I. INTRODUCTION TO MERS

History:

In 1991, an Inter Agency Technology Task Force (IAT) comprised of representatives from the Mortgage Bankers Association of America (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. MERS incorporated in the State of Delaware in October of 1995.

The MERS® System became operational in April 1997.

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. The use of MERS continues to expand and includes MERS® Commercial, MERS® e-Registry, MERS® iRegistration, and MERS® FraudAlert. Each went live in 2003, 2004, 2008, and 2010 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 electronic notes ("eNotes.") It allows lenders to register Notes electronically, and provides greater liquidity, transferability, and security in the creation and transfer of Notes. MERS® iRegistration is an information only registration of a loan that provides MERS Members with the anti-fraud and tracking benefits of the MERS® System without naming MERS as the mortgagee. MERS® FraudAlert was created to reduce the risk of residential mortgage fraud from the point of origination by facilitating the sharing and reporting of key data.

Corporate Structure:

MERSCORP, Inc. is currently owned by 25 companies. A complete list of these companies can be found on the MERS Corporate Website, www.mersinc.org. MERSCORP, Inc. is the operating company that owns and operates the MERS® System and all other products. The MERS® System 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 wholly owned subsidiary 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 ("Governing Documents.") All documents can be downloaded from the MERS web site: www.mersinc.org.

Basic MERS:

- **Recording versus Registration**. The mortgage or deed of trust 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 Mortgage Electronic Registration Systems, Inc., 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. There are three types of loans registered on the MERS® System: loans closed on a security instrument where MERS is the original mortgagee ("MOM"); loans where the lien is assigned to MERS ("non-MOM"); and loans registered solely for tracking purposes where MERS is not the mortgagee or assignee ("iRegistration").

- **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 MERS remains the lien holder, there is no need for any assignments. Transactions on the MERS® System are not electronic assignments. If in fact the mortgage loan is sold to a non-MERS member, then an assignment is generated and recorded in the land records 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?

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 (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:

In 1998, the concept of MERS as Original Mortgagee (MOM) was developed. It involves the Borrower granting and conveying legal title to the mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) at the time of closing. MERS is the mortgagee in a nominee capacity for the Lender, who is the promissory note owner. 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 for 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 not separated, 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.

Suffolk County, New York Litigation

The end of 2006 saw the favorable conclusion 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. It is the law of New York that clerks must record all MERS' documents presented for recording with the appropriate filing fee.

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. As we were told by the AG's office, they take 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."

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]:

o Adjustable Rate Rider	o Condominium Rider	o Second Home Rider
o Balloon Rider	o Planned Unit Development Rider	o
Other(s) [specify] ___		
o 1-4 Family Rider	o Biweekly Payment Rider	

(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

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 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]:

o Adjustable Rate Rider o Condominium Rider o Second Home Rider

o Balloon Rider o Planned Unit Development Rider o Other(s) [specify] _____
o 1-4 Family Rider o Biweekly Payment Rider

(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

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 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.
(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]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ Other(s)[specify] _____
☐ 1-4 Family Rider	☐ Biweekly Payment Rider	

(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 _____
[Street]
_____, New Mexico _____ ("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.

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 for downloading on 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:

In 2008, 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, Xxxxxxxxxx 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__.

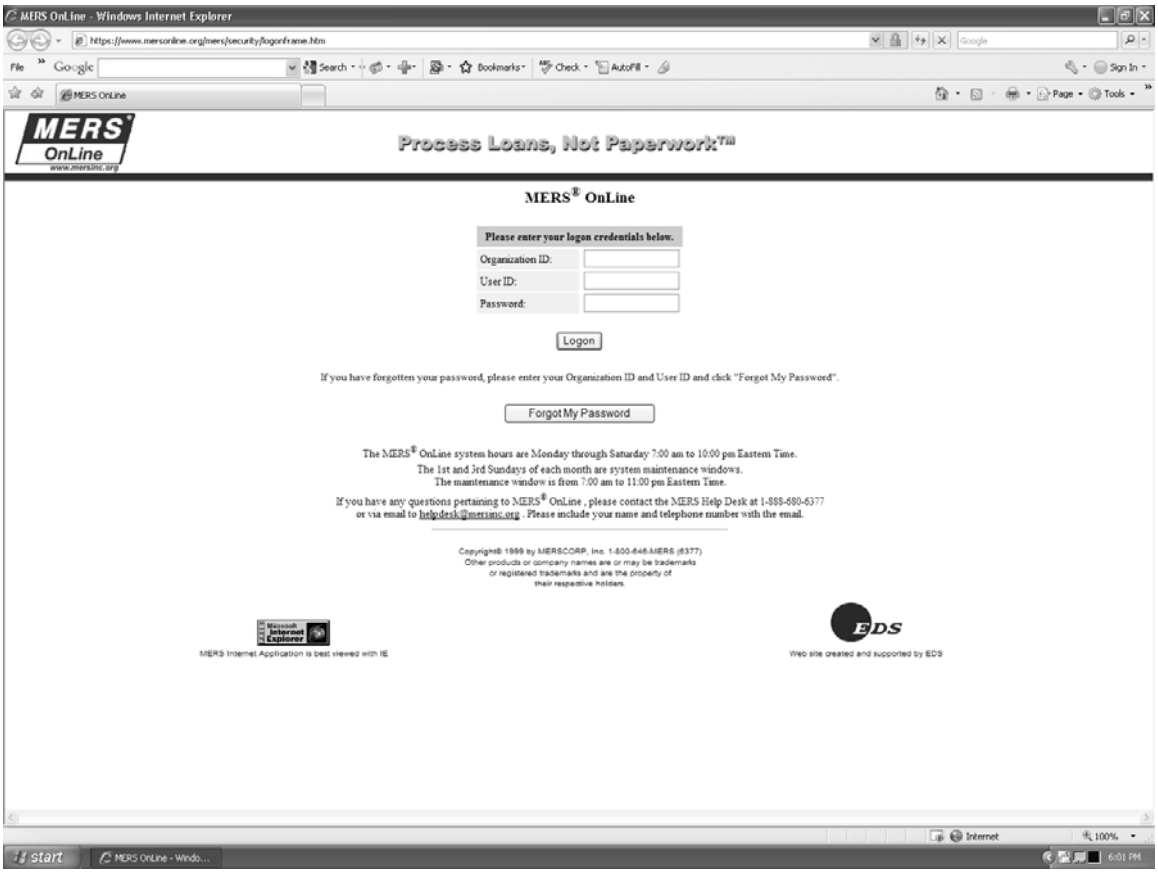
_____
Agent of Mortgagee (or Assignee)

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.

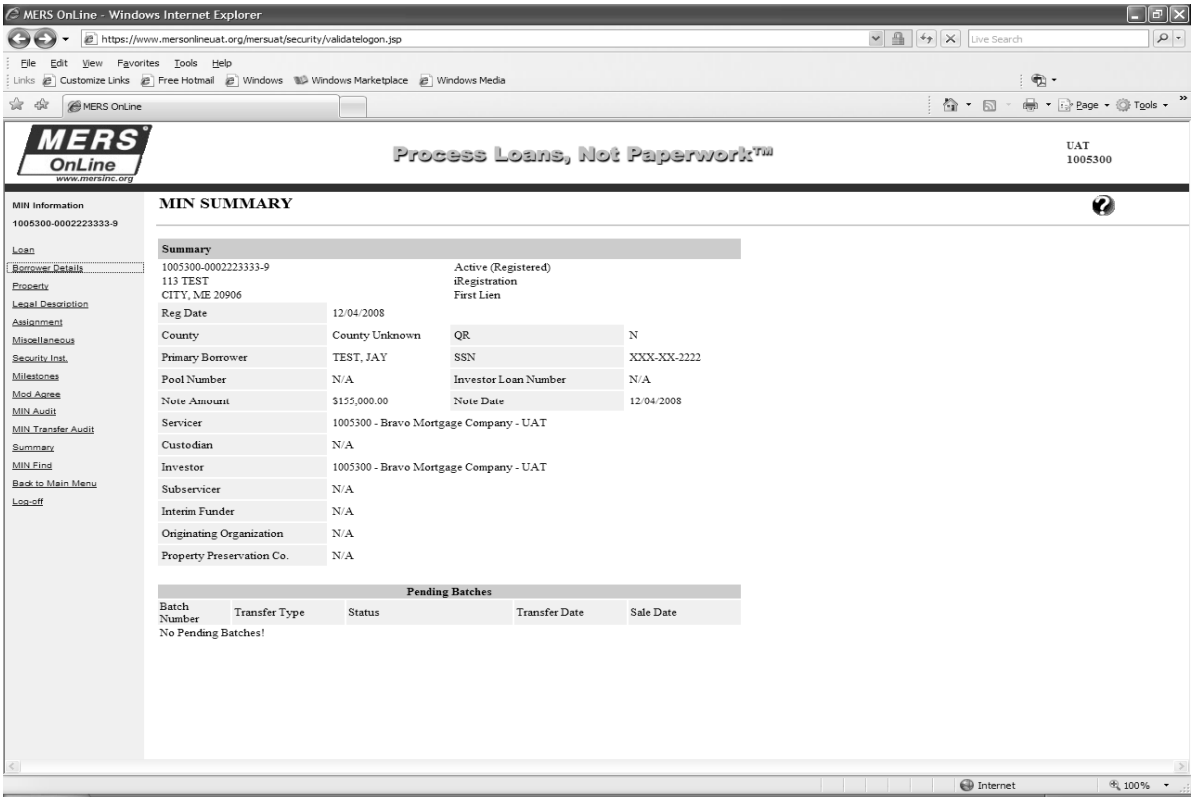


Information displayed on a MIN Summary

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) or iRegistration
- 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
- Originating Organization
- Property Preservation Company
- QR Flag (Y/N)



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 Member continues to prepare documents, but a MERS Certifying Officer executes them.

Question: ***What is a Certifying Officer?***
A certifying officer is an officer of the Member who is appointed a MERS officer by the Corporate Secretary of MERS by the issuance of a MERS Corporate Resolution. The Resolution authorizes the certifying officer to execute documents as a MERS officer.

Question: ***Does the title that the officer holds as an officer of the Member correspond to the title that the officer 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 officer is a Senior Vice President of the Member, that officer is not a Senior 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 officer 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 officer is signing as an officer of the Lender on behalf of MERS. The Corporate Resolution does not need to be recorded.

Question: ***How do we update our officer list?***
The MERS Certifying Officer list may only be updated thru the MERS Corporate Resolution Management System (CRMS). Please consult your MERS Project Manager or contact merscertifyingofficer@mersinc.org.

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

Be it Resolved that the attached list of candidates are officers 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 **XX** day of XXXX, 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 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 when the mortgage was 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?***

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 the chain of title starts with MERS. 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.

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

Yes, because 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 Member. Issues are often quickly resolved once it is explained 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?***

Most attorneys and title companies understand that it is appropriate to send payoff funds directly to the Member when MERS is the mortgagee of record. Sometimes it helps to have a letter explaining how the payoff process works when MERS is the mortgagee for those who may still want to have documentation in their files. A sample of a letter used is as follows:

May 10, 2010

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 [can be 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 servicer has gone out of business, we will verify that the mortgage loan has in fact been paid off by asking for documentation from the person requesting the lien release or verifying another way. Once we are satisfied, 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 the MERS® System.

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 because they received the pay-off and 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 may be unaware that the assignment was even sent for recording. When this happens, title companies should be able to 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 executed the lien release in their name. 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 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

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

Four 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 who 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. *See* Minnesota Statutes Chapter 507, Section 403. 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 Satisfactions 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

Under MERS Membership Rule 8, the beneficial owner (promissory note-owner) of the mortgage loan or its servicer shall determine whether foreclosure proceedings with respect to a mortgage loan shall be conducted in the name of Mortgage Electronic Registration Systems, Inc., by the servicer, or by 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 by 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 have Mortgage Electronic Registration Systems, Inc. foreclose, the note must be endorsed in blank and in possession of one of the Member's MERS Certifying Officers. MERS, as the mortgagee (and the note-holder) will foreclose when asked to do so but as noted above, it is the Investor who sets the policy as to what option will be implemented. See Fannie Mae Announcement SVC-2010-05.

Pursuant to the MERS Rules of Membership, the following requirements apply to all foreclosures brought by a MERS Certifying Officer:

(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 from Mortgage Electronic Registration Systems, Inc. to the Member. 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.

- 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.
- If MERS is not the party to foreclosure, the assignment from MERS must be executed prior to the foreclosing entity commencing the foreclosure.

- 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 transferring title to either the servicer or to the investor so that MERS does not stay as the titleholder for an extended period.

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 on to 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 a period of time as possible. The MERS Corporate Resolution appointing certifying officers gives the authority to execute deeds on behalf of MERS.

Question: ***Can MERS Foreclose in its name?***

Yes, when MERS is foreclosing, MERS becomes the holder of the note by possessing the original note endorsed in blank, which makes it a holder of the bearer paper (see MERS Membership Rule 8). Possession of the bearer paper gives MERS adequate legal standing to pursue a foreclosure in any state.

Alabama

In *Crum v. LaSalle Bank, N.A.*, 2080110 (Ala, Civ.App., September 18, 2009), the appellate court affirmed the trial court's decision finding that MERS has the power to assign its rights as expressly authorized by the borrower under the mortgage and granting summary judgment in favor of the foreclosing assignee.

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.

Arizona

"Beneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest." A.R.S. § 33-801(1). There is nothing under Arizona law that requires the beneficiary to also be the holder of the note. See, e.g., A.R.S. §§ 33-804 & 809(C) (noting that the beneficiary's involvement in a trustee's sale is limited to appointing a successor trustee and signing "by the beneficiary or the beneficiary's agent" of the trustee's statement of "breach or nonperformance and of the beneficiary's election to sell or cause to be sold the trust property."); A.R.S. § 33-707(A) (noting that the trustee, but not the "beneficiary," is one of the persons required to release a deed of trust upon payment of the debt secured thereby); see generally, BAXTER DUNAWAY, Law of Distressed Real Estate (Jurisdictional sum.: Ariz. Pract.), 5 L. Distressed Real Est. § 63:8 (2009).

In *Cervantes v. Countrywide Home Loans, Inc., et al.*, No. 09-cv-00517 (D.Ariz. Sept. 23, 2009), the judge granted the MERS motion to dismiss and entered a final judgment in favor of MERS, holding that the fact that MERS does not obtain rights to collect mortgage payments or obtain legal title to the property in the event of a non-payment does not transform MERS into a sham beneficiary.

Courts are affirming that possession of the note is not required in order to commence non-judicial foreclosures. In both *Diessner v. Mortgage Electronic Registration Systems, Inc., et al., 2:09cv00095 (D. Az., 2009), and Mansour v. Mortgage Electronic Registration Systems, Inc., et al.,* 2:09cv00037 (D. Az., 2009), the court affirmed that MERS was entitled to foreclose and did not need to be in possession of the original note.

The court in *Diessner* held that "Diessner does not cite, nor is the court aware of, any controlling authority providing that the cited UCC section applies in non-judicial foreclosure proceedings in Arizona. To the contrary, district courts "have routinely held that Plaintiff's 'show me the note'

argument lacks merit." The court went on to state that "Arizona's non-judicial foreclosure statute does not require presentation of the original note before commencing foreclosure proceedings.

