

MERSCORP, INC. AND
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Case Law Outline

March 2011

MERS Law Department

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MERS

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Editor's Note: If there are cases which the reader believes should be discussed in this outline, please e-mail the case to generalcounsel@mersinc.org. Cases that are in active litigation such as on appeal may not be included in this version but will be once the case is concluded. All references to MERS mean Mortgage Electronic Registration Systems, Inc., unless otherwise indicated.

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I. INTRODUCTION TO MERS

Corporate Structure:

MERSCORP, Inc. is a privately held stock-holder corporation. 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.

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.

Pivotal Win in Suffolk County, New York Litigation Confirming MERS Right to have Mortgages Recorded: See *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81 (N.Y. Ct. App. 2006).

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.”

Pivotal Win regarding RESPA: *In re MERSCORP, Inc., RESPA Litigation*, 2008 U.S. Dist. LEXIS 40473 (S.D. Tex. May 16, 2008); affirmed by United States Fifth Circuit Court of Appeal (Dec. 2008) resulted in a dismissal of a multidistrict class action lawsuit against MERS in which the Federal District Judge ruled that the borrowers have failed to state a claim for relief. The Plaintiffs alleged that a small fee charged by mortgage lenders, which was then paid to the Defendants, violated provisions in the Real Estate Settlement Procedures Act ("RESPA"). See 12U.S.C. § 2607. The district court, sua sponte, ordered that one section of MERS motion in opposition to class certification be treated as a Rule 12(b)(6) motion to dismiss. The Plaintiffs argued that the nominal fee paid by mortgage lenders to MERS constituted the kickback or thing of value and that MERS received the referral of business from the mortgage lenders. Therefore, the allegation is that MERS received both the kickback and the business referral, not that MERS received a referral of business in exchange for a kickback. Quite simply, the Plaintiffs failed to state a claim under Section 2607(a). Additionally, the Court found that it could be argued that the service provided by MERS actually did provide a benefit to the borrower: as loans became easier to securitize and sell, larger numbers of people were able to obtain mortgage loans. The Court held that what is important for the analysis relevant is that MERS received a small fee from member mortgage lenders. In exchange for the fee, MERS performed the service of being the permanent record mortgagee in the public land records, regardless of how many times the beneficial and servicing rights to the mortgage loans were bought and sold. Because the fee was paid in exchange for a service that was actually performed, the Plaintiffs failed to state a claim under Section 2607(b).

II. 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 by Mortgage Electronic Registration Systems, Inc., by the servicer, or by a different party to be designated by the beneficial owner.¹

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.

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.

¹ There is currently a Rule Change in circulation for a 90-day comment period which, if passed, will no longer allow members to foreclose in MERS' name. This may become effective sometime in June 2011.

- 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.
- Please note that Fannie Mae requires that the servicer bring foreclosures in the servicer's name. An assignment from MERS to the servicer is needed. See Fannie Mae Announcement SVC-2010-05.

Borrowers frequently challenge MERS' involvement in foreclosures and sometimes allege that MERS has violated the Fair Debt Collection Practices Act ("FDCPA"). MERS is not a debt collector and does not violate the ("FDCPA") when foreclosing mortgage loans. In *Banner v. CFM, Homecomings Financial, MERS, et al*, 09-7525 (E.D. Cal., May 5, 2010), the court found that MERS did not violate the FDCPA since actions associated with a foreclosure is not considered to be collecting a debt under the Act. The court in *Legaspi v. Litton Loan Servicing et al*, Santa Clara Superior Court Case No. 1 -09-CV 148284 (May, 2010) reached a similar conclusion, as did the court in *Teodoro Warque v. Taylor, Bean & Whitaker, MERS, et al.*, 09-1906 (D. Ga. 8/18/2010). Please see the Georgia Foreclosures section for further discussion on the *Warque* case.

TREATISES

The promissory note and mortgage are **NOT** split because of an agency relationship between MERS and the note-holder when MERS is named as mortgagee and nominee for the lender, its successors and assigns. See Restatement (Third) Property, comment to Section 5.4. It states,

[A] [m]ortgage may not be enforced except by a person having the right to enforce the obligation or one acting on behalf of such person. As mentioned, in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. For example, assume that the original mortgagee transfers the mortgage alone to A and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage. . .

The result is changed if A has authority from B to enforce the mortgage on B's behalf. For example, A may be a trustee **or agent of B** with responsibility to enforce the mortgage at B's direction. A's enforcement of the mortgage in these circumstances is proper . . . **The trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances.** Courts should be vigorous in seeking to find such a

relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of B's expectation of security.

Restatement (Third) Property, § 5.4, comment e (emphasis added).

The same section of the Restatement also says a ~~mortgage~~ may be enforced only by, *or on behalf of*, a person who is entitled to enforce the obligation the mortgage secures" (emphasis added). Restatement (Third) Property, § 5.4(c)

In addition, the **Restatement (Third) of Agency** validates the law of agent-principal relationships. An agency relationship exists when a principal manifests assent to have an agent act on its behalf, subject to the principal's control and consent of the agent. Restatement (Third) of Agency § 1.01 (2006). Also, an agent may act on behalf of both a disclosed principal (the original lender) and a later unidentified principal (lender's successor and assign). *Id.* at § 1.04.

The mortgage agreement, as executed by the borrower, expressly spells out the principal-agency relationship between MERS and the lender. *Id.* at § 2.02 (~~An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives . . .~~). As such, any actions taken by MERS are necessarily actions taken by the lender, its successors and assigns. For evidence of this, please see the mortgage language stating, ~~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 . . . and to take any action required of Lender.~~"

~~C~~ourts have accepted MERS as reconciling modern lending practices with traditional real property law" and ~~r~~ecognize the entity serving as nominee or agent as the record holder of the encumbrance." Joyce Palomar, 3 Patton & Palomar on Land Titles § 567.50 (3d ed. 2009).

CASE LAW

Nominee (or agency) relationships are well established in the law. In *Sprint Communications Company vs. APCC Services, Inc.*, 128 S. Ct. 2531, 2541-2542; 171 L. Ed. 3d 424; (2008) the U.S. Supreme Court treated the issue of an agent's standing. The Court found that this is proper, saying:

~~The history and precedents that we have summarized make clear that courts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts-both before and after the founding-have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection. We find this history and precedent well nigh conclusive" in respect to the issue before us: Lawsuits by assignees, including assignees for collection only, are eases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.~~" ...

But federal courts routinely entertain suits which will result in relief for the parties that are not themselves directly bringing suit. Trustees bring suit to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth...

The aggregators have a contractual obligation to litigate in the [payphone operator's] interest." [Explanation in the original, internal quotations and citations omitted]"

Alabama

Citing, in part to the *Diessner* and *Zambrano* decisions (discussed below in Arizona and Virginia respectively), the court in *Farkas v. SunTrust Mortgage, Inc, et al.*, Case No.10-cv0512 (S.D.Al, Jan. 5, 2011), found ~~those~~ opinions consistent and well-reasoned," in that, like Arizona and Virginia, Alabama is a non-judicial foreclosure state and that the foreclosing party does not need to demonstrate ownership of the promissory note before taking action on the corresponding mortgage. In response to the borrower's claim that Article 3 of the Uniform Commercial Code (UCC) requires the foreclosing party prove an interest in the note, the court states, ~~the~~ UCC is irrelevant to non-judicial foreclosure proceedings (*see* Ala. Code §§ 35-10-11 through 14)." MERS was the foreclosing mortgagee for the subject mortgage.

In *Fannie Mae v. Nelson*, Jefferson County Circuit Court, Case No. 2010-900390 (Jan. 18, 2011) the Court granted Fannie Mae summary judgment as to its ejectment action against the borrower because the Court found that Fannie Mae received valid title to the property from MERS subsequent to the foreclosure sale conducted by MERS. The Court held that under Alabama law MERS had the power and authority to conduct the foreclosure sale in its own name and the special warranty deed (after the foreclosure sale) from MERS to Fannie Mae was valid and gave Fannie Mae superior legal title to the property. The Court also held that an assignment of mortgage from MERS to the servicer was unnecessary for MERS to proceed with the foreclosure on behalf of the servicer.

In *Mortensen v. Mortgage Electronic Registration Systems, Inc. et al*, S.D. Ala. No. 09-0787 (Dec. 23, 2010) the Court granted summary judgment to MERS and all defendants finding that the borrower knowingly and willingly gave a mortgage interest in the property to MERS and that the mortgage expressly stated MERS was the mortgagee under the security instrument. The Court held that the MERS assignment to the current servicer of the mortgage loan was valid and assigned all MERS' interest in the mortgage to the servicer.

In *Crum v. LaSalle Bank, N.A.*, 2080110 (Ala, Civ.App., September 18, 2009), the appellate court affirmed 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. (Borrower's appeal petition to Alabama Supreme Court denied).

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. The plaintiff has appealed the case to the United States Court of Appeals, Ninth Circuit (Case #09-17364). The briefing has been completed and, as of the date of this material, no decision from the court has been rendered.

On 9/30/10, the Judge hearing IN RE Mortgage Electronic Registration Systems (MERS) Litigation, a Multi-district litigation case (D.Ariz., Sept. 30, 2010, MDL Docket No. 09-2119-JAT) granted MERS motion to dismiss filed in 6 cases out of the original 7 cases that initially were included in the MDL. MERS had already won the lead case, *Olga Cervantes v. MERS, et al.*, mentioned in the preceding paragraph. The Judge finds that **“The MERS System is not fraudulent, and MERS has not committed any fraud.”** Furthermore, Nevada case law finds the MERS deeds of trust are universally enforceable. As for the wrongful foreclosure claim, to win on this claim the plaintiffs must establish they were not in default. The Judge notes that not one of them can show they are not in default. Even if the plaintiffs could show they were current on their loan obligations, the court finds that the trustees were properly appointed and had the power to exercise the power of sale. He addresses the ~~splitting~~ of the note and mortgage” theory that we are seeing raised in many states. The Judge finds no evidence of this and points out that ~~the~~ deed of trust state that MERS will serve as the nominee for the original lender as well as the original lender’s successors and assigns. From the very language of the deeds of trust, to which plaintiffs agreed in entering into their home loan transactions, MERS is still acting as the nominee for the current holder of the promissory note.”

The Judge notes that the Plaintiffs appear to shift their focus in their response away from an attack on the legitimacy of the MERS System itself because as the Judge notes he had already dismissed with prejudice this claim in the *Cervantes* case. Now, in an effort to distinguish the 6 cases from *Cervantes*, the plaintiffs maintain that these claims are now about how the defendants created and used the MERS System to facilitate the securitization and sale of loans procured by fraud, and how the defendants created and used the MERS System to facilitate wrongful foreclosures on the parties who were victims of predatory lending. This shift of the claim fails as

well and is dismissed by the judge. See also the Court's January 25, 2011 decision wherein the Court dismissed an additional forty complaints. 2011 WL 251453 (Jan. 25, 2011)

The Court found that the plaintiffs have failed to make a claim for fraud because the complaint fails to allege ~~who~~ made what misrepresentations or when any of the alleged misrepresentations took place." Without an underlying wrong, there cannot be as a matter of law, a conspiracy to commit fraud related to the MERS System.

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), *aff'd* 09-16497 (9th Cir. 2010), and *Mansour v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:09cv00037 (D. Az., 2009), *aff'd* 09-16778 (9th Cir. 2010), the court affirmed that MERS was entitled to foreclose and did not need to be in possession of the original note. Also see *Sweet v. Megastar Financial Corp., et al.*, 2:10cv1322 (D. Az., 2010), granting MERS motion to dismiss on allegations of wrongful foreclosure based upon failure to produce the 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); *Puttkuri 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 not 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."

In *Ciardi v. The Lending Company, Inc. et al.*, 2010 WL 2079735 (D. Ariz.) the Court held that the mortgage and note are not split as the Plaintiff alleges because "...the very language of the deed of trust, which Plaintiffs quote in their amended complaint, states that MERS will serve as the nominee for the original lender as well as the original lender's successors and assigns. Thus, from the very language of the deed of trust, to which Plaintiff Bianca Ciardi agreed to in entering into the home loan transaction, MERS is acting as the nominee for the current holder of the promissory note." The Court found that the deed of trust which the Plaintiff freely entered into designated MERS as beneficiary and authorized MERS "to take any action to enforce the loan, including the right to foreclose and sell the property". Lastly, the Court found that the language in the deed of trust "confers an agency relationship between MERS and the original and successive lenders without the need to produce a separate agency contract each time the promissory note is sold."

AOM Group LLC et al v. MortgageIT, Inc. et al., Case No. CV 09-2639-PHX-SRB (D. Ariz.)(June 3, 2010). The Court held that the Plaintiff's "show me the note" argument lacks merit in the State of Arizona. Plaintiff's lawsuit challenging the validity of completed trustee sale claiming among other things unlawful fraudulent foreclosure by MERS and the servicer dismissed in its entirety. See also *Ferrell et al v. Stumpf et al*, No. CV 10-1231 (D. Ariz.)(Sept. 10, 2010)("Any claim relating to the production of the original note are hereby dismissed with prejudice.")

Maxa v. Countrywide Loans, Inc., et al., 3:10cv8076 (D. Az., 2010), affirmed that possession of the note is unnecessary when commencing a non-judicial foreclosure and that MERS has the authority under the deed of trust to commence foreclosure. In rejecting the plaintiff's assertion that the defendants did not have the right to enforce the note and thus the foreclosure was invalid, the court stated that "a trustee's sale is not an action to enforce the Note. Rather it is an exercise of the power of sale upon default which the trustor granted to the trustee under the Deed of Trust." The court held that Arizona law "confers power of sale on the trustee upon default or breach of the contract secured by the trust deed without reference to enforcing or producing a note or other negotiable instrument." The court also found that "Plaintiff not only conveyed the power of sale to the trustee, but also agreed to empower MERS, as the lender's nominee, to exercise the lender's rights, including the right to foreclose." Further, the court squarely rejected the plaintiff's claims of fraudulent misrepresentation based upon the notion that MERS was not a valid beneficiary. "[N]o Arizona authority has been found that requires a beneficiary under the Deed of Trust to be the owner and holder of the Note or that holds MERS cannot be named as a

nominal beneficiary under a deed of trust.” The court also noted that MERS lack of registration as a foreign corporation was not an impediment to foreclosure because “conducting a trustee’s sale is not a proceeding in court.”

In *Kane v. Bosco*, No. 10-CV-01787-PHX-JAT, 2010 WL 4879177 (D.Ariz. Nov. 23, 2010), the court rejected the argument that MERS cannot assign mortgages. (“Contrary to Plaintiffs’ allegations, the Court fails to see how the MERS® System lacks authority as a nominee of lenders to assign deeds of trust, and how, in assigning deeds of trust, commits fraud or records forged or false documents, as Plaintiffs allege.”). *Id.* at *11.

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.

In *Kimberly Peace v. Mortgage Electronic Registration Systems, Inc., et al.* (United States District Court, Eastern District of Arkansas, 4:09-cv-00966), Judge Susan Webber Wright granted the motion to dismiss finding among other things that the MERS assignment is valid to give BAC standing to appoint ReconTrust as BAC’s agent to exercise its right to initiate a non-judicial foreclosure. The borrower alleged that the assignment from MERS to BAC has no legal effect because MERS is —not on the note and is not an agent for the note-holder.”

California

Challenges to MERS ability to foreclose are defeated routinely. The form complaints that 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.

In *Nancy Coburn v. The Bank of New York Mellon, N.A.*, the United States District Court of the Eastern District of California (No. 2:10-CV-03080 JAM-KJN) granted Defendants' Motion to Dismiss and ruled that Plaintiff's deceit allegation that MERS lacked the power to assign the Deed of Trust to BONY because MERS was not the owner of the mortgage or holder of the Note fails. The court held that MERS had the authority to assign its beneficial interest to another party and MERS did not violate California Civil Code §1095 when assigning the Deed of Trust to BONY. The Court found that §1095 does not apply because the assignment of Deed of Trust was signed by an assistant secretary of MERS, and not by an attorney in fact.

In *Gomes v. Countrywide Home Loans, Inc., et al.*, the Fourth District California Court of Appeal (No. D057005, February 18, 2011) affirmed MERS' authority to initiate non-judicial foreclosure. The Court rejected the appellant's argument that he was entitled to bring a lawsuit to challenge whether MERS was authorized to initiate a foreclosure action. In rejecting this argument the Court held that ~~n~~owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action." The Court went on to find that ~~t~~he recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures. Further, the Court recognized that Gomes, by executing the deed of trust, specifically agreed that MERS had the authority to foreclose and was precluded from alleging such a claim. Also see *Jimenez v. Mortgage Electronic Registration Systems, Inc., et al.*, (DCA No. D056325, February 15, 2011).

In *Earl A. Dancy v. Aurora Loan Services, LLC*, 2010 U.S. Dist. LEXIS 116513, the borrower sought to set aside the foreclosure, contending that neither the loan servicer nor MERS were the "true" beneficiaries of the subject deed of trust and therefore had no authority to institute foreclosure proceedings. The court found that ~~t~~his contention lacks merit...the Deed of Trust expressly designates that MERS is acting solely as nominee for Lender and Lender's successors and assigns...[and] MERS is the beneficiary under this Security Instrument." The court further held that ~~w~~hether or not MERS owned the note or was entitled to any payments thereunder does not obviate the fact that the Deed of Trust designated MERS as a beneficiary, which, under section 2924(a) [of the California Civil Code], has the right to foreclose." The Plaintiff also argued that MERS could not have been the beneficiary under the Deed of Trust at the time of the foreclosure because the mortgage was sold ~~a~~t some point after 2005." The court stated that ~~t~~he fact remains that MERS continued to be [the] new mortgagee owner's nominee and beneficiary under the Deed of Trust. As such, MERS retained the power to appoint Quality as substitute trustee."

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 ~~M~~ERS 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 ~~B~~orrower 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.” Also see *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) and *Linda Nacif v. J. Ross White-Sorensen, et al.*, #GIC828794 (San Diego County Superior court, March 9, 2009) (court determined that MERS held interests in the property and rejected the plaintiff’s argument that MERS had no standing because it was not qualified as a foreign corporation).

