern Time.
The 1st and 3rd Sundays of each month are system maintenance windows.
The maintenance window is from 7:00 am to 11:00 pm Eastern Time.

If you have any questions pertaining to MERS® OnLine, please contact the MERS Help Desk at 1-888-680-6377 or via email to helpdesk@mersinc.org. Please include your name and telephone number with the email.

Copyright© 1999 by MERSCORP, Inc. 1-800-646-MERS (6377)
Other products or company names are or may be trademarks or registered trademarks and are the property of their respective holders.

Done

start

Inbox - Micro... Untitled - Mes... 3 Internet ... 3 Windows... LawBase MERS Unidentified M... OctMERS Out...

Internet

11:32 AM
Tuesday
4/8/2008

Information displayed on a MIN Summary

The following information is displayed on the MIN summary when a MIN is selected for viewing:

MIN Information

- MIN
- MIN Status (will be in bold red font if not in Active status)
- MOM (Y/N)
- Property address
- Lien Type
- Primary borrower name
- Social Security Number (if you are allowed to view it)
- Pool number
- Note amount
- Note date
- Servicer name
- Custodian name
- Investor name
- Loan number
- Subservicer name
- Interim funder name
- QR Flag (Y/N)

The screenshot displays the MERS OnLine web application in a Microsoft Internet Explorer browser window. The address bar shows the URL: <https://www.mersonline.net/mersonline/security/validatelogin.jsp>. The page header includes the MERS OnLine logo, the slogan "Process Loans, Not Paperwork™", and the text "Training 1000001".

The main content area is titled "MIN SUMMARY" and displays the following information:

Summary			
1001361-0000000000-3	Active (Registered)	MOM: Y	QR: N
1234 BEDROCK BEDROCK, WY 82001		Reg Date:	09/26/2001
County: Laramie		First Lien	
Borrower	FLINSTONE, FRED		
SSN	555-55-5555		
Pool Number	N/A	Investor Loan Number	N/A
Note Amount	\$120,000.00	Note Date	09/25/2001
Servicer	1001361 - Wyoming State Bank		
Custodian	N/A		
Investor	1001361 - Wyoming State Bank		
Subservicer	N/A		
Interim Funder	N/A		

Below the summary, there is a section titled "Pending Batches" with a table structure:

Batch Number	Transfer Type	Status	Transfer Date	Sale Date
No Pending Batches!				

The left sidebar contains a navigation menu with the following links: Loan, Borrower Details, Property, Legal Description, Assignment, Miscellaneous, Security Ind, Milestones, Mod Agree, MIN Audit, MIN Transfer Audit, Summary, MIN Find, Back to Main Menu, and Log-off.

III. CERTIFYING OFFICERS

Numerous documents can only be executed by the mortgagee of a mortgage loan (assignments, lien releases, etc). When Mortgage Electronic Registration Systems, Inc. is the mortgagee, the Lender continues to prepare documents and executes them by its MERS certifying officer.

Question: *What is a Certifying Officer?*

A certifying officer is an employee of the Lender who is appointed a MERS officer by a MERS Corporate Resolution. The Resolution authorizes the certifying officer to execute documents as a MERS officer.

Question: *Does the title that the employee holds as an employee of the Lender correspond to the title that the employee holds as a MERS Certifying Officer?*

No. All MERS Certifying Officers are appointed assistant secretaries and vice presidents of Mortgage Electronic Registration Systems, Inc. That means that if an employee is a Senior Vice President of the Lender, that employee is not a Senior Vice President of MERS. The employee is an assistant secretary and vice president of MERS.

Question: *Do we need to file a power of attorney and what do we do if we are asked to produce a power of attorney?*

Being appointed as a MERS Certifying Officer means that the employee is an officer of MERS and can sign as a MERS officer. A power of attorney is not needed because that is not the capacity of how a certifying officer is signing. A power of attorney would be necessary if an employee is signing as an employee of the Lender on behalf of MERS. The Corporate Resolution does not need to be recorded and is appointing the employee as an officer of MERS. In essence, the employee is a dual officer of the lender and MERS.

Question: *How do we update our officer list?*

To update your MERS Certifying Officer list, please forward your updated list to merscertifyingofficer@mersinc.org. Please be sure to include your MERS org ID in this email request. You will receive a confirmatory response and a return copy of your updated list by email once the update has been completed.

Question: *Who should be named as a certifying officer?*

Anyone that signs documents for the Lender currently should be named as a certifying officer. This way, the Lender's procedures will not need to be changed and the same people will continue to execute the documents.

Question: *Do we need MERS Corporate Seals?*

If you currently are using seals or stamps on your assignments or lien releases, then you probably need to order MERS Corporate Seals. MERS can provide the seals to you at \$25.00 each plus shipping and handling. Some Lenders do not use seals and therefore probably do not need MERS seals.

Question: *Do we need to record the Corporate Resolution?*

No, the Corporate Resolution is not a power of attorney document. However, we have become aware that in Massachusetts and some parishes in Louisiana, it may be required that the document be on file. A filing in these counties is required for all corporations, not just for MERS. We can provide extra copies of the corporate resolution for recording if this becomes necessary for you.

Massachusetts also requires that a “Vote” be on file prior to accepting documents executed by officers on behalf of an entity for recording in addition to filing the corporate resolution. A “Vote” is an acknowledgment attached to the Corporate Resolution that is signed by the Corporate Secretary for MERS. A “Vote” must be on file for all entities who file documents for recording with the Land Court. Before offering documents for filing with the Land Court, a Member should obtain an original executed “Vote.” This document must be filed along with an original of the Member’s MERS Corporate Resolution along with a copy of the most current list of certifying officers. To obtain an executed “Vote”, please contact the MERS Law Department.

Question: *Can a MERS Certifying Officer accept mail and/or service of process for MERS?*

No, the Corporate Resolution does not grant certifying officers the authority to accept mail or notices on behalf of MERS. Service of process meant for MERS and MERS mail in general should be directed to P.O. Box 2026, Flint, MI 48501-2026.

Question: *Do I need to hold a specific position at my company in order to become a MERS Certifying Officer?*

Yes, the employee should be an officer of the member who has authority to sign for the member.

Question: *What does the Corporate Resolution look like?*

CORPORATE RESOLUTION

Be it Resolved that the attached list of candidates are employees of **(Insert Name of MERS Member)**, a Member of Mortgage Electronic Registration Systems, Inc. (MERS), and are hereby appointed as assistant secretaries and vice presidents of MERS, and, as such, are authorized to:

- (1) Release the lien of any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member;
- (2) Assign the lien of any mortgage loan naming MERS as the mortgagee when the Member is also the current promissory note-holder, or if the mortgage loan is registered on the MERS[®] System, is shown to be registered to the Member;
- (3) Execute any and all documents necessary to foreclose upon the property securing any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member, including but not limited to (a) substitution of trustee on Deeds of Trust, (b) Trustee’s Deeds upon sale on behalf of MERS, (c) Affidavits of Non-military Status, (d) Affidavits of Judgment, (e) Affidavits of Debt, (f) quitclaim deeds, (g) Affidavits

regarding lost promissory notes, and (h) endorsements of promissory notes to VA or HUD on behalf of MERS as a required part of the claims process;

(4) Take any and all actions and execute all documents necessary to protect the interest of the Member, the beneficial owner of such mortgage loan, or MERS in any bankruptcy proceeding regarding a loan registered on the MERS[®] System that is shown to be registered to the Member, including but not limited to: (a) executing Proofs of Claim and Affidavits of Movant under 11 U.S.C. Sec. 501-502, Bankruptcy Rule 3001-3003, and applicable local bankruptcy rules, (b) entering a Notice of Appearance, (c) vote for a trustee of the estate of the debtor, (d) vote for a committee of creditors, (e) attend the meeting of creditors of the debtor, or any adjournment thereof, and vote on behalf of the Member, the beneficial owner of such mortgage loan, or MERS, on any question that may be lawfully submitted before creditors in such a meeting, (f) complete, execute, and return a ballot accepting or rejecting a plan, and (g) execute reaffirmation agreements;

(5) Take any and all actions and execute all documents necessary to refinance, subordinate, amend or modify any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member.

(6) Endorse checks made payable to Mortgage Electronic Registration Systems, Inc. to the Member that are received by the Member for payment on any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member;

(7) Take any such actions and execute such documents as may be necessary to fulfill the Member's servicing obligations to the beneficial owner of such mortgage loan (including mortgage loans that are removed from the MERS[®] System as a result of the transfer thereof to a non-member of MERS).

I, William C. Hultman, being the Corporate Secretary of Mortgage Electronic Registration Systems, Inc., hereby certify that the foregoing is a true copy of a Resolution duly adopted by the Board of Directors of said corporation effective as of the day of , which is in full force and effect on this date and does not conflict with the Certificate of Incorporation or By-Laws of said corporation.

William C. Hultman, Secretary

IV. TITLE COMPANIES

How are title policies issued when MERS is the original mortgagee?

There are three options that are used:

1. Naming as the insured, “the Lender, its successors and assigns appearing of record as Mortgage Electronic Registration Systems, Inc.”
2. Naming as the insured, “Mortgage Electronic Registration Systems, Inc. as the beneficiary and [originating Lender] as the beneficial lender”
3. Naming as the insured, “[originating Lender] and Mortgage Electronic Registration Systems, Inc. solely as nominee for the Lender, its successors and assigns, as their interests may appear.”

Issues:

#1. A title company may refuse to name a lender on the title policy when the lender is not named on the MOM (MERS as Original Mortgagee) mortgage nor is there an assignment to the lender. This occurs when a third party originator or broker is involved. For example, ABC Mortgage Company uses Bob Broker Company to originate loans. The mortgage document reads “Mortgage Electronic Registration Systems, Inc. as nominee for Bob Broker Company, its successors and assigns.” Bob Broker is not a MERS member because ABC Mortgage Company has signed a MERS Broker Agreement that allows a MERS member to have its broker be listed on the MOM mortgage as the lender. There will not be an assignment from Bob Broker to ABC Mortgage in this case.

Question: Can ABC Mortgage Company be named on the title policy if the mortgage was originated MERS as nominee for Bob Broker?

No, because ABC Mortgage Company is not named on the mortgage and there is no assignment to ABC Mortgage Company. The title company will not agree to name specifically ABC on the policy. However, ABC Mortgage Company is fully covered under the title policy because in the definition section of the standard title policy, the owner of the indebtedness is always insured. ABC Mortgage Company is a successor to the promissory note from Bob Broker because ABC purchased the loan and therefore is the owner of the indebtedness. It is not true that ABC Mortgage Company must be specifically named on the title policy in order to have coverage.

Prior to using MERS, ABC Mortgage Company may have been named on the title policy because the process was different. Typically, the mortgage was issued in Bob Broker’s name and an assignment from Bob Broker to ABC Mortgage Company was simultaneously issued and recorded. It was the assignment that allowed ABC Mortgage Company to be listed on the policy or endorsement as the insured by name.

#2. If a MOM is not used and instead MERS becomes the mortgagee of record by an assignment, MERS cannot fix a problem that exists in the chain of title prior to MERS becoming the mortgagee of record.

Question: *I am showing MERS as the last mortgagee of record, but I cannot find a prior assignment to Last Chance Mortgage, the company that assigned the mortgage to MERS. What can we do?*

Many times callers think that MERS can fix this. MERS cannot clear up a problem in the title that originated before MERS became the mortgagee. However, by using a MOM, MERS can prevent future problems like this from occurring because assignments go away. This problem was created because the MERS Member instructing Last Chance Mortgage to assign the loan to MERS did not check to make sure that Last Chance Company had clear title to pass on.

#3. A title company called with this question: One of the attorney agents called with the following fact pattern:

- Mortgage to ABC Mortgage Corporation recorded 11/12/99;
- Assignment by ABC to MERS as nominee for AMF Corporation recorded 11/22/00;
- Assignment directly from AMF Corporation to non-MERS member recorded on 1/25/01, which is executed by AMF Corporation with no reference to MERS.

Our agent wonders if he needs a Confirmatory Assignment from MERS to perfect the chain of title.

YES, MERS is the mortgage lien holder on this loan pursuant to the 11/22/00 assignment. The 1/25/01 assignment from AMF to the Non-MERS member is not a valid assignment transferring the lien because MERS holds the lien, not AMF. To correct this, an assignment from MERS to the Non-MERS member is needed.

V. PAYOFFS & LIEN RELEASES

Title companies may want an explanation of the relationship between MERS and the Lender. Issues are often quickly resolved once the member fully understands and lets the title agent know that MERS is the mortgagee and, as such, is the entity that will execute the lien release.

Question: *I have received a payoff figure from ABC Mortgage Company, but my title report shows MERS as the mortgagee. Therefore, I need to have an assignment from MERS to ABC Mortgage Company. Can you do this?*

As more and more loans are registered onto the MERS® System, attorneys and title companies understand that it is appropriate to send payoff funds directly to the Lender when MERS is the mortgagee of record. When a company just cannot seem to get there without some sort of documentation for their files, a letter explaining how the payoff process works when MERS is the mortgagee may be needed. A sample of a letter can be provided as follows:

May 10, 2008

Western Peninsula Title Co.
123 Insurance Street, Suite 3
Orlando, FL 11111

VIA FACSIMILE AND FIRST CLASS MAIL

RE: Robert M. and Karen L. Borrower, 123 South Mortgage Road, Orlando, FL 49736
MIN 1000000-1234567891-0

Dear Sir or Madam:

Please be advised that ABC Mortgage Company is the servicer of the above-referenced mortgage loan, and as such has provided a payoff figure to you. Mortgage Electronic Registration Systems, Inc. (MERS) is the mortgagee of record pursuant to recorded mortgage [or assignment if a non-MOM mortgage or deed of trust]. MERS is holding the mortgage in a nominee capacity for the promissory note-owner of the mortgage loan.

MERS, as the mortgagee, is authorizing and instructing that all funds are made payable to ABC Mortgage Company and forwarded directly to them. Upon payoff of the mortgage, MERS will execute a lien release.

If you have any questions or problems, please contact me.

Very truly yours,

“MERS Vice President [use a MERS Certifying Officer to sign the letter]”

Question: *What happens when a lien release or satisfaction is not recorded, not done properly, or not done in a timely manner and MERS shows up on a title report as the lien holder on a mortgage that has been paid off?*

MERS will look up the mortgage registration on the MERS® System to find out the name of the servicer. We then direct the caller to the servicer to handle the verification of the payoff and obtaining a MERS officer's signature and recording of the lien release.

We require the MERS member servicing the mortgage that is receiving the payoff to have the lien release executed and recorded in accordance with the applicable state law. The lien release must be executed by one of the MERS certifying officers. Failure to timely record a correct release can potentially subject MERS to statutory penalties and other damages and MERS will look to the member to indemnify MERS for these costs.

If the mortgage is not registered, MERS is in a difficult position because we cannot verify that it was paid off if we do not know which member is the current servicer. If the caller has the mortgage or assignment to MERS, we can sometimes figure out which member is involved. If they do not have the documentation, we may send someone to the land records to pull the mortgage or the assignment. Once we are satisfied that the mortgage loan has been paid, we will execute the lien release.