In *Mansour*, the court held that other courts are routinely finding that the Plaintiff's "show me the note" argument lacks merit. *See Ernestberg v. Mortgage Investors Group*, No. 2:08-cv-01304- RCJ-RJJ, 2009 WL 160241, at *5 (D. Nev. Jan. 22, 2009); *Putkkuri v. Reconstruct Co.*, No. 08cv1919 WQH (AJB), 2009 WL 32567, at *2 (S.D. Cal. Jan. 5, 2009); *San Diego Home Solutions, Inc. v. Reconstruct Co.*, No. 08cv1970 L(AJB), 2008 WL 5209972, at *2 (S.D. Cal. Dec. 10, 2008); *Wayne v. HomEq Servicing, Inc.*, No. 2:08-cv-00781-RCJ-LRL, 2008 WL 4642595, at *3 (D. Nev. Oct. 16, 2008).

Both courts also held that MERS is not a debt collector under the Fair Debt Collection Practices Act ("FDCPA"), and that foreclosure was considered collecting a debt under the statute. "The Court finds the legislative history and the legal authority discussed above to be persuasive, and therefore finds that none of the Defendants (an assignee, a servicing company, and a fiduciary) is a "debt collector" as defined in the FDCPA. The Court further finds that the non-judicial foreclosure proceeding at issue is not an attempt to collect a "debt" for FDCPA purposes." *Mansour* at 5. Also see *Diessner* at 8.

In *Blau v. America's Servicing Company, et al*, No. CV-08-773 (D. Ariz., Sept. 28, 2009), the court recognized that MERS, as the beneficiary, is the proper party to execute an assignment of the deed of trust. The borrower granted MERS the ability to take any action which the lender would be able to take, including the ability to foreclose, assign, and substitute the trustee. The court also found that MERS had no liability under TILA since it had not been involved in making the loan to the plaintiff. See a further discussion of the Blau decision under the Service of Process heading for the Kansas Supreme Court Case, *Landmark National Bank v. Boyd Kesler*.

Silvas v. GMAC Mortgage, LLC, et al., 2009cv00265 (AZ Dist., 2009), reaffirmed MERS standing as the beneficiary of a deed of trust. In this case the plaintiff alleged a host of claims against the defendants including a claim for conspiracy to commit fraud using the MERS System. In rejecting the plaintiff's allegations, the court found that they were insufficient to support the claim and also inaccurate. "Plaintiff agreed to empower MERS to foreclose because the Deed of Trust designates MERS as the beneficiary and authorizes MERS to take any action to enforce the loan, including the right to foreclose and sell the property."

<u>California</u>

Challenges to MERS ability to foreclose are routinely being defeated. The form complaints borrowers are filing center on two general theories: 1) MERS cannot be a beneficiary, and 2) MERS is not registered to conduct business in the state of California. MERS is defeating these lawsuits daily.

In *Derakhshan v. Mortgage Electronic Registration Systems, Inc., et al.,* 8:08-cv-01185, (C.D. Cal., 2009), *aff'd 2009 CA. Lexis 63176 (June 29, 2009)* the court found that MERS was the beneficiary and therefore entitled to foreclose. . Judge Andrew J. Guilford held that "MERS is the named beneficiary in the Deed of Trust. By signing the Deed of Trust, Plaintiff agreed that MERS would be the beneficiary and act as nominee for the lender. The deed explicitly states that "Borrower understands and agrees that MERS holds only legal title . . .[and] has the right: to exercise any or all of those interests, including but not limited to, the right to foreclose and sell the property." (RJN Ex. A 3-4.) Plaintiff explicitly authorized MERS to act as beneficiary with the right to foreclose on the property."

The Court stated that while MERS was a foreign corporation, it was exempt from the requirement to be licensed in California because "evidences of debt or mortgages, liens or security interests on real or personal property" and the "enforcement of any loans by trustee's sale, judicial process, or deed in lieu of foreclosure or otherwise" do not constitute the transaction of intrastate business." See also *Pili v. Mortgage Electronic Registration Systems, Inc., et al.,* KC054036 (Los Angeles County Superior Court, 2009) and Leon Francies Jr., v. Homeq, et al., S-1500-CV-267108 (Kern County Superior Court, 2009).

In *Knowledge Hardy v. IndyMac Federal Bank, et al*, 09-935 (E.D. Cal. 2009), the court found that MERS was the beneficiary and did not breach a duty of care to the borrower by acting as the beneficiary and assigning the Deed of Trust to IndyMac. MERS participation in the foreclosure did not violate the covenant of good faith and fair dealing.

In *Winter v. Chevy Chase Bank, et al*, 09-3187 (N.D. Cal. 2009), the court found that MERS had not committed negligence or breached the implied covenant of good faith and fair dealing when it initiated non-judicial foreclosure proceedings against the plaintiff.

In *Gaitan v. MERS, et al*, 09-1009 (C.D. Cal. 2009), the court found that MERS has the right to initiate foreclosure proceedings and found MERS not liable for claims including wrongful foreclosure, breach of contract, and breach of the implied covenants of good faith and fair dealing.

In *Baisa v. Indymac, MERS, et al*, 09-1464 (E.D. Cal. 2009), the court found that MERS has the right to execute an assignment of the deed of trust and is not a debt collector for the purposes of California's Rosenthal Act. The act of assigning a Deed of Trust does not constitute debt collection. Furthermore, when MERS assigned its interest, it did not commit negligence against the borrower nor make a misrepresentation or fraudulent claim to the borrower.

In *Imelda T. Lomboy, v. SCME Mortgage Bankers; B.E.Z. Financial Network,, MERS, et al.*, 09-1160 (N.D. Cal. 2009), a case similar to *Derkhasan*, the plaintiff, a borrower in foreclosure, alleged that because MERS is not registered to do business in California that it cannot foreclose. Judge Samuel Conti ruled that under California law MERS is not required to register to do business in California and that MERS is able to foreclose. The court noted that MERS, as the beneficiary on the Deed of Trust, had the authority to make a substitution of trustee, and that the substitute trustee appointed by MERS was able to carry out the foreclosure.

Similar to *Lomboy*, the court in *Bogdan v. Countrywide Home Loans*, 09-1055 (E.D. Cal. 2010), the court found that MERS was not required to register to do business in California. The court also dismissed fraud and unfair competition claims against MERS.

In Labra v. Cal-Western Reconveyance Corp., 09-2537, (C.D. Cal. 2010),, the court dismissed a declaratory judgment claim that MERS lacked authority to appoint substitute trustee after finding that the "deeds of trust explicitly state that MERS is the nominal beneficiary under the deeds of trust, and provide further that MERS has the right to foreclose and sell the property" and "to take any action required of a lender"). The court also dismissed fraud claims against MERS.

MERS authority to foreclose was affirmed again in *Pantoja v. Countrywide Home Loans, et al.*- US Dist. Ct., 5:09cv016015 (N.D. Cal., 2009). In this case the plaintiff filed a complaint alleging wrongful foreclosure, unfair business practices, failure to disclose information regarding the plaintiff's loan, claims arising under TARP, and various violations of state law related to the Notice of Default and the trustee sale. The Court granted MERS motion to dismiss on several grounds. First the Court concluded that the plaintiff lacked standing to bring the suit because he failed to tender the amounts due and owing under the note. The Court also held that the plaintiff did not have a private right of action under TARP, and that his claims for unfair business practices were not supported by any facts. The Court also denied the claims for wrongful foreclosure. The Court found that "[u]nder California law, there is no requirement for the production of an original promissory note prior to the initiation of a non-judicial foreclosure. Therefore, the absence of an original promissory note in a nonjudicial foreclosure does not render a foreclosure invalid." Also see *Roque v. SunTrust Mortgage, Inc., et al.,* 5:09cv00040 (N.D. Cal., 2009); *Alicia v. GE Money Bank, et al.,* 4:09cv00091 (N.D. Cal., 2009); *Pataglunan v. Reunion Mortgage, et al.,* 3:09cv00162 (N.D. Cal., 2009)

In its analysis, the Court began by referring to the state statutory authority governing non-judicial foreclosures which states that a "trustee, mortgagee, or beneficiary or any of their authorized agents" may commence a non-judicial foreclosure, and that "if the deed of trust contains an express provision granting a power of sale, the beneficiary may pursue non-judicial foreclosure..." The Court went on to quote language from the deed of trust at issue in the case, which specifically stated that "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." The Court held that the plain language of the deed of trust expressly designate MERS as the beneficiary. The Court went on to point out that the "[p]laintiff distinctly granted MERS the right to foreclose through the power of sale provision" and therefore, "pursuant to the terms of the Deed of trust, §2924, as a beneficiary, MERS has the right to conduct the foreclosure process."

With respect to non-judicial foreclosures, the Court held that "courts have been clear to allow MERS to conduct the foreclosure process when granted the power of sale provision. Since Plaintiff granted MERS the right to foreclose in his contract, his argument that MERS cannot initiate foreclosure proceedings is meritless."

In *Kerzic v. Central Mortgage Company, et al*., 37-2009-00087428-CU-OR-CTL (San Diego County Superior Court, 2009), the Court granted MERS motion for summary judgment and held

that "the Defendants have met their burden of demonstrating that the first cause of action for wrongful initiation of foreclosure, …, and the second cause of action for declaratory relief lack merit." The court reasoned that MERS was explicitly identified as the beneficiary under the deed of trust and that MERS assigned its interest to Central Mortgage.

In the case of *Sulak et al. v. Mortgage Electronic Registration Systems, Inc., et al.,* (Superior Court of Riverside County # RIC398123) MERS won all four appeals filed by the borrowers, and was awarded a judgment 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 believed that MERS could not enforce or collect on 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.

The California courts 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.

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).

In *Champlaie v. BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing, et al.,* 2:09cv1316, (E.D. Cal., 2009), the Court held that MERS is the beneficiary of the deed of trust and there are simply no facts that could support allegations stating otherwise. The plaintiff alleged violations of TILA, RESPA, state Rosenthal Act, state business and professional code, fraud, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing, and wrongful foreclosure. The Court rejected a claim for fraud based on the theory that MERS represented itself as the beneficiary under the deed of trust when it knew that it was not. The facts simply do not support this allegation. Additionally, the Court affirmed numerous California decisions holding that production of the original promissory note is not required when initiating non-judicial foreclosure.

MERS authority to commence non-judicial foreclose was affirmed again in *Swanson v. EMC Mortgage Corporation, et al.,* 1:09cv1507 (E.D. Cal., 2009). In this case the Court held that

"MERS correctly notes that as DOT beneficiary, MERS is empowered to commence foreclosure proceedings, including causing the trustee to execute a notice of default to start foreclosure. The DOT contains a power of sale to authorize non-judicial foreclosure. MERS demonstrates that it is a qualified DOT beneficiary to defeat a fraud claim to the effect it is not." The Court also held that MERS is exempt from registering as a foreign corporation under California Corporations Code §191(c)(7), rejecting the plaintiff's allegations that MERS was required to be qualified to do business in California (as compared to *Champlaie,* finding that MERS is not exempt under§191(c)(7)). The *Swanson* court further held that a foreign corporation does not transact intrastate business by "defending any action or suit."

Numerous California Courts, both state and federal, have affirmed MERS authority to serve as beneficiary and initiate non-judicial foreclosure proceedings. See *Macaraeg v. Fremont Investment and Loan, et al*., 2:08-cv-08473 (C.D. Cal., 2009) (holding that MERS does not need to be registered as a foreign corporation with the California Secretary of State because it is statutorily exempt from such requirements)*; Miller v. ETS Services, et al*- BC401572 (Los Angeles County Superior Court, 2009); *Milin v. Greenpoint Mortgage Funding, et al.*, 2:09-cv-00553 (C.D. Cal., 2009) (granting MERS motion to dismiss with prejudice after failing three times to assert viable claims); *Pfannestiel v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08-cv-02609 (E.D. CAL, 2009); *Rodman v. Aurora Loan Services, LLC, et al*.- RIC522799 (Riverside County Superior Court, 2009); *Salgado v. Mortgage Electronic Registration Systems, Inc., et al.,* 30-2008-00106416 (Orange County Superior Court, 2008) (granting MERS motion for summary judgment); *Ikard v. Mortgage Electronic Registration Systems, Inc., et al.,* 3:08cv1957 (S.D. Cal., 2009 (dismissing with prejudice all federal claims, including claims alleging fraud regarding MERS status as beneficiary, and remanding state law claims which were later dismissed for failure to prosecute.); *Mateos v. New Century Mortgage Corporation, et al*.- 56-2008-00332787 (Ventura County Superior Court, 2009), the court sustained MERS demurrer in its entirety on plaintiff's initial complaint containing allegations including quiet title, fraud, and that MERS was not the beneficiary under the deed of trust. (demurrer to first amended complaint alleging RICO violations sustained in its entirety.); *Peyton v. Recontrust Co*., No. TC021868, Notice of Ruling, at 2 (Cal. Super. Ct. County of Los Angeles S. Cent. Dist. Oct. 15, 2008) ("California permits non-judicial foreclosures"; MERS "is specifically identified as the beneficiary and nominee in Plaintiff's loan documents"); *Cencil v. Mortgage Electronic Registration Systems, Inc., et al.,* 08-01547 (Contra Costa County Superior Court, 2009); *V. Emia v. Mortgage Electronic Registration Systems, Inc*., et al., RIC502213 (Riverside County Superior Court, 2008); *A. Emia v. Mortgage Electronic Registration System, Inc.,* et al., 5:08cv00911 (C.D. Cal., 2008); *Gaviola v. The Mortgage Store Financial, Inc., et al*., 37-2008-00088896-CU-BT-CTL (San Diego County Superior Court, 2008); *Ebba v. Mortgage Electronic Registration Systems, Inc., et al*., 5:08cv1504 (C.D. Cal., 2009); *Martinez v. Mortgage Electronic Registration Systems, Inc., et al.*, PC043598 (Los Angeles County Superior Court, 2009); *Schwartz v. CitiMortgage, et al.*, 2:09cv2387 (E.D. Cal., 2009).

Some federal court judges appear to have lost patience with the meritless arguments and behavior of counsel filing these actions as evidenced by the order issued in *Mensah v. GMAC Mortgage, et al*., 2:09cv3196 (E.D. Cal., 2009). Plaintiff's counsel in this case repeatedly failed to file an opposition or otherwise respond to a motion to dismiss filed by the defendants. The Court rejected counsel's explanation for her inaction and referred her to the California State Bar.

She was also sanctioned $150.00 and the case was dismissed with prejudice. Also see *Inguez v. Bank of America, et al*., 2:09cv2903 (E.D. Cal., 2009); *Reyes v. Indymac Federal Bank, et al*., 2:09cv3382 (E.D. Cal., 2009) (counsel sanctioned $250.00 for failing to respond to defendants' motion to dismiss); *Topete v. HSBC Mortgage Services, Inc., et al*., 2:09cv2367 (E.D. Cal., 2009) (counsel sanctioned $150.00 for failing to respond to defendants' motion to dismiss.); *Borja v. Countrywide Home Loans, Inc., et al.,* 2:09cv2393 (E.D. Cal., 2009) (dismissing case with prejudice for failure to file opposition and plaintiff's counsel sanctioned $250.00.).