In *Perlas et al v. Mortgage Electronic Registration Systems, Inc. et al* No. C 09-4500 (N.D. Cal.)(Aug. 5, 2010) the Court held that the fact that MERS was at one time not registered to do business in California did not make its foreclosing activities illegal and now that MERS is registered in California any supposed error has now been retroactively cured. The Court also held that MERS, as the lender’s agent, has the authority to initiate non-judicial foreclosures.

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. Also see *Altman v. IndyMac Federal Bank, et al.*, 2:10cv2361 (E.D. Cal., 2010), dismissing claim of negligence and holding that MERS does not owe a duty to the borrower.

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 was 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. *See also Benham v. Aurora Loan Services*, No. C-09-2059, 2009 U.S. Dist. LEXIS 78384, 2009 WL 2880232 (N.D.Cal.) (“as the beneficiary under the Deed of Trust it is clear that MERS... had the authority to assign its beneficial interest under the Deed of Trust to [assignee]”)

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 *Derkhshan*, 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), found that MERS was not required to register to do business in California. The court also dismissed fraud and unfair competition claims against MERS. See *Benham*, mentioned above, (“Other courts ... have summarily rejected the argument that companies like MERS lose their power of sale pursuant to the deed of trust when the original promissory note is assigned to a trust pool.”) and *Nunez v. The Bank of New York, et al.*, BC399546 (Los Angeles County Superior Court, 2010), (*holding that MERS is the beneficiary*).

In *Labra v. Cal-Western Reconveyance Corp.*, 09-2537, (C.D. Cal. 2010), the court affirmed that MERS has the authority to appoint a substitute trustee after finding that the ~~deeds~~ 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.

In *Waldo Santiago Linares, et al. v. JLM Corporation, et al.*, #YC060372 (Los Angeles County Superior Court, Nov. 2, 2009), the court accepted the defense argument that California law does not require possession of the original note as a prerequisite to conducting a foreclosure sale. Additionally, under California law, an "allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid." See *Neal v. Juarez*, 2007 U.S. Dist. LEXIS 98068, 2007 WL 2140640 (S.D.Cal. July 23, 2007) (citing *R.G. Hamilton Corp. v. Corum*, 218 Cal. 92, 97, 21 P.2d 413 (1933) and *Cal. Trust Co. v. Smead Inv. Co.*, 6 Cal.App.2d 432, 435, 44 P.2d 624 (1935); *Cesar Castaneda, et al. v. Saxon Mortgage Services, Inc, et al.*, 2010 WL 726903 (E.D.Cal., Feb. 26, 2010); *Ultreas v. Recon Trust Company, et al*, Case No. CV 09-08810 DDP (C.D. Cal., June 7, 2010)(~~U~~nder California law, production of the original note is not required to initiate a non-judicial foreclosure.”); *Oliver v. Countrywide Home Loans, Inc.*, No. CIV S-0-1381 FCD GGH, 2009 WL 3122573, at *3 (E.D.Cal. Sept.29, 2009) (citing *Alvara v. Aurora Loan Servs.*, No. C-0-1512 SC, 2009 WL 1689640, at *6 (N.D.Cal. Jun.16, 2009); *Candelo v. NDEX West, LLC*, No. CV F 08-1916, 2008 WL 5382259, at *4 (E.D.Cal. Dec.23, 2008) (~~N~~o requirement exists under statutory framework to produce the original note to initiate non-judicial foreclosure.”); *Putkkuri v. Recontrust Co.*, No. 08cv1919, 2009 WL 32567, at *2 (S.D.Cal. Jan.5, 2009) (~~P~~roduction of the original note is not required to proceed with a non-judicial foreclosure.”); See *Pantoja, infra*.

Similarly, in *Chilton v. Federal National Mortgage Association*, 1:09cv2187 (E.D. Cal., 2010), the court held that California law does not require possession of the promissory note in order to proceed with a non-judicial foreclosure. The court dismissed the plaintiff’s complaint alleging wrongful foreclosure and lack of standing. Although MERS was not named as a party to the action, the plaintiff argued that based on the Kansas case *Landmark v. Kessler*, (discussed under Service of Process heading), MERS did not have standing to foreclose because the note and deed

of trust had been separated. In rejecting the plaintiff's claims, the court held that *Landmark* was inapplicable as it ~~did~~ not consider the requirements of California's non-judicial foreclosure process." Also see *Newbeck v. Washington Mutual Bank, et al.*, 4:09cv1599 (N.D. Cal., 2010), noting that plaintiff's reliance on non-California law analyzing judicial foreclosures is misplaced and does not support a claim to set aside a non-judicial foreclosure.

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, citing *Karlsen v. American Sav. & Loan Ass'n*, 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1981). Also see *Abdallah v. United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996), (~~—~~[A defaulted borrower is] required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure."); *Coy v. Realty Mortgage Corporation dba Mylor Financial, et al.*, 2:09cv8837 (C.D. Cal., 2009) (~~—~~Any claim relying on defects in the foreclosure process is subject to the tender requirement."); *Small v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:09cv458 (E. D. Cal., 2010), dismissing wrongful foreclosure claims due to lack of tender by the plaintiffs. 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); *Pataglanan 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.”

The court followed similar logic in *Kamp v. Aurora Loan Services, MERS, et al.*, 09-844, (C.D. Cal., 11/23/2009). The borrowers alleged that MERS did not have the right to transfer the promissory note. However, the court noted that there is no requirement under California law that the original note be produced in a non-judicial foreclosure. Furthermore, the court wrote, "...the Deed of Trust signed by the Kamps and attached to their Second Amended Complaint lists MERS as a beneficiary of the loan and says, 'MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interest, including but not limited to, the right to foreclose and sell the Property.'" The court then ruled that the borrowers had failed to state a claim for wrongful foreclosure.

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 MERS can foreclose and that the plaintiff's case lacked 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. Also, see *Arutyunyan v. Mortgage Electronic Registration Systems, Inc., et al.*, LC088607 (Los Angeles County Superior Court, 2010), denying request for preliminary injunction and noting that MERS, as the beneficiary of the deed of trust has the authority to foreclose and assign the deed of trust.

MERS authority to assign its interest in a deed of trust and commence foreclosure was affirmed again in *Lane vs. Vitek Real Estate Industries Group, et al.*, 2:10cv335 (E.D. Cal., 2010). In granting MERS motion to dismiss on the plaintiff's claim of wrongful foreclosure, the court held that MERS has "standing to foreclose as nominee for the lender and beneficiary of the Deed of Trust and may assign its beneficial interest to another party." Additionally, the court specifically rejected the assertion that MERS could not foreclose because it did not have an interest in the underlying promissory note. "There is no stated requirement in California's non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose." See Also *Paguio v. Deutsche Bank Trust Company, et al.*, CIVDS 907456 (San Bernardino County Superior Court, 2010), affirming MERS ability to serve as beneficiary and assign its interest in the deed of trust. Also affirming that MERS is exempt from registering as a foreign corporation; and *Wurtzberger v. Remae Mortgage Corp.*, No. 2:09-cv-01718-GEB-DAD, 2010 WL 1779972 (E.D. Cal. Apr. 29, 2010) (Burrell, J.) (MERS, as named beneficiary, acting solely as nominee, had the authority assign its beneficial interest in the trust and to foreclose). The court in *Sanchez v. U.S. Bank, N.A.*, Civ. No. 09-4506, 2010 WL 670632 (N.D. Cal. Feb. 22, 2010) also upheld an assignment executed by MERS and found a basis for MERS' execution of same in a 9th Circuit decision. See *Ott v. Home Savings & Loan Ass'n*, 265 F.3d 643, 647 (9th Cir. 1958) ("The taking of title by a nominee of a principal or the conveyance of title by a nominee is a familiar device in stock transactions or in the transfer of other interests represented by documents.")

In *Bernard F. Clark v. Countrywide Home Loans, Inc., et al.*, #1:09-cv-01998-OWW-DLB (E.D. Cal., Aug. 9, 2010), the Plaintiff alleged 17 causes of action in their amended complaint, among them (i) fraud and (ii) violations of the California Rosenthal Fair Debt Collection Practices Act ("RFDCPA"). For the fraud cause of action, the Plaintiff claimed that "each

Defendant has represented to Plaintiff and to third parties that they were the owner of the Trust Deed and Note as either the Trustee or beneficiary regarding...Possession of the Note[.]” and it is absolutely necessary to foreclose. The court found that ~~“i~~it is well established that there is no requirement under California law that the party initiating foreclosure be in possession of the original note.” For the RFDCPA claim, the court stated that the RFDCPA was enacted to ~~“p~~rohibit debt collectors from engaging in unfair and deceptive acts or practices in the collection of consumer debts, and to require debtors to act fairly in entering into an honoring such debts.” Cal. Civ. Code Sec. 1788.1. The court found that ~~“P~~laintiff’s allegations simply list statutory language then conclude that the Defendants violated each section.” The court did not accept this claim and confirmed that ~~“t~~he law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the RFDCPA[.]” citing to *Collins v. Power Default Servs., Inc.*, No. 09-4838 SC, 2010 WL 234902, at *3 (N.D. Cal. Jan. 14, 2010).

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, including a judgment affirming an award of attorney’s fees to MERS.

Sulak is a case in which the borrowers stopped making payments on their loan and initiated a suit for damages and injunctive relief against MERS, the servicer, the trustee, and the foreclosure firm (among others) to prevent a non-judicial foreclosure. The Sulaks 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 foreclosure 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 *Champlaine*, finding that MERS may not be 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.”

In *Pok v. American Home Mortg. Servicing, Inc.*, No. CIV 2:09-2385 WBS EFB, 2010 WL 476674 (E.D.Cal. Feb. 3, 2010)(W. Shubb), the Eastern District court determined that ~~the~~ listed nominee and beneficiary under the Deed of Trust, MERS had authority to assign its beneficial interest to another party.” *Id.* at *7. Plaintiffs also alleged that MERS owed them a duty to ~~perform~~ its administrative function recording, [sic] maintaining, and transferring documents as it relates to [p]laintiffs’ loan in a manner not to cause [p]laintiffs harm.” The court noted that the plaintiffs did not cite any authority for this contention and further stated that ~~the~~ absent contrary authority, a pleading of an assumption of duty by MERS, or a special relationship, plaintiffs cannot establish MERS owed a duty of care.” determined that ~~the~~ . . . foreclosure ~~pursuant~~ to a deed of trust does not constitute debt collection under the [California Rosenthal Fair Debt Collection Practices Act]” and that ~~MERS~~ is not required to obtain a certificate of qualification from the Secretary of State because it does not ~~transact~~ intrastate business’ within the meaning of the statute.” [Citing to the *Lomboy* decision].

Numerous other 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); *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); *Gaitan v. MERS*, 09-1009 (C.D. Cal., 12/4/2009); *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); and *Legaspi v. Litton Loan Servicing et al*, Santa Clara Superior Court Case No. 1 -09-CV 148284 (May, 2010) (“foreclosing on property is not a “debt collection” activity within meaning of FDCPA and original promissory note is unnecessary for non-judicial foreclosure); *Polonski v. MILA, Inc., et al.*, 09-488591 (San Francisco County Superior Court, 2010); *Ultreass v. Recon Trust Company, et al* Case No. CV 09-08810 DDP (C.D. Cal., June 7, 2010 and August 12, 2010); *Ali v. GMAC Mortgage, et al.*, 2:10cv00669 (E.D. Cal., 6/4/10); *Kwon v. PMAC Lending Services, Inc., et al.*, 30-2009-00126309 (Orange County Superior Court, 2010); *Banner v. CFM, et al*, 09-7525 (C.D. Cal, 5/3/10), (which found that MERS is not a creditor under the FDCPA); *Millan v. Mortgage Electronic Registration Systems, Inc.*, BC429379 (Los Angeles County Superior Court, 2010); *Antonio Ocbena et al v. GMAC Mortgage LLC et al*, N.D. Cal., No. C 10 1552 (Aug. 2, 2010) (The Court found that Plaintiffs agreed to the deed of trust provision naming MERS as beneficiary.); *Pfannelstiel v. Mortgage Elec. Registration Sys., Inc.*, No. CIV5-08-2609, 2009 WL 347716 (E.D. Cal. Feb. 11, 2009) (Brodz, J.) (MERS has authority to commence foreclosure proceedings on plaintiff’s property); *Morgera v. Countrywide Home Loans, Inc.*, No. 209CV01476MCEGGH, 2010 WL 160348 (E.D. Cal. Jan. 11, 2010) (England, J.) (MERS had legal right to foreclose on debtor’s property as nominee of the lender; “[t]he fact that MERS . . . lacked a beneficial interest in the note that was secured by the mortgage does not deprive MERS of standing to enforce the note and foreclose the mortgage”); *Linkhart v. US Bank National Association*, 2010 U.S. Dist. LEXIS 48281 (C.D. Ca. May 17, 2010); *Manabat v. Sierra Pacific Mortg. Co.*, No. 10-1018, 2010 U.S. Dist. LEXIS 70377 *30 (E.D. Ca. June 25, 2010) (holding MERS, as the deed of trust beneficiary, and Chase, as loan servicer, have authority to commence non-judicial foreclosure); *Powell v. Mortgage Electronic Registration Systems, Inc., et al.*, RIC524302 (Riverside County Superior Court, 2010); *Dancy v. Aurora Loan Services, LLC, et al*, 2010 U.S. Dist. LEXIS 116513 (No. Dist. Cal., Nov. 2, 2010) (“Assuming arguendo that original lender, [], had sold the mortgage as of the date of the trustee’s sale, the fact remains that MERS continued to be new mortgage owner’s nominee and beneficiary under the Deed of Trust. As such, MERS retained the power to appoint [] as its substitute trustee.”) .

Some federal court judges have begun to not only dismiss the meritless cases against MERS, but have commented on the 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

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.).

In response to a claim that MERS' initiation of the foreclosure sale constituted a nuisance, a federal court dismissed the suit and explained that "[w]hile the institution of foreclosure proceedings touches upon Plaintiff's interest in his land, it does not interfere with his use and enjoyment of the land' as that term is understood in nuisance law." *Boles v. Merscorp, Inc.* (C.D.Cal.,2009) 2009 WL 734133, 7; citing 13 *Witkin on California Law* §§ 133-52 (10th ed.2005)

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.

Similar to the claims made by the plaintiff in *Saxon Mortgage Services, Inc. et al v. Hillery* discussed above, plaintiffs have challenged MERS ability to foreclose in California claiming that the "~~securitization~~" of the mortgage loan violates RICO, usury and antitrust laws. These claims have been found to be unwarranted and have been dismissed with prejudice. *Ultreras v. Recon Trust Company, et al* Case No. CV 09-08810 DDP (C.D. Cal., June 7, 2010).

MERS 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 the exact same corporate name. They also used our trademark in an email address and wrongfully accepted service of process for MERS. We 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 they had created, and forward any service of process received for MERS. The court recognized MERS reputation in the mortgage industry, the value provided to members, and the rights in our registered mark. The case was resolved with the defendants entering into permanent injunctions.

In *Reynoso v. Paul Financial, et al.*, Case No. CIV485072, San Mateo County Superior Court (Jan. 18, 2011), the court found that MERS has the authority to conduct non-judicial foreclosures and that authority should not be invalidated ~~on~~ the basis of adhesion contract—an equitable concept judicially created in the context of, and designed to address unfairness inherent in, consumer purchases of goods and services, and not in the context and venue of a residential real estate purchase. [citations omitted].” The court also specifically found that the ~~power~~ of sale [provision] to be exercised in a non-judicial foreclosure” can be separated and transferred separately from the promissory note and was also consistent with ~~pre~~valing California appellate cases. [citing *California Trust Co. v. Smead Inv. Co.* (1935) 6 Cal. App.2d 434-435; *R.G. Hamilton Corp. v. Corum* (1933) 218 Cal. 92, 97)]. The court also found unpersuasive the plaintiff’s challenge that MERS’ authority to act in non-judicial foreclosures cannot be transferred without a recorded assignment and notice of assignment to the borrower.

~~The~~ much slower traditional real estate and recording procedures of requiring a recorded assignment and notice to the borrower are clearly outmoded and do not fit the current commercial needs and realities of the residential mortgage marketplace. In short, it is time to take these features of residential real estate loan transfers out of the horse & buggy‘ age and into the commercial electronic village‘ that exists today.”

Connecticut

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 ~~th~~ese 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”. 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.)

This decision supports the analysis that MERS has standing to foreclose because the owner of the note authorizes and transfers the note to MERS prior to the foreclosure so that MERS is a holder of the note (and of the mortgage, too).

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.

District of Columbia

In re Stevenson, Case 06-306, (Bankr. D. DC. 2008), the court found MERS to be a necessary party to a reformation action.

Wells Fargo v. Wrenn, Case 08-185, (D. DC. 2009), the court noted 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 no longer would commence foreclosures 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. MERS filed an appeal on September 14, 2005. A joint amicus brief was filed on MERS' 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.

MERS 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 MERS' 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.

The 5th District Florida appellate court re-affirmed the Court's holding in *Azize* when it affirmed summary judgment of foreclosure in favor of the appellee Deutsche Bank National Trust Company in *Gregory Taylor, Appellant v. Deutsche Bank National Trust Company, Appellee, Fifth District Court of Appeal, Case No. 5D09-4035 (July 2010)*. The Court held the MERS mortgage assignment to Deutsche Bank in anticipation of foreclosure to be a valid transfer because ~~MERS~~ was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment." The Court went on to find that the assignment was not defective because MERS lacked a beneficial ownership interest in the note

Shortly after the 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, ~~to~~ 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.” Further, ~~“Under~~ the mortgage contracts, [MERS] has the legal right to foreclose on the debtors’ property. [MERS] is the mortgage.” *Trent v. Meisner*, No. 07-13911, 288 Fed. Appx. 571, 2008 U.S. App. LEXIS 14918 at *2 (11th Cir., 2008).

One Florida opinion which held that MERS cannot assign a mortgage has been vacated and cannot be relied upon as a defense to a foreclosure. In *Aurora v. Mendes DaCosta*, (20th Judicial Circuit, Collier County, Case No. 09-142-CA, Sup. Motion for Reconsideration Granted 7/30/10), an initial trial court order which held that an assignment from MERS was not valid was vacated because of an undisclosed conflict of interest by the judge who wrote the opinion.