Question. *I am showing that Jane Smith's mortgage was assigned to MERS on December 15, 2000, but ABC Mortgage Company signed the lien release. There is no assignment to ABC Mortgage Company, what do I do?*

This sometimes occurs because one of two things has happened:

1. Occasionally, a mortgage is included in a bulk transfer and for whatever reason is pulled out of the bulk. However, the assignment to MERS may have already been prepared, is not pulled, and is recorded by mistake. In other words, there was no intention to have MERS be the mortgagee and to have it registered on MERS.

For example, ABC Mortgage (non-MERS member) is selling 1,000 mortgages to XYZ Mortgage (MERS Member). Jane Smith's mortgage is paid off prior to the transfer, but the assignment to MERS has already been prepared, is not pulled, and mistakenly is recorded. ABC Mortgage is unaware that the assignment has already been recorded and still thinks they hold the mortgage lien in the land records so it signs the lien release. MERS shows up on the title report as holding a mortgage lien. MERS will not have a record of this mortgage because XYZ did not register it because they did not purchase it. XYZ is unaware that the assignment was even sent for recording. When this happens, title companies insure over it because ABC can show that the loan was paid in full and no outstanding lien currently exists.

2. The second situation where this can happen requires something to be done to fix it. In this case, MERS really is intended to hold the mortgage lien, but the MERS Member internally did not pick up the fact that MERS is the mortgagee or does not know the correct way to release a lien held by MERS. For instance, ABC Mortgage Company registers Jane Smith's mortgage

on the MERS® System and MERS is recorded as the mortgagee. However, ABC Mortgage Company fails to track somehow that MERS holds the mortgage lien, so they go ahead and execute the lien release on behalf of ABC Mortgage Company. Sometimes, county recorders reject the release based on this discrepancy. If it is recorded, it does not release the lien properly and MERS may still show up on a title report. To fix this, ABC Mortgage Company needs to prepare another lien release and have it executed by MERS.

Question: What happens if a Recorder/Clerk refuses to record a MERS lien release?

Whether the Clerk records or marks the mortgage lien as discharged is not what evidences the lien actually being discharged. Keep in mind that the promissory note should be marked "paid in full" when the loan is paid off. The mortgage lien follows the note, so if there is no outstanding note, there cannot be a mortgage lien regardless of what the land records show. Please contact the MERS Law Department and let us know about the issue.

State Specific Lien Release Requirements:

(a) COLORADO

(i) FHA NUMBER AND LOST NOTE AFFIDAVIT

Question: In Colorado, when we release the lien, we send a copy of the original Deed of Trust and are exempt from providing the original evidence of debt under Colorado Revised Code Section 38-39-102(3.5)(b), because we are a Federal Housing Administration(FHA) approved lender. We normally do not have any problem. However, I do not think MERS qualifies under any of the exemptions and we are not inclined to send the original collateral and an original Affidavit of Indemnification to the Public Trustee with each Request for Release of Deed of Trust.....what should we do?

This Statute requires a public trustee to release a lien upon (1) receipt of a written request, (2) production of the original cancelled evidence of debt and (3) receipt of a fee. When the original note cannot be produced, the public trustee may accept an indemnification agreement. However, only specific entities are allowed to sign an indemnification agreement and MERS does not fit into any of the authorized categories. The accepted entities include, but are not limited to 1) a bank, 2) an industrial bank, 3) a Colorado licensed savings and loan association, 4) an FHA approved mortgagee, 5) a state chartered credit union or federally chartered credit union operating in Colorado, 6) an agency of the federal government or 7) a federally created corporation that originates, guarantees, or purchases loans. A public trustee system seems to be used only in Colorado. They are appointed by each county to perform various functions and exercise the powers conferred to them by statute, such as releasing liens and opening and administering foreclosures as well as some other duties.

MERS has worked with the attorney that represents the Colorado Public Trustee Association ("CPTA") on how written requests for release for MERS deeds of trust should be submitted to the Colorado Public Trustees. We recommend that our members continue naming themselves as the holder and owner of the indebtedness, identify MERS as the original beneficiary (if the Deed

of Trust is a MOM document), reference your FHA number on the document, and sign the document in your name. In describing MERS as the Original Beneficiary, the CPTA attorney agreed that members do not need to reference the nominee relationship of MERS to the original lender and the original lender's successors/assigns. The Original Beneficiary section should only state, "Mortgage Electronic Registration Systems, Inc.".

(b) LOUISIANA

Two years ago, Louisiana made a change as to who may release a mortgage lien. LA RS 44:109B, which became effective July 1, 2006, replaces the use of lost note affidavits by allowing licensed financial institutions to request the cancellation of a mortgage without the additional affidavit that was previously required. A handful of clerks' offices began to reject cancellation requests that identified MERS as the requesting party and signed by MERS.

It has been explained to us by local counsel that the change allows only a licensed financial institution that is also an "obligee" (or an "authorized agent of the obligee") to avail itself of LA RS 44:109B. While MERS as the original mortgagee may be an obligee if the mortgage contract is a MOM (MERS as Original Mortgagee), MERS is not a licensed financial institution. Therefore, MERS cannot request cancellation under LA RS 44:109. However, the originating lender, its successors, and assigns are also obligees under a MOM mortgage contract and therefore, may request cancellation under LA RS 44:109B.

We recommend that the Member which receives the pay off on a MOM (as a successor and assign of the originating lender) and is also a licensed financial institution may identify itself as the requesting party in the top portion of the form and at the sign off. MERS as the original mortgagee acting in a nominee for the originating lender, its successors, and assigns would be identified in the section of the form listing the recording information for the mortgage being cancelled.

(c) NEW YORK

Even though we received a unanimous decision from the New York Court of Appeals in December 2006 that MERS lien releases should be recorded, some Counties continue to erroneously rely upon a 2001 New York Attorney General's Opinion as a basis for either outright rejecting lien releases executed by a MERS officer or recording the release, but not marking their records as the mortgage being discharged.

At this time, a majority of counties in New York accept MERS satisfactions for recording. A few counties continue to take the position that they will only accept satisfactions of MOMs that include "as nominee" language following the identity of MERS on the release. This may be because the counties have indexed the mortgage to the originating lender's name instead of MERS as the original mortgagee. The counties requiring the "as nominee" language are **Cayuga, Clinton, Cortland, Erie, Monroe, Montgomery, Nassau, Oneida, Onondaga, Orange, Oswego, Otsego, Putnam, Saratoga, Steuben, St. Lawrence, Sullivan, Ulster, Warren, and Westchester Counties**. The satisfaction should read, "MERS as nominee for (original Lender), its successors, and assigns."

We also know of two counties, **Herkimer and Saratoga**, that will return the MERS satisfaction unrecorded and suggest that the discharge be signed by the lender. If the original document is re-tendered, the county will record it but not index the mortgage as discharged. However, the counties have indicated that a "minute" will be added to the mortgage referencing the recorded discharged. Anyone doing a title search would see that a discharge has been recorded for that particular mortgage. Further, if the note is marked paid in full, the mortgage is effectively discharged regardless of what the Recorder does. Therefore, re-submit all MERS satisfactions to the Herkimer and Saratoga County Clerk's along with instructions to the Clerks that the member wants the satisfactions recorded.

Whether or not the Clerk marks the mortgage lien as discharged is not what evidences the lien actually being discharged. Keep in mind that the promissory note should be marked "paid in full" when the loan is paid off. The mortgage lien follows the note, so if there is no note, there cannot be a mortgage lien outstanding.

Keep submitting MERS lien releases even if you think or hear that a specific county recorder may reject the satisfaction. It is the duty of the mortgagee after payment of the indebtedness due under the note to execute and acknowledge before a proper officer, a satisfaction of mortgage and present it for recording. By presenting the MERS satisfaction to the Recorder for recording, we are in good faith complying with New York law. New York law is clear that under Real Property Section 321(2)(b) the county clerk has a mandatory duty to record any instrument relating to a mortgage, including discharges of mortgages and certificates "purporting" to discharge a mortgage "regardless by whom any such instrument has been executed." Any county that does not record a MERS release is acting contrary to law. If a Clerk chooses to act contrary to their statutory duty, then the liability is on them for any damages incurred. Title companies are insuring new loans and insuring over the recorded satisfactions not indexed as discharged because the simple fact is that the loan has been paid and all parties involved would agree that no outstanding lien exists.

In December 2007, MERS released a bulletin notifying all members that a street address must be given for MERS on all documents submitted for recording in New York that identify MERS as the mortgagee. This includes satisfactions and other documents such as assignments, modifications, consolidations, etc. The address that you need to use for MERS on recorded documents is 3300 S.W. 34th Avenue, Suite 101, Ocala, FL 34474, P.O. Box 2026, Flint, Michigan 48501-2026.

(d) OTHER STATES

Minnesota

MERS worked with the county recorders to have Minnesota legislation passed that clarifies the already existing requirement that county registrars must accept MERS releases. The change became effective on August 1, 2004. Previously, the Torrens Counties in Minnesota had rejected MERS lien releases claiming that there must be two releases: one from MERS and one from the original lender. The Torrens System differs from abstract recording in that it is more stringent because a title examiner actually issues an opinion that the title is held by the person or entity

listed in the land records. It provides a state guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time. You do not have to search beyond the immediacy of the register. Since the legislation has passed, we are not aware of any further issues.

North Carolina

North Carolina recording law allows MERS to execute Satisfaction of a security instrument. The loan servicer also has the right to execute the releases as well. On October 1, 2005, the State's revised statutes expanded the authority to execute a Satisfaction from the owner of the indebtedness to what the State now describes as a "Secured Creditor". A Secured Creditor can be either an entity that (1) holds or is the beneficiary of a security interest or (2) is authorized to receive payments on behalf of an entity that holds a security interest and record a satisfaction of the security instrument once there is full performance of the secured obligation. MERS, as the beneficiary of a Deed of Trust, qualifies as a Secured Creditor under the statute.

Below, we have included a sample Satisfaction of Deed of Trust that includes the statutorily required information. We recommend that members consult counsel to determine whether the document meets the member's needs.

SATISFACTION OF SECURITY INSTRUMENT

(G.S. 45-36.10; 45-37(a)(7))

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: _____ (identify as deed of trust or mortgage)
Original Grantor: _____ (identify original grantor(s), trustor(s), or mortgagor(s))
Original Secured Party: _____ (identify original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)
Recording Data: The security instrument is recorded in Book _____ at Page _____ or as document number _____ in the office of the Register of Deeds for _____ County, North Carolina. This satisfaction terminates the effectiveness of the security instrument.

Date: _____

Title: _____ of _____

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid, certify that _____ personally appeared before me this day and acknowledged that he/she is a _____ of _____, and that he/she, as _____, being authorized to do so, executed the foregoing Satisfaction of Security Instrument for and on behalf of _____.

WITNESS my hand and official stamp or seal this ____ day of _____

Notary Public

My commission expires: _____

VI. FORECLOSURES

MERS has not changed the way the industry handles foreclosures. The mortgage industry has historically used servicing agents to bring foreclosure suits as agents for the promissory note-owner. Under MERS Membership Rule 8, the beneficial owner (promissory note-owner) of such mortgage loan or its servicer shall determine whether foreclosure proceedings with respect to such mortgage loan shall be conducted in the name of Mortgage Electronic Registration Systems, Inc., the name of the servicer, or the name of a different party to be designated by the beneficial owner.

In the event that the beneficial owner or its designated servicer determines that foreclosure proceedings shall be conducted in the name of a party other than Mortgage Electronic Registration Systems, Inc., the servicer designated on the MERS[®] System shall cause to be made an assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. to the person designated by the beneficial owner, and such beneficial owner shall pay all recording costs in connection therewith.

If a Member chooses to conduct foreclosures in the name of Mortgage Electronic Registration Systems, Inc., the note must be endorsed in blank and in possession of one of the Member's MERS certifying officers.

Pursuant to the MERS Rules of Membership, the following requirements apply to all foreclosures brought in MERS' name:

- (i) The Member shall not plead MERS as the note-owner in any foreclosure document; including but not limited to, the foreclosure complaint.
- (ii) The Member shall not plead MERS as a co-plaintiff in a foreclosure action.
- (iii) If the note is lost or cannot be located, the Member shall not commence a foreclosure action in the name of MERS, but rather must assign the mortgage out of MERS.

Mortgage Electronic Registration Systems, Inc. shall not be obligated to take title to any property that is the subject of a mortgage foreclosure; provided, however, that if the Member so requests, Mortgage Electronic Registration Systems, Inc. may take title at the conclusion of the foreclosure sale upon prior written consent to the Member from Mortgage Electronic Registration Systems, Inc. If title is taken in the name of Mortgage Electronic Registration Systems, Inc., the Member shall take all necessary and reasonable steps to remove Mortgage Electronic Registration Systems, Inc. from title as soon as possible.

To help MERS Members understand how to foreclose when using MERS as the mortgagee, state-by-state recommended foreclosure procedures are available on the MERS website, **www.mersinc.org**.

- We recommend to our members that loans that are already in foreclosure should not be assigned to MERS. If a mortgage is assigned after foreclosure proceedings have begun, the foreclosure may have to be re-started. This will just add unnecessary delays.
- As a rule, MERS should not take title at the end of a foreclosure. However, there are nine states where this may be unavoidable. The states are Connecticut, Louisiana, Michigan, Minnesota, Montana, New Mexico, South Dakota, Texas, and Vermont. A subsequent deed should be issued immediately following the deed to MERS either to the servicer or to the investor so that MERS does not stay as the titleholder for an extended period.
- Please note that Fannie Mae requires in New Hampshire, Rhode Island, and the Parish of New Orleans, Louisiana an assignment of the mortgage from MERS to Fannie prior to foreclosing. This is the same requirement you already follow on non-MERS loans. It has come to our attention that Fannie Mae may be requiring an assignment in Connecticut as well. Moreover, Fannie Mae has taken the position that MERS cannot be the note-holder, so Members servicing Fannie Mae loans should not foreclose in the name of MERS in judicial foreclosures.

Question: *I am renting a house and just received a foreclosure notice from MERS. I have been paying my rent to my landlord every month. What can I do?*

When we receive calls like this, we look up the property on the MERS[®] System and find out who is listed as the servicer for the loan. We then refer the caller to the servicer for further handling.

Question: *What happens if MERS holds the second lien and the first lien holder forecloses on its mortgage?*

MERS receives service of process as the second lien holder and then forwards the documentation onto the servicer of the subordinate lien listed on the MERS[®] System for that property. Where MERS is also the plaintiff first lien holder foreclosing the first, the caption of the lawsuit may distinguish the two mortgages by describing the plaintiff MERS as Mortgage Electronic Registration Systems, Inc. as nominee for (the name of whatever MERS member the MERS System shows the mortgage being registered to) and the defendant MERS as Mortgage Electronic Registration Systems, Inc. as nominee for (the name of whatever MERS member the MERS System shows the mortgage being registered to).

Question: *What happens if MERS takes title after the foreclosure is completed? Can we deed it out?*

If MERS takes title, MERS should remain in title for as short of time as possible. The MERS Corporate Resolution appointing certifying officers gives the authority to execute deeds on behalf of MERS.

Question: *What is the Status of MERS foreclosures? Are they being challenged?*

The cases discussed below may or may not be an exhaustive list of cases involving MERS. We encourage our members and their counsels to alert us to challenges so that we can participate in the case if needed and keep track of trouble spots.