Recently, some complaints filed against MERS cite to *Saxon Mortgage Services, Inc., et al. v. Hillery, et al.,* 3:08cv4357 (N.D. Cal., 2008), for the proposition that an assignment of the deed of trust from MERS is invalid and separates the note and deed of trust, and therefore the assignee lacks standing to commence a non-judicial foreclosure. However, the issue in this case was not the validity of the assignment from MERS. Rather, the plaintiffs failed to provide evidence to the court that they held both the mortgage and the note showing their standing to proceed with a declaratory relief action, as opposed to a non-judicial foreclosure. In fact, the Court acknowledged that Plaintiff Consumer Solutions provided proof of the assignment of the deed of trust from MERS and that MERS had the authority to assign the deed of trust. However, the Court pointed out that the plaintiffs failed to allege in the complaint that Consumer Solutions also held the note, which was necessary to proceed with the declaratory relief cause of action. Subsequently, Consumer Solutions filed an amended complaint attaching a copy of the note with the appropriate endorsements. The defendant filed a motion for summary judgment again attacking Consumer Solution's standing to bring the action. In denying the defendant's motion, the court held that there was sufficient proof of Consumer Solutions' ownership of the note and deed of trust. Further, as discussed below in the section entitled Service of Process Kansas Supreme Court Case, the agency relationship between MERS and the note holder is described in MERS Terms and Conditions and the security instrument, and shows that there is no separation of the note and deed of trust.

In addition to foreclosures, MERS recently obtained a significant victory in California protecting its corporate identity and trademark. In *MERS v. Brosnan, et al*, 09-3600, (N.D. Cal. 2009), MERS sued individuals who incorporated entities in California, Arizona, Oregon, Washington, and Texas with our exact same corporate name. They also used our trademark in an email address and wrongfully accepted service of process for MERS. Once MERS learned of this situation, we acted quickly to protect our reputation and obtained a temporary restraining order and then a preliminary injunction against the individuals and California entity. The court ordered the individuals and the California entity to cease use of MERS name and trademark, dissolve or change the companies entities they had created, and forward any service of process received for MERS. The court recognized MERS reputation in the mortgage industry, the value we provide to our members, and the rights we have in our registered mark. The case was settled and resolved with the defendants entering into permanent injunctions.

Connecticut

(i) Status of Foreclosures:

Connecticut judges have upheld MERS right to foreclose. *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). *Book v. Mortg. Elec. Reg. Sys., Inc.*, 608 F. Supp. 2d 277, 287 (D. Conn. 2009)(observing state court affirmation of MERS foreclosure and rejecting plaintiff's claims because "[t]hese claims essentially challenge MERS' legal authority to foreclose on the Fairfield property, an issue that was necessarily raised and settled in MERS' favor in state court.")

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". T 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."

Fleet National Bank v. Nazareth, 75 Conn. App. 791, 818 A.2d 69 (2003) supports MERS' standing to foreclose. 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 *Fleet National Bank* decision supports the proposition that MERS has standing to foreclose when the owner of the note authorizes MERS to foreclose and in turn transfers the note to MERS prior to the foreclosure so that MERS is the note holder (as well as mortgagee).

In *MERS v. Rees* (No. CV03081773, 2003 Conn. Super. LEXIS 2437 (9/4/03), 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.

> 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.)

(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 (sic) 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.

District of Columbia

Wells Fargo v. Wrenn, Case 08-185, (D. DC. 2009), the court found that MERS, as the beneficiary on the Deed of Trust, is the legal holder of the security instrument as an agent of the note holder.

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*, (965 So. 2d 151, 153-54 Fla. Dist. Ct. App. 2007); *Mortgage Electronic Registration Systems, Inc. v. Revoredo, et al.*, (955 So. 2d 33, 34 Fla. Dist. Ct. App. 2007).

In September 2005, MERS suspended the option 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 was removed from state court to federal by MERS under the Class Action Fairness Act of 2005. 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). 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." *Trent v. Meismer*, No. 07-13911 (11th Cir., 2008)

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 [Chattahoochee] 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." (Emphasis added.)**

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

Hawaii

In re the Matter of Fred and Ruby Rich, L.C. #08-0053, Land Court for the State of Hawaii (April 6, 2009). In *Rich*, the Hawaii Land Court held that, for recordation and disposition of lien interests (mortgages, assignments, and lien releases/satisfactions), it is not required for MERS to identify the lender in a mortgage transaction. Further, the fact that language describing a

nominee or agency relationship may be disclosed does not affect the validity of any subsequent document in the chain of title that does not include the same nominee/agency disclosure or that includes a different nominee/agency disclosure.

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.

Implicit in the Estrella holding was recognition by the Seventh Circuit that MERS has standing to commence a foreclosure proceeding as agent on behalf of its principal.The Court held that in suits brought by agents, federal rules of civil procedure directs Federal District Courts to ascertain the citizenship of the principal of the plaintiff to determine whether federal diversity jurisdiction exists.

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.

In *Roberts v. MERS*, No. 2008-CA-262, the Kentucky Court of Appeals recognizes that MERS is the lien-holder of a mortgage loan by an assignment of the mortgage loan, but the court reversed a lower court's ruling which had applied the doctrine of equitable subrogation to give MERS priority over a judgment lien that had been recorded before a mortgage which was assigned to MERS was recorded. The court noted that the originator, New Century, had not conducted a title search (thus it had not discovered the prior lien) and had not obtained title insurance.

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.

Maine

In *HSBC v. Murphy*, Maine District Court, Lewiston, Re-08-340 the court granted summary judgment for plaintiff HSBC in a foreclosure where MERS had assigned the mortgage to HSBC. The borrowers had argued that the assignment from MERS to HSBC was ineffective and the court rejected this challenge to MERS standing. This case re-affirms MERS ability to assign mortgages in Maine.

Maryland

A debt elimination theory brought by plaintiffs as a means to challenge foreclosures brought by MERS was not received well by the United States District Court for the District of Maryland. The theory was that the plaintiffs' debts were extinguished when the original mortgage lender sold their loan to another lender. Not surprisingly, the cases were all dismissed. In *Kelly v. Countrywide Home Loans, et al.,* (2006) Civil Action No. PJM-06-1973, Judge Peter J. Messitte dismissed with prejudice the claims brought by the borrowers stating that "even accepting the vague set of facts provided in the Complaint, no cause of action can possibly be made out by the Complaint under any of the counts alleged by Plaintiffs." Judge Messitte went on to conclude that the "Complaint contains assertions which are utterly fanciful, without the slightest foundation in law." See also *Jean Kelly v. Novastar, et al.*, (2006) civil action No. AW-06-2616 ([n]owhere in the fragmented statements contained in the Complaint can the Court glean a cognizable legal theory."); *Freeman v. HSBC Mortgage Services,* (2006) Civil Action No. AMD-06-02259 ("[t]he gravamen of the plaintiff's claims appear to be the alleged unenforceability of the mortgage note, but for reasons that defy comprehension."); *Jones v. EMC Mortgage Co.,* (2007) civil action No. DKC-06-3038 ("[t]he complaint itself… lack[s] not only detail, but clarity, appear[s] to rest on faulty premises, and rely on fanciful legal theories."); *Jones v. Indymac Bank, et al.* (2008), Civil Action No. AW-06-2350.

Massachusetts

Bassilla, et al. v. GMAC Mortgage, et al., Case #09-J-519, Commonwealth of Massachusetts Appeals Court (December 4, 2009). In *Bassilla*, both the trial and appellate level courts denied the Plaintiffs' motion for a preliminary injunction to stay the foreclosure sale and upheld MERS

rights to assign the mortgage as the mortgagee. The appellate court rejected arguments that MERS lacked the authority to assign the mortgage interests without owning or holding the promissory note and that MERS split the mortgage from the note when the note transferred to a subsequent investor. The appellate court specifically held that "[T]he lender's nominee and record title holder had the ability to make a valid assignment."

Commonwealth of Massachusetts Division of Banks, Notice

As of May 1, 2008, all financial entities with a benefit or interest in a Massachusetts residential mortgage are required to submit an electronic filing for all foreclosure petitions and foreclosure sales involving one-to-four family, owner-occupied properties. This is not a MERS specific requirement. Chapter 206 of the Acts of 2007, An Act Protecting and Preserving Home Ownership amends the General Laws to provide mortgage protection for existing and new home owners, and mandates use of a database to track foreclosure activity electronically.

In addition to the foreclosure petition filing information, the Division will require information for the 90-Day Notice of Right to Cure which is required to be mailed to delinquent borrowers prior to the filing of the foreclosure petition. The information under the 90-Day Notice of Right to Cure must be electronically submitted to the Division within five business days of filing the petition for authority to foreclose under the Servicemens' Civil Relief Act in the Land Court or Superior Court. *NOTE: the 90-Day Notice of Right to Cure must be submitted to the Division's online foreclosure database only upon an action to foreclose (i.e. a foreclosure petition).*

MERS has collaborated with the Massachusetts Division of Banking to simplify the use of their database for MERS Members. This allows MERS Members to enter either their federal tax identification number or a MERS Organization Identification Number (Org ID) when completing the user account registration. Only one of the two validation numbers will be required. Once the MERS Member finalizes the DOB/MERS registration process, the foreclosure petition and sale data submission is automatically populated by the MERS® System.

To access Massachusetts Foreclosure Petition Database go to the Division's website at www.mass.gov/dob, or visit the MERS homepage at www.mersinc.org .

Michigan

MERS has repeatedly proven its right to foreclose in Michigan, and attempts to challenge MERS standing have been rejected by the 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 mortgagee. 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.

MERS has continued to prevail in actions brought by borrowers seeking to set aside a MERS foreclosure. Both the Michigan appellate and Supreme Court found that the appellant's recorded lis pendens was invalid and, as such, the MERS defendant's foreclosure by advertisement was not subject to the appellant's litigation outcome (*Ruby & Associates, P.C. v. Shore Financial Services, et al*., (276 Mich App 110, 112 (2007), vacated in part 480 Mich 1107 (2008). The Supreme Court noted that it reviewed *de novo* the trial court's grant of summary disposition in favor of defendants. Many other Circuit and District Court judges have repeatedly granted 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. Circ. 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); *CitiMortgage, Inc. v. Glore, Michigan*, Case No. 08-01-754-OLT, *23rd Judicial District; Ruby & Associates v. MERS, et al. 408 Mich. 1107 (2008); Bank of New York v. Schram*, No. 08-735-AV, Washtenaw Cty. Cir. Ct., Mar. 6, 2009, *affirming lower court decision Bank of New York v. Schram*, 14A District Court, Washtenauw County, DC1-07-25790-LT (6/4/08); *English v. Flagstar Bank*, 2009 U.S. Dist. LEXIS 97427 (E.D. Mich. Oct. 21, 2009); *U.S. Bank National Association, as Trustee v. Ahmad Ghaddar, et al.*, Case No. 08LT1282 (19th Judicial District, Michigan, January 4, 2010, J. Hultgren).

In two recent opinions, 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. See *Bank of New York v. William Diefenbach*, Civ. No. 07-11691-AV (Kent County Cir. Ct., May 23, 2008, J.Sullivan); see also *Richards v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 08-091304-CH (Oakland Cty. Cir. Ct., Sept. 10, 2008, J. Morris). As Judge Sullivan stated in *Diefenbach*, "[t]he statute does not appear to bar an agent, or nominee, of the owner of the indebtedness to bring an action of foreclosure." Further, the Court noted "[to] do so would seem to go against the vast history of agency law supported by this state." *Id*. at p. 2. 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).

In *Hilmon v. Mortgage Electronic Registration Systems, Inc.*, No. 06-13055, 2007 U.S. Dist. LEXIS 29578 (E.D. Mich. Apr. 23, 2007) the court noted that the borrowers have agreed to give MERS the ability to foreclose the mortgage, and thus MERS had the ability to foreclose.

In *Depauw v. Mortgage Electronic Registration Systems, Inc., et al,* United States District Court, Eastern District of Michigan, *Case No. 08-15255,* the court affirmed MERS ability to foreclose under Michigan law and found that MERS was not liable for claims related to the origination of plaintiff's loan.

Similarly, in *Federal National Mortgage Association v. Angela Salmon*, Michigan, 46th Judicial District, Case No. LT091600 (12/21/2009), the court recognized MERS' authority to assign its mortgage interests as mortgagee.

Minnesota

The Supreme Court of Minnesota in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009) recognized that it is entirely permissible for MERS to be the legal titleholder of the mortgage without any interest in the underlying debt. The Court held the underlying debt could be assigned without separating the mortgage from the note, as the noteholder would hold equitable title to the mortgage while MERS retained legal title. The legal titleholder, MERS, has rights in the mortgage and that transfer of the note did not carry with it legal title to the mortgage.
The Plaintiffs in Jackson asserted that MERS had not complied with §580.02 of the Minnesota statutes which requires "that the mortgage [be] recorded and, if it has been assigned, that all assignments thereof [be] recorded…" The plaintiffs argued that the assignment of the underlying indebtedness was equivalent to the assignment of the mortgage itself and, thus all assignments of the underlying indebtedness must be recorded before MERS can commence foreclosure proceedings. The court flatly rejected this argument:

> "We affirm today the principles set for in the foregoing cases. Our case law establishes that a party can hold legal title to the security instrument without holding an interest in the promissory note. The cases demonstrate that an assignment of only the promissory note, which carries with it an equitable assignment of the security instrument, is not an assignment of legal title that must be recorded for purposes of a foreclosure by advertisement.."

Also see *Teff v. Mortgage Electronic Registration Systems, Inc., et al.,* Fourth Judicial District, Case No. 27 CV 09-8345 (8/7/09), in which the Court upheld MERS authority to foreclose by advertisement. The Court went on to find that MERS was not under any obligation to produce the original note as all of the statutory foreclosure requirements were met and the foreclosure was valid.

In re Sina, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006) 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 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*.

Nevada

Much like California, Nevada has also experienced a surge in copycat complaints aimed at delaying foreclosure. As in California, both state and federal courts in Nevada have explicitly held that MERS has standing to foreclose.

In *Vazquez v. Aurora Loan Services, et al.*, the court granted MERS Motion to Dismiss the plaintiff's claims of wrongful foreclosure, negligence and quiet title. The court stated that, "[t]he loan documents and foreclosure notices recorded in the Official County Records sufficiently demonstrate standing by Defendants with respect to the loan and the foreclosure conducted pursuant to applicable law and Nevada foreclosure statutes. N.R.S. §§ 107.080 *et. seq.*" 2:08-cv-01800, (D. Nev., 2009). Likewise, in *Ramos v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv01089 (D. Nevada., 2009) the court found that the MERS did have authority to conduct a non-judicial foreclosure. Pursuant to state law "'the beneficiary, the successor in interest of the beneficiary or the trustee,'" is authorized to commence foreclosure proceedings. The court specifically noted that the deed of trust identified MERS as "'the beneficiary under this Security Instrument,'" and that the borrower agreed that MERS had the authority to foreclose. Also see, *Vera-Jaramillo v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08-cv-01734, (D. Nev., 2009); *Paz v. Aurora Loan Services, et al.*, No. A578829, (Clark County Nev. Dist., 2009); *Elias v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1836 (D. Nev., 2009) (holding that the deed of trust and foreclosure notices were evidence of MERS authority to foreclose); *Lahip v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1370 (D. Nev., 2009) (holding that "MERS has standing and was properly designated as a

nominee beneficiary."); *Jordan v. Aurora Loan Services, et al.*, 2:08cv1847 (D. Nev., 2009).