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.

Townes et al v. MERS et al., Case No. 1:10-cv-1227-WSD (N.D. Georgia) (May 25, 2010) involved claims made by the Plaintiffs/Borrowers that MERS violated Georgia law by failing to record assignments in the county land records office thus depriving the county and state of revenues. The Court found that the Plaintiffs failed to assert a statute or other legal basis for this claim and the claim was dismissed (along with all other claims made in this lawsuit).

In *Teodoro Warque v. Taylor, Bean & Whitaker, MERS, et al*, 09-1906 (D. Ga. Aug. 18, 2010), the court denied an FDCPA claim against MERS because, "... the security deed expressly grants MERS the authority to foreclose on plaintiff's property." The court further wrote, "... [t]he nominee of the lender has the ability to foreclose on a debtor's property even if such nominee

does not have a beneficial interest in the note secured by the mortgage." Because Taylor Bean had named MERS as its nominee in the original mortgage, MERS was granted the power to act on behalf of the lender and foreclose. MERS had the ability to exercise the power of sale clause while Taylor Bean retained the ownership interest in the note, thus MERS and Taylor Bean's interests were aligned.

In *The Harpagon Company, LLC v. Moore, et al*, Fulton County Superior Court No. 2009-CV-167758 (Feb. 1, 2011), the Court validated a MERS security deed assignment when it ruled that Branch Banking and Trust Company (~~BB&T~~) was ~~the~~ current and legally proper holder of the Security Deed" which MERS had previously assigned to BB&T in preparation for foreclosure on defendant's property.

In the federal courts, the Eleventh Circuit Court of Appeals recognized MERS' standing to foreclose as mortgagee and nominee for the beneficial owner of the note. *See Johnson v. Mortgage Elec. Registration Sys., Inc.*, 252 Fed. Appx. 293 (11th Cir. 2007) (affirming grant of summary judgment to MERS on its foreclosure of plaintiff's property). *See also LaCosta v. McCalla Raymer, LLC et al* N.D. Georgia No. 10-CV-1171 (Jan. 18, 2011) (~~Plaintiff~~ unequivocally granted MERS the power to sell the Property if she were not able to comply with the terms of the Note.") *Nicholson v. OneWest Bank*, No. 1:10-CV-0795-JEC-AJB, 2010 WL 2732325 (N.D. Ga. Apr. 20, 2010) (. . . the nominee of the lender has the ability to foreclose on a debtor's property even if such nominee does not have a beneficial interest in the note secured by the mortgage . . . Under Georgia law, a borrower who has executed a deed to secure debt is not entitled to enjoin a foreclosure sale unless he first pays or tenders to the lender the amount admittedly due [citing *Mickel v. Pickett*, 247 S.E.2d 82, 87, 241 Ga. 528, 535 (1978)]); *Cory Brown v. Federal National Mortgage Association, et al* N.D. Ga. No. 10-CV-03289 (March 25, 2011, Final R&R adopted by Court)(Plaintiff conveyed the property to MERS through the security deed giving MERS the right exercise all of the interests granted to MERS by the Borrower ~~including~~ but limited to, the right to foreclose and sell the Property...". The Court held that the security deed is a contract which includes a power of sale. ~~Plaintiff~~ unequivocally granted MERS the power to sell the Property in the event Plaintiff failed to comply with the terms of the note.").

Hawaii

Sakugawa v. Mortgage Electronic Registration Systems, Inc. et al, D. Hawaii No. 10-00028 (Feb. 25, 2011). Summary judgment granted in favor of MERS as to plaintiff's claims for fraud and state law violations regarding loan origination. The Court found that MERS was not involved in the loan origination process and had no contact with the plaintiff regarding the transaction and therefore that there was "no basis to find that MERS committed any fraudulent, unfair or deceptive acts regarding the loan consummation. The Court found that MERS is the mortgagee under the security instrument and that the mortgage permits MERS to foreclose and sell the property.

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.

Idaho

Trotter v. Bank of New York Mellon et al, Kootenai County District Court, Case No. CV-10-95 (July 2, 2010). MERS' and other defendants motion to dismiss was granted with prejudice. MERS as a matter of law was the beneficiary of the plaintiff's/borrower's deed of trust according to I.C. § 45-1502 and had the authority to assign its rights to Bank of New York who in turn had the right to appoint a successor trustee, Reconstruct Company N.A. to conduct the non-judicial foreclosure. The *Trotter* Court found that the plaintiff produced no evidence to support his claim that securitization of the mortgage loan prevented a foreclosure action or sale. The Court also held that the note and deed of trust may be sold one or more times without prior notice to the borrower.

Edwards v. Mortgage Electronic Registration Systems, Inc. et al, Kootenai County District Court, Case No. CV-10-2745 (Nov. 16, 2010). MERS' motion for summary judgment granted as to all claims in plaintiff's complaint. The Court refused to consider the adverse Idaho bankruptcy decisions involving MERS, *In re Sheridan* and *In re Wilhelm* [discussed in the Bankruptcy section of the outline], stating that these decisions "do not create binding law in the area of mortgage foreclosure in Idaho". The Court relying on Idaho law and the language in the deed of trust held that MERS is the beneficiary under the borrower's deed of trust which the borrower agreed to when she executed the deed of trust. The Court found that as the beneficiary MERS was entitled to appoint the successor trustee who commenced the non-judicial foreclosure sale in accordance with Idaho's Deed of Trust Act.

Indiana

The Bank of New York Mellon v. Michael R. Green, Johnston Superior Court, Cause No 41D01-0901-MF-00027 (Sept. 20, 2010) held that Bank of New York Mellon's mortgage is enforceable and that MERS as the mortgagee, had the right to assign same. There is no disconnection between the note and mortgage since MERS was defined as both mortgagee and nominee for Fremont and Fremont's successors and assigns and acted in accordance with the terms of the mortgage.

Illinois

In *Mort. Elec. Reg. Sys., Inc. v. Barnes*, 1-09-2345 (Ill.1st App., Dec. 3, 2010), the Court of Appeals for the State of Illinois, First District (overseeing the Chicago area trial courts), held that Mortgage Electronic Registration Systems, Inc. ("MERS") has standing to bring an action to foreclose a mortgage under the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1501, et seq. ("IMFL"). This matter involved an Illinois foreclosure, with MERS foreclosing as the plaintiff. After the borrower failed to appear or answer the complaint, the court entered a default judgment of foreclosure, and the property was sold at judicial auction. When MERS moved to confirm the judicial sale, the borrower filed a motion to vacate the judgment of foreclosure and deny confirmation, arguing that MERS failed to properly plead or prove its standing, and challenging

whether MERS maintained any real interest in the property. The Appellate Court rejected the borrower's arguments, specifically noting that a foreclosure complaint in Illinois is deemed sufficient if it follows the model complaint set forth in the Illinois Mortgage Foreclosure Law (~~–IMFL~~”), and finding that the borrower admitted MERS's allegations relating to standing by failing to answer the complaint. The Appellate Court went further, holding that, ~~–MERS~~ satisfied the statutory definition of a mortgagee, which goes beyond just note holders to also encompass any person designated or authorized to act on behalf of such holder.” The Appellate Court stated: ~~–A~~ plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person. . . . Illinois does not require that a foreclosure be filed by the owner of a note and mortgage.”

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 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.

Horton v. Country Mortg. Services, Inc., 2010 WL 55902, *3 (N.D. Ill. January 4, 2010) In granting summary judgment to MERS, the *Horton* court found that MERS was not a creditor (or assignee) of the subject mortgage loan and held that MERS is not subject to TILA and therefore cannot be found in violation of TILA.

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 Kentucky.

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.

In *Hall v. HSBC, et al.*, 06-CI-00127 (Ky. Ct. App. 2010) the Kentucky Court of Appeals recognized that MERS was the proper party to release a mortgage, because it held the legal title to the mortgage.

Maine

In *Deutsche Bank v. Saunders*, Docket No. Cum -09-640 (August 12, 2010), the Maine Supreme Judicial Court determined that in order to be the mortgagee, with the power and authority to foreclose, you must possess an enforceable right in the debt obligation securing the mortgage. This was a foreclosure case in which MERS did not have possession of the note and the court ruled that MERS lacked standing to institute the subject foreclosure proceedings under Maine law because it did not hold any interest in the underlying note. A foreclosing party – be it MERS or anyone else- must hold the note and be the mortgagee of record. As the Saunders court noted, Maine's adoption of the Uniform Commercial Code specifically allows the holder of the promissory note the right to enforce its terms. The Court recognized and agreed that MERS held legal title and upheld MERS' right to be the mortgagee.

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 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

In *Anderson v. Burson*, 196 Md.App. 457, 9 A.3d 870 (Dec. 22, 2010), the Maryland appellate court took note of MERS' role in the mortgage loan process by citing its powers and authority under deed of trust appointment MERS as beneficiary. The Court, in affirming the lower court's decision, found that, under the "shelter/umbrella principle", the transferee note owner obtained rights of the original lender and the right to enforce despite the lack of indorsement on the transferred note.

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, U.S. District Court 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 ~~Com~~plaint 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 (~~th~~e 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 (~~th~~e 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.

In *Flores v. Deutsche Bank National Trust Company, et al.* Civ. No. 10-0217 (Dist. of Md, July 7, 2010), the court determined that the holder of a note and its agents may enforce the deed of trust and that any subsequently appointed substitute trustee has the right to foreclose. The court also held that loan securitization or the purchase of credit default swaps or other insurance ~~does~~ not absolve Plaintiff of responsibility for the Note.” *Flores v. Deutsche Bank National Trust, et al.* (DKC-10-0217), 2010 WL 2719849 (D. Md. 2010). (see also *Parillon v. Fremont Investment and Loan*, 2010 WL 1328425 (D.Md. 2010).

In *Suss v. J.P. Morgan Chase Bank, N.A.*, 2010 WL 2733097 (D.Md. July 9, 2010), the District Court of Maryland found, as a matter of law, the existence of MERS to be valid by stating, ~~—~~. . . courts that have considered the issue [of MERS and MERS Member’s use of the MERS® System] have found that the system of recordation is proper and assignments made through that system are valid.”

In *Miles, Jr., et al. v. Sydnor, et al.*, #24-O-08-3542, (Baltimore City Circuit Court (Jan. 8, 2011), a former property owner challenged MERS’ authority to appoint substitute trustees to the deed of trust for purposes of foreclosure, alleging that MERS had no beneficial interest in the loan. The record showed that the trustee for the securitized trust endorsed and delivered the note to the loan servicer for the purposes of making it the holder of the note. Regarding MERS capacity to appoint a substitute trustee(s), the court found that ~~the~~ Deed of Trust expressly authorizes MERS to act as nominee of the lender or holder of the note.” The court also made a point of noting that the MERS appointment of substitute trustee was executed by an employee of the law firm handling the foreclosure who was appointed as an officer of MERS. The court had no issue with MERS’ grant of signing authority to non-MERS employees. Also, the court found no support in the former property owner’s citation to *In re Hwang* and *In re Mitchell* (discussed below in the Bankruptcy Section of the Outline under California and Nevada respectively) as a basis for MERS lacking authority to appoint substitute trustees. As to *Hwang*, the *Sydnor* court stated that ~~it~~ is somewhat difficult . . . to identify the principle on which the [Hwang] court’s holding actually turned.” As to *Mitchell*, the *Sydnor* court determined that the bankruptcy decision found evidentiary defects but also noted that MERS could act as a nominee or agent for its members. Here, ~~the~~ evidence showed that Aurora is a member of MERS. Therefore, the defect identified in *Mitchell* does not exist here.”

In *Jones v. HSBC Bank, N.A., et. al.*, #09cv2904, (D.Md, Feb. 3, 2011), the federal District Court dismissed plaintiff’s action on *res judicata* grounds by concluding that the plaintiff previously raised the same wrongful foreclosure claims in a state circuit court action. The Circuit Court was

found to have implicitly considered plaintiff's argument regarding whether sale of the promissory note separate from an assignment of the deed of trust (with MERS as beneficiary) split the note from the deed of trust. The District Court stated that "[i]n entering a judgment for possession of the property in favor of HSBC, the Circuit Court rejected the arguments [regarding split of mortgage loan instruments] Plaintiff raises in this Court." The Circuit Court decision is *Buonassissi v. Jones*, Case No. 316757-V (Montgomery Cty. Cir. Ct., Dec. 2, 2009).

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 held that MERS had the authority to assign the mortgage interests without owning or holding the promissory note and that MERS did not 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."

The Massachusetts appellate court, in *Novastar Mortg., Inc. v Saffran*, 2010 Mass. App. Div. 117, at *2 (Mass. App. Div. 2010), implicitly recognized MERS' authority as nominee to assign its interest:

(— . ., the notice of sale that was recorded did identify Novastar and described it as _the present holder by assignment_ of the mortgage given by Saffran to MERS dated July 27, 2007. It is true that Novastar did not record an assignment from MERS, but [the statute governing foreclosure under power of sale] does not require that assignments of mortgages be recorded. . . . Saffran, once again, introduced nothing to rebut, or contradict, the recorded documents stating that Novastar was the holder of the mortgage by assignment[.]”).

Diogenes DeBrito v. Own It Mortgage Solutions, et al., Case #09-02354, Commonwealth of Massachusetts Middlesex Superior Court, (March 8, 2010). The court rejected the Plaintiff's attempt to attach assignee liability to MERS for alleged fraudulent misrepresentation and predatory lending practices by the loan originator under 15 U.S.C. § 1639(h) and state regulations. In granting MERS' motion to dismiss, the court specifically found that the Plaintiff failed to allege sufficient facts to suggest that MERS is a mortgage broker, lender, or a creditor under state law and 15 U.S.C. § 1639(h).

In *Medeiros v. MERS, et al*, Middlesex Cty. Sup. Ct., MICV 2009-03548, Aug. 13, 2010, the plaintiff alleged that MERS and the lender had engaged in misrepresentations and unfair business practices in the origination of the loan. The borrowers alleged that the defendants, including MERS and the lender, knew or should have known that borrowers would be unable to pay their loan. The court dismissed the challenges against MERS and the lender and held that since the borrowers had signed the loan applications where they had themselves inflated the amounts of their own incomes that they could not make any allegations of misrepresentations by MERS or the lender.

The Land Court's holding in *Bevilacqua v. Rodriguez*, 2010 WL 3351481 (Mass. Land Ct., Aug. 26, 2010), more directly shows the importance of complying with MERS Membership Rule 8 before initiating foreclosure. Here, the plaintiff (Bevilacqua) who purchased property, post-foreclosure sale, attempted to quiet title against the mortgagor / former property owner (Rodriguez). The Land Court held that —. . Mr. Bevilacqua has no plausible claim to title since it derives, and derives exclusively, from an invalid foreclosure sale,” The court determined invalidity of the foreclosure because ~~—MERS~~ has not assigned the mortgage to U.S. Bank” and ~~—[U.S. Bank]~~ was not the holder of the mortgage at the time the sale was noticed and conducted as required by G.L. c. 244, § 14 and thus [Bevilacqua] acquired nothing from that sale.” The court further held that title is still held by Rodriguez.

In *Randle v. GMAC Mortg., LLC*, 2010 WL 3984714, at *1 (Mass. Land Ct. Oct. 12, 2010) , the Court treated a MERS assignment as valid without question. (*See also: Amtrust Bank v. TD Banknorth, N.A.*, 2010 WL 1019638, at *1 (Mass. Land Ct. Mar. 22, 2010)).

In *David Kiah v. Aurora Loan Svc., MERS, et al*, Case #10-cv-40161 (D.Mass, Nov. 16, 2010), the U.S. District Court for the District of Massachusetts upheld the ~~—successors and assigns”~~ language stating that MERS could assign the mortgage without holding the note or possessing a beneficial interest in the note because ~~—legally~~ MERS was holding the mortgage in trust for Aurora.” It reasoned that, ~~—[b]y~~ law, the transfer of the note automatically transfers the underlying security, even without a formal assignment” and that ~~—[p]~~laintiff’s theory that the note and the mortgage somehow became disconnected from one another, and that the mortgage should disappear as a result, is not tenable[.]” Moreover, ~~—p~~laintiff’s claims [were] contradicted by the very documents that he submitted with the complaint[.]” In an amended order on the motion to dismiss (March 4, 2011), the court further held that the ~~—commonplace~~ phrase “successors and assigns” . . . [made] clear that the note and mortgage may be assigned and that MERS may continue to act as an agent for the new owners.” ~~—By~~ law, the transfer of the note automatically transfers an equitable interest in the underlying mortgage . . . [and that] [a]n equitable right to the mortgage was therefore transferred to Aurora along with the note.”

In *JP Morgan Mortgage v. Patricia Lord, et al*, Land Court (Middlesex Cty.) Case No. 10 MISC 427846 (Nov. 29, 2010) the Court denied defendants’ motion to dismiss JP Morgan’s service member’s action against them. The ground for defendants’ motion was lack of standing on the part of JP Morgan because the mortgage assignment from MERS to JP Morgan was invalid. The Court disagreed. The Court held the MERS assignment was valid and provided JP Morgan with standing to bring the action because MERS as mortgagee of record ~~—had~~ full power to act with respect to the mortgage, including the power to assign it.” The Court also found that MERS has both a contractual and fiduciary responsibility to the noteholder with respect to the mortgage.

In *GMAC Mortgage LLC v. Reynolds, et al.*, Land Court Misc. Case No. 400318 (Nov. 30, 2010), the defendants argued that the plaintiff lacked standing to file a Service member’s Civil Relief Act lawsuit. The Land Court specifically found that the assignment of mortgage from MERS to the plaintiff and the transfer of the blank-endorsed promissory note to the plaintiff each separately suitable to provide standing to file the action. ~~—MERS~~, as mortgagee of record, has the authority to assign the mortgage even without proof of authorization by its principal. [citing

JP Morgan Acquisition Corp. v. Lord (see above)].” In response to the defendants challenge to the authority of the signatory on the MERS mortgage assignment, the court determined that —. . signatory (an outside attorney) is not ‘disqualified’ from acting on behalf of MERS merely because a member of his firm is involved in foreclosure-related proceedings against the defendants. [citation to SJC Rule 3:07, Rules 1.7, 1.8, 1.9, 3.7].”

