

MERS as “Holder of the Note”

“The record reflects that [original lender] was the holder of the promissory note. There is no evidence in the record or the pleadings that MERS held the promissory note or that [original lender] gave MERS the authority to transfer the promissory note. **MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer promissory note is ineffective. ... MERS never held the promissory note, thus its assignment of the deed of trust ... separate from the note had no force.”** *Emphasis added. Bellistri v. Ocwen Loan Serv’g, LLC*, 284 S.W.3d 619 at 623-624 (Mo. Ct. of Appeals, Eastern Dist., 5th Div., 2009). *See also* *In re (multiple cases)*, 407 B.R. 392 at 394-405 (Bankr. D. Idaho 2009) (summarizing multiple cases wherein movants were denied standing to enforce promissory notes assigned to them by MERS because MERS has no authority to make any such assignments despite being named in deeds of trusts as nominee and beneficiary).

“[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned. ... **MERS purportedly assigned both the deed of trust and the promissory note. ... However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority ... to assign the note.”** *Emphasis added. Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008).

MERS as “Beneficiary”

“Further, **MERS is not the beneficiary, even though it is so designated in the deed of trust.** [Original Lender], as the lender on the deed of trust, was the beneficiary. [Original Lender] receives the payments on the debt.” *Emphasis added. Mortgage Elec. Registration System, Inc. v. Southwest Homes of Arkansas*, 301 S.W.3d 1 at 4 (Sup. Ct. Arkansas, 2009).

“**MERS is not an economic ‘beneficiary’ under the Deed of Trust.** It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid.” *Emphasis added. In re Sheridan*, 2009 WL 631355, at *4 (Bankr.D. Idaho, 2009).

“Another source of confusion is the fact that entities such as MERS are often not only named as a nominee, but as a “beneficiary” on deeds of trust. This unorthodox usage of the word “beneficiary” causes all manner of havoc upon foreclosure. Oftentimes, it is clear that defendants in these actions do not understand the *source* of the confusion themselves, as they use the word “beneficiary” without attempting to untangle the confusion. Black’s gives three definitions for this word. The first definition is the most common one: “A person for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something as a result of a legal arrangement or instrument.” *Id.* at 165. From this most common definition of the word, plaintiffs typically conclude that because **MERS does not stand to benefit** directly from the foreclosure and

has no right to sue on the promissory note (which is almost always true), that MERS cannot possibly be a "beneficiary." **It is correct that MERS is not a beneficiary.** MERS is the nominee of the beneficiary. Often, the true beneficiary (the lender/nominator) will obfuscate this distinction on the deed of trust by referring to MERS as the "beneficiary of record. **This is a fiction. MERS is not a beneficiary in any ordinary sense of the word. Calling MERS a beneficiary is what causes much of the confusion.** To a large extent, defendants in these actions have brought this mass of litigation upon themselves by this **confusing, unorthodox, and usually unnecessary use of the word "beneficiary" to describe MERS' role.**" *Emphasis added. Michelle WEINGARTNER v. CHASE HOME FINANCE, LLC*, No. 2:09-cv-02255-RCJ-RJJ, 702 F.Supp.2d 1276, United States District Court, D. Nevada (March 15, 2010).

"A "beneficiary" is defined as "one designated to benefit from an appointment, disposition, or assignment ... or to receive something as a result of a legal arrangement or instrument." BLACK'S LAW DICTIONARY 165 (8th ed. 2004). But **it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary** as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, **if it doesn't walk like a duck, talk like a duck, and quack like a duck, then it's not a duck.**" *Emphasis added. In re Hawkins*, No. BK-S-07-13593-LBR, 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009).

MERS as "Payee"

"[MERS] identified itself as the current payee of the Note, contrary to its own corporate procedures." *Emphasis added. Mortgage Electronic Registration Systems, Inc. v. Medina*, Case Nos. 2:09-CV-00670-KJD-GWF, BK-S-08-12206-BAM (Dist. Ct., D. Nevada, 2009).