See also Dunlap v. Mortgage Electronic Registration Systems, Inc., No. 08-00918, slip. op. at 1 (D. Nev. Jan. 6, 2009) (Jones, J.) "Mortgage Electronic Registration Systems, Inc., does have standing and the authority to initiate foreclosure proceedings on the subject property under the language of the Deed of Trust."; *Orzoff v. Mortgage Elec. Registration Sys.*, No. 08-01512, slip. op. at 9-10 (D. Nev. Mar. 26, 2009)(Jones, J.) "Plaintiff has cited no authority that is controlling upon this Court that holds that MERS cannot have standing as nominee beneficiary in connection with a non judicial foreclosure proceeding under Nevada law."; *Hoskins v. Countrywide Home Loans, Inc., et al.*, 2:09cv00166 (2009); *Deras v. Decision One Mortgage Company, LLC, et. al.*, 2:08cv1655 (D. Nev., 2009), holding that "the Defendants have standing to foreclose the subject deeds of trust and have not wrongfully foreclosed the subject deeds of trust, contrary to Plaintiff's allegations…"; *Croce v. Trinity Mortgage Assur.*, Case No. 2-08-cv-01612-KJD (D. Nev. Sept. 28, 2009) ("Plaintiffs have cited **no** authority that is controlling upon this Court that holds that MERS cannot have standing as a nominee beneficiary in connection with a nonjudicial foreclosure proceeding under Nevada law. This Court has previously determined that MERS does have such standing."; and, *Beltran v. MERS*, Case No. 2:08-cv-1101 (D. Nev. Jan. 5, 2009) (MERS "does have standing and the authority to initiate foreclosure proceedings on the subject property under the language of the Deed of Trust."). And this Court recognized that "[c]ourts around the country have held the same."; *Khalil v. Fidelity National Default Solutions Tustin*, No. A560582, slip. op. at 3 (Dist. Ct. Clark County Nov. 24, 2008) ("MERS, as a lender's nominee and the named beneficiary [on the Deeds of Trust], ha[d] standing to foreclose on the Deeds of Trust"); *Gonzalez v. Home American Mortgage Corp*., No. 2:09-cv-00244, slip op. at 6 (D. Nev. Mar. 12, 2009) (upholding right of MERS, as the named beneficiary on the Deed of Trust, and ReconTrust, as successor trustee, to initiate non-judicial foreclosure without presenting the note); *Wayne v. HomEq Servicing*, 2008 WL 4642595-RCJ (D. Nev. Oct. 16, 2008) ("authorization to proceed with foreclosure is one of the functions of a loan servicer"); *Sagaydoro v. Mortgage Electronic Registration Systems, Inc., et al*., 2:08cv1331 (D. Nev., 2008); *Pantoja v. Mortgage Electronic Registration Systems, Inc., et al*., A561317 (Clark County Nevada District Court, 2008); *Medina v. Countrywide Home Loans, Inc., et al*., 2:08cv00133 (D. Nev., 2009); *Mendiola v. Mortgage Electronic Registration Systems, Inc., et al*., 2:08cv01138 (D. Nev., 2009); *Carlson v. EMC Mortgage, et al*., A566830 (Clark County Nevada District Court, 2008); *Razon v. Mortgage Electronic Registration System, Inc., et al.*, 2:08cv00949 (D. Nev., 2008); *Rios v. Mortgage Electronic Registration System, Inc., et al*., A566524 (Clark County Nevada District Court, 2009); *Munoz v Mortgage Electronic Registration Systems, Inc.*, et al., A567999 (Clark County Nevada District Court, 2009); *Esteban v. Mortgage Electronic Registration Systems, Inc., et al*., 2:08cv1616 (D. Nev. 2009); *Orata v. Mortgage Electronic Registration System, Inc., et al*., A573676 (Clark County District Court, 2009); *Balino v. Countrywide Home Loan, et al.*, 2:09cv00049 (D. Nev. 2009); *Vargas v. Mortgage Electronic Registration System, Inc., et al.*, A573625 (Clark County Nevada District Court, 2009); *Montes v. Litton Loan Servicing, et al*., 2:09cv00012 (D. Nev., 2009); *Arciosa v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1147 (D. Nev., 2008); *Aganon v. Mortgage Electronic Registration Systems, Inc., et al*., (2:08cv1372 (D. Nev., 2008); *Balaoro v. GMAC Mortgage, et al*., 2:09cv00155 (D. Nev., 2009).

Challenges to MERS authority to substitute the trustee have also been rejected in Nevada. In *Gomez v. Countrywide Bank, FSB, et al.*, 2:09-cv-1489 (D. Nev. 2009), the court specifically rejected the plaintiff's claims and held that MERS, in its capacity as the nominee of the note owner, had the authority to substitute the trustee on the deed of trust and that the foreclosure was proper. The court reasoned that "so long as the note is in default and the foreclosing trustee is either the original trustee or has been substituted by the holder of the note or the holder's nominee, there is simply no defect in foreclosure." In granting the Defendants' Motion to Dismiss, the court held that the plaintiff's complaint was entirely without merit and that the claims for suitability, and liability per se were frivolous.

In *Marian Ladringan v. Bear Stearns Residential Mortgage Corp, MERS, et al*, 09A580990, (Dist. Ct. Clark County, Mar. 19, 2010), the court found that MERS was able to act as the beneficiary on the Deed of Trust, "because of the plain language" of the security instrument. The court also found that MERS is able to foreclose.

New York

In the case of *LaSalle Bank National Association, as Trustee v. Michael Lamy* (12 misc. 3d 1191A, 824 N.Y.S.2d 769 (Suffolk Co. 2006)(Burke, J.) MERS is not foreclosing on the mortgage loan as the plaintiff but executed an assignment of the mortgage to LaSalle Bank to commence the foreclosure. There were procedural defects in this case which the judge pointed out, namely that the assignment from MERS to LaSalle is dated after the commencement of the foreclosure and 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. MERS 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.

Mortgage Electronic Registration Systems, Inc. v Burek, 4 Misc 3d 1030, 798 NYS2d 346 and *Mortgage Electronic Systems, Inc. v. Bastian*, 12 Misc 3d 1182(A), 2006 WL 1985461 had underlying procedural issues that would have sidetracked the appeal away from the issue of whether one needs to own the note to have standing. 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. 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)).

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.

Ohio

Below is a position statement that was released in response to questions regarding the dismissal of various foreclosure cases in Ohio. MERS was not the foreclosing party in any of the dismissed foreclosures.

Ohio Federal Court Opinions and Orders in Mortgage Foreclosure Actions

Recent decisions rendered by three Federal District Court Judges relating to mortgage foreclosure actions in Ohio have generated a lot of attention in the press and various newsletters. These decisions actually support the ability of Mortgage Electronic Registration Systems, Inc. (MERS) to foreclose on a mortgage loan when MERS is the mortgagee of record and holder of the promissory note. This is true even for loans that have been securitized with MERS as mortgagee. If the loans in the cases had been registered on the MERS® System with MERS as the mortgagee, and the plaintiffs had followed the MERS Membership Rules and Recommended Foreclosure Procedures, then the cases would not have been dismissed because MERS satisfies the conditions laid out by the judges in their decisions. As best we can tell, only one of the 14 loans involved in the Ohio cases that were dismissed was a MERS registered loan. The Plaintiff Trustee failed to obtain an assignment from MERS prior to initiating the foreclosure in violation of MERS policy.

In recent years certain ill-advised practices have been adopted in the default management process by some in the residential servicing community that were intended to expedite the foreclosure process - - e.g., the widespread use of lost note affidavits. It was these "short cuts" that were rejected by the judges in the Ohio cases, and none of the rejected procedures are part of the approved MERS procedures.

Two fundamental elements that must be pled at the commencement of any foreclosure action in order for the plaintiff to show that he or she has standing are (1) that the plaintiff is the holder[1] of the promissory note evidencing the indebtedness being collected and (2) that the plaintiff is the mortgagee of the mortgage that is being foreclosed, which secures the payment of the promissory note. The first problem addressed in the case was that copies of the promissory notes being presented to the court were not endorsed either to the Plaintiff or endorsed in blank so that the Plaintiff could prove that the plaintiff was the holder of the note. The other problem was that proper assignments of the mortgage to the Plaintiffs had not been prepared prior to the commencement of the foreclosure action, and as a result, the plaintiffs could not satisfy the second requirement.

The MERS Recommended Foreclosure Procedures[2] show how securitization trustees can avoid the problems involved in the Ohio cases. Under the MERS Membership Rules and Foreclosure Procedures, if MERS had been the mortgagee of any of the mortgage loan being foreclosed and the trustee chose to foreclose in the trustee's name, then the trustee is required to have obtained an assignment from MERS to the trustee prior to initiating the foreclosure action in the trustee's name. By following this MERS requirement, the trustee would have been protected from what

[1] Under the UCC, a plaintiff need only be the holder and not the "owner" of the promissory note.
[2] These procedures can be found on the MERS web site at www.mersinc.org.

happened in Ohio when Judge Boyko stated that "none of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint."

Alternatively, if MERS had been the mortgagee on any of the mortgage loans being foreclosed, the trustee could have chosen to bring the foreclosure in MERS' name. The MERS Membership Rules and Foreclosure Procedures require that the note be endorsed in blank and in the possession of a MERS officer or its foreclosure counsel. This results in MERS being the mortgagee of record as well as the note-holder. The MERS requirements address and protect against Judge Boyko's concern that in the 14 cases before him, the attached Note and Mortgage do not match the named Plaintiff.

In two Florida appellate court decisions rendered this year, *Mortgage Electronic Registration Systems, Inc. v. Oscar Revoredo*, 955 So.2d 33 and *Mortgage Electronic Registration Systems, Inc. v. George Azize*, 2007 WL 517842, which addressed challenges to the ability of MERS to foreclosure a mortgage, appellate courts have ruled unanimously that MERS had standing to prosecute a foreclosure when MERS is the holder of the promissory note and the mortgagee. The laws in Florida about standing to foreclose are not different than the law being applied in the Ohio cases. If the loans in the Ohio cases had been MERS registered mortgage loans with MERS as the holder of the note and the mortgagee, and the plaintiffs had followed our procedures, the cases would not have been dismissed.

The Ohio decisions should not trouble MERS members. Instead, the opinions confirm the MERS business model and the benefits that MERS offers to the mortgage industry. When MERS is the mortgagee, MERS grounds title to the mortgage lien for the original lenders and all of its successors and assignees, and thus does not require an assignment to be prepared and recorded when interests in the mortgage loan are transferred from one trading partner to another, including a securitization trustee. With the additional benefit of tracking the location of the promissory note, MERS can easily obtain the required status of being the note-holder. MERS meets the test put forth by the Ohio Judges. By using the MERS® System and following the MERS Rules, MERS members can avoid the outcome that occurred in Ohio.

In *Wells Fargo Bank v. Oties Jordan*, Case No. CV-631753, Court of Appeals of Ohio, Eighth Appellate District, County of Cuyahoga, March 12, 2009, the court ruled that Wells Fargo did not have standing to foreclosure because when it filed the foreclosure it did not hold both the mortgage lien and the promissory note, even though the mortgage was assigned to Wells Fargo after the foreclosure was filed. This ruling comports with MERS Rule 8, which requires that when MERS forecloses, it must be both the lien holder and the note holder.

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.

Oregon

In *Parkin Electric, Inc. v, Saftencu*, Circuit Court of Oregon, 5th District, Case No. LV08040727 (letter brief) (2009), the Court rejected the plaintiff's argument and held that MERS is the real party in interest, MERS can conduct business in the state of Oregon, and that the MERS deed of trust is valid and the MERS registration system does not circumvent Oregon's recording system.

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).

There have been a number of in cases filed in response to foreclosures claiming violations of TILA, RESPA, and state consumer protection and lending statutes among others. In *Hartman v. Deutsche Bank National Trust Co.*, et al. (2008 WL 2996515 E.D. Pa.) the court dismissed all

claims noting the plaintiffs failed to set forth facts that would support any cognizable claims against MERS. In particular, the court found that MERS cannot be held liable as an assignee under the TILA provision if it is not the owner of the obligation [15 U.S.C. § 1641(f)(1)]. The complaint in this case is substantially similar to those filed in other cases where motions to dismiss are pending.

A 2007 Pennsylvania bankruptcy court ruling found that MERS could not be found liable under TILA and RESPA claims because it was the mortgagee of record as nominee for the lender and lender's successors/assigns (*In re Escher*, 369 B.R. 862, at 867 (Bankr., E.D. Pa., June 12, 2007). MERS' agency relationship also precluded it from liability under the Pennsylvania Credit Services Act and Uniform Trade Practices and Consumer Protection Law, among others.

On April 20, 2010 the Pennsylvania Supreme Court denied defendants'/borrowers' Petition for Allowance of Appeal appealing the decision of the appellate court in *Mortgage Electronic Registration Systems, Inc. v. Ralich*, 2009 WL 2596091 (Pa.Super.). The Pennsylvania appellate court affirmed the trial court's decision that MERS has authority to foreclose; the appellate court specifically noted that the defendants/ borrowers explicitly acknowledged and consented to this authority when they executed the mortgage.

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

In April 2009, the Commonwealth of Pennsylvania, Department of Revenue issued Realty Transfer Tax Bulletin ("RTT") 2009-01. The 2009 bulletin superseded and rescinded RTT-04-016, which outlined the applicability of a tax exemption where an agent foreclosed mortgages on behalf of a principal(s) and assigned the credit bid directly to the principal(s). While more broadly discussing mortgage assignments, foreclosures, and the applicability of the commonwealth's realty transfer tax and exemption, RTT 2009-01 still 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. Fannie Mae, Freddie Mac, and Ginnie Mae are exempt as investors from the transfer tax. Please see a copy of the letter on the following pages.

The Pennsylvania Department of Revenue advised 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 RTT 2009-01, RTT-04-016, or wish to further discuss the above, please contact the MERS Law Department at (703) 761-1270.

pennsylvania
DEPARTMENT OF REVENUE

REALTY TRANSFER TAX BULLETIN 2009-01

Issued: April 17, 2009

MORTGAGES, MORTGAGE FORECLOSURES AND MORTGAGE ASSIGNMENTS

The Department is issuing this Bulletin to address the application of the Pennsylvania Realty Transfer Tax to mortgages, mortgage foreclosures and mortgage assignments.

This Bulletin addresses issues raised in Private Letter Ruling RTT-04-016, and revises the Department's policy regarding those issues. Consequently, this Bulletin supersedes Private Letter Ruling RTT-04-016, which has been rescinded.

Section 1. General Rule

Documents that effectuate or evidence the conveyance of title to real estate located in Pennsylvania are subject to Realty Transfer Tax, unless the document is excluded or exempt from tax by statute. 72 P.S. § 8102-C.

Section 2. Mortgages

Under Pennsylvania law, a **MORTGAGE** is a written instrument that both conveys and creates a security interest in real estate. "A mortgage is in essence a defeasible deed, requiring the grantee to reconvey the property held as security to the grantor upon satisfaction of the underlying debt or the fulfillment of established conditions." Hahnemann Medical College & Hospital v. Com., 416 A.2d 604 (Pa. Cmwlth. 1980). Hereinafter, the term **MORTGAGE** means both the mortgage instrument and the security interest that it creates. The term **MORTGAGE INSTRUMENT** means the mortgage instrument itself. The term **MORTGAGE INTEREST** means the security interest in the real estate created by the mortgage. The term **MORTGAGOR** refers to the person who grants a mortgage interest in real estate. The party that holds the mortgage interest is referred to as the **MORTGAGEE**.