BAC Home Loans Servicing LP v. Kay, Land Court Case No. 10 Misc. 428719, Memorandum and Order on Defendant’s Motion to Dismiss (Dec. 22, 2010)(Long, J.). Defendant's motion to dismiss BAC Home Loan's complaint under MA Servicemembers Civil Relief Act for lack of standing denied. Assignment of mortgage from MERS gave BAC Home Loans standing to bring a servicemember's action against the borrower because MERS as mortgagee of record had full power to act with respect to the mortgage, including the power to assign it. The Court found that the fact that the original lender was no longer in existence when the assignment was made does not make the assignment invalid because "MERS had the authority to assign the mortgage without need to demonstrate the direction of its principal, and its assignee had the right to rely on that authority.” Any objection to MERS’ exercise of those powers must be timely, and can only come from the principal itself.”

In *Citibank, N.A., as trustee v. Collette*, Land Court Misc. Case No. 425412 (Dec. 23, 2010), the defendant challenged plaintiff’s standing to bring the Servicemembers Civil Relief lawsuit, by arguing in his motion to dismiss that MERS could not assign the mortgage to the plaintiff —without first demonstrating that it had [original lender’s] authority to do so . . .” Plaintiff also argued that the assignment was defective because it was executed by an employee of the law firm handling the foreclosure. The Land Court rejected both claims. Citing to *JP Morgan Acquisition Corp. v. Lord*, Land Court Misc. Case No. 427846 (Nov. 29, 2010) and *BAC Home Loans Servicing LP v. Kay*, Land Court Misc. Case No. 428719 (Dec. 22, 2010), —. . as the granted and record mortgagee, MERS may validly assign the mortgage without need to demonstrate authorization from its principal.” Further, —[employee of law firm], as an Assistant Secretary and Vice President of MERS, had authority to execute the assignment on behalf of MERS and was not disqualified from doing so because she was also a member of the [law firm] engaged in foreclosure-related proceedings against the defendant. [citing to SJC Rule 3:07, Rules 1.7, 1.8, 1.9 & 3.7]” The Land Court also separately rejected arguments pertaining to the promissory note, by stating, —[the] mortgage has been assigned to CitiBank, with assignment recorded at the Registry. Whatever issues may exist with the note are beside the point, and I need not and do not reach or decide them, since CitiBank’s standing is independently conferred by its status as mortgages. [citing *Bank of America, N.A. v. Hutchinson*, Land Court Misc. Case No. 427950 (Dec. 23, 2010)]”

In *Lyons v Mortgage Electronic Registration Systems, Inc.*, No. 09 MISC. 416377(JCC), 2011 WL 61186 (Mass. Land Ct. Jan. 4, 2011), the Plaintiffs asserted that MERS did not have authority to conduct the foreclosure sale and, therefore, the sale was void as a matter of law. Plaintiffs also alleged that only the lender, as the holder of the note, has the right to execute the power of sale under the mortgage, unless it has assigned the mortgage from its name. The Land Court took note of the operative language in the Mortgage where “[t]he Mortgage expressly designates MERS as the mortgagee (solely as nominee for the Lender, and its successors and assigns). . . with the power of sale . . .” Further, “[t]here is no viable basis for the Plaintiffs’

claim that the foreclosure sale of the Property should be invalidated because MERS foreclosed on the Property as nominee for [Lender]." The Land Court then cited the reasoning in the *In re Huggins* decision which "illuminates the fallacy in the Plaintiffs' arguments that MERS lacked authority to foreclose as the Lender's 'nominee' because such an arrangement unlawfully separates the note and mortgage." The Land Court determined that "[a]s a result of this grant [of Mortgage from Plaintiffs], MERS needed no assignment [to foreclose]."

In *BAC Home Loans Servicing LP v. Thomas et al*, Mass. Land Ct. Case No. 10 MISC 435156 (Jan. 5, 2011) the Defendants' motion to dismiss BAC Home Loan's complaint under MA Servicemembers Civil Relief Act for lack of standing denied. Assignment of mortgage from MERS gave BAC Home Loans standing to bring a servicemember's action against the borrowers because MERS as mortgagee of record had full power to act with respect to the mortgage, including the power to assign it and furthermore MERS has both a contractual and fiduciary responsibility to the note holder with respect to the mortgage.

Recently, in *U.S. Bank v. Ibanez*, 2011 WL 38071, the Massachusetts Supreme Court affirmed a Land Court issued an opinion denying the plaintiffs' motions for entry of default in connection with two foreclosure proceedings in the consolidated cases of *U.S. Bank National Association v. Ibanez*, Misc. Case No. 384283 (KCL), Massachusetts Land Court (2009), and *Wells Fargo Bank, N.A. v. Larace*, Misc. Case No. 386755 (KCL). The Supreme Court found that the lower court's opinion denying the plaintiff's motions was appropriate due to the fact that the plaintiffs did not have title to the mortgages at the time the notice of foreclosure was published nor at the time of sale. Although, MERS was not a party in either case and was never the mortgagee of record on either property, the Court's holding is consistent with the requirements under Rule 8 of the MERS Rules of Membership. Rule 8 requires that when commencing a foreclosure in a party name other than MERS, the MERS member must execute the assignment from MERS to the foreclosing party prior to the commencement of the foreclosure action. In each of the cases, the evidence before the court showed the assignments conveying the mortgages to the plaintiffs were not executed until months after the foreclosure sales were completed.

In *Adamson v. Mortgage Electronic Registration Systems, Inc.*, #11-0693-H (Suffolk County Superior Court, March 23, 2011) (Brassard, J.), the borrower filed suit to challenge the validity of the August 2010 MERS-as-mortgagee foreclosure sale and also to request a preliminary injunction of the Feb. 2011 closing of a sale of the property from MERS to a 3rd party. In part, the borrower argued that MERS did not provide proof that it was the owner of the note with authority to enforce same. The court denied plaintiff's preliminary injunction motion, finding that the mortgage "expressly grants MERS the authority to foreclose on the Property and to sell the Property." Further, ". . . Adamson cannot show that he will likely succeed on the claim that MERS lacked the authority to foreclose under Massachusetts law." And, ~~MERS~~ as the record mortgagee has the authority to foreclose under the Massachusetts statutory scheme even if it did not hold the Note. [citing to *Boruchoff v. Ayvasian*, 323 Mass. 1, 10 (1948)]

The court also noted plaintiff's citation to *U.S. Bank Nat'l Ass'n v. Ibanez*, for its argument that Deutsche Bank, as holder of the note, failed to show a complete chain of assignments linking it to the record holder of the mortgage. The court stated that it ~~agrees~~ that the holding in *Ibanez* stands for the proposition that an entity seeking to foreclose must hold the mortgage at the time

of the notice and sale . . . [and] further agrees that . . . there is insufficient evidence to show a complete chain of assignments from Fremont [original lender] to Deutsche Bank. However, this court finds that the facts in the present case are distinguishable . . . In *Ibanez*, the foreclosing parties were the entities claiming to be the holders of the mortgages through a chain of assignments. [internal citation omitted]. Here, MERS is the foreclosing party acting as the mortgagee and the nominee of the holder of the Mortgage. Therefore, **any defect in Deutsche Bank's chain of assignments does not affect MERS's authority to foreclose as the mortgagee and as the nominee for the current holder of the Mortgage**, whoever that party may be.” (emphasis added).

Division of Banks, Commonwealth of Massachusetts 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. 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 Organizational 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.

This requirement 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).*

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

In 2002, Jennifer M. Granholm, Attorney General, issued formal Opinion, No. 7116, August 28, 2002 (2002 Mich AG LEXIS 19) interpreting MCL 565.201 *et. seq.* The Attorney General determined that the Register of Deeds is required to accept MERS mortgages and index them as either mortgagee for the disclosed principal or an undisclosed principal. Attorney General Granholm found at page 2 of the opinion rendered that MERS is ~~an~~ organization of lending

institutions established to serve as mortgagee of record for mortgage lenders who participate in the MERS system.” At page 3, she further found,

No provision in the Recording Requirements Act suggested that a discrepancy will exist to the mortgage interest instrument simply because the mortgagee is listed as a nominee of a mortgagee who remains undisclosed.

The Attorney General further goes on to say on that page –The term “nominee” was defined in *Schuh Trading Co v. Comm’r of Internal Revenue*, 95 F.2d 404, 411 (CA 7, 1938), as follows:

–The word nominee ordinarily indicates one designated to act for another as representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, or as the grantee of another ...”

Attorney General Granholm determined that there was no reason why a MERS mortgage was not in compliance with the statute, and a mortgage could appropriately be recorded naming MERS as mortgagee.

Agency relationships in Michigan are well established in law. A party can contract with another party to appear and act on its behalf. In the case of an entity that does not die, such as a banking corporation, an insurance company, or a trust represented by an institutional trustee, there would be no lapse of authority as there might be with a non-durable power of attorney. Michigan Law and Practice, The Agency, Chapter 1, Section 2 and Chapter 3, Sections 77, 78 and 84 spell out the broad range of agency in Michigan: –An agent acts for or in place of the principal by the principal’s authority”.

End of Redemption Period – Effect on Foreclosure Challenges

Michigan law is clear that once the redemption period expires, the former mortgagor no longer has standing to prosecute a wrongful foreclosure claim. Both MERS and non-MERS related litigation establish this precedent.

In *Mission of Love v. Evangelist Hutchinson Ministries*, No. 266219, 2007 Mich App LEXIS 988, the plaintiff filed a complaint for injunctive relief for wrongful foreclosure one day before the redemption period expired. After the redemption period’s expiration, the defendants filed a motion for summary disposition. In affirming the circuit court’s grant of summary disposition, the Court of Appeals concluded the following:

We disagree with plaintiff’s argument. On the contrary, defendants are correct that, *after title vested in Evangelist pursuant to the foreclosure, it was no longer necessary to resolve the subject matter of plaintiff’s lawsuit, i.e., the validity of the warranty deed, because plaintiff no longer had standing.* In order to have standing, a party must have –a legal or equitable right, title or interest in the subject matter of the controversy.” *MOSES, Inc. v Southeast Michigan Council of Gov’ts*, 270 Mich. App. 401, 414; 716 N.W.2d 278 (2006) (internal citation omitted). *After the redemption period expired, plaintiff no longer had any right*

or interest in the property, because the property had been validly purchased at a foreclosure sale. At that point, the trial court could not grant plaintiff the relief it sought (title to the property) if it were successful in its suit. Therefore, the trial court did not err in granting defendants' motion for summary disposition and declining to decide the merits of plaintiff's fraud claim.

Mission of Love, at pages *13 -*14 (emphasis added).

The only exceptions to enlarging the redemption period before its expiration are when there is either a procedural irregularity in the sale (e.g., failure to publish notice of sale) or when there is fraud. *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 450, 454; 270 NW 743 (1936).

In *Overton v. Mortgage Electronic Registration Sys*, No. 284950, 2009 WL 1507342 (Mich Ct App, May 28, 2009), the appellate court affirmed the lower court ruling that plaintiff-appellant lacked standing to pursue any interest in the property. Here, the plaintiff claimed fraud in connection with a foreclosure sale. The redemption period expired a few weeks after the plaintiff filed suit, and the defendants brought a motion for summary disposition asserting that the plaintiff no longer had standing to assert any continued interest in the subject property. The trial court granted summary disposition in the defendants' favor, and the Court of Appeals affirmed. The Court of Appeals noted that:

Plaintiff is simply trying to wage a collateral attack on the foreclosure of the property. Even if his assertions were true and the cases he cites indeed supported his arguments, plaintiff was required to raise the arguments when foreclosure proceedings began. Plaintiff made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Although he filed his suit before the redemption period expired, that was insufficient to toll the redemption period.

see also, *Kama v Wells Fargo Bank*, No. 10-10514, 2010 WL 4386974, 2 (ED Mich, Oct. 29, 2010) (Hood, J.); *Smith v Wells Fargo Home Mortgage, Inc*, No. 09-13988, 5-8 (ED Mich, Aug. 16, 2010) (Steeh, J.); and *Moriarty v BNC Mortgage, et al*, Case No. 10-13860, 4-5 (ED Mich, Dec. 15, 2010) (Duggan, P.)

The Michigan Court of Appeals arrived at the same conclusion in an earlier opinion. Relying in part upon *Reid v. Rylander*, the appellate court found in *Jackson v. Laker Group, LLC*, 2005 Mich App LEXIS 2736 at 5,6 (2005), that "because Jackson failed to challenge the foreclosure by advertisement before the eviction proceedings were initiated and before the lapse of the redemption period, we conclude that she is precluded from challenging the validity of the underlying mortgage," *Jackson*, at pg 6.

In *Reid*, *supra*, the Michigan Supreme Court held that the

Validity of the sale may be tested in a summary proceeding based thereon, insofar as the invalidity thereof appears in the procedure, but underlying equities, if any, bearing on the instrument, legal capacity of the mortgagee or trustee, and other matters, wholly de hors the record, inclusive of any accounting to determine the amount due, cannot be made triable issues in a summary proceeding.

Reid v. Rylander, 270 Mich 263; 258 N.W. 630 (1935) (emphasis added)

In *Henley v. MERS, et al.*, Case No. 09-103457-CH (Oakland Cty., March 24, 2010), the court granted defendants' motion for summary disposition, finding that ~~Plaintiff~~ does not have an interest in the subject property because Plaintiff's property rights were extinguished once the redemption period expired."

In *US Bank National Association as Trustee v Greficz, et al.*, Case No. 09-17580-CZ (Wayne Cty. Cir., Aug. 11, 2010), the defendant alleged wrongful foreclosure by claiming that the foreclosure sale was improperly conducted by the sheriff's office. The court granted summary disposition in favor of the plaintiff, finding that the sheriff's sale was conducted properly and that —. . if [county sheriff] did not have the authority, no prejudice exists because Defendant never attempted to redeem that property [and] never raised the argument before the redemption period ran out."

In *Sagmani v. Lending Associates, LLC, et al.*, No 10-111201-CH (Oakland Cty. Cir., Feb. 3, 2011) (R. Chabot), the Circuit Court cited to the appellate decision in *Mission of Love v. Evangelist Hutchinson Ministries*, (discussed above), and stated that ~~th~~he Court of Appeals expressly held the expiration of the redemption period results in the loss of standing to the plaintiff to all claims involving the property, including fraud claims."

In addition to accepting the assignment of mortgage by MERS to the servicer, the Oakland County District Court, in *SunTrust Mortgage, Inc. v. Sikora*, No. LT10H2448 (47th Judicial Dist., Feb. 22, 2011) (J. Brady), followed *Reid v Rylander* in holding that ~~th~~unfortunately for Defendants they failed to challenge the foreclosure by advertisement prior to the time that the eviction proceedings were initiated and before the lapse of the redemption period . . . Defendants should be precluded from challenging the validity of the mortgage."

MERS Complies with Michigan's Foreclosure-by-Advertisement Statutes

MERS has continued to prevail in actions brought by borrowers seeking to set aside MERS foreclosures. The Michigan Supreme Court reviewed *de novo* a trial court's grant of summary disposition in favor of the foreclosing defendants where the record included a MERS foreclosure by advertisement. The Court did not make any finding of error with the MERS foreclosure (*Ruby & Associates, P.C. v. Shore Financial Services, et al.*, (276 Mich App 110, 112 (2007), vacated in part 480 Mich 1107 (2008)).

Many Circuit and District Court judges have granted summary disposition repeatedly 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 *Amera Mortgage Corporation v. Schatz*, LT-05-6565 (Wayne Cty. Dist. Ct. Feb. 17, 2006, J. Moiseey); *Carrington v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 06-625557-CH (Wayne Cty. Cir. Ct. Jan. 26, 2007, J. Giovan); *Murray, et al. v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-623719-CH (Wayne Cty. Cir. Ct. Feb. 6, 2007, J. Baxter); *Pope v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-611918-CH (Wayne Cty. Cir. Ct., March 2, 2007, J. Torres); *CitiMortgage, Inc. v. Glore, Michigan*, Case No. 08-01-754-OLT, 23rd Judicial District; *Cody v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 08-103341-CK (Wayne Cty. Cir. Ct., June 20, 2008, J. Murphy); *Wilson, et al. v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 08-090519-CH (Oakland Cty. Cir. Ct. August 6, 2008, F. Mester); *RFC v. Saurman*, 62-A Judicial District, Case 08-692 LT (Oct. 3, 2008)(S. Timmers), *aff’d* 08-11138-AV (Kent Cty. Cir., Jan. 29, 2009); *Bank of New York Trust Company v. Messner*, Civ. No. 08-0937-LT (12th District Court, October 20, 2008, M. Klaeren), *aff’d* 09-16497 (4th Cir. of Jackson Cty., 2009); *Aurora Loan Service, LLC v. Yono Yono*, Civ No. 2008-DA8884-AV (Oakland Cty. Cir. Ct., February 25, 2009, N. Grant); ; *Bank of New York v. Schramm*, No. 08-735-AV, Washtenaw Cty. Cir. Ct., Mar. 6, 2009, *affirming lower court decision Bank of New York v. Schram*, 14A District Court, Washtenaw County, DC1-07-25790-LT (6/4/08); *U.S. Bank National Association, as Trustee v. Ghaddar, et al.*, Case No. 08LT1282 (19th Judicial District, Michigan, January 4, 2010, J. Hultgren); *Bank of New York, as Trustee v. Bourne*, Michigan, 14A-1 Judicial District, Case No. DC1-09-393-LT (January 19, 2010); ; *Fannie Mae v. Sweeney*, #09-15734 LT, Michigan 8th Judicial District Court; *Langford v. Mortgage Electronic Registration Systems, Inc., et al.*, #09-10107-CH, Kent County Circuit Court (March 17, 2010); *U.S. Bank National Assoc. v. Leverette*, Civ. No. 10-303417-LT, 36th Judicial District Court (Wayne Cty. District Ct., April 16, 2010, N. Southern); *Mortgage Electronic Registration Systems, Inc. v. Gillenwaters*, Civ. No. DCB 09-6488 (14th Judicial District Court, March 12, 2010, C. Pope)(—MERS, acting in its capacity as [lender’s] nominee, holds legal title, which satisfies the ownership requirement in section 600.3204(1)(d) . . . MERS may properly seek to foreclose by advertisement); *Wells Fargo Bank, N.A. v. Craig*, Case No. 10-1289-LT (8th Judicial Dist. Court, April 19, 2010), appeal denied, Kalamazoo Cty. Cir., Oct. 6, 2010 (— . . the law in Michigan does encompass a nominee . . . MERS [is] a legitimate entity upon which to engage in foreclosure by advertisement . . .”); *Bakri v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 09-030482-CH (Wayne Cty. Cir. Ct., April 23, 2010, M. Sapala); *Voydanoff v. Select Portfolio, et al.*, Civ. No. 09-102194-CK (Oakland Cty. Cir. Ct., April 28, 2010, R. Chabot); *Rogers v. Mortgage Electronic Registration Systems, Inc., et al.*, No.09-1268-CH (Jackson Cty. Cir. Ct., May 5, 2010); In *Hamblin v. Mortgage Electronic Registration Systems, Inc., et al.*, No. A-09-0618-CH (Kalamazoo Cty. Circuit Court, May 18, 2010) (G. Giguere, Jr.) (court ruled that, pursuant to the terms of the mortgage, MERS can foreclose on behalf of the lender and the lender’s successors and/or assigns); *Procopio v. Guaranteed Rate, Inc., et al.*, #2010-0290-CH (Macomb Cty. Cir. Ct., June 4, 2010); *Basinger v. Bank of America, N.A., et al.*, #10-652-CH (Eaton Cty. Cir. Ct., July 23, 2010) (Court dismissed with prejudice the plaintiff’s claim that MERS lacked standing to foreclose); *Fenn-Vandiver v. Mortgage Electronic Registration Systems, Inc.*, No. 10-003769-CZ (Wayne Cty. Cir., Aug. 10, 2010); *U.S. Bank Natl. Assoc. as Trustee v. Greficz, et al.*, #09-17580-CZ (Wayne Cty. Cir. Ct., Aug. 11, 2010); *Wells Fargo Bank, N.A. as Trustee v. Cherrette*, 64A Judicial District, #10-0856-LT, (April 28, 2010) *Aff’d.*, #10-K-27747-AV, Ionia

Cty. Cir. Ct., Sept. 17, 2010, appeal denied, Mich. Court of Appeal, Nov. 5, 2010; *U.S. Bank Natl. Assoc. as Trustee v. Greficz, et al.*, 21st Dist. Ct., #08-1219 LT (Nov. 8, 2010).