The most common challenge to MERS foreclosures is based on “standing”. Standing is a legal concept to ensure that a plaintiff has a real interest in the action being litigated. In mortgage foreclosure cases, the crucial factor appears to be whether the plaintiff is a holder of the note. In the typical MERS foreclosure, MERS is a holder of the note because it possesses the original note endorsed in blank, which makes it a holder of the bearer paper. Possession of the bearer paper should give MERS adequate legal standing to pursue a foreclosure in any State.

Arkansas

In *Mortgage Electronic Registration Systems, Inc. v. Stephanie Gabler, et al.*, (Circuit Court of Garland County # 2004-17-II) the borrowers claimed that MERS does not have standing because MERS is not the owner of the note. However, ownership of the note is not required to have standing. (See the discussion on Florida below). The court held that **“MERS has standing to seek relief for its Writ of Assistance and is the proper party to foreclose the mortgage as MERS is the mortgagee of record and holder of the promissory note.”**

MERS obtained a foreclosure judgment, held the foreclosure sale, and obtained a post-judgment order for writ of assistance to remove the occupant(s), including the named defendant, Gabler. Shortly after the writ was obtained in June 2004, the pro se borrowers sought removal to federal court, and the Western District of Arkansas rejected jurisdiction. A subsequent emergency appeal to the 8th Circuit Court of Appeals was also denied. The borrowers then filed for bankruptcy, but voluntarily dismissed the bankruptcy action four months later.

The borrowers then went back to state court in the eviction action and filed an objection to the writ of assistance, a request for injunction, and a counterclaim. The borrowers claimed in their objection that they were not properly served in the foreclosure proceedings and that MERS does not have standing because it is not the owner of the note.

The court rejected all of the contentions made by the borrowers and ordered that MERS may execute its writ with the assistance of the county Sheriff.

California

Occasionally the case of *Sulak et al. v. Mortgage Electronic Registration Systems, Inc., et al.*, (Superior Court of Riverside County # RIC398123) comes up when researching challenges to MERS’ standing. MERS prevailed at every stage in this action. MERS won all four appeals filed by the borrowers, including a judgment affirming an award of attorney’s fees to MERS.

Sulak is a case in which the borrowers stopped making payments on their loan and initiated a suit for damages and injunctive relief against MERS, the servicer, the trustee, and the foreclosure

firm (among others) to prevent a non-judicial foreclosure. The Sulaks stopped making payments on the loan because they believed that MERS could not enforce or collect the note and deed of trust 1) without holding a Certificate from the Secretary of State, 2) without responding to multiple requests for validation of the debt under the Fair Debt Collection Practices Act (FDCPA), and 3) without having endorsements on the note or recorded assignments to successors in interest to the original lender. In an unpublished opinion entered on September 20, 2004, the Appellate Division characterized the Sulaks approach as “[e]ssentially, plaintiffs called ‘Olly olly oxen free’ on the note and deed of trust, and stopped making payments.”

The California courts have rejected the borrowers’ theory at every procedural step in this litigation. All three of the Sulaks’ motions for a temporary restraining order and both of their orders to show cause for a preliminary injunction have been denied for their inability to demonstrate likelihood of success on the merits of the complaint. All of these rulings were upheld in full by the Fourth Appellate Division.

The trial court sustained demurrers against the borrowers’ first amended complaint, second amended complaint and third amended complaint. The Sulaks were given 30 days to file a fourth amended complaint, but did not do so. Instead, the Sulaks filed another appeal, which was rejected by the Fourth Appellate District because the demurrer on the third amended complaint was not a final judgment subject to appeal.

MERS and its co-defendants moved to have the case dismissed, and that motion was granted on May 17, 2005. The borrowers attempted to have the order of dismissal vacated, but that motion was denied on July 25, 2005. The trial court subsequently awarded attorney’s fees to MERS and the other co-defendants. The borrowers filed yet another appeal in September 2005.

In a December 7, 2006 ruling, the Fourth Appellate District upheld the dismissal of the Sulaks’ claims, and thereby put this litigation to rest. (*Sulak, et al. v. Mortgage Electronic Registration Systems, Inc., et al.*, DCA No. E038916). In doing so, the Fourth Appellate District specifically held that MERS was not required to be registered with the California Secretary of State, because the mere act of enforcing deeds of trust does not constitute “doing business” in California under California law.

The Fourth Appellate District upheld the award of attorney’s fees to MERS in a March 14, 2007 decision. (*Sulak v. Mortgage Electronic Registration Systems, Inc., et al.*, DCA No. E039775).

Connecticut

(i) Status of Foreclosures:

Connecticut judges rejected recent challenges to foreclosures brought in the name of MERS. *Mortgage Electronic Registration Systems, Inc. v. Ventura*, No. CV 054003168S, 2006 WL 1230265 (Conn. Super. Ct. April 20, 2006); *Mortgage Electronic Registration Systems, Inc. v. Leslie*, No. CV044001051, 2005 WL 1433922 (Conn. Super. Ct. May 25, 2005).

In *Ventura*, MERS brought a foreclosure action and moved for summary judgment on the issue of liability. In granting the motion for summary judgment, Judge John W. Moran held that, as the mortgagee, “there is no question that the named plaintiff [MERS] is the correct party to bring this action”. The borrowers had challenged whether MERS could enforce the debt since the affidavit of indebtedness indicated that Chase Home Finance, LLC was “servicing” the note and mortgage. Judge Moran observed, “The obvious plain meaning of this is that Chase Home Finance, LLC services the note and mortgage in this case. In our current times where many mortgages are bundled and bought and sought in the mortgage investment world, the servicing of notes and mortgages by third-party companies is the rule rather than the exception.” The court observed that the note was endorsed in blank, and was therefore bearer paper, and that MERS could therefore bring the action.

In *Leslie*, the borrowers moved to strike a MERS foreclosure complaint on the grounds of standing. Judge Jane S. Scholl held, “The facts alleged here support the Plaintiff’s standing in this matter. The Plaintiff has alleged that it is the mortgagee and the holder of the note and mortgage from the Defendants. This is sufficient to support the Plaintiff’s standing.”

These recent decisions illustrate the fact that mortgages can be foreclosed in Connecticut by MERS because MERS is the record owner of the mortgage and is entitled to enforce the note. If the note is endorsed in blank, possession of the note is transferred to MERS prior to foreclosure and the original note is delivered to counsel for the plaintiff in the foreclosure action to be used at the foreclosure judgment hearing.

A note endorsed in blank is “bearer paper”. Connecticut General Statutes Section 42a-3-109, provides:

“(a) A promise or order is payable to bearer if it:

“(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

“(2) Does not state a payee; or

“(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

“(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

“(c) An instrument payable to bearer may become payable to an identified person if it is specially endorsed pursuant to section 42a-3-205(a). **An instrument payable to an identified person may become payable to bearer if it is endorsed in blank** pursuant to section 42a-3-205(b).” Connecticut General Statutes Section 42a-3-205(b), provides, “If an endorsement is made by the holder of an instrument and is not a special endorsement, it is a ‘blank endorsement’. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.”

The Uniform Commercial Code defines “holder,” as follows: “‘Holder’, with respect to a

negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. 'Holder' with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession" (C.G.S. §42a-1-201(20).)

Therefore, where the instrument has been endorsed in blank or otherwise is bearer paper, the person in possession is the holder of the note. A holder is entitled to enforce a promissory note. Connecticut General Statutes Section 42a-3-301, provides, "'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." (It is important that the Complaint plead that MERS is a holder of the note, not that it is an owner of the note.)

The earlier decision in *Fleet National Bank v. Nazareth*, 75 Conn.App. 791, 818 A.2d 69 (2003) supports MERS' standing to foreclose. The Connecticut Appellate Court addressed the issue of standing in foreclosure actions. This is a seminal decision in Connecticut at the appellate level regarding the standing of the holder of a promissory note to pursue a foreclosure.

In *Nazareth*, the defendant-mortgagors appealed from the entry of judgment of foreclosure by sale in favor of the substituted plaintiff, R. I. Waterman Properties, Inc. The loan originator (Shawmut Mortgage) had merged with and into Fleet Mortgage Corporation. Prior to the foreclosure, Fleet Mortgage assigned its interest in the mortgage, but not the note, to Fleet National Bank. In turn, Fleet National Bank assigned the mortgage (but not the note) to the substituted plaintiff, which was a wholly owned subsidiary of Fleet National Bank and which handled Fleet National Bank's foreclosure accounts.

On appeal, the defendants claimed that the plaintiff lacked standing to foreclose the mortgage. The Appellate Court distilled the facts as follows, "It is undisputed that Fleet Mortgage is the holder of the note, while the plaintiff is the holder of the mortgage." (75 Conn.App. at 794.)

The plaintiff contended that it had standing and relied on *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301 (1996), rev'd after remand, 246 Conn. 594, 717 A.2d 713 (1998), and on *Connecticut National Bank v. Marland*, 45 Conn.App. 352, 696 A.2d 374, cert. denied, 243 Conn. 907, 701 A.2d 328 (1997). The Appellate Court distinguished those cases because in those cases it was not disputed that "the party seeking foreclosure had an interest in the note and the mortgage." (75 Conn.App. at 794.) In *Bedford Realty*, the foreclosing plaintiff had lost the original of the note, and in *Marland*, the court had made the specific finding that the foreclosing plaintiff was the holder of the note and mortgage. "In this case, however, the plaintiff was never the holder of the note," wrote the Court in *Nazareth*. The court pointedly observed that neither the plaintiff nor the court could cite any authority "to support [the plaintiff's] claim that it has standing to foreclosure on the mortgage without ever having been assigned the note". (75 Conn.App. at 795.) Finally, the Court observed that the Connecticut legislature had by statute allowed a holder of the note to foreclose even if it had not been assigned the mortgage (75 Conn.App. at 795, citing C.G.S. §49-17.), but that no statute

provided for the converse, i.e. a holder of the mortgage to foreclose when it did not hold the note.

This decision supports the analysis that MERS has standing to foreclose because the owner of the note authorizes and transfers the note to MERS prior to the foreclosure so that MERS is a holder of the note (and of the mortgage, too). Under the analysis used by the Court in *Nazareth*, MERS would have standing to foreclose the mortgage. Please see MERS Recommended Foreclosure Procedures on the MERS Website at www.mersinc.org.

Some may mistakenly think *MERS v. Rees* (No. CV03081773, 2003 Conn. Super. LEXIS 2437 (9/4/03)) cast doubt on MERS standing to foreclose. The Court in *Rees* did not issue any adverse ruling pertaining to MERS standing to commence a foreclosure proceeding on behalf of a principal. To the contrary, the *Rees* case involved procedural issues. The counsel in *Rees* had erroneously pled that MERS commenced the suit as the current owner of the note and mortgage but the papers supporting the motion for summary judgment reflected that MERS served as an agent/nominee. As such, the *Rees* court found sufficient issue of fact warranting the denial of summary judgment. Being consistent in the pleadings is crucial.

(ii) Department of Banking Opinion:

The Department of Banking issued a March 9, 2006 letter in response to a consumer filing a complaint with the Department alleging that Mortgage Electronic Registration Systems is an unlicensed consumer collection agency. This complaint was filed in conjunction with a foreclosure initiated in MERS' name against this consumer. The Department of Banking found that MERS is not in violation of Connecticut General Statutes Sections 36a-800 et seq. MERS role is limited to being the plaintiff in the legal foreclosures themselves and is not in the business of contacting the borrowers by telephone or letter to demand payment. All loan administration and efforts to resolve the default without foreclosure are handled directly by the mortgage servicer and not MERS. Even if MERS was acting as a consumer collection agency, the Department of Banking held that MERS would be exempt from the provisions of the Consumer Collection Agency statute because MERS provides significant services to its members for loans that are current as well as for loans that are in default.

Florida

MERS had two important victories in Florida appellate courts, which have unanimously decreed that MERS is permitted to foreclose mortgage liens when it is the holder of the note and mortgage. See *Mortgage Electronic Registration Systems, Inc. v. Azize*, (Fla. DCA Case No. 2D05-4544, opinion filed February 21, 2007) [32 Fla. L. Weekly D546]; *Mortgage Electronic Registration Systems, Inc. v. Revoredo, et al.*, (Fla. 3d DCA No. 3D05-2572, opinion filed, March 14, 2007).

As background, in September 2005, we suspended the option of allowing MERS members to foreclose in MERS' name in Florida. We did so because we were in the process of appealing two adverse decisions against MERS' standing as a proper plaintiff in foreclosure actions in local trial courts. The first trial court decision came from Judge Logan in Pinellas County in the *Azize* case. Judge Logan issued an August 18, 2005 Decision on an Order to Show Cause why the

Complaint should not be Dismissed for Lack of Proper Plaintiff. He dismissed with prejudice as to MERS and dismissed without prejudice as to the “proper Plaintiff”. He ruled that a party had to own the “beneficial interest” in the promissory note in order to foreclose on the note. Judge Logan made this ruling despite the fact that the borrower had never appeared in the case to contest the foreclosure. We filed an appeal on September 14, 2005. A joint amicus brief was filed on our behalf by Fannie Mae, Freddie Mac, the MBA, JP Morgan Chase, and Countrywide. The Jacksonville Area Legal Aid (JALA) filed an Amicus Brief in opposition.

We also appealed a similar Order in the *Revoredo* litigation entered by Judge Jon I. Gordon in Dade County on September 28, 2005. Judge Gordon held that a plaintiff must establish ownership of the note in order to have standing. JP Morgan Chase filed an Amicus Brief in support of our position.

MERS prevailed in the Pinellas County Appeal in the *Azize* decision, filed by the Second District Court of Appeal (“Second DCA”) on February 21, 2007. A unanimous appellate panel reversed Judge Logan’s Order, and held that MERS could foreclose when it alleges that it is the holder of the note, and observed “standing is broader than just actual ownership of the beneficial interest in the note”. The Second DCA stated that Judge Logan’s conclusion that MERS could never be a proper plaintiff since it did not have a beneficial interest in the notes was “an erroneous conclusion.” The Second DCA also observed in a footnote that, frequently, multiple entities hold a beneficial interest in a particular note, and that courts have routinely allowed agents, such as servicers, to bring foreclosure suits to enforce the note on behalf of the holders of beneficial interests in the note. Finally, the Second DCA explained that Florida’s rules of civil procedure permit an action to be prosecuted “in the name of someone other than, but acting for, the real party in interest.”

Shortly after our victory in the Second DCA, the Third District Court of Appeal (“Third DCA”) reversed Judge Gordon’s Order in Dade County in the *Revoredo* decision. The unanimous panel indicated that it agreed with the Second DCA’s ruling that MERS had standing to foreclose, and that ruling was consistent “with the clear majority of cases which have considered the question of MERS’ standing to maintain foreclosure proceedings.” The Third DCA observed, “[t]o the extent that courts have encountered difficulties with the question . . . the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law.” Although MERS does not actually “own” the note it is foreclosing, the Third DCA stated “[w]e simply don’t think this makes any difference” and noted that the Florida rules of civil procedure allow an action to be brought by an authorized agent on behalf of the real party in interest. The Third DCA concluded that, since “no substantive rights, obligations, or defenses are affected by the use of the MERS device” there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business.” As a result of these two decisive victories in the Florida appellate courts, the right of MERS to foreclose in Florida is now firmly-established.