Even though a mortgage creates a defeasible conveyance of title to real estate, for Realty Transfer Tax purposes, a taxable document does not include "mortgages, deeds of trust or other instruments of like character given as security for a debt and deeds of release thereof to the debtor." 72 P.S. § 8101-C (definition of "document"). Department regulations provide that a "conventional mortgage or assignment, extension, release or satisfaction thereof" is not a taxable document. 61 Pa. Code § 91.101.

The Department has interpreted the statutory exclusion applicable to mortgages to include any instrument that is akin to a mortgage if the instrument is given as

security for a debt as part of a "financing transaction." 61 Pa. Code § 91.193(b)(23). A financing transaction is an "arrangement in which the following apply:"

(i) Realty is transferred by the debtor solely for the purpose of serving as security for the payment of a debt.
(ii) No sale or gift is intended.
(iii) The debtor retains possession and beneficial ownership of the real estate transferred before default.
(iv) The transferee obtains title or ownership to the real estate only so far as is necessary to render the instrument of transfer effective as security for the debt.
(v) The transferee or the transferee's successor is obligated to return the transferred real estate at no or only nominal consideration to the debtor upon payment of the debt before default.

61 Pa. Code § 91.101 (definition of "financing transaction"). A "sale and leaseback" is an example of a transaction that may qualify as a financing transaction under certain circumstances. 61 Pa. Code §§ 91.168 and 91.193(b)(23); *see also* Hahnemann, 416 A.2d 604 (Pa. Cmwlth. 1980).

A mortgage is generally accompanied by a **PROMISSORY NOTE** or **NOTE** (in older practice, a bond and warrant). The note is evidence of the debt obligation for which the mortgage is given. The mortgage and the note, while separate instruments, secure the same debt. However, the note is a personal obligation of the obligor (mortgagor). A judgment on the note permits the obligee to execute on the personal property of the obligor as opposed to just the real estate encumbered by the mortgage. Ronald M. Friedman, Ladner Pennsylvania Real Estate Law §§ 22.01 and 25.04 (5th ed. 2006).

Section 3. Mortgages in Default and Mortgage Foreclosures

Although a mortgage itself is not a taxable document, certain real estate transactions associated with a mortgage in default or a mortgage foreclosure can have Realty Transfer Tax consequences.

Some mortgagors who are in default of their mortgage loan convey the mortgaged real estate to the mortgagee in lieu of requiring the mortgagee to foreclose on the real estate. Such a deed given in lieu of foreclosure is a document that would be subject to Realty Transfer Tax as explained in Section 1, above. However, a statutory exemption exists for such a deed. See Section 4, below.

In a mortgage foreclosure action,[1] the sheriff exposes the mortgaged real estate to sale for the benefit of the mortgagee and the mortgagor. If the mortgagee is a

[1] See Pa. R.C.P Nos. 1141-1150.

successful bidder, the sheriff is required to execute a deed for the real estate to the mortgagee. Pa. R.C.P. No. 3135. The sheriff's deed conveying title to the real estate as the result of a mortgage foreclosure is a document that would be subject to Realty Transfer Tax as explained in Section 1, above. However, a statutory exemption exists for such a deed. See Section 4, below.

Section 4. Realty Transfer Tax Exemptions for Transfers to Mortgagees

Realty Transfer Tax is not imposed upon a document that effectuates a transfer of title to real estate from "a mortgagor to the holder of a bona fide mortgage in default in lieu of a foreclosure or a transfer pursuant to a judicial sale in which the successful bidder is the bona fide holder of a mortgage." 72 P.S. § 8102-C.3(16).

The above statutory provision provides for two tax exemptions related to the transfer of title to real estate to a mortgagee—(1) a transfer from a mortgagor in default in lieu of foreclosure to a mortgagee, and (2) a transfer to a mortgagee who is a successful bidder at a judicial sale of the mortgaged real estate. Each exemption applies to a transfer of title of real estate to a mortgagee when the mortgage is in default—either by a mortgagor in lieu of foreclosure or by a sheriff under a judicial sale. Further, the transfer must be to a person who holds the mortgage interest in the real estate. As explained in Sections 5 and 6 below, the mortgagee can be different from the party of record named in the mortgage instrument.

Although the Realty Transfer Tax law provides exemptions for a transfer to a mortgagee, there are restrictions on the exemptions.

When there is a transfer of title to real estate from a mortgagor to a mortgagee, the transfer is only exempt if the mortgagor is "in default" of the mortgage loan and the transfer is in "lieu of foreclosure." Consequently, it is the Department's position that there must be evidence that the mortgagor is in default of the terms of the mortgage loan, which default would permit the mortgagee to foreclose on the mortgage. Otherwise, the conveyance cannot be considered to be in lieu of foreclosure. A default is not limited to a failure to remit mortgage payments. It can also include any other failure to comply with a mortgage term that would allow the mortgagee to foreclose on the mortgage loan. Evidence of default that is acceptable to the Department includes the actual filing of a mortgage foreclosure action or written notice from the mortgagee to the mortgagor of the mortgagee's intent to foreclose.

In order for the exemption related to transfers from a sheriff to a mortgagee as the result of a judicial sale to apply, the deed of conveyance from the sheriff must be executed in favor of the mortgagee who held the mortgage interest at the time of the sale and who made the bid at the sale (or for whose benefit the bid was made). The exemption does not apply if the mortgagee assigns the mortgage or bid to another person after the bid is made and the sheriff executes the deed in favor of the assignee. Id.

In determining the imposition of tax on a sheriff's deed directly to a mortgagee's assignee, the Department will look to 61 Pa. Code § 91.170(b) and treat the deed as representing two transactions. Tax will be due on the single deed as if both transactions had been effectuated by separate documents. The first transaction will be deemed to be a conveyance from the sheriff to the mortgagee. This transaction is exempt from tax. 72 P.S. § 8102-C.3(16). The second transaction is a conveyance of the real estate from the mortgagee to the assignee. This transaction is taxable. If consideration is given for the assignment and the assignment is at arms-length, then the conveyance is a sale and the sale price is the taxable value. 61 Pa Code § 91.132. The sale value includes the amount paid for the assignment plus any obligation assumed by the assignee (such as the sheriff sale bid.) If there is no consideration or the assignment is not at arms-length, then the assignment is not considered a sale and the computed value of the real estate is the taxable value for the second transaction. 61 Pa. Code § 91.135(1).

The above explanation should not be misconstrued to suggest that the tax exemption only applies if the sheriff's deed conveys the real estate to the original lender/mortgagee. Any valid assignment of the mortgage interest prior to the bid at the foreclosure sale does not affect the exemption, even if the assignment is made after the mortgage foreclosure action is initiated. An assignment of the mortgage interest prior to the sheriff sale and entry of the bid makes the assignee the mortgagee entitled to claim the exemption. Any conveyance from the sheriff to the mortgagee is exempt from tax. However, any person who becomes an assignee of the mortgage interest after the bid is made is not a mortgagee to which the exemption applies. This rule is intended to prevent a mortgagee from disguising what is in substance a transfer of real estate from the mortgagee to the assignee, where the mortgagee is otherwise a small step away from consummating its purchase of and title to the real estate at the sheriff sale.

Section 5. Mortgage Assignments

A. Assignments Historically

"As a general rule, mortgages are freely transferable by the mortgagee under the covenants, terms and conditions set forth in the mortgage document as are mortgage notes, bonds, or any other underlying obligation for which the mortgage is given as collateral. Traditionally, mortgages were not assigned as a matter of course. . . . In modern practice, a great number of mortgages are assigned from the original mortgagee to an investor or servicing agent. . . . Often mortgages may be assigned more than one time during the term of a mortgage with the mortgagor remitting payments to a succession of mortgage holder-assignees." Ladner § 26.01(a).

"An assignment is usually done by an instrument called an assignment of mortgage, which is a writing under seal, signed, acknowledged and recorded, assigning the bond or promissory note and mortgage to the assignee. An assignment, when duly executed and acknowledged, should be recorded. It will then have all the incidents and force of a public record and is notice to any subsequent assignee. . . ." Ladner § 26.01(d) (emphasis added). Although an assignment generally includes an assignment of both the note and the mortgage, Pennsylvania law provides that "'. . . ,

an assignment of the bonds [or promissory note], whenever made, carries with it all of the security provided for by the mortgage and all the right, interests, and remedies of the mortgagee.'" Andrews v. The Marine National Bank of Erie, 33 A.2d 75, 78 (Pa. Super. 1943) (*citing* 19 Corpus Juris Secundum § 1192). "So, if the bond or note is assigned, the mortgage is presumed to go with it." Ladner Pennsylvania Real Estate Law § 26.01(d). Consequently, an assignment of the note alone is sufficient to convey the mortgage interest even if the mortgage instrument and the mortgagee named therein remains unchanged. The purchaser of the note, thus, becomes the new mortgagee. The original mortgagee named in the mortgage instrument remains on the mortgage instrument in name alone and is no longer the mortgagee.[2]

B. Modern Practice of Assignment by Sale and Negotiation of the Promissory Note

Many lenders do not assign a mortgage by assigning the mortgage instrument. Rather, they sell the mortgage interest by negotiating the promissory note. The lender sells the promissory note in a secondary mortgage market, most often to one of the government or government-sponsored entities created by statute to purchase residential mortgage loans from banks and other lenders. *See* 12 U.S.C. §§ 1451-1459, 1716-1723 et seq. (creating the Government National Mortgage Association ("Ginnie Mae"), Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac")). In turn, these entities resell notes in a tertiary mortgage-backed securities market, usually as part of a bundle of notes held in trust for investors. As a result, the beneficial owners of these promissory notes can be thousands of investors whose identities change as these negotiable instruments are sold and resold in these markets, and as the investors sell and resell their shares in the mortgage-backed securities. For Realty Transfer Tax purposes, when a note is held in trust for investors of mortgage-backed securities, the trust (or more specifically, the trustee of such trust) is deemed to hold the mortgage interest associated with the note, not the individual investors who merely have invested in the mortgage-backed securities.

A lender who sells a note may contract with the note purchaser to become a servicer of the mortgage loan for the note purchaser. A **SERVICER** provides a fee-based service for lenders/mortgagees which service includes: billing borrowers; collecting, monitoring and reporting loan payments; remitting loan payments to the lender; receiving, holding and disbursing tax and insurance escrows; and foreclosing on defaulted loans. When a lender sells a note and retains the servicing rights, the lender continues to be the mortgagee in the recorded mortgage instrument in order to remain the party to receive service of process related to the mortgage.

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[2] This is not to suggest that the mortgagee of record is not entitled to service of process and other legal rights of a mortgagee of record. It merely indicates that the mortgagee of record no longer holds the mortgage interest and is not considered the mortgagee for purposes of the tax exemption.

In the alternative, the lender may decide, in addition to selling the note, to sell the servicing rights to another party through a purchase and sale agreement. In that case, the lender assigns the mortgage instrument to the purchaser of the servicing rights, which assignment is recorded in the land records. Thus, the purchaser of the servicing rights becomes the named mortgagee on the recorded mortgage instrument. Nonetheless, the servicer is the mortgagee in name only. The true mortgagee is the owner of the note.

Sales of servicing rights may occur multiple times over the life of the mortgage loan requiring numerous assignments of the mortgage instrument from one servicer to the next. Regardless of whether the original lender acts as the servicer or whether the servicing rights to a mortgage loan are sold to another party, a servicer is never considered a mortgagee for Realty Transfer Tax purposes. See Section 7 for a further discussion of servicers.

C. Effective Date of Assignment

For purposes of determining the effective date of a mortgage assignment, the Department looks to the date the written assignment agreement is executed by the parties or the date the written assignment agreement indicates that the assignment becomes effective, whichever date is later. The date that the parties enter into talks or negotiations related to the assignment of a mortgage has no bearing on the date the assignment is effective.[3] Therefore, the Department will generally disregard evidence of talks, negotiations and oral agreements when a written assignment agreement exists.

One exception to this rule is when a written assignment agreement merely memorializes an existing oral assignment agreement. In that case, the Department will accept the effective date of the oral agreement as the effective date of the assignment.[4] However, the written agreement must indicate by express terms that it

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[3] An arrangement of terms, in contemplation of a written contract, is not a perfect agreement upon which an action can be maintained, but to produce such effect, it must be shown by acts or declarations of the parties that they intended the agreement to be operative before execution and without regard to a writing. Thus, where an intention is manifested in any way that legal obligations between parties shall be deferred until a writing is executed, preliminary negotiations and agreements do not constitute a contract, and where the parties making a parol agreement contemplate a subsequent reduction of the terms to writing, the parol agreement alone is not enforceable without showing an intention that it should become operative before the execution and without regard to the writing. 12 P.L.E. 2d Contracts § 28 (footnotes omitted).

[4] Legal obligations, however, can arise out of a contract whose terms are definitely agreed upon, notwithstanding that the parties understood that a formal contract was subsequently to be executed, and where the parties agree orally to all the terms of a contract between them and part of their mutual understanding is that a written contract embodying such terms shall be drawn and executed by them, the oral contract may be enforced, even

merely memorializes a prior oral agreement and must provide the date the oral agreement was effective. If it does not, the Department will not accept parol evidence to prove the existence of a prior oral agreement.

When the parties do not execute a written assignment of the mortgage instrument but merely assign the mortgage interest by selling and negotiating the promissory note, the Department looks to the date the promissory note is negotiated to determine the effective date of the assignment.

Section 6. Mortgage Electronic Registration System (MERS)

There has been a recent trend to track mortgage assignments and sales of servicing rights electronically. The Mortgage Electronic Registration System (MERS) was created for this purpose.

MERS is a national electronic registry system, owned and operated by MERSCORP, Inc. (MERSCORP). It became operational in 1997.

Lenders who are members of MERS designate MERS to act as their nominee and to become the nominal mortgagee listed in the mortgage instrument.[5] A **NOMINEE** is someone who acts on behalf of another. As such MERS is the party named in the mortgage instrument, but the mortgage interest remains with the lender. MERS is made the nominal mortgagee in one of two ways. Under the first method, the lender assigns its mortgage to MERS by a written assignment agreement. Under the second and more common method, MERS receives the mortgage as the Original Mortgagee of Record (MOM).[6] In other words, at the loan closing, the borrower directly executes the

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though one of the parties thereafter refuses to execute it. Moreover, even though the parties to an oral agreement contemplate that it is to be reduced to writing and signed, if the understanding is that this is to be done simply as a memorial of the agreement, the contract is binding, notwithstanding that it is never put to writing, and such a contract is obligatory from the date of the making of the oral agreement. 12 P.L.E. 2d Contracts § 28 (footnotes omitted).

[5] More specifically, Mortgage Electronic Registration System, Inc. (MERS, Inc.), a subsidiary corporation of MERSCORP, is named the nominal mortgagee.

[6] A sample of the language contained in a mortgage in which MERS, Inc. is named as the nominal mortgagee is as follows:

> "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.
>
> * * *
>
> 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

mortgage instrument with MERS as the nominal mortgagee for the lender and the lender's successors and assigns. The lender is named as the payee under the promissory note.

By either method, MERS becomes the nominal mortgagee of record in the county land records. The MERS member registers the mortgage on the MERS System. After MERS becomes the nominal mortgagee of record, recording future assignments of the mortgage interest or servicing rights from one MERS member to another is not required because MERS remains the nominal mortgagee of record.

Mortgage and servicing rights are not transferred on the MERS System. In other words, the MERS System does not effectuate the electronic transfer of rights. The MERS System only tracks the changes in servicing rights and ownership of mortgage interests. Servicing rights are sold via a purchase and sale agreement. Mortgage interests are sold via endorsement and delivery of the promissory note. These are non-recordable events.