In two other 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 “[t]o 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 *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.

In *Anuzis v. OneWest Bank, et al.*, #09-102148-CZ, Oakland County Circuit Court (March 5, 2010), the court granted summary disposition to MERS, noting that, “[b]y specifically and unequivocally agreeing that MERS would be his ‘mortgagee’ and by accepting that MERS was ‘acting as nominee for Lender and Lender’s successors and assigns’ and thereafter accepting the agreed-upon . . . Loan, Plaintiff cannot now contend that the [m]ortgage, itself, is invalid because of the lack of a debtor-creditor relationship between himself and MERS . . .” The Court also cited Restatement of the Law, Third Property (Mortgages), Section 5.4(c), in stating, “[t]he authority to enforce a mortgage may be validly delegated by the lender (note holder) to an agent (who is not a lender and has no creditor-debtor relationship with the borrower)”.

In *Kada v. Mortgage Electronic Registration Systems, Inc., et al.*, #10-3716-CK (Macomb Cty. Cir. Court, Nov. 22, 2010) (E. Servitto), the plaintiff alleged that MERS could not be both a mortgagee and nominee for another and that use of MERS as mortgagee was improper. In ordering summary judgment be granted to the defendants, the court accepted MERS arguments that it may hold mortgage interests as mortgagee and exercise its mortgagee rights under the mortgage.

The court in *Bayda Hanna, et al. v. SunTrust, et al.*, #2010-1639-CK (Macomb Cty. Cir. Court, Nov. 29, 2010), the plaintiffs challenged two MERS assignments of mortgage on the theory that MERS lacked an interest in the mortgage note. In granting MERS and the other defendants an Order of Summary Disposition, the court took no issue with the MERS assignments.

In *Cannon, et al. v. Mortgage Electronic Registration Systems, Inc.*, #10-4117-cz (Wayne Cty. Cir., Dec. 7, 2010), the court took no issue with an assignment of mortgage executed by MERS and subsequent foreclosure by advertisement by that assignee.

In *Decker v. Mortgage Electronic Registration Systems, Inc.*, #10-3954-CH (Macomb Cty. Cir., Jan. 12, 2011), the court relied on the Michigan Supreme Court decision in *Ruby* [discussed above] and found that the Michigan Supreme Court “tacitly acknowledg[ed] the right of MERS to foreclose a mortgage on behalf of a lender”. Further, “[t]he Mortgage plainly identifies MERS as the mortgagee and endows MERS with the authority to both sell the property and foreclose the Mortgage. Consequently, MERS does have an interest—however limited—in the Mortgage . . .” The court also specifically noted that “Plaintiffs’ reliance on *Landmark Nat’l Bank v. Kesler* [*see below discussion in the Service of Process section of the Outline under Kansas] is misplaced.” The *Landmark* Court was not concerned with whether MERS could bring a foreclosure action, according to the *Decker* decision. *Decker* also points out that the *Landmark* Court did find that MERS was an agent of the lender. Further, in *Decker*, the court determined that “MERS has authority in this matter to assign its rights, is vested with the power of sale of the property and can exercise all of the interests of the lender.”

Michigan federal courts have also upheld MERS foreclosures by advertisement. See *English v. Flagstar Bank*, 2009 U.S. Dist. LEXIS 97427 (E.D. Mich. Oct. 21, 2009); *Mentag v GMAC Mortgage LLC*, 430 BR 439 (ED Mich 2010) (recognizing that where debtor expressly gave MERS the right to foreclose in the mortgage, he could not object to MERS’ standing, as long as MERS was acting as nominee for the proper party.); *Safford, et al. v. Precision Funding, et al.*, #09-14925-BC, U.S. Dist. Court, E.D. Michigan (February 9, 2010); *Brown v. Countrywide Home Loans*, 2010 WL 1136515, 1 (ED Mich 2010); *Robbins v. MERS*, 2009 WL 3757443, 7 (WD Mich 2009); and *Bourne v. The Bank of New York as Trustee, et al.*, 10-cv-11592, U.S. Dist. Court, E.D. Michigan (June 28, 2010).

In *Hilmon v. Mortgage Electronic Registration Systems, Inc.*, No. 06-13055, 2007 U.S. Dist. LEXIS 29578, 2007 WL 1218718 (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*, Case No. 08-15255 (E.D.Mich. Sept. 24, 2009), 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.

In granting the defendant’s motion for summary judgment, the court in *Ted Corgan, et al. v. Deutsche Bank Natl. Trust Company as trustee*, No 1:09-cv-939 (WD Mich., July 20, 2010) (Hon. T. Greeley), cited *Hilmon* and *English* to reject the plaintiffs’ claim that the foreclosure by MERS was improper under Mich. Comp. Laws § 600.3204. The court concluded that MERS maintained the power to initiate foreclosure proceedings on the defaulted mortgage as expressly set forth in the original mortgage. The court also cited *United States v. Garno*, 974 F. Supp. 628, 633 (E.D. Mich. 1997) in noting that, “[u]nder Michigan law, a foreclosure should not be set aside without good reason . . .” The court also noted that:

Plaintiffs argue that this case is distinguishable from *Hilmon* because there was a change in ~~ownership~~” and the *Hilmon* case dealt with assignment of a servicing agreement rather than the original mortgage. However, in this case, MERS authority was not changed by any action which occurred after the time of the original mortgage. Plaintiffs clearly and expressly gave MERS the power to foreclose on the defaulted mortgage. That power was never taken away from MERS by any transfer of the mortgage or modification of some of the terms of the mortgage.

In *Yuille v. American Home Mortgage Servicing, Inc., et al.*, 2:09-cv-11203-BAF-DAS (E.D. Mich. (Oct. 25, 2010), The court held that there is no separation of the note and mortgage when using the MERS mortgage instrument; that plaintiff is barred from seeking equitable intervention from the court (quieting title to plaintiff) where the plaintiff has 'unclean hands' (i.e., defaulted on repayment of mortgage loan); and, in addressing two recorded MERS assignments, the court found that “[W]here a corporation has authorized or ratified the signature of its name in such manner as to bind the corporation itself, whether such authority or ratification were express and formal or arose from acquiescence and inaction, the signature cannot be disputed by any third party for the purpose of invalidating the [document] which the corporation itself cannot or does not attack” and that “ Plaintiff, being a stranger to the transaction, is without standing to challenge its validity.” [citation to *Long v. City of Monroe*, 265 Mich. 425, 441 (1933)].

The court in *Ridha v. Mortgage Electronic Registration Systems, Inc. et al.*, #10-13824 (E.D. Mich., November 23, 2010) found that the state’s Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA) ~~does~~ not apply to MERS because it is not a mortgage broker, mortgage lender, or mortgage servicer.” Further, the Truth-in-Lending Act (TILA) does not apply to MERS ~~because~~ [MERS] did not originate the loan and therefore do not meet the definition of creditor‘ under the TILA.”

In *Yaldo v. Deutsche Bank National Trust Company*, No. 10-cv-11185 (E.D. Mich., Nov. 30, 2010) (S. Murphy, III), the borrower-plaintiff argued that ~~Under~~ Michigan’s Foreclosure Statute the Defendants cannot enforce a security agreement not supported by the debt instrument in their possession.” In response, the court found ~~no~~ provision [in the foreclosure by advertisement statute] . . . requiring the mortgagee to present the original promissory note to the mortgagor for the foreclosure to be valid.” (citing *Stanton v. Federal National Mortgage Assoc.*, 2010 U.S. Dist. LEXIS 15905 at *9-*10 (W.D. Mich. Feb. 23, 2010). Further, in response to an allegation that MERS did not own the indebtedness represented by the mortgage, the court stated, ~~Even~~ if MERS did not own any indebtedness on the mortgage, Yaldo cites no authority supporting his proposition that assignment to Deutsche is void . . .”

In *Golliday v. Chase Home Finance LLC*, No. 10-CV-532 (W.D.Mich., Jan. 5, 2011), the plaintiffs alleged, in part, that fraud arose from the fact that a law firm’s attorney signed a MERS assignment of mortgage to Chase while acting as a Vice President of MERS and also that the lawyer signed the assignment without authority. In response, evidence was produced to demonstrate the lawyer’s authority to sign on behalf of MERS and the court found the assignment valid absent further evidence of fraud.

In *Young v. Federally Chartered Savings Bank*, No. 10-cv-13488 (E.D.Mich., Jan. 25, 2011) (T. Ludington), the plaintiff contended that MERS does not have standing to foreclose because it was an artificial entity designed to circumvent certain laws and legal requirements. Citing to *Hilmon*, the court held that the plaintiff had expressly given to MERS the right to foreclose as nominee for the lender and could not contend after the fact that MERS did not have the right to foreclose. Plaintiff also claimed MERS breached an implied covenant of good faith and fair dealing in the loan contract. Citing the state appellate court decision in *Fodale v. Wast Mgmt. of Mich., Inc.*, 718 N.W.2d 827, 841 (Mich. Ct. App. 2006), the court concluded that ~~Michigan~~ does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing.”

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~~ We affirm today the principles set forth 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*.

William L. Blanchard et al v. Mortgage Electronic Registration Systems, Inc. et al, Rice County District Court, File No. 66 CV 10-99 (May 14, 2010) All counts of plaintiff's complaint for injunctive relief to stop foreclosure sale dismissed on motion of MERS and all other defendants. The Court cited to *Jackson* "[t]he authority of MERS to foreclose is codified by statute, Minn. Stat. § 507.413, and the validity of its recording procedures has been upheld, *Jackson* at 501. The Court held defendant U.S. Bank as assignee of MERS was proper party to initiate foreclosure sale and had full authority to do so.

In *Simmons v. MERS, et al*, 09-162 (D. Minn. 2/2/10), the court granted summary judgment for MERS where the borrowers had alleged that MERS had committed TILA violations. The court also upheld MERS participation in a foreclosure by advertisement.

The Minnesota Court of Appeals relied on the *Jackson* decision, above, in holding that ~~Because~~ MERS held a legal title to the security interest at the time of [foreclosure] judgment was entered, MERS has standing in this action [to foreclose as plaintiff]." *Hawkins Tree and Landscaping, Inc. v. Paul Thomas Homes, et al.*, Court File No. A10-182 (Minn. App., Sept. 7, 2010)

The U.S. District Court in Minnesota found that “[i]t is clear that [the] Plaintiff has no plausible claim for relief” in challenging a foreclosure of his property by MERS and dismissed the case with prejudice. *Otieno v. Mortgage Elec. Reg. Sys., Inc.*, #10-3942 (Dist. of Minn., Dec. 10, 2010)

Nevada

Much like California, Nevada has also experienced a surge in copycat complaints aimed at delaying foreclosures. 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. Similarly in *Pajarillo v. Countrywide Home Loans, et al.*, 2:09cv00078 (D. Nev., 2010), the court affirmed MERS authority to initiate foreclosure and held that the “Plaintiff’s wrongful foreclosure claim is based on the faulty assertion that the non-party Mortgage Electronic Registration Systems, Inc., does not have standing to begin foreclosure proceedings against plaintiff’s property or to appoint, ...the successive trustee. The documents executed by plaintiff indicate otherwise.” 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 ~~the~~ courts 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) (~~an~~ 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); *Birkland v. City First Mortgage Services, LLC, et al.*, A604343 (Clark County Nevada District Court, 2010); *Simon v. Bank of Am., N.A.*, No. 10-cv-00300, 2010 U.S. Dist. LEXIS 63480 *30 (D. Nev. June 23, 2010) (finding "MERS is designated as the nominee of the lender and therefore has the right to foreclose").

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. See also *Saterbak v. MTC Financial, Inc.*, D. Nev. No. 10 cv 00501 (Feb. 4, 2011) (Defendants' motion to dismiss granted without

leave to amend. The Court held that the trustee had been properly substituted as trustee by MERS and therefore had authority to foreclose. "A nominee on a deed of trust has the authority, as an agent, to act on behalf of the holder of the promissory note and execute a substitution of trustee.")

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. See *Michelle Weingartner, et al. v. Chase Home Finance, LLC, et al.* 09-cv-02255 (D. Nev. 2010) in which Judge Jones agrees that MERS has the authority to execute the substitution of the trustee and the trustee can then validly foreclose on the deed of trust. MERS, as the nominee for the beneficial owner of the mortgage loan, has all the necessary powers under the deed of trust to take this administrative action. Other than Judge Jones disagreeing that the language of the contract makes MERS the beneficiary as agreed to be the parties to the contract, this decision upholds the validity of the MERS deed of trust, and when the borrower defaults on it, MERS will substitute the trustee, if necessary, and the foreclosure is valid under Nevada law.

In *Hubert v. Metlife Home Loans, et al.*, (Clark County District Court, No. A-10-620408, 2010) granting the defendants' motion to dismiss with prejudice and finding that production of the original promissory note is not necessary under Nevada's non-judicial process, that a note payable to bearer and the related security instrument can be enforced by the note holder despite the fact that MERS appears on the security instrument, and that the presence of MERS on the security instrument does not in and of itself cause the note and mortgage to be split or separated and does not invalidate the mortgage. See also *Cosgrave v. American Home Mortgage Corp., MERS, et al.*, (Clark County District Court, Case No. A-10-623894-C, 2010)

New Hampshire

In *Nichols v US Bank N.A., et al.*, No. 10-CV-476 (N.H. Sup. Ct., Hillsborough, Oct. 5, 2010), the court denied plaintiff's petition for a preliminary injunction, finding that he was unlikely to prevail on the merits of his case. The plaintiff challenged a MERS assignment by arguing MERS had no authority to transfer the mortgage to US Bank. Rejecting this argument, the court found, from language in the MERS mortgage, that ~~it~~ appears uncontested that MERS assigned the mortgage to US Bank and that the terms of the mortgage document contemplate its transfer."

In *Powers v. Aurora Loan Services*, No. 213-2010-CV-00181 (N.H. Sup. Ct., Cheshire, Feb. 14, 2011)(J. Arnold), the Plaintiffs asserted that MERS ~~as~~ nominee" lacked authority to assign the mortgage. The court determined that ~~co~~ntrary to Plaintiffs' assertions . . . , the use of MERS as nominee is in and of itself neither fraudulent nor wrong. MERS' status as nominee allows it to perform its core function of facilitating the tracking of mortgages." Further, the court also cited specific language in the ~~TRANSFER OF RIGHTS~~" section of the mortgage where the plaintiffs specifically conveyed the mortgage to MERS and the successors and assigns of MERS (emphasis in the opinion). The court also noted that the Landmark decision from the Kansas Supreme Court (discussed in Section Service of Process Section of this Outline below) ~~received~~ questionable treatment in subsequent decisions." [citing to *McGinnis v GMAC Mortgage Corp.*,

No. 2:10-cv-00301-TC, 2010 WL 3418204, at *3 (D.Utah Aug. 27, 2010) and *Blau v Am. 's Serv. Co.*, No. cv-08-773, 2009 U.S. Dist LEXIS 90632, * 21-22 (D.Ariz. Sept. 29, 2009)].

New Jersey

In *Skypala v. Mortgage Electronic Registration Systems, Inc.*, 655 F. Supp. 2d 451, 461 (D. N.J. 2009), the court held that the servicer and MERS owed no independent duty to the borrower and, accordingly, dismissed the negligence claim against the servicer and MERS.

In *Bank of New York v. Raftogianis, et al*, F-7356-09, Superior Court of New Jersey, Chancery Division, Atlantic County, the court restated the principle that a plaintiff in a judicial foreclosure must have the right to enforce both the mortgage and the note. In *Raftogianis*, US Bank brought a foreclosure in its own name. An assignment from MERS had been recorded. A copy of the note endorsed either or blank or to US Bank was not provided to the court at the time that the foreclosure was filed. The court held that an assignment from MERS cannot confer standing to foreclose – MERS agrees that an assignment is not sufficient to have standing to foreclose in New Jersey because when MERS is holding a mortgage lien we hold the mortgage as an agent of the lender but this in and of itself does not give MERS the ability to transfer the note. The court also ruled that when MERS is the mortgagee that the note and mortgage are not split because there is no intent to do so.