At the end of July 2007, MERS successfully defeated a putative class action case captioned *Sandy S. Trent, etc., et al. v. Mortgage Electronic Registration Systems, Inc., United States District Court, Middle District of Florida –Jacksonville Division, Case No. 3:06-cv-374-J-32HTS*. This case involved an original complaint, a removal from state court to federal filed by

MERS under the Class Action Fairness Act of 2005, an amended complaint and then finally the seconded amended complaint that the Court dismissed with prejudice. The Plaintiffs in this putative class action sought relief under two Florida statutes, the Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). After the plaintiffs' revised the complaint twice in an attempt to state of cause of action, the FCCPA count essentially alleges that MERS "engaged in a pattern and practice of illegal debt collection practices" by sending pre-suit communications representing MERS as a "creditor" of the plaintiffs. The FDUTPA allegations were similar to the FCCPA count, but further alleged that MERS violated the ACT because it engaged in the unlicensed practice of law and used deceptive means to collect debts owed by class members.

The 20-page opinion stated that MERS is the mortgagee of the mortgages and has the ability to foreclose. By pointing to the language in the mortgage contract, the Court held that the mortgagors (Plaintiffs) were aware at the outset of MERS' role in the mortgage transaction and that MERS obtained legal title to the note and the ability to foreclose. The findings were that MERS did not attempt or threaten to enforce a debt obligation that it knew was not legitimate. In reviewing the pre-suit notices and the transaction itself, the Court stated, "it cannot identify any root abusive conduct." The Court concluded that "MERS role was not hidden or materially misrepresented and a reasonable consumer in the plaintiffs' position would not likely to be misled in any material way by the pre-suit communications."

Georgia

Georgia courts recognize the right of MERS to foreclose, as illustrated by the decision in *American Equity Mortgage, Inc. and Mortgage Electronic Registration Systems, Inc. v. Chattahoochee National Bank*, # 05-cv-1951 (Forsyth Cty. Sup. Ct., Dec. 29, 2005, J. Dickinson). This was an action to enjoin an immediate judicial sale due to equitable subrogation in which the court recognized the validity of a lien held by MERS and the authority of MERS to enforce it.

The borrower executed a security deed naming CitiFinancial Services as the grantee in exchange for a loan. The deed was recorded. On June 15, 2004, the borrower re-financed the loan by obtaining a home equity credit line from American Equity Mortgage. The deed to secure the debt named MERS as the grantee in a nominee capacity for American Equity. The deed was recorded on June 24, 2004, and CitiFinancial's loan was paid off by the refinance.

Approximately a month prior to the re-finance, Chattahoochee Bank obtained a writ due to a judgment lien obtained against the borrower in the amount of \$679,240.01. Chattahoochee provided a Notice of Levy on Land to the borrower, which indicated that it intended to conduct a judicial sale of the property.

American Equity, claiming it had no knowledge of Chattahoochee's interest in the land when it loaned the money for the refinance, brought suit and obtained a temporary restraining order. Following the entry of the temporary restraining order, the issue was raised as to which entity should be the plaintiff in an effort to determine whether American Equity/MERS has priority over Chattahoochee Bank.

After briefing and an evidentiary hearing, the Honorable David L. Dickinson determined that “MERS, in its capacity as grantee in the deed to secure debt and as nominee for American, or its successor in interest as the holder of the note, is the entity that would suffer irreparable harm if [Chatahoochee] foreclosed on its judgment lien and is the entity entitled to seek an injunction in this case. **MERS is entitled to enforce the American Deed to Secure Debt per its terms.**”

The court awarded MERS a permanent injunction precluding Chatahoochee or its successors or assigns from selling or foreclosing on the property so long as the deed held by MERS remains in effect.

Illinois

Mortgage Electronic Registration Systems, Inc. v. Estrella, 390 F.3d 522 [7th Cir. 2004] shows ample authority for MERS to commence a foreclosure proceeding, in its agency capacity on behalf of its principal. In *Estrella*, the Seventh Circuit issued a “public chastisement” to counsel for “failing to do any research into the requirements of federal appellate jurisdiction before filing this appeal” (390 F.3d at 524). Some borrowers have mistakenly tried to use this case to support a challenge to the standing of MERS to foreclose. To the contrary, the *Estrella* case did not negatively rule upon the standing of MERS to commence a foreclosure proceeding on behalf of its principal. At issue was an application to confirm a sale. On appeal, the Seventh Circuit dismissed the appeal based upon well-settled law that Court orders denying confirmation to judicial sales are not final decisions, and thus are not appealable.

In addition, the court opined that the district Court may lack federal subject matter jurisdiction over the proceeding because for diversity of citizenship purposes “it is the citizenship of the principal, and not that of the agent that matters.” (390 F.3d at 525). Because the principal in *Estrella* was an Illinois corporation and the suit was brought against Illinois residents, the Seventh Circuit opined that subject matter jurisdiction “is doubtful.” Implicit in the holding was recognition by the Seventh Circuit that MERS has standing to commence a foreclosure proceeding as agent on behalf of its principal. Indeed, the *Estrella* Court did not dismiss the proceeding in its entirety for lack of standing by the agent, rather cited to *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314, 319 [7th Cir. 1998] which recognizes the capacity of an agent to commence a proceeding “[w]hen the principal’s interests are affected by the litigation, the principal’s citizenship counts even if the agent is the sole litigant” (emphasis added). In short, the federal appellate Court did not issue a blanket ban to suits commenced by MERS as an agent on behalf of its principals. Instead, in suits brought by agents, it directs federal district Courts to ascertain the citizenship of the principal of the plaintiff to determine whether federal diversity jurisdiction exists.

Illinois statutory law specifically permits an agent to commence a foreclosure proceeding on behalf of a principal. Section 735 ILCS 5/15-1504(a)(3)(N) provides in pertinent part:

A foreclosure complaint may be in substantially the following form:...(N) capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledge, an agent, the trustee under a trust, deed or otherwise, as appropriate.) (Emphasis added).

Kentucky

In 2005, the Master Commissioner in Jefferson County issued a document entitled, “Guidelines For Lien Enforcement Actions in Jefferson County, Kentucky.” The Master Commissioner expressly stated that MERS could foreclose when it is the holder of the note. The Master Commissioner concluded by stating that MERS would be the “real party in interest” and thus a proper plaintiff in a foreclosure action if the note was endorsed to MERS, either by specific assignment or allonge naming MERS, or an endorsement in blank.

The MERS Rules of Membership require that when foreclosing in MERS’ name, our Members must have the note endorsed in blank so that MERS can be the holder. As such, MERS’ practice and procedures are consistent with the Master Commissioner’s interpretation of the necessary elements for standing to foreclose. So long as MERS brings the action as the holder of the note, MERS can foreclose in Jefferson County, Kentucky. We are not aware of any instances where a MERS foreclosure was rejected in any county in Kentucky where the note was endorsed in blank and MERS pled that it was the holder.

Louisiana

In Louisiana, the foreclosure process will normally require at the end for MERS to take title to the property for a short period. This is because in Louisiana only the foreclosing creditor may make a credit bid for the full amount owed at sale. This bid cannot be assigned. All other parties must pay in cash. If MERS is to be the foreclosing entity (creditor), then only MERS can make a credit bid. A successful credit bid will lead to title being conveyed to MERS.

When conveying title out of MERS, Louisiana parishes may require an original MERS resolution as evidence that the signing officer has authority to convey title in the name of MERS. (The MERS corporate resolution provides authority for members to convey title out of MERS.) This requirement is not specific to MERS and would be required for any entity conveying title. An alternative way to handle it is to record one resolution with a parish, get certified copies, and then record them in all the other parishes.

Michigan

MERS has repeatedly proven its right to foreclose in Michigan, and attempts to challenge MERS’ standing have been rejected by the trial courts. The validity and enforceability of MERS mortgages was affirmed by the Attorney General of Michigan in formal Opinion No. 7116, August 28, 2002, (2002 Mich AG Lexis 19). Specifically, the Attorney General stated that the Register of Deeds is required to accept MERS mortgages and index them as either mortgagee for the disclosed nominee or an undisclosed nominee. The Attorney General described MERS and the legal acceptance of the use of a “nominee,” and concluded that, “No provision in the Recording Requirements Act suggests that a discrepancy will exist to the mortgage interest instrument simply because the mortgagee is listed as a nominee” for an undisclosed party.

Since that time, MERS has prevailed in several actions brought by borrowers seeking to set aside a MERS foreclosure based upon this same mistaken theory that MERS lacked standing under the foreclosure-by-advertisement statute. It appears that in these challenges borrowers are using a

form complaint with identical arguments and case citations. The Circuit Court judges are repeatedly granting summary disposition to MERS, holding that the borrower's complaint must be dismissed because MERS "has an interest in the mortgage sufficient to foreclose and to exclude any other party from foreclosing and such foreclosure was proper and unobjectionable as to all issues raised in this case or that could have been raised." See *Pope v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-611918-CH (Wayne Cty. Cir. Ct., March 2, 2007, J. Torres); *James A. Murray, et al. v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-623719-CH (Wayne Cty. Cir. Ct. Feb. 6, 2007, J. Baxter); *James and Shawneen Murray v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-623719-CH (Wayne Cty. Cir. Ct., Feb. 6, 2007, J. Baxter); *Carrington v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 06-625557-CH (Wayne Cty. Cir. Ct. Jan. 26, 2007, J. Giovan); *Amera Mortgage Corporation v. Schatz*, LT-05-6565 (Wayne Cty. Dist. Ct. Feb. 17, 2006, J. Moiseey).

In each case, MERS established its right as a proper party plaintiff by showing numerous precedents supporting the right of MERS to foreclose. MERS demonstrated that it acts as a nominee for the owner of the indebtedness, and therefore has standing to bring a foreclosure by advertisement pursuant to MCL 600.3204. MERS further demonstrated that it had standing to act as mortgagee and enforce notes under both MCR 2.201.(B)(1) and MCL 600.2041. Michigan law, like the laws of many other States, permits a party "with whom or in whose name a contract has been made for the benefit of" to file suit. MERS also cited case law from the Michigan Supreme Court holding that a corporate entity can be the mortgagee without having any beneficial interest in the underlying debt. See *Canvasser v. Bankers Trust Company of Detroit*, 284 Mich. 634, 280 N.W. 71 (1938).

Minnesota

MERS had a significant victory in the Minnesota Court of Appeals in the decision of *In re Sina*, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006). In this case, the Court expressly held that MERS had standing to foreclose because it was the assignee of the mortgage.

MERS was the assignee of a mortgage given by the borrowers to Maribella Mortgage, LLC in 2002. In 2003, MERS commenced a foreclosure by advertisement after the Sinas defaulted on their mortgage loan. The property was sold to MERS in a sheriff's sale. The borrowers then brought an action in state court to set aside the foreclosure based upon an alleged failure by MERS to comply with the Federal Fair Debt Collection Practices Act. MERS removed the case to federal court, and the United States District Court for the District of Minnesota dismissed on MERS' motion for summary judgment. The borrowers appealed to the United States Court of Appeals for the Eighth Circuit, but the Eighth Circuit affirmed the judgment for MERS in 2005.

The borrowers then brought another state court action in the District Court for Hennepin County challenging the 2003 foreclosure, this time alleging that MERS did not comply with Minnesota's statutory foreclosure requirements because, among other reasons, MERS lacked standing. MERS again filed for summary judgment, contending that MERS had standing, complied with all statutory requirements, and that the borrowers' claims were barred by virtue of the prior decisions against them in their federal court litigation. In 2005, the trial court granted summary judgment to MERS, determining that the suit was barred by the doctrines of *res judicata* and

collateral estoppel by virtue of the federal court litigation. The borrowers again appealed, this time to the Court of Appeals of Minnesota.

The Court of Appeals noted that the trial judge had decided the case on *res judicata* and collateral estoppel grounds, so the standing issue was not even properly on appeal. Nonetheless, the appellate court decided to comment on the standing issue, observing, “the record shows MERS had standing to foreclose the property.” The appellate court rejected the notion that MERS was not the real party-in-interest, stating, “the assignment [of the mortgage] was recorded in MERS’s name. And by agreement, MERS retained the power to foreclose the mortgage in its name. Because MERS is the record assignee of the mortgage, we conclude that MERS had standing to foreclose the property by advertisement.” The Court of Appeals then concluded that the foreclosure complied with all statutory requirements, and that the trial court properly ruled that the borrowers’ claims were barred by *res judicata* and *collateral estoppel*.

New York

There has been some speculation that the case of *LaSalle Bank National Association, as Trustee v. Michael Lamy* (2006 NY Slip Op 51534(U), decided August 7, 2007, Supreme Court, Suffolk County, Burke, J.) creates an issue for MERS foreclosing as a plaintiff. However, MERS is not foreclosing on this mortgage loan as the plaintiff, but rather executed an assignment of the mortgage to LaSalle Bank to commence the foreclosure. The issues surrounding this case are the result of procedural defects. The Judge pointed out that the assignment from MERS to LaSalle is dated after the commencement date of the foreclosure as well as the note allonge is undated. Justice Burke points out that only the owner of the note and mortgage at the time of the commencement of a foreclosure action may properly prosecute the foreclosure. We have corrected these defects and on August 15, 2007, Judge Burke signed the Order of Reference and cited to the appellate level case *Mortgage Electronic Registration Systems, Inc. v. Coakley*, 41 AD3d 674, 838 NYS2d 622 as support that the Plaintiff has sufficiently demonstrated its entitlement to the relief requested.

The Coakley decision correctly finds that MERS has standing to bring a foreclosure action. The court found that the promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (UCC). At the time of the commencement of the foreclosure, MERS was the lawful holder of the promissory note and of the mortgage. Moreover, the Court held that MERS’ standing is further supported by the language in the mortgage instrument itself. The borrower expressly agreed without qualification that MERS had the right to foreclose upon the premise in the event of a default.

Some may want to continue to focus on an incorrect legal assumption of two cases: *Mortgage Electronic Registration Systems, Inc. v. Burek*, 4 Misc 3d 1030, 798 NYS2d 346; *Mortgage Electronic Systems, Inc. v. Bastian*, 12 Misc 3d 1182(A), 2006 WL 1985461. These cases held that Mortgage Electronic Registration Systems, Inc. (MERS) may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action. MERS did not appeal either of these cases because of underlying procedural problems that would have sidetracked the appeal away from the issue of whether one needs to own the note to have standing to foreclose.

The Coakley case controls these cases and rightly concludes that to have standing one must be the holder of the note and does not need to own the note.

Furthermore, New York law recognizes the rights of an agent to sue on behalf of his principal (CPLR 1004; *Airlines Reporting Corp. v. S&N Travel, Inc.*, 238 A.D.2d 292 [2d Dep't 1997]), and specifically recognizes the right of an agent to commence a foreclosure proceeding on behalf of a principal. (See Bergman on New York Mortgage Foreclosures; section 16.02[1][a] (Matthew Bender Co., Inc 2004) and *Fairbanks Capital Corp v. Nagel*, 289 A.D.2d 99 [1st Dep't 2001] (Court rejected mortgagor's argument that servicing agent lacks standing to maintain an action in its capacity as servicing agent for a trustee)).

Any foreclosures brought to MERS' attention as having issues were the result of the complaint not being pleaded properly. For example, in *Mortgage Electronic Registration Systems, Inc. v. Burek*, 4 Misc. 3d 1030A [Sup. Ct. Richmond County 2004], the complaint alleged that MERS is "the sole, true, and lawful owner of the bond/note and mortgage securing the same." We do not recommend or support complaints making this allegation and when we become aware of it, we advise to amend the complaint or dismiss it. Interestingly, the summary judgment papers reflected that the action was brought in an agency capacity.