The MERS System is designed to serve only its members. Therefore, if servicing rights or a mortgage interest is sold to a non-MERS member, then a paper assignment must be executed and the mortgage will be transferred to the non-MERS member. MERS cannot remain the nominal mortgagee for a non-MERS member.

A mortgagee who is a member of MERS may decide to have MERS foreclose on the mortgaged real estate on the mortgagee's behalf.

For Pennsylvania Realty Transfer Tax purposes, when MERS is acting as the nominal record mortgagee, the Department will consider MERS to be a mere agent acting on behalf of the mortgagee. The holder of the original or negotiated promissory note, as the case may be, is the mortgagee.

Section 7. Application of Pennsylvania Realty Transfer Tax

Determining whether the RTT exemptions discussed in Section 4, above, are applicable to a particular situation is difficult given the frequency that real estate loans and mortgages are sold and the number of actors involved in real estate lending that can have some interest in or responsibility related to the note and mortgage. The actors can include: banks, savings associations and other lending institutions, loan and mortgage originators, brokers and servicers, common trust funds, warehouse lenders, wholesale lenders, retail lenders, and document custodians.

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 _____:

In order for one of the realty transfer tax exemptions discussed in Section 4 to apply, it is imperative to identify the mortgagee. Normally, this will be the party named in the original mortgage instrument or, in the case that the mortgage is assigned, the assignee of the mortgagee. In the case where the promissory note securing the mortgage loan is negotiated, the owner and holder of the note is the mortgagee. In the case where the record mortgagee is a nominal mortgagee, such as MERS, the mortgagee is the original lender holding the promissory note, or in the case of an assignment, the assignee of the note.

Subsidiary Corporations and SPEs. A subsidiary corporation, special purpose entity (SPE) or other business entity of the mortgagee is not the mortgagee. For Realty Transfer Tax purposes owners of business entities are separate and distinct from the business entities themselves. 72 P.S. § 8102-C.4. Therefore, a deed from a mortgagor or sheriff to a mortgagee's subsidiary corporation, SPE or business entity is not exempt from tax.

Servicers. A loan servicer is never considered a mortgagee. As stated above, the mortgagee must be the party that holds the mortgage interest in the real estate. A servicer holds the servicing rights to the mortgage loan and acts on behalf of the mortgagee for purposes of administering and collecting the mortgage loan. Those rights have nothing to do with the incidents and ownership interest in the real estate or the security in the real estate. Consequently, a person acting solely as a servicer can never be the mortgagee. Nonetheless, as previously discussed, a servicer might stand in the position of a nominal mortgagee of record for purposes of receiving service of process related to a mortgage loan and, as such, may initiate foreclosure proceedings on behalf of the actual mortgagee. To that extent, a servicer can be considered as a nominal mortgagee as discussed below.

Deeds in lieu of Foreclosure. Any deed executed by a mortgagor to a mortgagee, whether the original mortgagee or assignee, in lieu of foreclosure is not subject to tax as explained in Section 4.

Foreclosures and Judicial Sales. Any deed executed by a sheriff as the result of judicial sale in a mortgage foreclosure action to a mortgagee is not subject to tax as described in Section 4.

Nominal Mortgagees. In the event that a nominal mortgagee, such as MERS, takes title to real estate secured by a mortgage on behalf of the mortgagee, the deed to the nominal mortgagee will not be subject to tax. The nominal mortgagee stands in a position of an agent of the mortgagee. Any transfer to an agent is treated as a transfer to the principal. 72 P.S. § 8102-C.3(11)(ii), 61 Pa. Code §§ 91.193(b)(11) and 91.153(b)(2). In this case, the principal is the mortgagee. Consequently, the deed to the nominal mortgagee is exempt from tax. Further, any subsequent conveyance from the nominal mortgagee to the mortgagee is exempt from tax as a conveyance from an agent to a principal as long as the conveyance is for no or nominal consideration. *See* 72 P.S. § 8102-C.3 (11), 61 Pa. Code §§ 91.193(b)(11) and 91.153(a)(1).

In the case where the nominal mortgagee takes title to the real estate on behalf of the mortgagee, the conveyance is exempt from tax as explained above. However, if the mortgagee thereafter assigns its right to receive the real estate from the nominal mortgagee to another party, the conveyance from the nominal mortgagee to the assignee is subject to tax.

Documentation and Evidence. In all cases, it is the burden of the party claiming the tax exemption to prove that the exemption is applicable to the particular transaction. Any person claiming the exemptions explained in Section 4 must make sure that they have adequate documentation to demonstrate the applicability of the exemption claimed. Such documentation includes the actual note and mortgage securing the obligation and identifying the mortgagee. In the case where the mortgage has been assigned, then it is imperative for the assignee to have possession of and be able to produce the assignment documents—either the written assignment agreement and/or the note that has been negotiated to the assignee. In the event that a nominal mortgagee, such as MERS, takes title to the real estate, documentation must exist that evidences that the nominal mortgagee is taking title to the real estate on behalf of the mortgagee. Without such documentation to substantiate the identity of the mortgagee and the date on which the mortgagee obtained the mortgage interest, the Department can disallow the exemption and assess tax on the transaction.

Recording. Whenever a taxpayer files a document with the Recorder of Deeds to which the taxpayer believes an exemption explained in Section 4 is applicable, the taxpayer must file a statement of value with the document to claim the exemption. A copy of the instrument by which the mortgagee obtained its mortgage interest should be submitted with the statement of value. Without the submissions of such documentation with the statement of value, the Recorder is authorized to reject the document for recording without the proper amount of tax being paid and remitted.

Even if the above procedure is followed and the Recorder accepts a deed for recording, nothing in this Bulletin shall be construed to limit the Department's authority to investigate any document or transaction, deny an exemption or assess tax due the Commonwealth.

Rhode Island

In Rhode Island, a mortgagor challenged MERS' right to hold mortgage liens as mortgagee and standing to foreclose those liens. The Superior Court in *Bucci v. MERS* (Sup. Ct. R.I., Aug. 25, 2009) consolidated numerous challenges and issued a declaratory judgment upholding MERS' rights as mortgagee. The *Bucci* court specifically held that MERS has the right to invoke the statutory power of sale because and may foreclose because it is the named mortgagee and nominee of the lender and the lender's successors and assigns.

Texas

In the Texas Court of Appeals decision *Athey v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1634066 (Tex. App. – Beaumont) (April 22, 2010) the Court affirmed the trial court's decision in favor of MERS on its motion for summary judgment. The Appeals Court held that the deed of trust gave MERS the authority to proceed with the non-judicial foreclosure against the plaintiffs/borrowers regardless of the fact that MERS was not the owner or holder of the promissory note.

Utah

In *Burnett v. Mortgage Electronic Registration Systems, Inc., 09-69 (D. Ut. 2009)* the court noted that the granting clause in the Deed of Trust gives MERS explicit authority to foreclose and to substitute trustees. Once the borrower defaulted, MERS was authorized to commence the foreclosure process. The court wrote, "[T]he language in the Deed of Trust clearly grants MERS the authority to exercise the full ambit of authority possessed by the Lender." The court rejected the borrower's claim the MERS cannot be the beneficiary on the Deed of Trust.

Virginia

In *Ruiz v. Samuel I. White, P.C., et al*, 09-688 (E.D. Va. 2009), the court wrote, "The plain terms of the deed of trust compel the conclusion that MERS has the authority to appoint successor trustees. The deed of trust names NVR as the lender and also names MERS as "the nominee for Lender and Lender's successors and assigns." … As the nominee, MERS has the right under the terms of the deed of trust to exercise any or all the rights granted to NVR, including NVR's right 'at its option…[to] remove Trustee and appoint a successor trustee to any Trustee appointed hereunder." The court also found that the language in the Deed of Trust gives MERS the right to foreclose and sell the property. After further evidence was submitted on the issue of whether MERS was the note holder, the court found that since the original note was endorsed in blank and was in the possession of a MERS Certifying Officer that MERS was the note holder and that it did not violate the Fair Debt Collections Practices Act for foreclosure-related notices to state that MERS was the note holder when in fact it was.

In *Ruben Larota-Florez v. Goldman Sachs Mortgage Co., et al.*, #09cv1181, U.S. Dist. Ct., Eastern Dist. of VA (2009), the court found that foreclosure of a deed of trust does not constitute collection of a "debt" under the Fair Debt Collection Practices Act. The court also found that a non-judicial foreclosure does not involve sufficient state action to support a claim arising under the 14th Amendment of the U.S. Constitution.

Washington

In *Moon v. GMAC Mortgage Corporation, et al*, No. C08-969Z, 2008 WL 4741492 (W.D. Wash. Oct. 24, 2008), the plaintiff challenged MERS ability to act as the beneficiary on Deeds of Trust and claimed that this violated Washington State's Deeds of Trust Act. The court noted that MERS was named as the original beneficiary on the Deed of Trust and upheld MERS ability to act as the beneficiary Finding that "simply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument." *Moon* at * 5.

In Vawter v. Quality Loan Service Corporation of Washington, et al, Case No. C09 -1585 (W.D. Wa. 2010), the Court dismissed plaintiff's entire complaint with prejudice which included a wrongful foreclosure claim and held that MERS held legal title to the Deed of Trust before MERS assigned the Deed of Trust to the loan servicer and that "technical flaws" in the foreclosure process are not proper grounds to restrain the trustee sale. The Court cited extensively to the Court's decision in *Moon* finding that the fact that "MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument." *Moon* at 5.

The Vawter Court also held that MERS and the loan servicer cannot be found liable for violations of the Washington Consumer Protection Act for the acts of other defendants in connection with the loan origination.

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?***

(i) Proof of Claim

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. Conversely, if a proof of claim is being filed in the servicer or investor's name and MERS remains the mortgage, it is critical that an assignment out of MERS is recorded prior to filing the proof of claim. This may help avoid a number of serious issues throughout the bankruptcy. When the proper documentation is submitted to support MERS interest, the courts recognize MERS standing.

Bankruptcy judges are paying attention and more and more are carefully scrutinizing proofs of claim and motions for relief, even if the borrowers have not raised the issue. Whether MERS is the party filing the proof of claim or seeking relief, it is important the the note holder and the lien holder be the same entity. In one 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 attorney decided that the MERS claim would not be 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 another case, a judge expunged a proof of claim filed by the servicer because MERS was the lien holder at the time the case was filed and the note was endorsed to the investor. The court found that the servicer had not sufficiently proven its standing to enforce the note and mortgage.

(ii) Motion for Relief from Stay

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. If MERS is the movant on a motion for relief from stay, in addition to being the mortgagee, MERS will need to be the note-holder for a particular loan transaction prior to filing a motion from relief from stay. Each MERS member, through its duly appointed MERS Certifying Officer(s), is responsible to ensure that outside counsel that files pleadings on behalf of MERS properly describes MERS and attaches all necessary proof to show MERS has standing at the time the pleading is filed. Training Bulletin 2008-06 outlines the requirements for filing MERS Motions for Relief from Stay.

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).

Recently questions are being raised in responses to motions for relief from stay filed in the name of MERS. The courts mainly are focused on the documentation that was submitted (or omitted in some cases) along with the motion such as the payment history and the note. Numerous courts have held that MERS can seek relief from stay, when the proper documentation showing MERS interest in the mortgage is submitted to the court. *See In re Jackson*, 08-90391 (Bankr. S.D. Cal. 200); *In re Smith*, 366 B.R. 149 (Bankr. D. Colo. 2007); *In re Roberts*, 367 B.R. 677 (Bankr. D. Colo. 2007); *In re Scott*, 376 B.R. 285 (Bankr D. ID 2007). *In re Darrell Royce Sheridan and Sherry Ann Sheridan* (U.S. Bankruptcy Court District of Idaho, case no. 08-20381-TLM) is an example of a case where, had counsel explained MERS correctly, we would have prevailed. The complaint did not clearly state MERS standing to move for relief in its capacity as the holder of the mortgage and the note. The court noted that the note holder would be entitled to enforce the note and move for relief but there was no evidence to show who the holder was in this case. MERS has worked with outside counsel to explain MERS standing to seek relief as the mortgagee or beneficiary and a holder of the note.

MERS filed a statement in response to an Order to Show Cause issued by a bankruptcy judge in Ohio. See *Mortgage Electronic Registration Systems, Inc. Statement Explaining the Nature of Its Business and Providing a Status Report on Its Case Audits*. The Cartier Statement walks through

MERS role in the industry and its rights to enforce the mortgage as the mortgagee were provided in response to questions regarding MERS standing. Upon providing the courts with this type of explanatory briefing, bankruptcy courts including those mentioned above have continued to find MERS has standing under 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. In addition, counsel should be provided with necessary documentation to support the motion such as the payment history, a copy of the note with endorsements, and other supporting affidavits that may be needed to prove up standing. The courts have been granting the motion and requested relief to proceed with the foreclosure once MERS role has been explained accurately as the mortgagee and the note-holder.

We are on the lookout for these challenges and step in as soon as we are alerted. We continue to work with outside counsel to assist in explaining MERS to the trustees and the court. Please have your bankruptcy counsel contact the MERS Law Department immediately if they are dealing with these issues, as we stand ready to assist.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	Case No. 04-15754
	)	
THERESA A. CARTIER,	)	Chapter 13
	)	Judge Morgenstern-Clarren
Debtor	)	
	)	
	)	
	)	Filed Electronically

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S STATEMENT EXPLAINING THE NATURE OF ITS BUSINESS AND PROVIDING A STATUS REPORT ON ITS CASE AUDITS

On May 5, 2008, the Court entered an order directing Mortgage Electronic Registration Systems, Inc. ("MERS") to file a statement explaining the nature of its business operations and providing a status report on its case audits. MERS submits this memorandum in response to the Court's order.

I. Background—MERS: A Company that Holds Mortgage Liens As The Mortgagee Of Record As Well As Operates An Innovative System That Efficiently Tracks Changes In Ownership Interests and Servicing Rights

A. The Residential Mortgage Market

MERS was formed to play a vital role in a federally-established free-market system that is designed to reduce the costs of, and increase the availability of, funding for home loans.[1] When a mortgage lender lends money to a home buyer, it obtains in exchange both a promissory note, which is a negotiable instrument, and also a security instrument in the underlying property.

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1 The background facts that are set out in this section are drawn from either the following sources or others identified in footnotes: *Matter of Merscorp, Inc.*, 24 A.D.3d 673, 673-75 (N.Y. Sup. Ct. 2005), *leave to appeal granted*, 6 N.Y.3d 712 (2006); *Opinion of Michigan Attorney General No. 7116*, 2002 Mich. AG LEXIS 19, at *1-6 (2002); Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. 32, 32-36 (July-Aug. 1997); Slesinger & McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 805-18 (1995); *In re Huggins*, 357 B.R. 180 (Bank. D. Mass. Dec. 14, 2006).

The security instrument usually takes one of two forms, either a "mortgage," with the borrower as the "mortgagor" and the lender or its nominee as the "mortgagee" with the borrower as the "trustor" and the lender or its nominee as the "beneficiary."