"...MERS admits that it does not actually receive or forfeit money when borrowers fail to make their payments..." *Emphasis added. Mortgage Electronic Registration Systems, Inc. v. Medina, supra.*

In *Mortgage Electronic Registration Systems v. Young, supra*, the court reinforced that **"MERS has no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans."***23 " *Emphasis added.*

In re *Sheridan, supra*, as well reinforces that MERS is not the Payee in saying, "MERS is not an economic 'beneficiary' under the Deed of Trust. **It is owed and will collect no money** from Debtors under the Note, **nor will it realize the value of the Property** through foreclosure of the Deed of Trust in the event the Note is not paid." *Emphasis added.*

"The deed of trust indicates that MERS holds legal title and is the beneficiary, as well as the nominee of the lender. It further purports by contractual agreement with the borrower to grant MERS the power to "exercise any and all rights" of the lender, including the right of foreclosure. However the

deed of trust provides that **all payments are to be made to the lender...**” *Emphasis added. Mortgage Elec. Registration System, Inc. v. Southwest Homes of Arkansas, supra, at 3.*

MERS as “Nominee”

An agency relationship cannot be presumed to exist. *Johnson v. Owens*, 629 S.W.2d 873, 875 (Tex.App.-Fort Worth 1982, writ ref’d n.r.e.). Although the question of agency is generally one of fact (*Horne v. Charter Nat’l Ins. Co.*, 614 S.W.2d 182, 184 (Tex.Civ.App.-Fort Worth 1981, writ ref’d n.r.e.)), **the question of whether a principal-agent relationship exists under established facts is a question of law for the court.** *Norton v. Martin*, 703 S.W.2d 267, 272 (Tex.App.-San Antonio 1985, writ ref’d n.r.e.). Thus, the existence of an agency relationship can be a question of law to be determined by the agreement between, and the words and conduct of, the parties. See *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 858 (Tex.App.-Fort Worth 1986, no writ). In other words, if the facts are uncontroverted or otherwise established, the existence of an agency relationship is a pure question of law. See *American Int’l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 539 (5th Cir.1987) (applying Texas law). **Proof of agency requires a showing that the alleged principal has the right to assign the agent's task and the right to control the means and details of the process to be used to accomplish the task.** *Johnson v. Owens*, 629 S.W.2d at 875. See *Ross v. Ewing Estates Apartments*, 796 S.W.2d 206 (Tex.App.-Dallas 1990, rehearing denied).

In determining a principal's vicarious liability, the proper question is not whether the principal authorized the specific wrongful act; if that were the case, principals would seldom be liable for their agents' misconduct. Rather, the proper inquiry is whether the agent was acting **within the scope** of the agency relationship **at the time of committing the act.** See *Leonard Lakin and Martin Schiff, The Law of Agency 144-45 (1984).*

A nominee is “[a] person designated to act in place of another, usu. in a very limited way” and “[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.” *Emphasis added. Black’s Law Dictionary 1076 (8th ed. 2004).* See also *E. Milling Co. v. Flanagan*, 152 Me. 380 at 382-383, 130 A.2d 925, 926 (1957) (demonstrating the limited role of a nominee in a contract case).

“Since MERS admits that it does not actually receive or forfeit money when borrowers fail to make their payments, **MERS must at least provide evidence of its alleged agency relationship** with the real party in interest...” *Emphasis added. Mortgage Electronic Registration Systems, Inc. v. Sheila Medina, supra.*

“An agent is a person who, by agreement with another called the principal, acts for the principal and is subject to his control.” *Emphasis added. Taylor v. Gill*, 934 SW 2d 919 at 922 (Ark. Sup. Ct., 1996) (quoting AMI 3d 701 (1989)).

An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal

desires him to do in the light of the principal's manifestation and the facts as he knows or should know them at the time he acts. *Restatement (Second) of Agency* § 33 (1958).

“MERS asserts authority to act, arguing that once it becomes the agent on a security instrument, it remains so for every MERS member lender who acquires ownership. This authority is alleged to arise from the contractual relationship between MERS and MERS members. Thus, MERS argues it may act to preserve the rights of the lender regardless of who the lender may be under the MERS electronic registration. We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act. ... **MERS holds no authority to act as an agent and holds no property interest in the mortgaged land.**” *Emphasis added. Mortgage Elec. Registration System, Inc. v. Southwest Homes of Arkansas, supra*, at 3.