However, the case does not stand for MERS not being able to foreclose. Instead, citing to issues of fact, the *Burek* Court denied summary judgment, but did not question or disturb New York procedural law and case law, which specifically permits an agent to commence a suit on behalf of its principal. With respect to the pending summary judgment application, the *Burek* Court found sufficient issues of fact warranting its denial, namely conflicting proof the mortgagor produced showing that he was not in default on his mortgage obligations, outstanding discovery sought of plaintiff on its claim of default, and counsel's presentation of conflicting allegations concerning the standing of the plaintiff. Although the *Burek* Court cited to issues of fact in denying summary judgment, it did not issue any ruling barring MERS from commencing a foreclosure proceeding on behalf of its principal. The Court did not dismiss the proceeding for lack of standing.

North Carolina

In 2006, a few counties in North Carolina were delaying non-judicial foreclosures of MERS liens, for varying reasons. Some clerks did not understand that MERS was the beneficiary under the original MOM deed of trust. Accordingly, these clerks were requiring assignments from the original lender to whichever entity was initiating the foreclosure through the trustee, whether that entity was MERS or a subsequent lender or servicer who had acquired the loan from the original lender. Requiring such assignments was in direct conflict with N.C.G.S. § 47.17.2, which specifically provides that there is no need for an assignment of the deed of trust to be prepared or recorded in order to foreclose.

We contacted the Administrative Office of the Courts ("AOC"), the entity that provides legal counsel to all of the county clerks in North Carolina. The AOC issued a letter on January 24, 2007 to all of the Clerks of Superior Court throughout North Carolina. The letter states that MERS' "nominee status does not make any difference with regards to whether it is the holder of

the note and has the right to foreclose.” The letter further states that, “MERS should be treated like any other note-holder seeking to foreclose in North Carolina.”

With regard to assignments, the letter states, “There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust.” (Emphasis in original).

The letter goes on to explain what is required when the note-holder foreclosing a MERS deed of trust is the original lender, MERS, or a subsequent lender. If MERS is designated as the foreclosing entity, it need only produce a copy of the original deed of trust, an original or copy of the note endorsed in blank or endorsed specifically to MERS, an affidavit stating that MERS is the holder and the debt is outstanding, and proof that the borrowers and any other known lien holders have received notice of the foreclosure. The same rules apply if a subsequent lender is the foreclosing entity. There is no need for an assignment of the deed of trust, as any entity bringing the foreclosure just needs to demonstrate that it is the holder of the note and that the note is secured by a recorded deed of trust.

Oklahoma

We have received favorable rulings in Oklahoma trial courts when MERS’ standing is challenged. See *Mortgage Electronic Registration Systems, Inc. v. William C. Warden, et al.*, CJ-2005-7027 (District Court of Oklahoma Cty., March 3, 2006, J. Swinton). In that case, a borrower attempted to vacate a foreclosure judgment on several grounds, including the contention that MERS lacks standing to sue because it is not registered to do business in Oklahoma and because MERS was not the “real party in interest” since it did not own the note.

MERS argued that it was not required to register with the Secretary of State in order to foreclose in Oklahoma, pursuant to the exception from the registration requirement for entities that create or acquire mortgages found in Okla. Stat. Ann. Tit. 18 §§ 1132(A)(6), 1132(A)(7). MERS further argued that it had standing to foreclose because it held the recorded mortgage and at all times indicated that it was appearing as the designee of the trustee, Bank of New York.

The Court entered an order denying the motion to vacate the foreclosure judgment. This judgment was not appealed.

Pennsylvania

(i) Status of Foreclosures:

The standing of MERS to foreclose was affirmed by a Pennsylvania appellate court in *Mortgage Electronic Registration Systems, Inc. v. Estate of Harriet L. Watson, et al.*, Superior Court of Pennsylvania # 637 WDA 2006, filed December 27, 2006. The case involved affirmative defenses and counterclaims filed by the estate of a deceased borrower in response to a foreclosure suit brought by MERS in 2003 to foreclose a MOM mortgage. Among the estate’s defenses and counterclaims was the theory that MERS somehow lacked standing because it was

not the “real party-in-interest” and because MERS allegedly could not bring a foreclosure suit in Pennsylvania if it did not register as a foreign corporation doing business in Pennsylvania.

The trial court and appellate court disregarded the estate’s challenges to MERS’ standing to foreclose due to the clear language of the mortgage itself, and held that MERS was not required to register as a foreign corporation because the act of acquiring, recording, or enforcing a mortgage lien constituted a specific exception under 15 Pa.C.S.A. § 4122 to the general requirement that companies “doing business” in Pennsylvania must obtain a certificate of authority in order to file suit in Pennsylvania. Such actions, by statutory definition, do not constitute “doing business.” The unanimous appellate court ruled observed, “In the instant case, Appellee [MERS] was identified as the mortgagee in the mortgage documents. Therefore, Appellee did not need a certificate of authority to commence mortgage foreclosure proceedings, because this activity falls within the exclusions under 15 Pa.C.S.A. § 4122.”

Pennsylvania law has long recognized the standing of a named mortgagee to foreclose on the security interest, even if there are other entities interested in the amount claimed. *Metal Products Co. v. Levine*, 1 D& C 271, 273 (Beaver Cty. 1921).

(ii) Assignment of Credit Bid (Revenue Ruling):

MERS has a favorable private letter ruling from the Commonwealth of Pennsylvania, Department of Revenue. It allows the investor use of the Realty Transfer Tax exemption where MERS is foreclosing as the nominee or agent of the investor and the investor is the successful bidder at the sheriff’s sale. The sheriff’s deed issues directly to the investor, rather than to MERS, as MERS participates merely as an agent of the investor. MERS’ right to the exemption confers to the investor based on the agency/principal relationship owed from MERS to the investor. Our original Letter Ruling started out in 1999 and we have since had it renewed. Coverage by the new Private Letter Ruling lasts thru June 2009 and is renewable at 5-year intervals. Fannie Mae, Freddie Mac, and Ginnie Mae are exempt as investors from the transfer tax. Please see the letter on the following pages as an example.

The Pennsylvania Department of Revenue recently advised us that it will need proof that the grantee identified in the sheriff’s deed of transfer actually holds the mortgage loan at the time of the conveyance. The attorney foreclosing for MERS must then include the promissory note information along with his/her submission of other documents to the Department of Revenue. We advise that print copy information from the MERS® System should not be provided to the foreclosing attorney or the Department of Revenue as proof of the investor’s note ownership. Information in the MERS® System does not prove or disprove an investor’s actual note ownership. Only the note and note endorsements can definitively prove that. If you need a copy of the Private Letter Ruling or wish to further discuss the above, please contact the MERS Law Department at (703) 761-1270.

OFFICE OF CHIEF COUNSEL
DEPT. 281061
HARRISBURG, PA 17128-1061

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE



June 23, 2004

PHONE: 717 787-1382
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JOHN D. BRENNER, JR.
DIRECT DIAL: (717) 705-3906
jbrenner@state.pa.us

Melissa S. Woloshin
1701 Market Street
Philadelphia, PA 19103-2921

Re: Realty Transfer Tax
Private Letter Ruling No. RTT-04-016
Mortgage Electronic Recording Systems, Inc. ("MERS")
Principal/Agent - Mortgage Foreclosure

Dear Mrs. Woloshin:

The Department of Revenue, Office of Chief Counsel is issuing this private letter ruling pursuant to §3.3 of Title 61 of the Pennsylvania Code. This responds to your letter of June 11, 2004. **By issuance of this letter ruling the Department renews Private Letter Ruling RTT-99-048 (09/30/99).**

Please be advised that this letter ruling is limited to the specific factual information contained herein and applies to * MERS and its members (Taxpayers), exclusively. Absent a statutory or regulatory change or rescission of this letter ruling by the Department, Taxpayer may rely on this letter ruling for five (5) years from the date of issuance. At the time this letter ruling expires, whether by statutory or regulatory change or rescission by the Department, you may resubmit your letter ruling request to the Office of Chief Counsel for review.

ISSUE

Whether recording a sheriff's deed poll to the real party in interest/beneficial owner, after having foreclosed on the mortgage in the name of MERS, is subject to the Pennsylvania Realty Transfer Tax ("RTT").

Melissa S. Woloshin
June 23, 2004
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CONCLUSION

The recording of a sheriff's deed poll to the real party in interest/beneficial owner, where the mortgage was foreclosed in the name of the legal owner MERS, is not subject to RTT where MERS is acting as the agent for the real party in interest or beneficial owner.

FACTS

MERS is a Delaware corporation with numerous members from the mortgage industry. MERS is a national electronic registry for tracking servicing rights and beneficial ownership interests in mortgage loans. MERS acts as nominee for the servicer and beneficial owner of a mortgage loan in the public land records.

Its members appoint MERS as the mortgagee of record on all loans that they register on the MERS system. This appointment eliminates the need for any future assignments when servicing rights are sold from one MERS member to another. Instead of preparing a paper assignment to track the change in the county land records, all subsequent transfers are tracked electronically on the MERS system.

MERS does not create or transfer beneficial interests in mortgage loans or create electronic assignments of the mortgage. The transfer process of the beneficial ownership of mortgage loans does not change under MERS. Promissory notes still require an endorsement and delivery from the current owner to the next owner in order to change the beneficial ownership of a mortgage loan.

All loans registered with MERS are assigned a unique, 18-digit number which is that loan's Mortgage Identification Number ("MIN"). The MIN does not change during the life of the loan. Once the loan is registered and assigned a MIN, information on the current beneficial owner of a mortgage loan can be accessed from the MERS system.

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MERS acts as the mortgagee of record in place of the servicer and receives service of all process related to the property. Where a loan defaults, MERS forecloses on the mortgage and the property securing the mortgage is taken to sheriff's sale. If it is the successful bidder, the beneficial owner of the property will receive a sheriff's deed poll.

DISCUSSION

72 P.S. §§ 8102-C.3(16) and 61 Pa. Code §91.193(b)(16) provide, in pertinent part, that:

A transfer to a holder of a bona fide mortgage in default if the transfer is made in lieu of foreclosure or the transfer is made under a judicial sale in which the mortgage holder is the purchaser. The exemption granted by this section does not apply to a transferee or assignee of the bid or other rights of the holder in the judicial sale . . .

Accordingly, if MERS were the successful bidder at the sheriff's sale, the transfer to MERS would be an excluded transaction and not subject to RTT since MERS was the mortgage holder.

Furthermore a transfer without consideration from an agent to the agent's principal is not subject to tax, if the agent acquired the transferred realty for the exclusive benefit of the principal. MERS is the nominee or agent for the beneficial owner of the mortgage. A transfer from MERS to the beneficial owner of the mortgage would qualify as an excluded transaction.

Under the rationale of the Pennsylvania Supreme Court case of Baehr Bros. v. Com., 487 Pa. 233, 409 A.2d 326 (Pa. 1979), two independent, wholly excludable, concurrent transactions can be collapsed into one deed that is excluded from the RTT. That is to say, if deed A to B is excludable and deed B to C is independently excludable, then a direct deed from A to C is excludable.

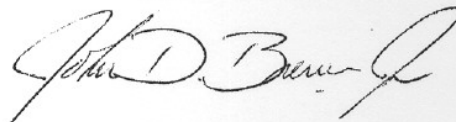
Melissa Woloshin
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Accordingly, a transfer to the beneficial owner of a mortgage (that was foreclosed on by MERS) via sheriff's deed poll, is an excluded transaction and not subject to RTT when the following documentation is attached to the statement of value:

1. A copy of this letter ruling; and
2. A notarized statement from the respective servicer/MERS officer that attests or affirms:
 - a. That the servicer is the beneficial owner of the mortgage and that MERS is acting as its agent;
 - b. That the servicer is a member of MERS;
 - c. That the mortgage identification number (MIN) provided is in fact the MIN that was assigned to the mortgage that was foreclosed on.

A copy of the terms and conditions for MERS membership was provided with this request for letter ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "John D. Brenner, Jr.", written in dark ink.

John D. Brenner, Jr.
Assistant Counsel

JDB:jlh

Wisconsin:

A very favorable opinion was rendered in *Mortgage Electronic Registration Systems, Inc. v. Diana M. Schroeder and American General Finance, Inc.*, Circuit Court, Branch 31, Milwaukee County (June 23, 2005). Plaintiff MERS filed the foreclosure when defendant Schroeder failed to make payments on her mortgage. The mortgage was a MOM (MERS as Original Mortgagee) with Paragon Home Lending, LLC as the original lender. MERS filed a motion for summary judgment and defendant responded contending that MERS is not the correct real party of interest because MERS is not the lender and that the loan is unconscionable. The Defendant claimed that, if the Court were to permit MERS' claim to remain, the lender could attempt to obtain a deficiency judgment against Defendant because MERS has not received a written assignment or request from the lender, JP Morgan Chase Bank, to proceed with the foreclosure.

The Court found that the mortgage was not unconscionable. As to MERS standing, the Court found that "according to the Mortgage, Ms. Schroeder is the borrower and mortgagor, and MERS is the mortgagee under the security instrument. See Mortgage, page 1 of 13." The Court further examined the Mortgage document and found, "According to the Mortgage, MERS is also the nominee for the Lender to exercise rights to foreclose and sell the property. See Mortgage, page 3 of 13."

The defendant tried to use *Mortgage Electronic Registration Systems, Inc. v. Estrella* (Case mentioned in materials under Illinois) as holding that only the lender is the proper party. The *Estrella* case did not stand for this proposition, and did not hold that MERS lacked standing to foreclose. The Wisconsin Court rightly observed that Schroeder's citation to *Estrella* "is to court dicta regarding subject matter jurisdiction, indicating the parties did not brief this matter."

The Court held that "In this case, MERS/Plaintiff has elected to foreclose on Defendant's property according to Wisconsin Statute 846.101 Foreclosure without deficiency. That statute does not require specifically that the "lender" be the plaintiff in a foreclosure case. The statute specifically refers to the "plaintiff." In this case, it appears MERS is properly enforcing the lender's interest according to the Mortgage. MERS has interest in the mortgage as mortgagee. It also has interest as "nominee" for the lender."

The Court also held that "Res judicata will act as a bar to Lender to pursue any judgment because the Lender, is a party in privity with MERS according to the Mortgage."

Mortgage Electronic Registration Systems, Inc. v. Degner, et al., (Circuit Court for Waukesha County # 05CV1982) is a more recent case in which a Wisconsin Court rejected an attack on the standing of MERS to foreclose. In his counterclaim and affirmative defenses, the borrower alleged various violations of federal lending laws. The borrower then brought a motion to dismiss which asserted that MERS could not foreclose because MERS was not registered as a foreign corporation and because MERS allegedly lacked standing because "it never takes possession of any funds" and "is not the servicing agent".

On February 6, 2006, the Honorable James R. Kieffer denied the motion to dismiss and stated at the motion hearing: "**MERS does have standing to bring and continue this foreclosure action**, and that is under . . . Section 803.01(2) of the Wisconsin Statutes. I'm satisfied given the

legal relationship of MERS and how it relates to HSBC and Household Finance and how these entities all work, I believe that Wisconsin law does provide for that . . .” (emphasis added). The final written order of denying the motion to dismiss was entered on February 23, 2006.