New Mexico

In 2008 the New Mexico Court of Appeals found a MERS post foreclosure sale assignment to a third-party assigning MERS' right of redemption as a junior mortgagee was valid giving the assignee the right of redemption after the foreclosure sale. *Mortgage Electronic Registration Systems, Inc. v. Montoya*, 186 P. 3d 257 (May 7, 2008).

New York

US Bank National Assoc. v. Flynn, 897 N.Y.S. 2d 855 or LexisNexis at 2010 N.Y. Misc. Lexis 511 (March 12, 2010). New York Supreme Court Justice Whelan upholds the authority that MERS can assign the mortgage. The court finds that where an entity such as MERS is identified in the mortgage as the nominee for the lender and as the mortgagee of record and the mortgage confers upon MERS all of the powers of such lender, its successors and assigns, a written assignment of the note and mortgage by MERS, in its capacity of the nominee, confers good title to the assignee and is not defective for lack of ownership interest in the note at the time of the assignment. There is no disconnect between the note and mortgage when MERS acts, at the time of the assignment, as the nominee for the owner or holder of the note. In *The Bank of New York v. Sachar*, Supreme Court of New York, Bronx County Index No. 380904/2009 (Mar. 3, 2011) the Court held that MERS was the nominee of the lender and mortgagee of record and that the MERS assignment of mortgage to the Bank gave the Bank standing to foreclose. The Court allowed the Bank's motion for summary judgment as to its foreclosure complaint against the defendant and dismissed defendant's affirmative defenses and counterclaims alleging the Bank did not possess standing to foreclose on defendant's mortgage because the assignment of mortgage was from MERS and not the original lender. In citing to *US Bank N.A. v. Flynn*

discussed above, the Court held that the Plaintiff has shown that the mortgage contract conferred broad powers upon MERS as nominee to act on the original lender's behalf." The Court here also cited to *Bank of New York v. Alderazi* in its opinion in which the Court found that MERS as nominee lacked capacity to assign the mortgage. The Court here disagreed with this decision and ignored the ruling.

In *Bank of New York v. Alderazi*, Supreme Court of New York, Kings County Index No. 2008-21739 (May 20, 2010) which is mentioned directly above the Court denied the Bank's foreclosure application without prejudice when it found the Bank did not provide adequate evidence of standing to foreclose because the Court questioned the validity of the MERS mortgage assignment to the Bank. The Court ignored the language in the mortgage document itself and found there was insufficient evidence in the record proving MERS had the authority to execute the mortgage assignment as nominee of the originating lender. This position is contrary to the findings from other New York courts as well as federal and state courts from around the country. MERS filed a motion to reconsider and a notice of appeal in this case and is presently awaiting a ruling from the Court on its motion to reconsider.

The court reached a similar conclusion in *HSBC v. MacPherson, et al*, N.Y. Supreme Court, Suffolk County, 08-29742, Decided 5/24/10, and found that MERS has the authority to assign the mortgage. The court wrote, "Contrary to MacPherson's assertion that MERS did not have the authority to assign the note and mortgage to HSBC, the mortgage signed by him expressly grants it all those rights that applicable laws gives [*sic*] to lenders who hold mortgages in real property.' Thus, in addition to the right to commence foreclosure proceedings, under the broad powers granted to it on the face of the instrument, as nominee MERS possessed the right to assign the mortgage and the underlying note."

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 was not foreclosing on this mortgage loan as the plaintiff, but executed an assignment of the mortgage to LaSalle Bank to commence the foreclosure. There were procedural defects in the case that the Judge pointed out that the assignment from MERS to LaSalle was dated after the commencement date of the foreclosure as well as the note allonge was undated. Justice Burke pointed 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. The defects were corrected 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 cited in the preceding paragraph 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. Following *Coakley*, the Second Department appellate division in *Mortgage Electronic Registration Systems, Inc. v. Menachem*

Korolizky, 2008 NY Slip Op 06811; 54 AD3d 737 (Sept. 9, 2008), affirmed a lower court decision and found that MERS had standing to commence foreclosure.

In *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 the Courts 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. Appeal of these two decisions was not taken because there were underlying procedural issues that would have sidetracked the appeal away from the issue of whether one needs to own the note to have standing. 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.)

In *Mathurin v. Lost & Found Recovery, LLC, et al.*, 2009 NY Slip Op 06240 (Appellate Division, Second Department, 2009), the court vacated a portion of the trial court order denying defendants, MERS and Greenpoint Mortgage Funding's, motion to dismiss on claims of negligence and gross negligence related to a purported foreclosure rescue scheme. The court held that neither MERS nor Greenpoint "owe [the plaintiff] a duty, in effect, to prevent the [co-]defendants, ..., from inducing her into entering into a fraudulent mortgage transaction pursuant to which they allegedly effected the transfer of real property owned by the plaintiff to [a co-defendant] under the guise of helping the plaintiff to refinance her mortgage."

In *U.S. Bank, N.A. v. Mancini, et als.*, 2010 NY Slip Op. 20093 at *4, 2010 N.Y. Misc. LEXIS 511 at **9, the court held that "... a MERS assignment does not violate this State's long standing rule that a transfer of a mortgage without a concomitant transfer of the debt is void." As such, the court determined that the MERS mortgage does not sever the lien from the note.

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.

North Dakota

In *Thomas H. Bray v. Bank of America, MERS, et al*, 2010 WL 30307 (D.N.D. Jan. 5, 2011) the Court found “as a matter of law that MERS [was] able to enforce the note and ha[d] standing to foreclose” because MERS was the named mortgagee on the mortgage and was in possession of the note endorsed in blank. The Court also found that “the foreclosure activities of MERS [were] not ... [as a matter of law] ... debt collection” and thus MERS was not subject to the Fair Debt Collection Practices Act.

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 holder¹ 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 Procedures² 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 foreclose 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.

While Judge Boyko dismissed several cases due to the lack of evidence establishing the plaintiff’s standing to foreclose, he reached a different result when the proper evidence was presented in *Long v. Mortgage Electronic Registration Systems, Inc., et al.*, 1:10cv2854 (N.D. OH, 2010). In *Long*, the borrower’s challenge to GMAC’s standing to foreclose was rejected because GMAC was able to show that it held both the note and the mortgage at the time the foreclosure action was filed. Further, the court squarely rejected the borrower’s allegation that MERS did not have the authority to assign the mortgage. Judge Boyko held that “[i]n Ohio, it is well settled that MERS, acting as mortgagee and nominee for the lender, may transfer the lender’s interest in the mortgage.”

In *Wells Fargo Bank v. Otis Jordan*, Case No. CV-631753, Court of Appeals of Ohio, Eighth Appellate District, County of Cuyahoga, March 12, 2009, is an example of members needing to be sure to follow MERS Rule 8 to get an assignment from MERS prior to commencing a foreclosure in their own name as well as being the note-holder. The court ruled that Wells Fargo did not have standing to foreclose because when it filed the foreclosure it did not hold both the mortgage lien and the promissory note.

In *S&A Capital Partners, Inc. v. Bowling, et al.*, No. 2009-CV-0153-H (Richland County Common Pleas Ct. Jun. 8, 2010), the court rejected plaintiffs' argument that "MERS negligently claimed and assigned interest in a mortgage in which it could have no interest". The court held that plaintiffs failed to allege facts sufficient to warrant a conclusion that MERS owed the plaintiffs a duty when it executed the assignment. The court also noted, "[a]ssuming the allegation of ineffective assignment to be true, a reasonably prudent person could not have foreseen that an ineffective assignment was likely to cause [plaintiffs] to suffer [mental anguish and economic loss] . . . [a]ny foreseeable liability from an ineffective assignment would run to the prior loan holder or a subsequent assignee."

In *Mortgage Electronic Registration Systems, Inc. v. Mosley*, 2010 WL 2541245 (Ohio App. 8 Dist. (June 24, 2010), the court determined that, "This provision [in the mortgage describing MERS as the mortgagee] makes it obvious that MERS did, in fact, have standing to foreclose on the Property . . . In this case, appellants executed a mortgage naming MERS, as nominee for Bank One, as the mortgagee. The Mortgage, which was signed by both appellants, also gave MERS a right to foreclose on the Property." In response to the appellants' claims of fraud and predatory lending, the appellate court cited the following observation in the record: "The foreclosure crisis in this country stems from numerous factors, only one of which is persons similar to [mortgage broker]. However, in this case [appellants] were more than victims, they were also participants. On the advice of [mortgage broker], they manipulated their debt and provided false documentation to obtain their loan."

In *Deutsche Bank National Trust Co. v. Traxler*, 2010-Ohio-3490, the Ninth Judicial District Court of Appeal affirmed summary judgment in a foreclosure action in favor of Deutsche Bank. The defendants appealed the trial court's ruling in favor of the plaintiff on various grounds included that MERS lacked the authority to execute an assignment of the mortgage lien to the plaintiff because it was only a nominee. The Court held that because the mortgage follows the note, even without the assignment from MERS the transfer of the note operated as an equitable assignment of the mortgage to Deutsche Bank. The Court also stated that "beyond equitable assignment, several other courts have recognized MERS' authority to assign a mortgage when designated both as a nominee and mortgagee." (citing, *BAC Home Loans Servicing, L.P., v. Hall*, 2010-Ohio-3472, (Ohio App., 7/26/10), *Countrywide v. Shifflet*, 2010-Ohio-1266, (Ohio App., 3/29/10) and *Deutsche Bank National Trust Company v. Ingle*, 2009-Ohio-3886, (Ohio App., 8/6/09))

In the *Shifflet* case, the Third Judicial District Court of Appeal affirmed summary judgment in favor of Countrywide and found that MERS properly assigned its interest in the mortgage to Countrywide, who was the appropriate party to commence the foreclosure action. The Court also addressed the trial court's dissent with respect to MERS being identified as a nominee of the originating lender and its authority to execute an assignment to CHLS. "[T]he mortgage specifically states that the Borrower understands and agrees that MERS holds legal title and has the right to foreclose and sell the property. Thus, MERS, and now by assignment CHLS, has a real interest in the subject matter of the litigation..."

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 opinion) (2009), the Court held that MERS is the real party in interest and that the MERS deed of trust is valid and the MERS registration system does not circumvent Oregon's recording system.

In *Stewart v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1055131 (D.Or.)(Feb. 9, 2010)(Magistrate's Findings and Recommendation for dismissal with prejudice adopted and final judgment entered on March 19, 2010) MERS motion to dismiss second amended complaint was granted with prejudice. The Court found that co-defendant U.S. Bank National Association was the real party in interest with standing to foreclose because the MERS assignment to U.S. Bank National Association complied with Oregon law. "The Oregon Deed of Trust Act...does not require presentment of the Note or any other proof of "real party in interest" or "standing" other than the Deed of Trust."The Court also held that the co-defendant and successor trustee had standing to foreclose because it was appointed (in accordance with Oregon law) by the new beneficiary-U.S. Bank National Association.

In *Bertrand v. SunTrust Mortgage*, D. Or. No. 09-857 (Mar. 23, 2011), the Court granted the defendants' motion for summary judgment and dismissed the plaintiff's lawsuit seeking to invalidate a non-judicial foreclosure due to MERS' involvement as deed of trust beneficiary and assignor of the deed of trust to SunTrust Mortgage. The Court ruled that MERS was the proper beneficiary under the deed of trust and possessed the authority to assign its interest in the deed of trust to SunTrust Mortgage. The Court also found that the evidence demonstrated that all deed of trust assignments were recorded "in due course."

Pennsylvania

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). Also see *Andrew v. Ivanhoe Fin., Inc.*, 2008 U.S. Dist. LEXIS 42860, at *3 (E.D. Pa. May 30, 2008) (noting MERS' foreclosure of property in state court proceedings and granting MERS' motion to dismiss with prejudice).

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 solely based upon MERS role as 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.

In *Mortgage Electronic Registration Systems, Inc. v. Ralich*, 2009 WL 2596091 (Pa.Super.), the appellate court affirmed the trial court's finding MERS has authority to foreclose and noting that the plaintiff borrowers explicitly acknowledged this right when they executed the mortgage.

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 and may foreclose because it is the named mortgagee and nominee of the lender and the lender's successors and assigns.

In granting MERS' motion to dismiss, Washington County Superior Court, in *Karin Ann Ames v. Litton Loan Servicing, et al.*, #WC09-0317 (Washington County Sup. Ct. R.I., Oct. 19, 2009), ruled that "Mortgage Electronic Registration Systems, Inc. has the right to invoke the statutory power of sale contained in the Mortgage executed by Plaintiff as MERS is the named mortgagee, as nominee for the beneficial owner of the promissory note."

A Duty Justice of the RI Supreme Court denied Plaintiff's motion to stay the trial court's order denying preliminary injunction in *Lisa Ronci v. MERS, et al.*, #09-5297 (Providence Sup. Ct. R.I., Jan. 7, 2010). The *Ronci* trial court denied Plaintiff's Motion for Preliminary Injunction and found that Plaintiff agreed to the statutory power of sale contained in the mortgage document when she executed it and preventing the foreclosure would be contrary to the contractual rights she granted the mortgagees. The Plaintiff then filed a Motion to Stay the foreclosure sale in the Rhode Island Supreme Court. In response, the assignee of the MERS mortgage filed an Objection to the Motion to Stay and a Motion to Dismiss both the appeal and underlying complaint. The Supreme Court denied the Motion to Stay.

In *Ouellette, et al. v. HSBC Bank USA, et al.*, #PC09-6699 (Sup. Ct. R.I., March 2, 2010), the plaintiffs argued that MERS lacked the authority to assign mortgages and that its attempt to assign voided the subsequent foreclosure. The court entered an Order dismissing the complaint and cited the reasoning in the *Bucci* decision (above) as its basis for dismissal.

In *Porter v. First NLC Financial Services LLC*, No. PC 10-2526 (Sup. Ct. R.I., Mar. 31, 2011) (J. Rubine), the court granted MERS' motion for summary judgment, largely based on the reasoning of the court's 2009 decision, *Bucci v. MERS* [above], also in favor of MERS. The plaintiff primarily argued that MERS lacked capacity to foreclose the subject mortgage as mortgagee because the original lender, First NLC, terminated its agency relationship with MERS by filing for bankruptcy protection in the Southern District of Florida and First NLC failed to affirm its contract with MERS pursuant to Section 365 of the Bankruptcy Code. As such, the MERS foreclosure sale was allegedly null and void. Plaintiff also argued that MERS was not the holder of the note or mortgage on the date of the foreclosure sale, and that there was no valid assignment of the Note payable to First NLC.

Finding the *Bucci* analysis to be "well-reasoned, thoughtful and concise", the *Porter* court determined that there was no injustice in the foreclosure because the borrower "undisputedly borrowed the funds to buy her home, arranged for the home to serve as security for the Note, and subsequently defaulted by her nonpayment under the Note [and] [n]o holding of this Court

should invalidate the foreclosure, which Plaintiff agreed would ultimately be the consequence of nonpayment of the mortgage loan.” The court found the terms contained in the MERS mortgage to be an unambiguous contract whereby the plaintiff specifically granted MERS the power to foreclose. As to the claim regarding First NLC’s bankruptcy, the court stated that ~~Plaintiff~~ has not cited to a single provision of the Bankruptcy Code, or any interpretation thereof to support her claim that the First NLC Bankruptcy . . . in any way affected Plaintiff’s grant of authority to MERS to enforce the statutory power of sale contained in the mortgage . . . [m]oreover, **whatever financial entity currently holds the beneficial interest of the Note, MERS is designated the nominee for the current beneficial owner of the Note** based upon the broad language contained in the Mortgage Agreement.”

Regarding the claim that MERS foreclosures were barred by Rhode Island statutory construction, the court agreed with the *Bucci* analysis in that the court will not reach ~~an~~ “absurd result” by construing the legislative enactment to mean that no lender could employ agents to take action on behalf of the lender.

Texas

On December 13, 2010, the District Court sitting in Rockwall County, Texas granted summary judgment in favor of MERS and other defendants in a declaratory judgment action brought against MERS and other defendants by the purchaser of the subject encumbered property at a Home Owner’s Association non-judicial foreclosure sale. The Court held that the MERS deed of trust lien survived the HOA non-judicial foreclosure sale and that pursuant to Texas law MERS is entitled to initiate non-judicial foreclosure as a nominee of the lender in the Deed of Trust. The Court further held that in this particular case the mortgage loan servicer was entitled to foreclose because it was the last assignee of the MERS Deed of Trust. See *Mark DiSanti v. Mortgage Electronic Registration Systems, Inc. et al*, Rockwall County, District Court, Cause No. 1-09-1244.

Citing to the *Athey* decision discussed immediately below, the Court in *Richardson v. CitiMortgage et al*, No. 6:10cv119 (E.D. Tex.) (Nov. 22, 2010) granted summary judgment in favor of MERS and CitiMortgage on plaintiff’s lawsuit seeking declaratory and injunctive relief against CitiMortgage’s authority to foreclose on the property. The Court found that under Texas law, MERS has the power of sale when it is named as beneficiary in the deed of trust. The Court ruled that because MERS was the nominee for the originating lender its successors and assigns, MERS had the authority to transfer the rights and interests in the Deed of Trust to the foreclosing party, CitiMortgage.

The Texas Court of Appeals in *Athey v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1634066 (Tex. App. – Beaumont) affirmed the trial court’s decision in favor of MERS on its motion for summary judgment. The Appeals Court held that MERS is the beneficiary of the Athey’s deed of trust and the deed of trust gave MERS the authority to proceed with the non-judicial foreclosure. MERS does not need to be the owner or holder of the note to do this.

In granting a summary and final judgment, a Texas federal court, in *Michael A. Griffin v. Wilshire Credit Corporation, et al.*, Case No. 4:09-CV-715-Y (U.S. Dist. Ct., N.D. Texas, June

8, 2010) (T. Means), held that “[Defendants] have established that MERS could assign its interest in the deed-of-trust lien to [assignee] as the named beneficiary” and “[defendants] are not required to produce the original note in order to foreclose on Griffin’s property.”