To provide notice of the lien to the world at large, the mortgage is recorded in the appropriate local land records office, which, in Ohio, is the county recorder's office.[2] In almost all instances, however, the mortgage lender sells the promissory note into the secondary mortgage market, most often to one of the government or government-sponsored entities created by Congress to purchase residential mortgage loans.[3] In turn, these entities resell the promissory note into a tertiary mortgage-backed securities market, usually as part of a bundle of promissory notes held in trust for investors.[4] As a result, the owners of these promissory notes may be thousands of people simultaneously, whose identities change as the notes are sold and resold and as investors buy and sell shares in the mortgage-backed securities.[5]

Because of the secondary and tertiary mortgage markets, the mortgage lender can sell the promissory note obtained from the borrower and then make the funds obtained from the sale of the note available to additional borrowers for the purchase of homes. Congress created the government-sponsored entities, Ginnie Mae, Fannie Mae, and Freddie Mac for this very purpose of increasing the availability of funds for home ownership.[6]

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2 *See* Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. at 34-35.

3 *See id.*

4 *See id.*

5 *Id.* at 34; Slesinger, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. at 808.

6 *See* 12 U.S.C. §§ 1451, 1716; *see also* 12 U.S.C. §§ 1451-59, 1716-23 *et seq.* (creating the Government National Mortgage Association ("Ginnie Mae"), Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac").

1. The Creation Of MERS

In 1993, the Mortgage Bankers Association, Ginnie Mae, Fannie Mae, Freddie Mac and others in the real estate finance industry created an electronic registration and tracking system—what is now called the MERS® System—similar to the one successfully used by the Depository Trust Company for the securities industry.[7] Almost every entity involved in home lending or servicing is a MERS Member.[8]

2. How MERS Works

Upon the purchase of a home, the borrower signs a security agreement that, among other things: (1) names the borrower as the mortgagor, and includes his or her name; (2) names Mortgage Electronic Registration Systems, Inc. as the mortgagee, as nominee for the mortgage lender and its successors and assigns; (3) includes MERS' address and its toll-free telephone number; (4) describes the secured real property; (5) refers to the borrower's promissory note in favor of the mortgage lender; and (6) expressly states that MERS holds legal title and authorizes MERS, with the express understanding and agreement of the borrower, to exercise the rights of the mortgage lender for whom it holds legal title "including but not limited to, the right to foreclose and sell the Property." The mortgage is then recorded in the local land records with MERS as the named beneficiary.

MERS Members contract with MERSCORP, Inc., the operating company that owns and operates the MERS® System, to electronically register and track beneficial ownership interests

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7 Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. at 33; *see* Slesinger & McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. at 810-11.

8 In addition to Ginnie Mae, Fannie Mae and Freddie Mac, MERS members include many national and international lenders and many of the largest and most well-known title associations and title insurers. A complete list of MERS members is available on MERS' website at www.mersinc.org.

and servicing rights in mortgage loans.[9] MERS Members contractually agree to appoint MERS, which MERSCORP wholly owns, to act as their common agent, or nominee, and to name MERS as the lienholder of record in a nominee capacity on all recorded security instruments for loans registered on the MERS® System. MERS status as "nominee" is a common occurrence in public land records and "has long been sanctioned as a legitimate practice."[10]

The purpose of the MERS® System is to track both beneficial ownership interests in, and servicing rights to, mortgage loans as they change hands throughout the life of the loan. By serving as the mortgagee coupled with this tracking, the need for mortgage assignments in the residential mortgage market is eliminated thereby increasing efficiency and reducing costs associated with mortgage lending.[11] Prior to the establishment of the MERS® System, the assignment process could take a long time to complete, up to six months for a modest loan portfolio. In addition, error rates as high as 33% were common, with assignments recorded in the wrong sequence—clouding title to property.[12]

When a promissory note is sold by the original lender to others, the various sales of the notes are tracked on the MERS® System. Beneficial ownership interests in the mortgage loan are sold by endorsement and delivery of the promissory note. The promissory note is the negotiable, intangible asset, which has value to financial institutions and investors. Local recording offices historically did not and currently do not record the transfer of promissory note ownership.

Once MERS becomes the mortgagee of record as nominee, it remains such when

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9 *Id.* at 33.

10 *In re Cushman Bakers*, 526 F. 2d 23, 30 (1st Cir. 1975), *cert. denied*, 425 U.S. 937 (1976).

11 Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. at 33.

12 *See id.* at 33-34.

beneficial ownership interests in the promissory note or servicing rights are transferred in the secondary mortgage market by one MERS Member to another, and it tracks such transfers electronically on the MERS® System.[13] The homeowner/borrower is notified by both the selling MERS Member and buying MERS Member (under the Truth in Lending Act, 12 U.S.C. § 2601 *et seq.*) of any transfer of servicing rights. The mortgage recorded thereby continues to provide public notice of the encumbrance to the underlying real property.[14] MERS remains the mortgagee of record and in doing so MERS keeps the chain of title clear and ascertainable, without the worry of unrecorded, incorrect, or intervening assignments.[15]

In making the name of the servicer publicly available, the MERS® System also fills another information void. Local recording offices historically did not and currently do not record the transfer of servicing rights.[16] Servicing rights are sold by a purchase and sale agreement, which is a non-recordable contractual right. Servicing rights are contract rights pursuant to which mortgage servicers agree to perform various administrative functions in connection with a loan, including the collection of payments, the tracking of insurance and real estate taxes, and remittance of payments to investors for which they are paid a fee that comes out of the interest payments made pursuant to the note. Knowing the identity of the current servicer enables consumers, lenders, servicers, and title insurers to arrange for consolidations, modifications, releases, or discharges of liens in a timely and reliable manner.[17] MERS, as

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13 Arnold, *Yes, There Is Life on MERS*, 11 Prob. & Prop. at 35.

14 *Id.* at 35-36.

15 *Id.*

16 *See id.* at 34.

17 *See id.*

mortgagee of record, then executes such consolidations, modifications, releases or discharges.[18] It is this current and easily accessible information that assists borrowers, title insurers and lenders to promote low-cost home ownership.[19]

As long as the sale of the note involves a MERS Member, MERS remains the mortgagee of record on the mortgage and continues to act as a nominee for the new note holder. This relationship is memorialized in the original security interest to which the borrower is a party, as well as in the MERS Membership Agreements. If a Member is no longer involved with the note after it is sold, an assignment from MERS to the non-MERS member is recorded in the county where the real estate is located, and the mortgage is "deactivated" from the MERS® System.

As of today, MERS has registered more than 55 million mortgages and deeds of trust.

B. MERS Has Standing To Bring A Foreclosure Action Or Seek Relief From Stay

1. Under Ohio Law, A Party Need Only Be The Mortgagee And Note Holder To Have Standing to Bring An Action Against A Borrower

A party that is the mortgagee and note holder for a particular loan transaction has standing under Ohio law to bring an action against the borrower. Clearly the mortgagee on a mortgage has the right to enforce the terms of the mortgage, including bringing an action in foreclosure or seeking relief from stay. Ohio courts have recognized MERS' right to bring an action against a borrower as mortgagee and nominee for a Member. *See In re Gemini Serv., Inc.*, 350 B.R. 74, 82-83 (Bank. S.D. Ohio 2006) (finding that mortgage could be assigned to MERS

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18 *See id.*

19 The borrower may look up the servicer's name and contact information for their MERS held lien using MERS® Servicer ID which is found on MERS website http://www.mers-servicerid.org/. The borrower can search by either the 18-digit Mortgage Identification Number (MIN) stated on the recorded instrument naming MERS as the mortgagee or beneficiary or by putting in their name and property address.

as nominee or agent for a MERS' Member and that MERS could hold legal title to the mortgage and bring an action on the mortgage).

Further, Ohio law only requires a party to be the holder of a promissory note in order to enforce the note obligation and bring an action in foreclose or seek relief from stay. Ohio law expressly gives the holder of a promissory note the right to enforce the note. *See* O.R.C. § 1303.31 (person is entitled to enforce a negotiable instrument if the person is a holder of the instrument or a non-holder in possession of the instrument with the rights of a holder, regardless of whether the person is the "owner" of the note); O.R.C. § 1303.03 (definition of negotiable instrument encompasses promissory notes); *Provident Bank v. Taylor*, 2005 Ohio 2573 (Delaware Cty. 2005) (statement by bank, in its affidavit in support of its summary judgment motion, that it was holder of promissory note secured by mortgage, was evidence that bank was proper party to bring foreclosure action, where maker of note did not contradict such evidence in his memorandum contra or his affidavit). Endorsing a promissory note, even in blank, and delivering it to a party is sufficient to make that party the note holder entitled to enforce the note.[20] *See* O.R.C. § 1303.22 (transfer of negotiable instruments); 1303.24 & 1303.25 ("blank endorsement" of note and delivery makes recipient lawful holder of note); *see also* Anderson, *Uniform Commercial Code* § 3.301:9 (3d. 1994) (holder of a negotiable instrument "may sue in his own name to enforce payment, even if he is not the owner").

The judicial recognition of MERS' standing is nothing new and follows naturally from long settled principles set forth in the Uniform Negotiable Instruments Act and the Uniform Commercial Code that entitle a nominal holder of an instrument to sue to enforce the instrument.

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20 Although mortgage assignments sometimes include language purporting to assign the promissory note as well, such assignments of the note have no legal effect. Under the laws of almost every state, including Ohio, the right to enforce a promissory note can only transferred from one party to another by endorsement and delivery of the note.

It is well settled under Ohio law, as it is under the law of most other states, that a nominal holder of an instrument has standing to sue to enforce the instrument. *See Wick v. Cleveland Secs. Corp.*, 71 Ohio App. 393 (Cuyahoga Cty. 1943) ("A person who is a holder within the meaning of the pertinent provisions of the Negotiable Instruments Act is entitled to sue notwithstanding he is without beneficial interest and a general code provision requiring every action to be prosecuted in the name of the real party in interest.").[21] Further, federal and state rules of procedure expressly confer standing to sue on "a party with whom or in whose name a contract has been made for another's benefit." *See* Fed. R. Civ. P. 17(a)(1)(F) *adopted by* Fed. R. Bank. P. 7017; *see also* Ohio Civ. R. 17 ("An executor, administrator, guardian, bailee, trustee of an express trust, 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 his own name . . . .").

Courts around the country have considered whether MERS is a real party in interest with standing to move for relief from the automatic stay or foreclose on a property, and the majority of courts have held that MERS has standing. *See, e.g., Mortgage Electronic Registration Sys., Inc. v. Revoredo*, 955 So.2d 33, 34 (Fl. 2007); *Mortgage Electronic Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674 (NY App. 2007); *In re Huggins*, 357 B.R. 180 (Bank. D. Mass. 2006);

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21 *See also Leavings v. Mills*, 175 S.W.3d 301 (Tex. App. Houston 2004) (a "holder" of an instrument is a person entitled to enforce the instrument); *Caballero v. Wilkinson*, 367 So.2d 349 (La. 1979) (although holder of bearer note was not the owner, he could sue makers for payment); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166 (Wash. 1969) (holder of negotiable instrument may sue thereon in his own name and payment to him in due course discharges instrument; it is not necessary for holder to first establish that he has some beneficial interest in proceeds); *Hubby v. Willis Agency, Inc.*, 283 P.2d 1080, 1082 (Colo. 1955) ("The payee and holder of a promissory note may maintain an action thereon even if he is not the beneficial owner of the negotiable instrument sued on, even though he is only a nominal payee and the beneficial interest of equitable ownership is another person"); *Stearns v. Los Angeles City School Dist.*, 244 Cal.App.2d 696, 701, 716 n. 3 (1996) (company that "concededly only holds record title" to deed of trust as nominee for two principals was a proper party in quiet title action, and judgment in that action against the nominee bound the principal despite the fact that the principal was not a party to the action at that time); *Nw Nat'l Bank & Trust Co. v. Hawkins*, 286 N.W. 717 (Minn. 1939) ("Even a nominal payee or title holder, although having a beneficial interest, may maintain an action on a promissory note").

In re Sina, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006); *Mortgage Elec. Registration Sys., Inc. v. Ventura*, No. 054003168S, 2006 WL 1230265 (Conn. Super. Ct. April 20, 2006); *Mortgage Electronic Registration Sys., Inc. v. Leslie*, No. CV044001051, 2005 WL 1433922 (Conn. Super. Ct. May 25, 2005).

Huggins illustrates. There, a debtor opposed MERS' motion for relief from the automatic stay on the ground that "MERS, not having a property or ownership interest in the rights of Spectrum, is not the real party in interest, consequently cannot collect the Note or enforce the Mortgage outside bankruptcy, and thus lacks standing in bankruptcy to seek relief to do so." *Huggins*, 357 B.R. at 183. After reviewing the facts concerning MERS' role in a mortgage transaction, the court identified four reasons why MERS has standing. "First, MERS is acting as nominee for Spectrum, which holds the Note . . . ." *Id.* "Second, MERS is the record mortgagee under the Mortgage with the powers expressly therein set forth, including the power of sale . . . ." *Id.* Third, the Massachusetts foreclosure statute "expressly authorizes the exercise of sale powers by a mortgagee, or person authorized to sell, precisely the position occupied by MERS." *Id.* Finally, "a denial of MERS' foreclosure right as mortgagee would lead to anomalous and perhaps inequitable results, to wit, if MERS cannot foreclose though named as mortgagee, then either Spectrum can foreclose though not named as mortgagee or no one can foreclose, outcomes not reasonably or demonstrably intended by the parties." *Id.* Each of these points applies equally under Ohio law.[22]

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22 The holding in *In re Foreclosure Cases*, No. 07-2282, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007), does nothing to alter the conclusion that MERS has standing to bring an action against a borrower when MERS is the mortgagee and note holder. In *In re Foreclosure Cases*, the District Court found that various plaintiffs lacked standing to bring a foreclosure action to enforce a note and mortgage because the plaintiffs produced no evidence demonstrating that they were the legal title holders of any rights under either the note or the mortgage as of the date of their foreclosure complaints. When MERS is both the note holder and the mortgagee at the commencement of any action against the borrower, it clearly has standing under Ohio law to bring that action.

2. Rule 8 of MERS' Membership Agreement

Each MERS Member enters into a Membership Agreement, which governs the relationship between MERS and its Members. Among the provisions in the MERS Membership Agreement is Rule 8, which provides the parameters that must be followed for the Member to bring an action in MERS' name. *See* Rule 8 of Membership Agreement (attached as Exhibit A). Although Rule 8 provides Members with the right to bring an action in MERS' name, they are not required to do so. *Id.* at Section 1(a). The Member servicing the loan is responsible for commencing a foreclosure or other proceeding in accordance with any applicable agreements between the parties' involved, including the Membership Agreement. *Id.* at Section 1(b). If the beneficial owner of the loan or its designated servicer decides to bring a foreclosure action or other action *in the name of a party other than MERS*, then the loan servicer is required to assign the mortgage from MERS to the appropriate party. *Id.* at Section 1(d). In such cases, MERS is not a party to any action brought because it is neither the mortgagee nor the note holder.

If the beneficial owner of the loan or its designated servicer elects to bring a foreclosure action or other action *in the name of MERS*, then the promissory note must be endorsed in blank to MERS and delivered to a MERS' Certifying Officer.[23] *Id.* at Section 2(a). At that point, MERS is both the note holder and the mortgagee (as MERS is designated the mortgagee, as nominee, for the mortgage lender and its successors and assigns on the loans of all MERS'

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23 Under the Membership Agreement, MERS is required to provide any Member, upon request, a corporate resolution designating one or more employees of the Member a MERS' Certifying Officer. As a MERS' Certifying Officer, the Member's employee may, among other things, (1) release the lien of any mortgage loan registered on the MERS System to such Member; (2) assign the lien of any mortgage naming MERS as the mortgagee when the Member is also the current promissory note holder, or if the mortgage is registered on the MERS System, is shown to be registered to the Member; (3) foreclose upon the property securing any mortgage loan registered on the MERS System to such Members; and (4) take any action necessary to protect the interest of the Member or the beneficial owner of the a mortgage loan in a bankruptcy proceeding concerning a loan registered on the MERS System shown to be registered to the Member.

members) and may properly bring the foreclosure or other action under the terms of both the Membership Agreement and applicable law.