Section 803.01(2), the statute cited by Judge Kieffer, provides that a “party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in the party’s name without joining the person for whose benefit the action is brought . . .” This language is quite similar to Rule 17(a) of the Federal Rules of Civil Procedure, which addresses the issue of whether a party is a “real party in interest” entitled to bring suit. Most states have a rule that incorporates almost identical language regarding standing to sue.

MERS obtained summary judgment in this action, and the borrower appealed the judgment. In a decision issued January 31, 2007, the Wisconsin Court of Appeals, District II, issued a unanimous decision affirming the judgment in MERS’ favor. *Mortgage Electronic Registration Systems, Inc. v. Degner*, (2006AP690).

VII. BANKRUPTCY

Question: *Can MERS file a Proof of Claim or a Motion for Relief from Stay?*

When MERS is the mortgagee of record pursuant to either a recorded MOM (MERS as Original Mortgagee) mortgage or an assignment, MERS holds an "in rem" mortgage interest in the property. Under the United States Bankruptcy Code, such an interest constitutes a claim in bankruptcy, and as such, MERS would qualify as a creditor for purposes of filing a Proof of Claim. A claim filed in MERS name is based upon the mortgage lien. Therefore, the claim is considered a secured claim. If the lien remains in MERS name and the Proof of Claim is filed in the servicer's name, the claim may be deemed unsecured and the priority afforded secured claims may be lost.

Keep in mind a claim based upon the mortgage lien securing the note are one in the same. In a recent case, outside counsel filed two Proofs of Claims, one in the name of MERS based upon the mortgage and a separate claim in the name of the investor based upon the note. The court in that case raised an issue regarding a purported conflict of interest. To the court, it appeared that counsel was representing two parties with a claim to the same amount of monies. The MERS claim was not pursued or defended and a default was taken against MERS. As a result, the investor lost priority as a creditor and was left with only an unsecured claim.

In addition, as a creditor and mortgagee of record, MERS would be a party in interest with standing to seek relief from the automatic stay under section 362(d) of the Bankruptcy Code. You can bring it in MERS name either alone or in MERS name as nominee for the lender. However, in such a proceeding, only the *in rem* interest is at issue, so MERS' name alone is fine.

Recently, the United States Bankruptcy Court for the District of Massachusetts affirmed the right of MERS to file a Motion for Relief from the Automatic Stay. *In re Huggins*, 2006 WL 3718179 (Bankr. D. Mass. December 14, 2006). In *Huggins*, the debtor opposed the Motion for Relief on the basis that MERS did not have a property or ownership interest in the note, and therefore was not entitled to enforce the mortgage outside of bankruptcy because it could not bring an action on the note.

United States Bankruptcy Judge Robert Somma rejected the debtor's arguments and granted the Motion for Relief. Judge Somma observed that the debtor's contentions regarding MERS' standing "misapprehend what MERS does, its rights under the Mortgage, the import of the Massachusetts foreclosure statute and" the directive of a previous precedent regarding the standard applied to granting the Motion for Relief. Judge Somma observed that MERS holds legal title to mortgages in a nominee capacity. He stated that under the terms of the mortgage instrument, "MERS then has the customary rights of a mortgagee under a Massachusetts mortgage and may act under the Mortgage on [the Lender's] behalf." He added that, under Massachusetts foreclosure statutes, "MERS as the mortgagee named in a recorded mortgage (albeit in a nominee capacity) is authorized to conduct a foreclosure by power of sale" He further observed that, in order to obtain relief from the stay, prior precedents establish that a movant like MERS need only establish a colorable claim in order for the motion to be granted.

Judge Somma concluded, “The Mortgage, the Massachusetts foreclosure statute, and MERS’s status as nominee mortgagee establish to my satisfaction that MERS has standing under Massachusetts law to foreclose on [the Lender’s] behalf” and therefore MERS had a colorable claim to the property warranting relief from the automatic stay. While no bankruptcy judge has discussed the topic as thoroughly as Judge Somma has in a published ruling, it should also be noted that MERS has obtained relief from the automatic stay in other bankruptcy actions where the debtor has challenged MERS’ standing. *See, e.g., In re McCoy*, Bankr. # 06-48716 (E.D. Mich. September 18, 2006).

We have recently seen that trustees in certain areas of the country have started filing oppositions to motions for relief from stay filed in the name of MERS. The trustees challenged the motion on various grounds including MERS standing to file the motion. Bankruptcy courts including those mentioned above have found MERS has standing as the mortgagee or beneficiary on the lien instrument and relief has been granted. It is important that counsel handling these motions understand that MERS is seeking relief as the mortgagee or beneficiary and that they are prepared to point to the MERS language in the mortgage or Deed of Trust. The courts have been granting the motion and requested relief to proceed with the foreclosure once MERS role has been explained.

You should notify MERS about these challenges when they arise. We have and continue to work with outside counsel to assist in explaining MERS to the trustees and the court. We also recommend that you share these materials with your outside counsel and we encourage you to contact the MERS Law Department with questions.

Question: *What happens if the Lender (MERS member) files a proof of claim and MERS files the Motion from Relief from Stay? Will the Debtor contest this inconsistency?*

This actually happened in a case in Chicago. The MERS member filed the proof of claim in their name and then filed a motion for relief from stay in MERS’ name. The debtor’s attorney filed a motion contesting MERS’ standing. Once the attorney representing MERS/Lender explained to the debtor’s attorney that MERS is the mortgagee pursuant to the recorded mortgage and as such, has an in rem interest, he withdrew his motion. Most contested foreclosure and bankruptcy cases boil down to a lack of understanding of MERS’ role, and the more attorneys know about the relationship between MERS and its members, the fewer complications should be encountered.

Question: *What should we do if we receive an adversary proceeding filed by a bankruptcy Trustee against MERS?*

In the past couple of years, we have seen a number of adversary proceedings brought by Trustees on behalf of debtors in Michigan bankruptcies. In some cases, not only are the Trustees seeking to avoid mortgage liens as preferential transfers based upon the recording date of the mortgage at issue, but also are looking to recovery money damages in the face amount of the mortgage.

You need to file an appearance and answer for MERS. In one such case, a member did not do so and MERS was defaulted. The court not only entered an order avoiding the mortgage lien but

also included a money judgment for the mortgage amount. A garnishment was issued against MERS to enforce the money judgment.

After filing a motion to set aside the default, the Trustee and the title company reached a settlement and as result, the default as well as the garnishment was dismissed. It is important that any action that needs be taken in response to adversary proceedings involving a prayer for money damages be taken on behalf of MERS in a timely manner.

VIII. SERVICE OF PROCESS, INDEMNIFICATION AND NOTIFICATION

A. SERVICE OF PROCESS

MERS receives service of process regarding many different issues because MERS appears in the land records as the mortgage lien holder. A post office box address in Flint, Michigan appears on every recorded document to MERS. Most service is received directly through this PO Box and at our mailroom in Ocala, Florida. However, we do receive some mail at our corporate office in Reston, Virginia as well as through our registered agents in a few states.

When we receive service of process, the documents are scanned into images and forwarded to the current servicer listed on the MERS[®] System. There is one central point of contact at each member that will receive the mail. It is the responsibility of the point of contact to distribute the mail to the proper departments within the member's organization. The member is responsible to handle the processing of the documents.

Question: *We received a complaint naming MERS as a defendant, will MERS be having separate counsel represent you, or should we retain counsel for MERS?*

Under the Membership rules and procedures, the member is responsible to take whatever action is necessary to protect the mortgage lien. For instance, if MERS holds the second lien on a member's behalf, and the first lien holder is foreclosing, it is the member's responsibility to defend the action in MERS name. However, if the allegations attack MERS itself, and not just in its capacity of mortgage lien holder, we may choose to bring counsel in to partner up with the member's retained counsel.

Question: *We only received the complaint from MERS yesterday and time to answer has already expired. What was the hold up?*

This usually occurs because: 1) the member's point of contact did not forward the documents internally in a timely manner; or 2) the mortgage loan was never registered with MERS by the member and it was labeled unidentified and therefore, it took some time to properly identify it.

If a mortgage loan is not registered with us, we will not know which member to send the documents to and it becomes unidentified. Once it is labeled unidentified, we send an e-mail out to all members with the borrower name and address or other identifiable information and ask our members to claim the loan if they are servicing it. If we receive no response, we send the information to an outside vendor to go to the applicable land records to pull either the mortgage or assignment to MERS. We can usually tell by the recorded document which member is involved. We then send it to the member along with an invoice for the search fee.

B. DEFENDING AND INDEMNIFYING MERS

Under Rule 9 of the Terms and Conditions of Membership and Rules 13 and 14 of the Rules of Membership, a Member is obligated to indemnify and defend MERSCORP, Inc. ("MERSCORP") or its subsidiary, Mortgage Electronic Registration Systems, Inc. ("MERS")

from: (a) claims arising from the actions or failure to act of the Member, (b) a transaction on the MERS® System initiated by the Member, or (c) an action taken by MERSCORP or MERS in compliance with an instruction from the Member.

Typically, MERS is named in suits or counterclaims seeking to quiet title to property, impose sanctions for housing code violations, challenge the validity of a loan based upon alleged failures to comply with statutory requirements for real estate transactions, or actions to foreclose on property liens (including mechanic's liens, tax liens, and actions to recover homeowner's association dues). In all of these instances, it is the Member's responsibility to provide a defense for MERSCORP or MERS, and to pay any legal fees, costs or judgment rendered against MERSCORP or MERS in the action. If the Member fails to provide a defense, MERSCORP or MERS has the right to retain counsel to defend the claim, and to submit any legal fees, costs, or judgment to the Member for payment.

Question: If a Member retains counsel to defend MERS, how involved will MERS be in the management of the case?

The MERS Law Department does not typically oversee actions in which there is no monetary claim against MERS or MERSCORP, such as a foreclosure action where MERS is named as a defendant simply by virtue of it having a junior lien on the property being foreclosed. We rely upon the authority delegated to the member to manage such actions. Nevertheless, in suits involving monetary claims against MERS or challenging the standing of MERS to hold a mortgage lien, the MERS Law Department tracks these cases and makes periodic inquiries to the member's in-house attorney managing the case, and to the attorney hired to defend MERS in the suit.

Some outside attorneys are still learning the mechanics of the relationship between MERS and the Member. The MERS Law Department is a valuable resource to such counsel for answers on how to plead certain matters and how to address certain legal challenges or discovery requests that are unique to MERS or MERSCORP. The retained counsel should promptly assert any defenses available to MERS or MERSCORP, even if the legal defense could not be asserted by the Member in its own capacity.

An attorney from the MERS Law Department will typically establish contact with the Member early in the litigation to confirm that a defense is being provided and to answer any questions. The MERS Law Department should be sent copies of any pleadings filed in the case, and should be kept aware of the progress of the litigation. MERS should also be consulted on any settlement, representation, or response to discovery, as a misrepresentation of MERS in one court could adversely affect MERS in another.

C. NOTIFYING MERS OF PENDING LAWSUITS

Frequently, a Member will be the first to learn that a claim has been filed or is threatened against MERSCORP, Inc. ("MERSCORP") or its subsidiary, Mortgage Electronic Registration Systems, Inc. ("MERS"). This is particularly true in a foreclosure action in MERS name, and the borrower files a counterclaim against MERS or MERSCORP. Under Rule 14, a Member is

required to immediately notify MERSCORP, Inc. (“MERSCORP”) of any lawsuit or threatened lawsuit naming either MERSCORP or MERS.

Question: Where should I send the notice?

Notice of a lawsuit should be sent to the attention of General Counsel of MERSCORP, and can be sent by fax (703.748.0183), email (mers@mersinc.org) or by prepaid delivery by overnight courier or registered or certified mail to 1818 Library Street, Suite 300 Reston, VA 20190. You will receive confirmation of receipt if you use any of these methods of service.

Question: What information should be included in the notice?

A notice should include the following information:

- (i) the name of the lawsuit, and the county, state and court in which the lawsuit is filed;
- (ii) the Mortgage Identification Number (MIN) of the mortgage loan involved;
- (iii) the date the complaint was filed and the date the Answer is due;
- (iv) the name and phone number of the contact person of the Member with respect to the subject lawsuit, threatened lawsuit or claim (which may be in-house counsel);
- (v) the name and telephone number of the attorney and law firm, if any, retained by the Member with respect to the subject lawsuit or claim; and
- (vi) a copy of all pleadings with respect to the subject lawsuit or claim in the possession of the Member or a copy of the written threat to initiate a lawsuit (as applicable).

Question: What if a Member receives notice of a threatened or pending lawsuit regarding a loan, but no longer has any interest in the loan?

The Member should always give MERSCORP notice of the lawsuit in the manner described in the discussion above. The Member should also indicate that it has transferred or terminated its interest in the mortgage loan, and should immediately update the MERS[®] System to reflect the change in interest in the loan.

Question: What if the Member believes that it is not obligated to indemnify a particular claim?

The Member is still required to provide prompt notice of the pending or threatened lawsuit, even if the Member believes it is not obligated to indemnify or defend the claim. The Member should set forth in the notice the basis for the refusal to indemnify and defend against the claim. Termination of the Member’s use of the MERS[®] System does not end a Member’s obligations to indemnify and defend MERS or MERSCORP for actions arising from its previous membership.

Members should review Paragraph 9 of the Terms and Conditions and Rules 13 and 14 of the Rules of Membership for a complete understanding of defense, indemnification, and notification obligations.

IX. SUBPOENAS

It is not uncommon for MERS to be served a subpoena to produce documents or provide testimony regarding a loan for which MERS holds a mortgage lien. MERS is served the subpoena because of its appearance in the land records as a mortgagee. These subpoenas generally are issued in cases involving bankruptcy matters, criminal investigations, or divorce proceedings. The MERS Help Desk will promptly forward the subpoena in the same manner as it does any litigation document to the Member servicing the loan. The subpoena usually requests documents only related to the history of the loan itself. MERS does not have such information in its possession. Therefore, a MERS certifying officer should respond. The certifying officer should indicate that the Member is the servicer of the loan, that the certifying officer is a vice president of MERS authorized to respond to the subpoena, that MERS has no documents in its possession, and that any documents produced are being produced by the Member.

Question: *What if our company has been served a subpoena in our name for the same information? Do we need to respond separately for MERS?*

It is typical for a party seeking information regarding a loan to serve both MERS and the servicer of the loan for the same information. The attorney issuing the subpoena is most concerned about receiving the documents for the case. As the MERS nominee relationship with mortgage lenders becomes more well known to lawyers throughout the country, we have found that it generally-acceptable for the Member to answer the subpoena in the Member's name by way of an employee who is also a vice president of MERS identified in the corporate resolution. The vice president should attach a cover letter with the response indicating that the Member is the servicer of the loan and the owner of all documents regarding the loan, that the response is being provided by an agent of the servicer who is also a vice president of MERS, and that MERS has no independent information regarding the loan.

Question: *How should we proceed if the subpoena requires MERS to provide an officer to testify at a hearing?*

In most instances, the attorney issuing the subpoena is more interested in the documents than in testimony, but occasionally an officer will need to be produced for a hearing (particularly in bankruptcy matters). The Member should select a certifying officer who is familiar with the Member's relationship with MERS to act as the witness. The witness should be able to explain briefly that he/she is an agent of the servicer and a vice president of MERS, and that MERS holds the mortgage lien in a limited agency capacity for the party with the beneficial interest in the note. If the subpoena involves issues regarding the history of MERS, the corporate governance of MERS, or any other matters that are specific to MERS and outside of the details concerning a particular loan or borrower, you should contact the MERS Law Department for additional guidance.