Francis Santarose v. Aurora Bank FSB, 2010 WL 3064047 (S.D. Tex.) (Aug. 3, 2010). Foreclosure conducted in the name of MERS. Summary judgment granted in favor of Aurora Bank with the Court holding that MERS has standing to foreclose the property with the authorization of Aurora. “The Deed of Trust establishes that MERS was a nominee under the security instrument with the expressly stated right to foreclose and sell the [Real Property].”

Anderson v. CitiMortgage, et al, E.D. Tex. No. 10-CV-398 (Mar. 23, 2011). The Court citing to *Athey* and *Richardson* discussed above granted (with prejudice) MERS’ and CitiMortgage’s motion to dismiss plaintiffs’ complaint for fraud, unjust enrichment and violations pertaining to loan origination. The Court found that the Deed of Trust names MERS as nominee for the Lender and the Lender’s successors and assigns and that MERS is also named as mortgagee on the Deed of Trust. The Court held that “mortgage documents provide for the use of MERS and the provisions are enforceable to the extent provided by the terms of the documents. The role of MERS in this case was consistent with the Note and Deed of Trust.”

Utah

Courts in Utah have strongly supported MERS right to act as the beneficiary on the Deed of Trust. In the case of *Wade v. Meridian Capital, MERS, et al.*, 10-998 (D. Ut. Mar. 17, 2011), Judge David Sam rejected the plaintiff’s argument that the deed of trust should be voided because MERS could not be the beneficiary. “Under the plain terms of the Trust Deed, which Mr. Wade signed, MERS was appointed as the beneficiary and nominee for the Lender and its successors and assigns and granted power to act in their stead, including making assignments and instituting foreclosure,” wrote Judge Sam in his March 17 decision. “The case law on this matter in this jurisdiction is clear and unequivocal that MERS is able to act as the beneficiary for the Trust Deed.” The court also recognized that MERS had the authority to assign the deed of trust to BAC Home Loans Servicing, LP.

Furthermore, on the same day, Judge Ted Stewart also issued a ruling to a similar case. In *Wareing v. Meridias Capital, MERS, et al.*, 10-165 (D. Ut. 3/17/11) the plaintiffs also claimed that their deed of trust should be nullified because MERS could not act as the beneficiary on the deed of trust. Judge Stewart also rejected this claim, finding that “MERS had the authority to act as a beneficiary under the Deed of Trust.”

Numerous attorneys in Utah have filed multiple suits making the exact same allegations (we refer to them as “copycat suits”) against MERS and the courts are recognizing MERS right to participate in the foreclosure process and even in one case are considering whether the plaintiff should pay MERS attorneys fees incurred as the result of a wrongfully entered Temporary Restraining Order (“TRO”). In *Commonwealth Property Advocates, LLC v. MERS, et al.*, (Case No. 100409167, 3rd Jud. Dist. UT. 8/4/2010), the court denied plaintiff’s motion for a preliminary injunction and dissolved a TRO which had delayed the sale of the property. Since the TRO was issued without a finding that the plaintiff was not required to give security and that

there was no finding that MERS would not incur costs because of the TRO, the court ordered MERS to submit a motion as to whether it may recover attorneys fees and costs it expended because of the wrongfully entered TRO. We are waiting for a ruling on that motion. Similar, in *Commonwealth v. CitiMortgage, Inc., MERS, et al.*, 2011 WL 98491, 10-885 (D.Utah 1/12/11), the court relied on the language in the Deed of Trust to find that MERS may act as the beneficiary and ordered counsel to show cause why he should not be sanctioned for bringing a frivolous motion to remand the case to state court.

Other courts have reached the same conclusion in Utah in cases filed by Commonwealth Property Advocates, LLC, including: *Commonwealth Property Advocates, LLC v. BAC Home Loans, MERS, et al.* (D. Ut. 09-1146, 8/9/10), *Commonwealth Property Advocates, LLC v. Ocwen Loan Servicing, LLC, MERS, et al.*, (Case No. 100410489, 3rd Judicial District). Although the court in these cases did not order MERS to submit findings on attorneys fees, the courts did dismiss plaintiffs efforts to seek injunctions to prevent foreclosures.

In *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 09-69 (D. Ut. 2009) the court affirmed that MERS is the beneficiary on the Deed of Trust. 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” and noted that the granting clause in the Deed of Trust gives MERS explicit authority to foreclose and to substitute trustees.

The court followed this same line of reasoning in *Rodeback v. Utah Financial, et al.*, 09-134 (D. UT., 7/13/2010). The court ruled that MERS did not split the note and the Deed of Trust because Utah law “makes it impossible to split the note from the security interest,” and found that the Deed of Trust was valid and enforceable. The court also noted that the Deed of Trust specifically authorizes MERS to foreclose and quoted from the language in the Deed of Trust, “MERS... has the right: to exercise any or all of [the interest granted by the Borrower through the trust deed], including, but not limited to, the right to foreclose and sell the property...” The *Rodeback* court also cited to the *Burnett* decision and noted that *Burnett* relied upon the exact same language in the Deed of Trust. The court also found that MERS did not split the note and Deed of Trust in *Commonwealth Property Advocates v. BAC Home Loans Servicing, LP; MERS; et al.*, 10-376 (D. Ut. 1/4/11).

Similarly, in *Rhodes v. Aurora Loan Services, et al.*, 2:10-cv-00230 (D. Ut., 2010), the court affirmed MERS authority to foreclose under the deed of trust. Citing *Rodeback* and *Burnett*, the court held that “[a]lthough MERS does not own the note, it is given authority to foreclose on the note by the note’s owner through the language in the deed of trust. Courts have consistently held that MERS has the authority to foreclose [o]n behalf of the lender and MERS need not possess the note in order to appoint a trustee [o]n behalf of the lender who does hold the note. See, e.g., *Rodeback v. Utah Fin.*, 1:09-cv-134, 2010 U.S. Dist. LEXIS 69821 * 9-10 (D. Utah July 13, 2010); *Burnett v. Mortgage Elec. Registration Sys., Inc.*, 1:09-cv-69, 2009 U.S. Dist. LEXIS 100409 * 10-11 (D. Utah October 27, 2009); *Mortgage Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 153-54 (Fl. Dist. 2d Ct. App. 2007); *Mortgage Elec. Reg. Sys., Inc. v. Ventura*, No. 4 Case 2:10-cv-00230-TC Document 20 Filed 08/13/10 Page 4 of 5 CV054003168S, 2006 Conn. Super. LEXIS 1154 * 3-4 (Conn. Super. Ct. April 20, 2006).”

The court reached this same conclusion in *McGinnis v. GMAC, MERS, et al*, 10-301 (D. Ut. 8/27/10), the court noted that MERS does not need to possess the promissory note in order to foreclose. Additionally, the plaintiffs in *McGinnis* argued that the *Landmark v. Kesler* (Kansas) case impacted MERS ability to foreclose in Utah. The court specifically found that *Landmark v. Kesler* does not concern MERS standing to foreclose and notes that the *Landmark* case ~~fails~~ to recognize the agency relationship between MERS and the lender that is created by the language in the Deed of Trust designating it as beneficiary."

The court in *Commonwealth Property Advocates, LLC v. MERS, CitiMortgage, et al.* (Case No. 100400594, 4th Jud. Dist., 8/4/2010) held that MERS is the beneficiary of the Deed of Trust. The court affirmed MERS ability to foreclose in Utah and found that MERS had executed a valid assignment of the Deed of Trust to CitiMortgage. The court wrote, "Under the express Terms of the Deed of Trust, '[t]he beneficiary for this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assignees of MERS.' Moreover, pursuant to the express powers given to MERS, MERS was granted the right to act in the stead of Sterns, including foreclosing and selling the Property." It concluded, "... the express terms of the Deed of Trust unassailably provide that MRS has the right to foreclose upon the property, even if Stearns had sold the note. It is also evident, pursuant to the valid assignment of Deed of Turst, that CITI now holds the beneficiary interest."

Relying on the same language in the Deed of Trust, the court in *King v. American Mortgage Network, Inc.* 09-125 (D. Ut. 8/16/10), wrote ~~—~~This Court, per Judge Kimball, interpreting an identical provision, has found that MERS had the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property. Here, MERS assigned its beneficial interest under the Trust Deed to Chase, as evidenced by an Assignment of Trust Deed." The court reached the same conclusion in *King v. American Mortgage Network*, 09-162 (D. Ut. 9/2/10), and wrote, ~~—~~Chase and MERs are clearly authorized to act on behalf of the holder of the Note, Fannie Mae, to begin foreclosure of the Property." The court upheld MERS role in the foreclosure and found that MERS had not split the mortgage and note.

In *Darin Southam v. Lehman Brothers Bank FSB, et al.*, 10-45 (D. Ut. 8/17/2010), the court again relied on the language in the Deed of Trust to find that MERS had the authority to, "initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property."

In *Jackie Van Leeuwen v. SIB, et al*, 10-730 (D. Ut. 1/4/11), the court granted MERS motion to dismiss and wrote, ~~—~~The central theory of Plaintiff's Complaint is that MERS lacks authority to foreclose on the deed of trust and to assign the deed of trust to a successor. This Court has already considered, and rejected, this theoryand the Court finds no need to repeat its prior rulings on this issue."

In *Marty v. MERS, Freddie Mac*, 10-33 (D. Ut. 10/19/10), the court held that MERS may substitute a trustee and may act as the beneficiary on the Deed of Trust for the original lender and its successors and assigns. In discussing plaintiff's claim that MERS had split the mortgage and the note, the court wrote, ~~—~~.there is no reason to conclude that MERS could not contract with Plaintiff and other parties to maintain the power to foreclose despite the conveyance of the

ownership of the debt as long as MERS were to act on behalf of those parties who have the ultimate right to collect the debt. To rely upon cases outside of Utah that hold otherwise, for our purposes, is *non sequitur*.⁴

In *Brandon Van Leeuwen v. BAC, MERS*, (D. Ut. 12/29/10), in dismissing a complaint with various allegations against MERS, the court again wrote, —.this Court has repeatedly rejected the arguments raised in Plaintiff’s Complaint and granted 12(b)(6) motions dismissing them. The court had the same result in *James D. Masero v. MERS & Recontrust Company*, 10-132 (D. Ut. 12/3/10).

In *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc.; et al*, 10-340 (D. Ut. 9/20/10), the court relied on the language in the Deed of Trust and wrote, " This Court, per Judge Kimball, interpreting an identical provision, has found that MERS had the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property. Thus, for the same reasons set out in *Burnett*, MERS has the authority to foreclose Deed of Trust 1 and Deed of Trust 2 by the express terms of the Deeds." The court used similar reasoning to grant MERS motion to dismiss in *George Foster v. BAC, et al*, 10-247 (D. Ut. 9/22/10), *Legrtand J. Van Gass, Liberti Van Gass v. Secuity Home Mortgage, LLC; MERS; et al*, 10-89 (D. Ut. 1/6/11); *Norman Tanner v. Bank of America, et al.*, 10-502 (D. Ut. 10/5/10); *Christopher Thayne v. Taylor, Bean & Whitaker, BAC, MERS, et al.*, 10-141 (D. Ut. 9/10/10); *Commonwealth Property Advocates, LLC v. First Horizon*, 10-375 (D. Ut. 11/16/10), (~~By~~ the clear language of the deeds of trust, MERS has the authority to foreclose and sell the property on behalf of both the original lender and the ~~lender’s~~ successors.”); *Smith v. Encore Credit et al.*, 10-43 (D. Ut. 10/13/10);

In *Witt v. CIT Group, et al.*, 10-440 (D. Ut. 11/5/10), the court wrote,

Plaintiffs allege that the assignment from CIT to MERS was invalid because Plaintiffs never consented to the assignment. As Defendants demonstrate, however, consent from Plaintiffs was not required. As a matter of general contract law, beneficial rights under a contract are freely assignable unless precluded by contract, forbidden by statute, or where the assignment would materially alter the duties and rights of the obligor. Thus, under general contract law, the assignability of a contract is assumed unless the parties express a contrary intent by contract. Here, Plaintiffs have not pled nor brought forth any evidence to suggest that Plaintiffs contracted for a prohibition on the assignment of the Note and Deed of Trust. In fact, the Deed of Trust attached to Plaintiffs’ Complaint expressly provides for assignment of the duties contemplated therein. Thus, Plaintiffs’ claim that the assignment was invalid because Plaintiffs never consented to the assignment is contradicted by the express terms of the parties’ Deed of Trust.

In opposing dismissal of these causes of action, Plaintiffs cite to the Restatement (Third) of Property to argue that their consent was necessary for a valid assignment because no ~~transfer~~ of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Plaintiffs appear to argue that this Restatement means that they, the mortgagors, must agree

to any transfer of the Note and/or Deed of Trust. However, as the illustrative comments to this section make clear, the ~~parties~~ to the transfer” who must agree to the transaction refers to the one assigning the duty (i.e., the mortgagee/assignor) and the one accepting the duty (i.e., assignor). Thus, Plaintiffs’ participation in the assignment is not required. Therefore, Plaintiffs’ claim fails as a matter of law and the Court will dismiss the causes of action associated with these arguments.

The court then discussed and rejected the theory that the mortgage and note are split when MERS is the beneficiary on the Deed of Trust:

"Plaintiffs argue that the Deed of Trust and Note are no longer valid because Defendants split the note in the process of securitization. In support of this argument, Plaintiffs cite to a ~~recent~~ California decision *In re Walker* (10-21656 Rickie Walker, Bankr. E.D. Cal. 2010, Docket Entry #66)" which appears to adopt Plaintiffs’ position. Through the federal CM/ECF system, the Court has located this docket entry. At the outset, the Court notes that this docket entry is actually not even an unpublished decision, but rather a preliminary minute entry from a hearing held on May 5, 2010. The hearing concerned an objection by Petitioner Rickie Walker to certain claims asserted against him by Citibank, N.A. The minute entry makes clear that Citibank failed to respond to the objection and, under the bankruptcy court’s local rules, such failure ~~is~~ considered as consent to the granting of the motion." Pursuant to this local rule, the bankruptcy court sustained Walker’s objection and accepted his arguments in full. Because the bankruptcy court did not consider the merits of Walker’s objections, this Court seriously doubts the precedential value of this minute entry. Moreover, the bankruptcy court noted at the outset of its findings that this was only a ~~tentative~~ ruling." Indeed, in the bankruptcy court’s final civil minute order, the court sustained the objection without reference to its prior tentative ruling and ~~further~~ ordered that the disallowance of this claim . . . does not alter, amend, modify, or effect any trust deed reference in the proof of claim or the rights of the actual owner of the note" Furthermore, the court noted that counsel had not accurately represented the status of *In re Walker* to the court.

In *Todd Taylor v. CitiMortgage Inc.; US Bank NA; MERS; et al*, 10-505 (D. Ut. 10-505), the court rejected the theory that securitization separated the note and mortgage and reminded plaintiff’s counsel of his obligation under Rule 11 not to file cases which use theories that the courts have repeatedly rejected.

See also Selfaison v. Bear Stearns Residential Mortgage, 09-910 (D. Ut. 4/4/10); *Jensen v. America’s Wholesale Lenders, et al*, 09-169 (D. Ut. 7/8/10); *Brett Meredith Rosier v. Taylor Bean & Whitaker, et al*, 10-210 (D. Ut. 1/5/11) (granting MERS motion to dismiss with prejudice), *Barrow v. Recontrust, et al*, 10-158 (D. Ut. 12/22/10), *Mark Howard v. American Brokers Conduit; MERS; Deutsche Bank National Trust Company; et al*, 10-896 (D. Ut. 12/1/10), court noted that ~~Plaintiff~~ has conceded that his claims lack merit"); *Mark C. Cottle and Michelle L. Cottle v. Direct Mortgage Corporation; MERS; et al*, 10-323 (D. Ut. 12/31/10),

Steve Smith v. Citimortgage Inc.; Capital One Home Loans LLC; MERS; et al, 10-503 (D. Ut. 12/20/10), *Tex White and Alysia White v. Zions First National Bank, N.A.; Mortgage Electronic Registration Systems; et al*, 10-250 (D. Ut. 12/29/10); *Christopher K. Jensen and Anne C. Jensen v. Lehman Brothers Holdings Inc.; Aurora Loan Services LLC; MERS; et al*, 10-553 (D. Ut. 12/27/10); *Stuart v. Bank of America*, 10-248 (D. Ut. 8/12/10); *Jonathan P. Rhodes vs. Wells Fargo Home Mortgage, et al*, 10-393 (D. Ut. 8/16/10); *Rhodes v. First Franklin, et al* 10-93 (D. Ut. 12/27/10); *Brunson v. MERS*, 10-831 (D. Ut. 12/27/10), ("This court and others in this district have universally held that MERS has the authority to foreclose in behalf of a lender"), *Munson v. Homecomings Financial, Aurora, MERS et al*, 10-664 (D. Ut. 11/22/10); *Glines v. Aurora, MERS*, 10-742 (D. Ut. 12/27/10); *Denuccio v. Bank of America, et al.*, Case No. 100502762 (5th Jud. Dist. 1/15/11). Plaintiffs agreed that MERS, as nominee for Lender and Lender's successors and assigns, had the right to foreclose the Property and recognized that MERS could take any action required of Lender; *Christensen v. Pinnacle Financial Corp, et al.*, 10-630 (D. Ut. 1/31/11);

Vermont

In *MERS v. Johnston*, 420-6-09, Rutland Superior Court (Oct. 28, 2009), the trial court dismissed MERS' foreclosure action against the borrower for lack of standing as to MERS because MERS was not the note holder when the foreclosure action was commenced. The Court recognized that Vermont law permits the holder of a mortgage loan promissory note to enforce the instrument but that the holder option was not available to MERS because the note was not payable to MERS, specifically indorsed to MERS and MERS was not the bearer of the instrument. The Court found that MERS' role as nominee for the lender without more was insufficient to give MERS standing to foreclose in its own name. Had MERS also been the note holder, in accordance with MERS rules and procedures, it would have been the proper party to bring the subject foreclosure action under Vermont law.

Virginia

In *Ruiz v. Samuel I. White, P.C., et al*, 09-688 (E.D. Va. Nov. 9, 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 it did not violate the Fair Debt Collections Practices Act for foreclosure-related notices to state MERS is the note holder when in fact it was.