At all time, Members acting through a duly appointed MERS Certifying Officer are strictly prohibited from (1) pleading MERS as the note-owner in any action; (2) pleading MERS as the co-plaintiff in any action; and (3) bringing an action in MERS' name if the note is lost or cannot be located and delivered to a MERS' Certifying Officer. *Id.* at Section 2(a)(i)-(iii). Under the Membership Agreement, MERS retains the right to sanction non-complying Members. If a Member pleads MERS as the note-holder or co-plaintiff or brings an action in MERS' name when the note is lost or cannot be located, then MERS may dismiss the action and/or sanction the MERS' Member $1,000 for the first violation and $5,000 for each subsequent violation.[24] *Id.* at Section 2(c).

II. The Status Of MERS' Case Audits

As indicated to the Court at the May 2, 2008 hearing in this matter, MERS has begun an audit of open cases in the United States Bankruptcy Court for the Northern District of Ohio to determine whether all outstanding motions filed in MERS' name complied with Ohio law and MERS' Membership Agreement and to ensure that all future motions are proper as well. As part of the audit process, MERS has been in the process of identifying and contacting all law firms handling open cases in MERS name in United States Bankruptcy Court for the Northern District of Ohio. The attorneys were instructed to review the files in all open cases to identify pending motions for relief from stay and to determine whether those motion were properly brought. To the extent that any motion for relief from stay does not comply with Ohio law and MERS'

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24 Because of non-compliance with the Membership Agreement in certain foreclosure actions brought in the State of Florida, MERS has revoked the right of any and all MERS' Members to bring foreclosure actions in MERS' name in Florida and may sanction any Member that brings such a foreclosure action $10,000. *Id.* at Section 1(c).

Membership Agreement, the attorney that filed the motion was instructed to withdraw it. The attorneys were further instructed not to file any future motions for relief from stay unless those motions complied with both Ohio law and MERS' Membership Agreement.

To date, MERS has completed the audit of three law firms handling open cases in MERS name in the United States Bankruptcy Court for the Northern District of Ohio. So far, the status of the audit of those firms is as follows.

Lerner, Sampson & Rothfuss. Lerner, Sampson & Rothfuss is presently handling 108 open cases before Judge Morgenstern-Clarren and 289 total open cases in the United States Bankruptcy Court for the Northern District of Ohio in the name of MERS. Of the 108 open cases before Judge Morgenstern-Clarren, there are no pending motions for relief from stay and any previously brought motions that did not comply with Ohio law or MERS' Membership Agreement were withdrawn. Similarly, of the 289 total open cases in the United States Bankruptcy Court for the Northern District of Ohio, there are no pending motions for relief from stay and any previously brought motions that did not comply with Ohio law or MERS' Membership Agreement were withdrawn.

The Law Offices of John D. Clunk Co., LPA. The Law Offices of John D. Clunk is handling two cases in the United States Bankruptcy Court for the Northern District of Ohio in MERS' name; however, neither of those cases has a pending motion for relief from stay.

Carlisle, McNellie, Rini, Kramer & Ulrich Co., L.P.A. Carlisle, McNellie, Rini, Kramer & Ulrich presently has eight cases in which MERS is the movant pending in the United States Bankruptcy Court for the Northern District of Ohio, including 2 before Judge Morgenstern-Clarren. All pending motions for relief from stay have or will be immediately withdrawn.

MERS is continuing the process of identifying law firms that have filed motions for relief

from stay in the United States Bankruptcy Court for the Northern District of Ohio and will similarly instruct those lawyers that motions brought in MERS' name must comply with Ohio law and MERS' Membership Agreement and any pending motions that do not meet those criteria must be withdrawn.

In addition, MERS is in the process of contacting its Members regarding the proper procedure—both under the various state laws and the Membership Agreement—for bringing a motion for relief from stay in MERS' name. Members are being instructed that any motion filed in MERS name that does not comply with the law and the Membership Agreement must be immediately withdrawn and that future motions should not be brought unless they meet these same criteria.

Respectfully submitted,

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Attorneys for Mortgage Electronic Registration Systems, Inc., acting as Nominee for Real Estate Mortgage Corporation

Dated: June 12, 2008

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. If MERS is both the mortgagee and the note holder when the motion for relief is filed, then we have sufficient standing to seek relief and the vast majority of judges recognize this dual role.

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. 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

Service of process is the procedure employed to give legal notice to a person regarding an action filed in court or administrative body so as to enable that person to respond to the proceeding before the court, body or other tribunal.

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 whereby MERS is the lienholder, and serves as the mortgagee under a mortgage security instrument, or the beneficiary under a Deed of Trust security instrument. Most service is received directly through this PO Box or 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 for handling the processing of the documents.

Question*: We received a complaint naming MERS as a defendant, will MERS be obtaining separate counsel on its own, or should we retain counsel for MERS?*

Under the Rules of Membership and Terms and Conditions, 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 business model, and not just in its capacity as 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.

Question: We received a complaint from MERS which identifies the MERS defendant as a "suspended" California corporation on the California Secretary of State website. Why is that?

There is a California corporation with a name similar to MERS that is listed as "suspended" on the CA Secretary of State's website. That entity name is "Mortgage Electronic Registration **System** Inc.", with a Sacramento address, and formerly identified a Mr. Seastrand as its agent. That entity is not affiliated in any way with Mortgage Electronic Registration **Systems**, Inc. ("MERS"), which is a Delaware corporation in good standing. In attempting to name MERS as a defendant for its mortgagee/beneficiary interests, plaintiffs sometimes make the mistake of naming and/or serving the California entity rather than MERS. Such errors are avoidable, since a plain reading of the recorded mortgage or deed of trust identifies MERS state of incorporation, mailing address, and telephone number for any necessary fact-checking.

Despite the plaintiff's error, we still look to the Member for the defense of MERS and to have counsel take all appropriate steps on behalf of MERS to adequately address the error. Please contact the MERS Law Department for any questions regarding the above.

MERS as the recorded Mortgagee or Beneficiary has a due process right to receive notice of legal actions.

The Kansas Supreme Court in *Landmark National Bank v. Kesler*, 2009 Kan. LEXIS 834 (Aug 28, 2009) issued a decision involving MERS that focused on finality of judgments. MERS involvement with this case arose from the fact that the company did not receive notice of a foreclosure action even though MERS was the mortgagee of record on a junior lien. In the opinion, the court noted that "Even if MERS was technically entitled to notice and service in the initial foreclosure action--an issue that we do not decide at this time--we are not compelled to conclude that the trial court abused its discretion in denying the motions to vacate default judgment and require joinder of MERS…." The case did not affect MERS standing to foreclose and the company is entitled to receive notice of legal actions when MERS is the mortgagee. The mortgage loan remains secured and enforceable.

The Arkansas Supreme Court held in *Mortgage Electronic Registration Systems, Inc. v. Southwest,* 2009 WL 723182 (March 19, 2009) that even though the deed of trust specifies MERS as the beneficiary, Pulaski Mortgage Company, Inc. as the lender on the deed of trust, was the beneficiary, because Pulaski "receives payment on the debt." This finding in the Opinion misconstrues the legal rights afforded a beneficiary under a deed of trust and presupposes that the beneficiary of a deed of trust is the legal equivalent to a party receiving payments under a promissory note. The court failed to offer any legal support for its finding that Pulaski was the beneficiary because at one point it received payment on the debt. It has been established in other jurisdictions that a beneficiary named in the deed of trust is granted a security interest in the subject real estate and must be receive notice., *See, e.g., Schmidt v. Langal, 874 P.2d 447 (Colo. App.1993), Monterey S.P. Partnership v. W.L. Bangham, Inc.* 49 Cal.3d 454, 777 P.2d 623 (1989), *In re Trustee's Sale of the Real Property of Upton*, 102 Wn.App. 220, 6 P.3d 1231 (2000); *Brand v. First Federal Savings & Loan Ass'n of Fairbanks,*

478 P.2d 829 (Alaska 1970); *Lohr v. Cobur Corp.*, 654 S.W.2d 883, 885 (Mo. 1983); *Wylie v. Patton*, 111 Idaho 61, 720 P.2d 649 (1986); *Kenly v. Miracle Properties*, 412 F.Supp. 1072, 1075 (D. Ariz. 1976).

All parties to the deed of trust, the contract governing this transaction, agreed that MERS, as beneficiary, acquired a security interest in the underlying real property. The Court's finding that Pulaski is the beneficiary is in direct contravention to long standing Arkansas law that it is the duty of the court to construe a contract according to the unambiguous language without enlarging or extending its terms. *North v. Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980).

The United States Supreme Court has held in *Mennonite Bd. Of Missions v. Adams* that a secured party possesses a substantial property interest that is significantly affected by a foreclosure sale; and since the secured party possesses a legally protected property interest, it is constitutionally entitled to notice reasonably calculated to appraise it of the pending foreclosure sale. 462 U.S. 791, 103 S.Ct. 2706 (1983).

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.

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 MERCORP. 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.

Question: We are the Member that originated the mortgage loan with MERS as the mortgagee but then transferred all interest in the promissory note and servicing rights. The plaintiff named us, rather than MERS as mortgagee, in his lawsuit and won't substitute us out. What should we do?

From time to time, we hear of situations where a party sends notice to the lender identified in a recorded MERS mortgage in addition to, or instead of, MERS as the mortgagee. The party providing notice is responsible for naming the interested party with a recorded interest that is affected by the party's action. For MERS mortgages, the lender does not hold the recorded interest and should not be named. Usually, the Member can persuade the plaintiff to substitute MERS in place of the lender by pointing out the operative language in the mortgage showing MERS as the mortgagee. Where that proves unsuccessful, have your local or in-house counsel consider providing a disclaimer-of-interest affidavit and cover letter similar to the below example.

Example Member Disclaimer Affidavit

PROBATE COURT OF Xxxxxxxx COUNTY, Xxxxxx

XXXXXXXXXXXX
Plaintiff
Vs
XXXXXXXXXXXX
Defendants

Case No. XXXXXXXXX

AFFIDAVIT OF DEFENDANT
XXXXX **MORTGAGE CORPORATION –**
DISCLAIMER OF INTEREST

Comes now XXXXXXXXX Mortgage Corporation DBA XXXXXXXXX Mortgage ("XXXXXXXXX") and for its response to the Complaint of the Plaintiff herein, states as follows:

1. that it has not been granted a lien interest in the subject real estate recorded at Book XXXX, Page XXXXX, in XXX County, State of XXXXXXX.,

2. that from the face of the recorded lien instrument that is subject to the above Complaint, the mortgagee / lien holder of record appears as Mortgage Electronic Registration Systems, Inc. ("MERS"). A copy of the subject mortgage / deed of trust is attached hereto and marked as Exhibit A.

3. that we have previously advised Plaintiff that MERS is the mortgagee of record, not XXXXXXXXX, and based on same, XXXXXXXXX has requested the Plaintiff to voluntarily dismiss XXXXXXXXX from its Complaint.

4. Based on the above, XXXXXXXXX (a) disclaims any interest in the above-cited recorded mortgage / deed of trust and (b) requests that Plaintiff take nothing in judgment against XXXXXXXXX based on the above improper naming of XXXXXXXXX as an interested party to these proceedings.

5. This party requests that no further pleadings in this action be sent to it or to its counsel.

This the 1st day of March 2010
Respectfully submitted

XXXXXXXXX MORTGAGE CORPORATION DBA XXXXXXXXX MORTGAGE

By:_____
[insert name], [insert title]

STATE OF XXXXX)
:
XXXXXX COUNTY)

Subscribed and Sworn to Before me this _____ day of _____, 2010.

_____ Seal:
Notary Public

Example Member Cover Letter

April 6, 2010

Xxxxxx County Court of Common Pleas
Xxx Xxxxx St.
Xxxxx, XX xxxxx-xxxx

RE:

XXXXXXXX
Plaintiff

vs.

XXXXXXXX
Defendant

Case No. XXXXXX

This letter serves as acknowledgement and receipt of the Summons and Complaint regarding the above referenced property. Please be advised that the mortgage loan on the above property closed on March 10, 201_ identifying Mortgage Electronic Registration Systems, Inc. ("MERS") as the recorded Mortgagee. The borrower(s) granted the lien interest directly to MERS. Xxxxxxxxx Mortgage Corporation is identified only as the originating lender for that loan secured by the recorded mortgage to MERS. **On April 23, 201_, the loan was sold** to a subsequent investor for which MERS continues as the recorded mortgagee and nominee/agent (unless there is a recorded assignment out of MERS' name in the land records).

Enclosed please find attached an affidavit executed by Xxxxxxxxx Mortgage disclaiming any interest in the above mortgage loan. I respectfully request that you accept the Disclaimer on behalf of Xxxxxxxxx, dismiss Xxxxxxxxx Mortgage Corporation from the above suit with prejudice, and send us a copy of the Order of Dismissal for our files.

If for some reason you are not going to proceed with the dismissal, please notify me immediately.

Thank you for your assistance in this matter.

Sincerely,

Xxxx Xxxxx
Vice President

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 foreclosures, 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. We need to respond and a MERS Certifying Officer located at the servicer's location 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. 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 be 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. 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 Mortgagee Affidavit. Should you encounter a jurisdiction that does not accept the affidavit, we recommend using a "MERS-to-MERS" mortgagee assignment similar to the format discussed below in the California Mortgagee 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., it successors and assigns, as nominee for the true beneficiary hereby assigns and transfers to itself, Mortgage Electronic Registration Systems, Inc, it 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 Mortgages 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, Kansas, 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: Alabama, California, Florida, Illinois, Iowa, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Texas, 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.

Recently the question of whether MERS must be licensed to do business in California was addressed in *Behrooz Derekshan v. Mortgage Electronic Registration Systems, Inc., et al.*, (Case no. SACV08-1185 AG). The Court found MERS is exempt from the licensing requirement in California. While MERS is a foreign corporation, the creation of "evidences of debt or mortgages, liens or security interests on real or personal property" and enforcement of that debt "by trustee's sale, judicial process, or deed in lieu of foreclosure or otherwise" are not considered transacting business. See Cal. Corp. Code §§ 191(c)(7), 191(d)(3).

XIII. MERS® COMMERCIAL

The MERS® Commercial System was launched in July 2003.

- Wells Fargo Bank N.A., Bank of America NA, Bear Stearns Commercial Mortgage Inc., NATIXIS Real Estate Capital Inc., and EverBank Commercial Real Estate Lending Group among others have registered 6,357 loans secured by 11,916 properties with an aggregate original principal balance of $114.8 billion, as of May 2010.

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 polices 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 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) Mortgage**e** 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	STATE	POSTAL CODE	COUNTRY
P.O. Box 2300	Flint	MI	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	STATE	POSTAL CODE	COUNTRY
P.O. Box 2300	Flint	MI	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.

XIV. 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, May 3 2010, members have registered 160,812 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

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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,

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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]

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[7] *Id.* (emphasis added).

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