Question: *What if the Member chooses not to respond to a subpoena issued to MERS?*

Failure to respond to a subpoena on behalf of MERS could result in additional subpoenas and, ultimately, a finding of contempt by the court. If MERS is found in contempt for failing to respond to the subpoena, any fines, penalties and/or attorney's fees associated with the contempt ruling or spent by MERS to challenge the finding of contempt shall be the Member's responsibility.

Question: *Will MERS produce information a Member has placed on the MERS[®] System to a third party in response to a subpoena?*

Occasionally, a party to a complex commercial dispute or class action will seek discovery from MERS of information contained on the MERS[®] System. As of the date of the preparation of these materials, MERS has never directly produced information from the MERS[®] System to third parties. Pursuant to Rule 9, Section 1(b) of the Rules of Membership, MERS has "no ownership rights whatsoever in or to any information contained on the MERS[®] System." It is our position that the information contained on the MERS[®] System is the private, proprietary property of our Members, and that the information should be produced, if at all, by the Member who owns the information. This approach protects the privacy of the information, and allows our Members to control how and when it is distributed.

While MERS will continue to protect the privacy of our Members' information, MERS cannot risk contempt of court if ordered to respond to a subpoena. Rule 9, Section 1(b)(iii) of the Rules of Membership does authorize MERS to produce information contained on the MERS[®] System in response to a subpoena or court order provided that MERS has taken reasonable efforts to notify any interested Member in advance to allow such Member time to attempt to quash the subpoena or court order. We will work with you to take the best legal strategy in order to protect your information while complying with any court order.

X. FILING CORRECTIVE DOCUMENTS

Question: *What happens when a loan is closed by a non-MERS member using MOM documents in error?*

From time to time, we are contacted by various non-member lenders and title companies that have erroneously closed loans using MOM (MERS as Original Mortgagee) documents (“Erroneous MOMs”). Erroneous MOMs are loans that are originated and recorded by lenders or individuals who are not MERS members. Contractually, MERS only agrees to be the lien holder in the land records for MERS Member. When MERS is contacted about Erroneous MOM documents, MERS takes one of two courses of action depending on the circumstances:

- 1) If the originating lender is an institutional lender that is not a MERS member, MERS may elect to execute an assignment out of MERS, provided that the originating lender indemnifies MERS for any potential liability that MERS may be unnecessarily exposed to by erroneously being named as the mortgagee. The MERS-prepared indemnification agreement is executed by the originating lender (and title company where applicable) and both the assignment and the indemnification are submitted to the relevant county recorder’s office for recording.
- 2) MERS takes a different approach if the lender that originated an Erroneous MOM is an individual. When this happens, MERS generally executes a Disclaimer of Interest affidavit. Through this document, MERS disclaims any interest in the property that is purportedly created by the Erroneous MOM on the basis that MERS never agreed to hold the lien on behalf of the non-member individual. The individual then records the Disclaimer in the applicable land records.

Question: *What if I am a broker preparing loans for sale to a MERS Member and I originate a MERS mortgage because the loan is to be purchased by a Member but, later on, the loan is sold to a non-Member?*

Under the MERS Membership Agreement, MERS contractually agrees to hold liens in the land records for its members. Therefore, if a mortgage is closed naming MERS as the mortgagee and the loan is then sold to a non-member, the lien must be assigned out of MERS by a recorded assignment. The MERS member that was to purchase the loan has the responsibility to execute the MERS assignment of the lien back to the originating lender (the non-member broker).

MORTGAGEE AFFIDAVIT

Question: *The MERS Mortgage Identification Number (MIN) was not printed on the MERS mortgage before it was submitted for recording. Should we re-record the document, this time with the MIN included?*

Each recorded MOM mortgage (and assignment to MERS) must display the MIN that uniquely identifies that particular lien interest. Rather than re-recording the full instrument, however, the member may be able to record a 1-page mortgagee affidavit that references the missing MIN. The affidavit does not modify any of the rights or obligations belonging to any party to the

recorded mortgage, so many jurisdictions will accept the document for recording. If the jurisdiction charges a per-page recording fee, this approach is much cheaper than re-recording the mortgage. Please refer to our website at www.mersinc.org for a sample of the MERS Mortgage Affidavit. Should you encounter a jurisdiction that does not accept the affidavit, we recommend using a “MERS-to-MERS” mortgage assignment similar to the format discussed below in the California Mortgage Assignment section.

MORTGAGEE ASSIGNMENT

In California and New Jersey, some County Recorders offices have rejected the Mortgagee’s Affidavit as not in compliance with state law. After reviewing the issue, it seems that California law does not provide a method for correcting previously recorded documents. Nonetheless, errors do occur and corrections need to be made.

To avoid the need for original documents and to provide a simpler, less expensive method to correct an errant document, MERS advises its Members to use a special form Assignment of Deed of Trust. The special Assignment would assign the trust deed from MERS as nominee to MERS as nominee for the purpose of noting a correction to the MIN on the originally recorded deed of trust or assignment. The use of this special Assignment eliminates the need for recording a new Deed of Trust to add or correct the MIN.

If a Member experiences a similar problem with the Mortgagee’s Affidavit in other states, the Member may need to slightly modify the sample MERS to MERS assignment below in order to meet the other states’ recording requirements.

RECORDING REQUESTED BY

WHEN RECORDED MAIL TO

SPACE ABOVE THIS LINE FOR RECORDER'S USE

ASSIGNMENT OF DEED OF TRUST

Lender's Loan Number: _____
MIN: _____ MERS Phone: 1-888-679-6377

FOR VALUE RECEIVED, Mortgage Electronic Registration Systems, Inc., its successors and assigns, as nominee for the true beneficiary hereby assigns and transfers to itself, Mortgage Electronic Registration Systems, Inc, its successors and assigns, as nominee for the true beneficiary all of its right, title and interest in and to a certain deed of trust executed by _____, Trustor(s), and naming _____ as original Trustee and _____, the original Beneficiary(ies), and bearing the date of the ____ day of _____, _____ and recorded on the ____ day of _____, _____ in the office of the Recorder of _____ County, State of California in Book _____ at Pages _____.

This Assignment is for the purpose of providing record notice of the Mortgage Identification Number (MIN) that was either omitted or incorrect on a prior Deed of Trust or Assignment. The correct MIN is _____ and the Mortgage Electronic Registration Systems, Inc telephone number to call for information when using this MIN is 888-679-6377.

Signed on the ____ day of _____, _____

Mortgage Electronic Registration Systems, Inc

By: _____
Assistant Secretary

STATE OF CALIFORNIA)
COUNTY OF _____) ss.

On _____ before me, the undersigned, a Notary Public, personally appeared _____ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

Name _____
Notary Public

(This area for official notarial seal)

XI. MASTER MORTGAGES

MERS has received inquiries from members regarding putting MERS on Master Mortgages. There are States with statutes that allow originating lenders to record a Master Mortgage in each county within the State and then the lender records a Short Form Mortgage (“Short Form”) for each mortgage loan that is originated for an individual borrower to secure a lien on a particular parcel of property within that county. The Master Mortgage contains the general terms of the mortgage and the Short Form includes the loan information for a particular borrower (i.e., borrower name, loan amount, property description, etc.). The Master Mortgage must first be on record in each county before the Short Form instrument may be used. Members have expressed an interest in using these Master Mortgages because there is significant reduction in recording costs for individual mortgages that are originated using the Short Form instrument.

In July 2007, Freddie Mac and Fannie Mae released Uniform Master Form Security Instruments and Uniform Short Form Security Instruments for those states with statutory provisions allowing for the use of master and short form mortgages. The Fannie Mae and Freddie Mac master and short form security instruments are available for use in the following 27 states: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Kentucky, Maine, Maryland, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

In addition, Fannie Mae and Freddie Mac adopted guidelines for naming MERS as the original mortgagee (MOM) on the Uniform Master and Short Form Mortgages. You may access the Fannie Mae/Freddie Mac Uniform Master and Short Form Mortgages including the guidelines adding MERS as the mortgagee on the web at <https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/>. Forms will be added as other states adopt similar statutes allowing the use of Master and Short Form instruments. Fannie and Freddie plan to incorporate the MERS language into their forms.

XII. STATE QUALIFICATION AND LICENSING

Question: *I noticed that MERS is not qualified as a foreign corporation in my state. Since MERS is the mortgagee of record for loans in all 50 states, how is this possible?*

Mortgage Electronic Registration Systems, Inc., a Delaware corporation with its principal offices at 1818 Library Street, Suite 300 Reston, VA 20190 (“MERS”) is qualified as a foreign corporation in the following states: Alabama, Arkansas, Florida, Illinois, Maine, Massachusetts, New Jersey, New York, Ohio, and Virginia. For other states, our outside counsel has determined that foreign corporation qualification is not necessary.

Similarly, our outside counsel has determined that MERS does not need to be licensed under any state laws dealing with mortgage banking or brokerage activities.

If, in the future, circumstances warrant a reassessment of the need for MERS to be licensed as mortgage banker or broker or qualify as a foreign corporation in other states, our membership rules obligate us to do so and we will take the appropriate action.

Question: *I have seen two different corporate names used for MERS: MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc. Which name is correct?*

The MERS family is comprised of two distinct corporate entities. MERSCORP, Inc. is the parent company of Mortgage Electronic Registration Systems, Inc. MERSCORP, Inc. is also a Delaware corporation with a principal office at 1818 Library Street, Suite 300 Reston, VA 20190. It employs all personnel and also owns and operates the MERS® System. Mortgage Electronic Registration Systems, Inc. is a wholly owned bankruptcy remote subsidiary of MERSCORP, Inc. and its sole purpose is to hold mortgage liens. Mortgage Electronic Registration Systems, Inc. is the entity that will be found in the land records.

MERSCORP, Inc. is qualified as a foreign corporation in the following states: California, Florida, Georgia, Illinois, Louisiana, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Iowa, and Virginia. Qualification in most of these states was required because MERSCORP, Inc. has employees based in those states.

Question: *Has MERS been challenged on whether or not MERS needs to be licensed or qualified to do business in any states?*

We were challenged in Nebraska and prevailed in a decision rendered by the Nebraska Supreme Court on October 21, 2005. In the case, *Mortgage Electronic Registration Systems, Inc. v Nebraska Department of Banking and Finance*, (filed October 21, 2005, No. S-04-786) the Court held that MERS services of holding mortgage liens for promissory note-owners is not the equivalent of acquiring mortgage loans as defined under Neb. Rev. Stat. section 45-702 (Reissue 2004). The Court held that MERS serves as legal titleholder in a nominee capacity, permitting lenders to sell their interests in the notes and servicing rights to investors. MERS has no

independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owes MERS any money.

XIII. SUFFOLK COUNTY, NEW YORK LITIGATION

The end of 2006 also saw the end of MERS' five-year dispute with the Suffolk County Clerk's office, with MERS winning a decisive victory in New York's highest court. On December 19, 2006, a unanimous New York Court of Appeals ruled that clerks in New York are required by statute to record MERS' mortgages and mortgage assignments. In addition, the Court of Appeals also ruled in a 6-1 decision that clerks must record MERS mortgage discharges. As such, it is the law of New York that clerks must record all MERS' documents presented for recording with the appropriate filing fee.

The Court of Appeals' decision affirmed the unanimous 4-0 decision by the Appellate Division, Second Department in 2005. The appellate court's ruling, which is clear and unambiguous, requires "county clerks to record all mortgages, assignments and discharges naming MERS as the mortgagee or as nominee for a lending institution."

By way of background, in April 2001, a New York Attorney General's Informal Opinion was issued stating that a recorder has the duty to index mortgages under the name of the true mortgagee. The Opinion affected MERS in that the facts supplied by Nassau County, NY to the AG's office were incorrect by erroneously concluding that MERS does not hold the mortgage interest to the mortgage and therefore is not the true mortgagee. The AG's office takes the facts as supplied to them without the obligation of further investigation.

The Suffolk County Recorder interpreted the AG's Opinion to mean that his office should not accept MOM (MERS as Original Mortgagee) mortgages at all. As a result of his actions, MERS filed a lawsuit against Suffolk County and its then-Recorder, Edward Romaine. MERS prevailed in the trial court, and prevailed again in the Appellate Division, but Suffolk County appealed to New York Court of Appeals, who agreed to review the case.

In the Court of Appeals, the Suffolk County Clerk contended that MERS instruments were not proper "conveyances" fit for recording because MERS holds no beneficial interest in the mortgage instruments. The Clerk further argued that Real Property Law Section 321(3) required it to refuse to record discharges of a mortgage that had not been assigned "of record" unless the satisfaction instrument listed the chain of assignments.

The Court of Appeals ruled against the Clerk on both issues. In holding that the Clerk must record MERS mortgages, the Court cited RPL Section 291, which states the Clerk "shall, upon the request of any party . . . record" "a conveyance of real property, within the state" which has been duly acknowledged and presented for recording. The Court reasoned that the recording of instruments affecting real property is a mandatory, "ministerial" duty. Thus, the Clerk "lacks the statutory authority to look beyond an instrument that otherwise satisfies the limited requirements of the recording statute."

With regard to assignments and discharges of mortgages, the Court observed, "As the nominee for the mortgagee of record or for the last assignee, MERS acknowledges the instrument and therefore, the County Clerk is required to file and record the instruments." After reviewing the legislative history of RPL Section 321(3), the Court concluded that a mortgage is either assigned

“of record” and its discharge must list the details of such an assignment, or there has been no assignment and the certificate of satisfaction to be discharged need only “so state” that there have been no assignments. The Court concluded: “The MERS discharge complies with the statute by stating that the ‘[m]ortgage has not been further assigned of record’ and, therefore, the County Clerk is required to accept the MERS assignments and discharges of mortgage for recording.”

XIV. MERS® COMMERCIAL

The MERS® Commercial System was launched in July 2003.

- Bank of America, Wells Fargo, Morgan Stanley, Pinnacle, and Bear Sterns among others have registered 6,166 loans secured by 11,632 properties with an aggregate original principal balance of \$104.5 billion, as of January 2008.

The adaptation of MERS (Mortgage Electronic Registration Systems, Inc.) for the CMBS multifamily marketplace is designed to eliminate the repurchase risk and cost associated with preparing, recording, and tracking mortgage assignments.

Mortgage assignments impose unnecessary costs on commercial originators and issuers. Additionally, servicers, special servicers, custodians, and trustees are subjected to operational problems caused by incorrect, unrecorded, and missing mortgage assignments over the life of the loan.

MERS® Commercial is a web-based, real-time application. Originators reserve a unique Mortgage Identification Number (MIN) from a web-based MIN generator within MERS® Commercial. The MIN is affixed to the promissory note and associated security instrument(s) that name MERS as the original mortgagee and nominee for the lender. With the recording of the security instrument(s), MERS becomes the mortgagee in the county land records and no assignments are required during a subsequent sale and transfer of the loan between MERS members.

The Originator or issuer enters the MIN, along with the required information to uniquely identify the loan and its collateral on MERS® Commercial immediately after closing.