“But whatever authority the nominee may have comes from the delegation of that authority by the principal. In its ordinary meaning, a nominee represents the principal in only a "nominal capacity" and does not receive any property or ownership rights of the person represented.” *Emphasis added. Landmark National Bank v. Kesler*, 192 P.3d 177 at 180 (Ct. of Appeals of Kansas, 2008). *See also Applebaum v. Avaya, Inc.*, 812 A.2d 880 at 889 (Del. 2002) (referring to nominees as “agents of the beneficial owners”).

“The relationship that MERS has to [an entity for which MERS purported to be acting as nominee] is more akin to that of a straw man than to a party possessing all the rights given a buyer. ... Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the [mortgage] document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.” *Emphasis added. Landmark National Bank v. Kesler*, No. 98, 489 at 166 (Sup. Ct. Kansas, 2009)

“The word "nominee" in its commonly accepted meaning, connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him.” *Emphasis added. Cisco v. Van Lew*, 60 Cal. App. 2d 575 at 583-584, 141 P.2d 433 (1943).

MERS as “Assignor”

In *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51 at 57 (Tex. App.-San Antonio, 2005) (pet. denied), the court recognized that an assignment is a transfer of a rights or interest from the party who owns such rights or interest to another party.

“First, as already noted, none of the relevant notes names a Movant as the payee. Second, none of the notes [are] indorsed, either in blank or to any specific person or entity. Third, neither the motions nor the supporting declarations establish that Movants possess the notes they seek to enforce. Fourth, each deed of

trust names Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary under the deed of trust, clarifying, however, that MERS is acting "solely as a nominee for Lender and Lender's successors and assigns." Each deed also states that MERS holds "only legal title" to the deed of trust, but it may foreclose and sell the property, among other things, "if necessary to comply with law or custom." **These deeds do not state that MERS is authorized to transfer the promissory notes.** Nevertheless, in four of the five cases, Movant submitted an assignment in which **MERS purports to assign to Movant the relevant deed of trust "together with" the corresponding secured promissory note.**" In re (*multiple cases*), 407 B.R. 392 at 394-405 (Bankr. D. Idaho, 2009).

"It is axiomatic that to be effective, an assignment of the note and a mortgage given as security therefore must be made by the owner of such note and mortgage and that an assignments (sic) made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee. **A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.**" *LaSalle Bank Nat. Ass'n v Lamy*, 12 Misc 3d 1191 [A] (NY Sup. Ct., 2006)

"These MERS members "contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system." When a mortgage is executed through a MERS member and registered in the MERS system, it is recorded in the real property records with MERS named on the instrument as nominee or mortgagee of record. While the mortgage is in effect, the **original lender** may transfer the beneficial ownership or servicing rights on the mortgage to another MERS member, with MERS [merely] tracking these electronic transfers..." *Emphasis added and notes added in brackets. Mortgage Electronic Registration Systems, Inc. v. Young, supra.*

MERS as "Original Mortgagee"

Black's Law Dictionary (8th ed. 2004) defines "mortgagee" as, "One to whom property is mortgaged; the mortgage **creditor**, or **lender**. — Also termed mortgage-holder. [*Cases: Mortgages 23. C.J.S. Mortgages §§ 73–75, 77.*]"

Bouvier's Revised Sixth Edition, 1856, Adapted to the Constitution and Laws of the united states of America, defines "mortgagee" as, "He to whom a mortgage is made. 2. He is **entitled to the payment of the money** secured to him by the mortgage; he has the **legal estate** in the land mortgaged, and may recover it in ejectment, on the other hand he cannot commit waste; 4 *Watts, R. 460*; he cannot make leases to the injury of the mortgagor; and he must account for the **profits he receives out of the thing mortgaged** when in possession. *Cruise, Dig. tit. 15, c. 2.*"