Once registered, the issuer (or custodian) updates MERS® Commercial to reflect changes in ownership due to securitization, foreclosure, repurchase, or payoff. All parties with an interest in the loan can easily monitor progress towards achieving final certification and other major loan events.

Changes to Loan Documents:

- The only change to the closing transaction is to the promissory note, security instruments, UCC1, and the title policies. The payee of the promissory note does not change in the MERS process and remains payable to the order of the originating lender and, upon sale, is endorsed to the subsequent purchaser, or in blank, depending on the purchaser's policies. MERS does not affect the chain of title to the mortgage promissory note.
- MERS does not require any particular forms of language, but the granting clauses of the security instruments need to be modified so that Mortgage Electronic Registration Systems, Inc. holds valid legal title to the mortgage (or becomes the

beneficiary in deeds of trust or the secured party under other types of security instruments).

- All major title insurers will issue title policies for loans secured by MOM security instruments. Title policies can be issued in the name of the originating lender or both the originating lender and Mortgage Electronic Registration Systems, Inc.
- Selected officers of the originating lenders and the servicers of loans registered on MERS® Commercial System can act for Mortgage Electronic Registration Systems, Inc., because they are also elected officers of that corporation and granted limited powers to act on its behalf. In their capacity as officers of Mortgage Electronic Registration Systems, Inc., they can execute releases of liens, satisfactions of mortgages, assignments to non-MERS members and initiate foreclosures in the name of Mortgage Electronic Registration Systems, Inc.

Changes to Securitization Documents:

- Pooling and servicing agreements, trust indentures and custodial agreements will need to be modified to reflect the change that assignments are not required for loans registered on the MERS® Commercial System.
- The rating agencies have also required a one-paragraph disclosure in the prospectus about MERS.

Sample Prospectus Disclosure

The original mortgages for some of the mortgage loans have been, or in the future may be, at the sole discretion of the originating lender, recorded in the name of Mortgage Electronic Registration Systems, Inc. (“MERS”), solely as nominee for the originating lender and its successors and assigns, and subsequent transfers of those loans have been, or in the future, may be, tracked electronically through the MERS® Commercial system. In some other cases, the original mortgage was recorded in the name of the originating lender of the mortgage loan, and record ownership of the mortgage was later assigned to MERS, solely as nominee for the owner of the mortgage loan, and subsequent transfers of the loan have been, or in the future, may be tracked electronically through the MERS® Commercial system. For each of these mortgage loans, MERS serves as mortgagee of record on the mortgage solely as a nominee in an administrative capacity on behalf of the note holder, and does not have any financial interest in the mortgage loan. For additional information regarding the recording of mortgages in the name of MERS see “Description of the Certificates—Assignment of Trust Assets” in the prospectus.

- The securitization trustee is required to be named as the Note Holder on the MERS® Commercial System.

Sample Changes to Mortgage and Security Agreement:

MERS does not mandate specific language changes to commercial mortgage loan documents, however, the following three requirements must be satisfied:

- 1) Legal title to the mortgage lien or the lien of other security agreements must be vested in Mortgage Electronic Registration Systems, Inc., a Delaware stock corporation with its principal offices at 1818 Library Street, Suite 300 Reston, VA 20190.
- 2) The 18 digit mortgage identification number ("MIN") required for each loan registered on the MERS[®] Commercial system must be placed on the cover page (or first page if there is no cover page) of each of the following documents: (a) promissory note, (b) mortgage or deed of trust, (c) other security instruments, (d) assignment of security instruments to or from MERS, (e) lien releases or reconveyances and (f) any other instruments recorded in the public land records in which MERS has a legal interest. Placement of the MIN on other loan documentation is optional for the Lender.
- 3) Notices provisions in the mortgage, deed of trust and other security instruments should be modified to add Mortgage Electronic Registration Systems, Inc. using the following address: MERS[®] Commercial, P.O. Box 2300, Flint, MI 48501-2300.

The following is one approach to changes in the mortgage instrument. It requires only minimal changes to the mortgage; only the granting clauses are modified to reflect that Mortgage Electronic Registration Systems, Inc. is the mortgagee and the references to the Lender remain the same, except that the three paragraphs below are added to explain the relationship of MERS to the other parties to the instrument.

Nominee of Capacity of MERS. MERS serves as mortgagee of record and secured party solely as nominee, in an administrative capacity, for Lender and its successors and assigns and only holds legal title to the interests granted, assigned, and transferred herein. All payments or deposits with respect to the Secured Obligations shall be made to Lender, all advances under the Loan Documents shall be made by Lender, and all consents, approvals, or other determinations required or permitted of Mortgagee herein shall be made by Lender. MERS shall at all times comply with the instructions of Lender and its successors and assigns. If necessary to comply with law or custom, MERS (for the benefit of Lender and its successors and assigns) may be directed by Lender to exercise any or all of those interests, including without limitation, the right to foreclose and sell the Property, and take any action required of Lender, including without limitation, a release, discharge or reconveyance of this Mortgage. Subject to the foregoing, all references herein to "Mortgagee" shall include Lender and its successors and assigns.

Relationship. The relationship of Mortgagor and Mortgagee under this Mortgage and the other Loan Documents is, and shall at all times remain, solely that of borrower and lender (the role of MERS hereunder being solely that of nominee as set forth in subsection (a) above and not that of a lender); and Mortgagee neither

undertakes nor assumes any responsibility or duty to Mortgagor or to any third party with respect to the Property. Notwithstanding any other provisions of this Mortgage and the other Loan Documents: (i) Mortgagee is not, and shall not be construed to be, a partner, joint venturer, member, alter ego, manager, controlling person or other business associate or participant of any kind of Mortgagor, and Mortgagee does not intend to ever assume such status; and (ii) Mortgagee shall not be deemed responsible for or a participant in any acts, omissions or decisions of Mortgagor.

No Liability. Mortgagee shall not be directly or indirectly liable or responsible for any loss, claim, cause of action, liability, indebtedness, damage or injury of any kind or character to any person or property arising from any construction on, or occupancy or use of, the Property, whether caused by or arising from: (i) any defect in any building, structure, grading, fill, landscaping or other improvements thereon or in any on-site or off-site improvement or other facility therein or thereon; (ii) any act or omission of Mortgagor or any of Mortgagor's agents, employees, independent contractors, licensees or invitees; (iii) any accident in or on the Property or any fire, flood or other casualty or hazard thereon; (iv) the failure of Mortgagor or any of Mortgagor's licensees, employees, invitees, agents, independent contractors or other representatives to maintain the Property in a safe condition; or (v) any nuisance made or suffered on any part of the Property.

Sample Changes to Promissory Note; Assignment of Leases and Rents; as well as the Pooling and Servicing Agreement

MERS does not mandate specific language changes to commercial mortgage loan documents, however, the following three requirements must be satisfied:

- Legal title to the mortgage lien or the lien of other security agreements must be vested in Mortgage Electronic Registration Systems, Inc., a Delaware stock corporation with its principal offices at 1818 Library Street, Suite 300 Reston, VA 20190.
- The 18 digit mortgage identification number (“MIN”) required for each loan registered on the MERS® Commercial system must be placed on the cover page (or first page if there is no cover page) of each of the following documents: (a) promissory note, (b) mortgage or deed of trust, (c) other security instruments, (d) assignment of security instruments to or from MERS, (e) lien releases or reconveyances and (f) any other instruments recorded in the public land records in which MERS has a legal interest. Placement of the MIN on other loan documentation is optional for the Lender.
- Notices provisions in the mortgage, deed of trust and other security instruments should be modified to add Mortgage Electronic Registration Systems, Inc. using the following address: MERS® Commercial, P.O. Box 2300, Flint, MI 48501-2300.

Instructions for UCC Filings

Borrower certificates will need to be modified to reflect the changes to documentation required by MERS® Commercial.

Whenever a UCC Financing Statement (Form UCC1) must be filed to perfect a security interest granted to Mortgage Electronic Registration Systems, Inc., the following information should be used to complete items 3 and 8 on the form as follows:

3. SECURED PARTY'S NAME

3a. ORGANIZATION'S NAME

Mortgage Electronic Registration Systems, Inc.

3c. MAILING ADDRESS CITY

P.O. Box 2300

STATE

Flint

POSTAL CODE

MI

COUNTRY

48501-2300

USA

8. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number ("MIN") for the loan

Complete all other items using Lender's normal closing instructions, and don't use the MERS address in Item B.

If a security interest is assigned to Mortgage Electronic Registration Systems, Inc. and a UCC Financing Statement Amendment (Form UCC3) must be filed to perfect the security interest, then the following information should be used to complete items 7 and 10 on the form as follows:

7. CHANGED (NEW) OR ADDED INFORMATION

7a. ORGANIZATION'S NAME

Mortgage Electronic Registration Systems, Inc.

7c. MAILING ADDRESS CITY

P.O. Box 2300

STATE

Flint

POSTAL CODE

MI

COUNTRY

48501-2300

USA

10. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number ("MIN") for the loan

For either form, complete all other items using Lender's normal closing instructions, and don't use the MERS address in Item B.

XV. MERS® eREGISTRY

The MERS® eRegistry is a system of record that identifies the owner (controller) and custodian (location) of registered eNotes. It satisfies the requirements of both E-SIGN and UETA for the establishment of a system reliably evidencing the transfer of interests in transferable records.

1st Advantage Mortgage, LLC registered the first eNote on the MERS® eRegistry on July 23, 2004. Its registration on the MERS® eRegistry ensures that only 1st Advantage Mortgage is recognized as the owner of the note, and provides any investor with the confidence that they can gain the benefits of purchasing this eNote while maintaining “Holder in Due Course” status. The borrower electronically signed the eNote and the entire closing document package during a standard settlement conference in the offices of Chicago Title in Lombard, Ill. Immediately after the borrower and the notary electronically “signed” the documents (using a mouse and clicking on boxes on the screen), 1st Advantage registered the loan on the MERS® eRegistry, making the loan immediately available on the secondary market. As of the date of this material, April 2008, members have registered 10,324 eNotes on the MERS® eRegistry.

eNotes are registered with MERS and uniquely identified in the eRegistry for tracking and verification. The eRegistry does not store the actual eNote. Rather, the eNote is stored by a legal fiduciary (“eCustodian”) in a secure electronic repository (“eVault”). However, the eRegistry stores information regarding the owner (or “controller”) and the location (or “custodian”) of the eNote. In turn, the eNote contains specific language referring to the eRegistry to identify its controller. In this manner, the eRegistry enables the rightful eNote owner to demonstrate conclusive legal control of the transferable record.

In performing initial registration of eNotes, the eRegistry:

- confirms the validity of the issuer;
- confirms that the registration dataset is complete;
- confirms that the eNote is not already registered by assigning a unique Mortgage Identification Number (MIN) and hash value to each eNote;
- creates a unique registration record; and
- sends a confirmation to the issuer.

Likewise, in recording a transfer of eNotes, the eRegistry:

- validates both the transferor and transferee;
- compares the hash value stored in the eRegistry with the value submitted by the transferor; and
- requires confirmation by the transferee within a specified time period after the transfer request.

The eRegistry performs additional functions, including (i) storing information about the location of an eNote; (ii) regulating access to the eRegistry by a controller or its delegatee; and (iii) providing functionality for handling the modification or liquidation of an eNote.

The MERS[®] eRegistry As Designed Satisfies the UETA/E-SIGN “Safe Harbor”

E-SIGN and UETA supplemented the traditional concept of “possession” of a paper instrument by a holder with an analogous concept of “control” over an electronic record.¹ “Control” in these circumstances serves as “the substitute for delivery, indorsement and possession” of a paper instrument.² In order for such control of an electronic record to be given meaning and effect, it is necessary pursuant to UETA and E-SIGN to establish a single, unique version of the electronic record with respect to which the rightful holder may assert “control.”

Specifically, under E-SIGN and UETA, “[a] person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.”³ The statutes also contain a “safe harbor” provision, enumerating criteria according to which a system may be deemed as a matter of law to establish reliably the identity of the controller, provided that the criteria are satisfied. These criteria are:

- a single authoritative copy of the transferable record exists that is unique, identifiable, and unalterable (except as provided below);
- the authoritative copy identifies the person asserting control as the person to whom the record was issued or (if the authoritative copy indicates that a transfer has occurred) the person to whom the transferable record was most recently transferred;
- the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller;
- any copy that is not the authoritative copy is readily identifiable as such; and
- any revision of the authoritative copy is readily identifiable as authorized or unauthorized.⁴

Given the novelty of these issues, we think it likely that courts will seek to measure any eRegistry system against these criteria. Moreover, we expect that most courts will

¹ See UETA § 16 cmt. 3.

² *Id.*

³ UETA § 16(b); 15 U.S.C. § 7021(b).

⁴ UETA § 16(c); 15 U.S.C. § 7021(c).

be reluctant to conclude that a system falling outside the safe harbor nonetheless reliably establishes “control” for purposes of the statutes. In this regard, we believe that the design of the eRegistry system created by MERS, in which MERS operates a single, authoritative registry of controllers nationwide, satisfies the foregoing safe harbor criteria.

Specifically, the MERS[®] eRegistry system:

(i) identifies a single authoritative copy of the transferable record that is unique, identifiable, and unalterable – which the system accomplishes by storing information regarding the controller and the custodian of the authoritative copy of the eNote;

(ii) verifies that the person asserting control is the person to whom the record was issued or to whom the transferable record was most recently transferred – which the system accomplishes by confirming the validity of the issuer upon initial registration, and validating both the transferor and transferee in the event of any transfer;

(iii) ensures that the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian – which the system accomplishes by storing information regarding the controller and the custodian of the eNote, and requiring validation and confirmation for any transfer request;

(iv) ensures that copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller – which the system accomplishes by requiring validation by the controller for any transfer request, as well as confirmation by the transferee within a designated time period;

(v) ensures that any copy that is not the authoritative copy is readily identifiable as such – which the system accomplishes by storing information regarding the location of the eNote, regulating access to the eRegistry, and requiring confirmation from the controller for any requested transfer; and

(vi) ensures that any revision of the authoritative copy is readily identifiable as authorized or unauthorized – which the system accomplishes by assigning hash values, MINs, and registration records to each eNote, which are verified upon any transfer request.

Notably, although the safe harbor provisions require that the system “identif[y] the person asserting control,”⁵ the transferable record itself need not identify the individual by name. Rather, “[t]he control requirements may be satisfied through the use of a trusted third party registry system.”⁶ In the MERS[®] System the authoritative copy of the eNote identifies the rightful controller by reference to the eRegistry. Based on review of the legislative history and commentary to UETA and E-SIGN, it is our view that this design is consistent with the statutory criteria that the system “identif[y] the person asserting control;” indeed, the comments to UETA state that “[a] system relying on a third party registry is likely the *most effective* way to satisfy the requirements of [the safe harbor provision] that the transferable record remain unique,

⁵ UETA § 16(c)(2); 15 U.S.C. § 7021(c)(2).

⁶ UETA § 16 cmt. 3.

identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.”⁷

The MERS[®] eRegistry establishes a reliable method for identifying the controller of a transferable record through the use of a trusted third party registry system, and that its design is consistent with the requirements of E-SIGN and UETA.⁸

⁷ *Id.* (emphasis added).

⁸ *Id.* (“The control requirements may be satisfied through the use of a trusted third party registry system.”)