In *Zambrano v. HSBC Bank USA, N.A.*, No. 1:09-cv-996, Dkt. No. 30 (E.D. Va. Nov. 9, 2009) (J. Hilton), the Court granted a partial dismissal of claims, holding that foreclosure on a deed of trust does not constitute debt collection under the FDPCA as a matter of law and that the non-

judicial foreclosure of plaintiff's property did not violate her Fifth and Fourteenth Amendment rights. ~~The~~ Fourth Circuit has held that a non-judicial foreclosure does not involve sufficient state action⁴ to support a claim arising under the Fourteenth Amendment." [citing to *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977)]. On May 25, 2010, the District Court dismissed the remaining counts concerning the plaintiff's wrongful foreclosure allegations. The note holder initiated the foreclosure process for the MERS-as-beneficiary deed of trust through its loan servicing agent's substitution of trustee. The Court determined that ~~Plaintiff~~ [could not] submit any evidence showing that Defendants violated any law or breached any contract in conducting the foreclosure." Further, ~~As~~ a holder of the Note, HSBC [note-holding trustee] enjoyed the security of the Deed of Trust and, therefore, was authorized to initiate the foreclosure on the Property through the trustee pursuant to the Deed of Trust and Virginia's foreclosure laws." *Id.* at Dkt. No. 57.

In *Ruben Larota-Florez v. Goldman Sachs Mortgage Co., et al.*, #09cv1181, (E.D.Va., December 8, 2009), the court dismissed several counts of the complaint and 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. Regarding MERS, the court held that the "Plaintiffs' signature evidences [they] agreed that MERS had the authority to foreclose and to take any action required of the Lender. Plaintiffs understood that the Property would be foreclosed in the event that they defaulted on their loan repayment obligations." The court rejected Plaintiffs' argument that loan securitization splits the note from the deed of trust and pointed out that Virginia law recognizes that a negotiation of a note secured by a deed of trust carries the security without formal assignment or delivery, i.e., the mortgage follows the note. As to Plaintiffs' argument that ~~credit~~ "credit enhancements" related to the securitized notes absolved borrowers from liability under the mortgage loan, the court determined that ~~no~~ provision in the U.S. or Virginia Codes supports Plaintiffs' argument that credit enhancements or credit default swaps (CDS) are unlawful. No decision from any court in any jurisdiction supports such a claim." Further, ~~Plaintiffs'~~ double recovery theory ignores the fact that a [Credit Default Swaps] contract is a separate contract, distinct from Plaintiffs' debt obligations under the reference credit (i.e. the Note)." On April 8, 2010, the *Larota-Florez* Court granted summary judgment, dismissing all remaining counts with prejudice (quiet title and declaratory judgment). The court ruled that Litton as servicer had authority to foreclose for three independent reasons: (1) the loan servicer has authority to appoint substitute trustee to foreclose; (2) the assignee of MERS has authority to foreclose; and (3) the holder of note endorsed in blank has authority to foreclose.

In *Horvath v. Bank of New York, N.A., et al.*, No. 1:09-cv-1129, Dkt No. 38 (E.D. Va. Jan. 29, 2010), the Court rejected the plaintiff's arguments that his promissory note was split from its related deed of trust based on the sale of pieces of the promissory note into the secondary market. Specifically, "the 'split' of [Plaintiff's] promissory notes from the deeds of trust does not render the deeds of trust unenforceable. The deeds of trust continue to grant a promissory note holder security . . ." See also *Winfried Ruggia, et al. v. Washington Mutual, a division of JP Morgan Chase Bank, et al.*, #09cv1067, U.S. Dist. Ct., Eastern Dist. of VA (May 13, 2010)

Aviles-Wynkoop v. HSBC Bank USA, N.A., CL 09-10645 (Fairfax February 19, 2010) (White, J.) Court found MERS had the authority to initiate foreclosure and dismissed the plaintiff's wrongful foreclosure complaint with prejudice.

In *Guido F. Rivero, et al. v. Lehman Brothers Bank, FSB, et al.*, Civ. No. 1:10-cv-35, (E.D.Va., March 11, 2010), the plaintiffs challenged the foreclosure action initiated by MERS, arguing that MERS lacked standing to proceed. In granting MERS and the other defendants' motion to dismiss, the Court took no issue with the MERS-initiated foreclosure. The court also determined that Virginia Courts have already ruled that the Commonwealth's foreclosure process does not violate due process.

The court dismissed a putative class-action complaint naming MERS wherein the plaintiffs alleged wrongful foreclosure among other claims. The court determined that defendants were not required to produce a promissory note before the defendants foreclosed the deed of trust and promissory notes are not required to be recorded in the land records. Further, —. . the trustee is not required to prove that they had the note in order to carry out a non-judicial foreclosure. They're not required to demonstrate standing in order to carry out the foreclosure." The court specifically determined that MERS and its parent company, MERSCORP Inc., were not debt collectors under the Fair Debt Collection Practices Act. Also, the court noted that "[t]he plaintiffs failed to pay their mortgage . . . and the loss, if any, was the loss of the property and that was caused by the plaintiffs' failure to pay the mortgage, not because of anything that [the trustee] did." See *hearing transcript of Luis G. Lara, et al. v. GMAC Mortgage, L.L.C., et al.*, #1:09cv1269 (E.D.Va., April 5, 2010).

In granting Defendants' Demurrer and Plea in Bar, the circuit court in *Karen Moore-Mann v. Wells Fargo Bank, N.A., et al.*, #CL09-3974-00, Franklin County Circuit Court (March 11, 2010) found that "[t]he Deed of Trust . . . grants MERS, as beneficiary under the Deed of Trust and as nominee for the Lender, the right to (a) exercise any or all of the interests of the Lender . . . and (b) to take any action required of the Lender . . . including the right to remove the Trustee and appoint a successor Trustee."

In *Silvia Merino, et al. v. EMC Mortgage Corporation, et al.*, #09-cv-1121 (E.D. Va March 19, 2010), the court dismissed MERS on motion. The court held that deeds of trust are not rendered unenforceable and does not leave promissory notes unsecured because the beneficiary of the deed of trust and holder of the secured promissory note are two different parties. The Court also agreed with *Horvath*, in that no factual or legal basis has been found to support the notion that the borrower is discharged from the promissory note and the property is released from the deeds of trust because the borrower's default triggered insurance coverage for any losses caused by the borrower's default.

In *Syed Areebuddin, et al. v. OneWest Bank, et al.*, 09-cv-1083, U.S. Dist. Ct., E.D.Va., (March 24, 2010), the court dismissed MERS on motion. In response to the Plaintiffs' allegation that the splitting, selling, and securitization of the promissory note rendered the deed of trust unenforceable, the court responded that "nothing in Plaintiffs' conclusory allegations provides a plausible basis for relief after considering the settled law of negotiable instruments or the enforcement of a deed of trust securing such instruments after their negotiation" and "the deed of

trust continues to secure the holder of a note and nothing in the negotiation or putative securitization of a note renders it unsecured."

In an Order dismissing *Vernon Hammett, et al. v. Deutsche Bank National Trust, et al.*, No. 1:09-cv-1401 (E.D.Va., March 25, 2010), the court held that transfer of the promissory note separate from an assignment of the MERS deed of trust did not 'split' one instrument from the other and that the note remains secured.

In *Matthew D. Upperman v. Deutsche Bank National Trust Company, et al.*, No. 1:10-cv-149, Dkt. No. 34 (E.D.Va., April 16, 2010), the Court held that "[t]here is no legal authority that the sale of pooling of investment interests in an underlying note can relieve borrowers of their mortgage obligations or extinguish a secured party's rights to foreclose on secured property." Further, " . . . the [MERS] Deed [of Trust] clearly confers authority on Defendants to foreclose on the Property in the event of Plaintiff's default is undisputed." The court goes on to cite that " . . . federal laws explicitly allow for the creation of mortgage-related securities . . . " Regarding the Plaintiff's allegation that sale of the note without a corresponding assignment of the Deed of Trust split the note from the mortgage, the Court held, "[i]f there has been a 'split' between the Note and Deed . . . the transferee of the Note nevertheless receives the debt in equity as a secured party."

In *Liliana E. Pazmino v. LaSalle Bank, N.A., as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2006-19, et al.*, Case No. 09cv1173 (E.D.Va., May 20, 2010), the court held that " . . . The Deed [of Trust] authorizes MERS to foreclose the Property in the event that Plaintiff defaulted on the loan. . . [u]nder the terms of the Deed, MERS as two roles: beneficiary and nominee for Lender. By signing the Deed, Plaintiff agreed that MERS, as nominee for Lender and Lender's successors and assigns, had the right to foreclose . . . and recognized that MERS could take any action required of Lender." The court also rejected the Plaintiff's standing argument, to the extent that she referred to a requirement that a secured party first prove in court its right to initiate a foreclosure before the start of proceedings, by stating, "[t]he fundamental flaw in Plaintiff's argument is that Virginia is a non-judicial foreclosure state. [Virginia law] do not require an interested party to prove 'standing' in a court of law before initiating the foreclosure process." In keeping with Merino and Horvath, the court rejected the double-recovery theory that mortgage insurance policies or other credit derivatives precluded defendants from recovering further payments from Plaintiff. Lastly, the court rejected Plaintiff's allegation that trading of pieces of the note on the secondary market split the Deed of Trust from the note thereby rendering it unenforceable. Specifically, the court found that " . . . this allegation contradicts the terms of the Deed and Virginia law."

The federal district court dismissed the portion of plaintiffs' complaint alleging that MERS and other parties to the deed of trust are not parties entitled to enforce the deed of trust. In quoting language from Virginia non-judicial foreclosure statute, the court stated "[e]very deed of trust to secure debts or indemnify sureties is in the nature of a contract and shall be construed according to its terms to the extent not in conflict with the requirements of law." The court found clear terms in the deed of trust empowering the trustee to enforce its terms. *Khair v. Countrywide Home Loans, et al.*, #10-cv-00410-JCC, (E.D.Va., June 14, 2010).

See also the court's holding in *Julio E. Tapia, et al. v. U.S. Bank, N.A., as Trustee, et al.*, Case No. 09cv1025, 2010 U.S. Dist. Lexis 62448, 19-20, (E.D.Va., June 22, 2010):

The Court finds this argument unavailing because the Deed of Trust authorized MERS to foreclose the Property in the event that Plaintiffs defaulted on the loan. The Deed of Trust states that "[t]he 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 Deed of Trust also provides "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 these 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." Under the terms of the Deed of Trust, MERS has two roles: beneficiary and nominee for Lender. By signing the Deed of Trust, Plaintiffs agreed that MERS, as nominee for Lender and Lender's successors and assigns, had the right to foreclose the Property and recognized that MERS could take any action required of Lender. Furthermore, Plaintiffs make no legally-supported argument and plead no facts in the Amended Complaint as to why MERS as nominee did not have the right to foreclose and sell the Property in accordance with law or custom. As such, Plaintiffs' allegation that none of Defendants have the authority to enforce the Deed of Trust is untenable.

In *Rosales v. Countrywide Home Loans, et al.*, #CL54255 (Loudoun Cty. Circuit Ct., June 2010) the court stated, "Virginia law does not require the recordation of notes, and effectuating such a statutory change is not the function of the judiciary." The court dismissed plaintiff's claims of wrongful foreclosure with prejudice.

In response to a demurrer by defendants, the Fairfax County Circuit Court dismissed plaintiff's claims that MERS as record beneficiary could not enforce the deed of trust or assign its authority to enforce to an assignee. *Awan v. OneWest Bank, et al.*, Case No. 10-6247 (Fairfax Cty. Cir. Ct., July 2010)(J. Rousch).

In *Ramirez-Alvarez v. Aurora Loan Services, LLC, et al.*, No. 09-1306 (E.D.Va., July 21, 2010), the court held "MERS had the authority and ability to enforce the terms of the security instruments." Further, "[i]n executing the Deed of Trust, [plaintiff] agreed that MERS, filling the dual roles of beneficiary and nominee for the lender, had the right to foreclose on the property and take any action required of the lender, such as the appointment of substitute trustees."

In *Van v. BAC Home Loan Servicing LP, et al.*, Cas No. 10cv73 (E.D.Va., Sept. 23, 2010), the court granted defendants' motions to dismiss the case, including claims of wrongful foreclosure of the MERS deed of trust. The court specifically noted that the Uniform Commercial Code does not apply to non-judicial foreclosures pursuant to deeds of trust.

In *Figueroa v. OneWest Bank FSB, et al.*, CL 10-61965 (Arlington County Circuit Court, October 29, 2010), the deed of trust named MERS as record beneficiary. The court held that, —.

. based on the notes and deeds, the power to appoint a substitute trustee and the power to foreclose in this case does exist.”

In *Brito-Arias v. Deutsche Bank National Trust Company, as Trustee*, CL2010-12733 (Fairfax Cty., Nov. 12, 2010)(T. Ney), Plaintiff argued against the validity of the MERS assignment to the trust, claiming MERS is not a beneficiary and had no authority to assign the Deed of Trust because it had no rights to receive payment. As such, the subsequent assignee-beneficiary could not appoint a substitute trustee for foreclosure. The court sustained the defendants’ demurrer, held the assignee to be the holder of the note, and found that —. . the substitute trustees have been properly appointed . . .”

In *Moore, et al. v. BAC Home Loans Servicing LP, et al.*, CL10-5348 (Prince William Cty., Jan. 3, 2011), the plaintiff argued that MERS had no authority to assign the deed of trust to BAC and BAC also had no authority to appoint a substitute trustee. The court dismissed plaintiff’s claims with prejudice on demurrer and took note of the court’s basis to exercise equitable powers in non-judicial foreclosures,

Under [Virginia’s nonjudicial foreclosure scheme], lenders need not establish ~~—standing~~” in any legal sense, nor are they required to satisfy the borrower, borrower’s counsel, or the court, that every ~~—~~” has been dotted in the process of foreclosure before any foreclosure can occur . . . adopting such a requirement would permit every foreclosure to be litigated upon bare assertion of lack of authority, which is inconsistent with Virginia’s nonjudicial foreclosure scheme . . . a suit is not a vehicle by which a Plaintiff may halt action by a Defendant while the Plaintiff conducts discovery to determine whether the Plaintiff has some right to object . . . [a]ccordingly, suits challenging foreclosures should be reserved for those cases in which Plaintiffs and their counsel can in good faith allege facts which would establish some substantial defect . . . and which would warrant exercise of the Court’s equitable powers . . .

The court then concluded that,

MERS is granted what is in the nature of a limited power of attorney by the Lender in the Deed of Trust. This is a role consented to by the Plaintiffs, and is not in conflict with any provision of law to which I have been cited, and accordingly under § 55-59 (preamble) this is an enforceable provision of the Deed of Trust. MERS appears to have acted under this authority in executing the assignment of the Deed of Trust . . . Plaintiffs’ right [to challenge MERS’ grant of authority] should be carefully limited to those cases in which they can allege facts which would render MERS’ actions invalid. Allegation that Plaintiffs have not been shown MERS’ authority, or written record does not contain it, are insufficient.

With regard to BAC’s authority to appoint a substitute trustee, the court determined that BAC could do both as the assignee-beneficiary of MERS *or* as the holder of the promissory note.

MERS initiated the non-judicial foreclosure process, in *Nunez v. Aurora Loan Servicing*, No. 201010108 (Fairfax Cty. Cir., Jan. 21, 2011)(S. Klein), by substituting the trustee. Plaintiff argued that because MERS was a “nominal beneficiary” and not the owner of the note, this voided the appointment of the new trustee. MERS pointed to the language in the deed of trust authorizing it to take any action on behalf of the lender, including foreclosure and prior case law in favor of MERS [cited above] and its capacity to foreclose as record beneficiary under the non-judicial foreclosure statutes. The court sustained MERS’ demurrer.

Washington

In *Daddabbo v. Countrywide Home Loans, Inc.*, No. C09-1417-RAJ, 2010 WL 2102485, at *5 (W.D. Wash. May 20, 2010), the Court held that “the deed of trust, of which the court takes judicial notice, explicitly names MERS as beneficiary. The deed of trust grants MERS not only legal title to the interests created in the trust, but the authorization of the lender and any of its successors to take any action to protect those interests, including the right to foreclose and sell the Property.” The Court considered the documents identifying the trust company as the holder of the note, and held that it does not “remotely support[] Plaintiffs’ assertion that MERS somehow has been stripped of the power that the deed of trust grants.” See also *Anderson Buick Co. v. Cook*, 7 Wash.2d 632, 641, 110 P.2d 857, 861 (Wash.1941) (“a mortgage may be held for the security of the real creditor, whether he is the party named as mortgagee or some other party”).

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

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 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 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).

In *Wells Fargo Bank, N.A., as Trustee for the holders of First Franklin Mortgage Loan Trust 2006-FF15 Mortgage Pass-Through Certificates, Series 2006-FF15 v. Michael P. Borman, et al.*, Brown County Circuit Court 09-CV-1993 (May 27, 2010), the defendant argued that the securitized trustee plaintiff could not enforce the mortgage assigned to it by MERS because MERS never held the mortgage or the note. The court disagreed and specifically held that MERS had the ability to transfer its interests in the mortgage. The court noted that “[i]nterpreting the mortgage is a question of law and is decided using state contract law. [citation to *Goebel v. First Federal Sav. And Loan Ass’n of Racine*, 83 Wis.2d 668, 670, 266 N.W.2d 352, 354 (Wis. 1978)]” Further, “... the transfer of rights provision in the mortgage is not ambiguous. The transfer of rights provision clearly states MERS’ interest as nominee is to collect repayment of loan and performance of [mortgagor-borrower’s] covenants and agreements under the mortgage and note. . . . The provision also states that [mortgagor-borrower] mortgages, grants, and conveys to MERS and to the successors and assigns of MERS his property which shows that when [mortgagor-borrower] signed the mortgage agreement he knew MERS had the ability to assign its interest in the mortgage.”

In *Countrywide Home Loans Servicing LP v. Rohlf*, Nos. 2009AP2330, 2010AP19, 2010 WL 4630328 (Wis. App. Nov. 17, 2010), the appellate court recognized MERS’ authority to assign mortgages as nominee. In reviewing the mortgage language, the appellate court noted that “... the mortgage designates MERS as the mortgagee and American Sterling Bank as the lender. MERS is also designated American Sterling Bank’s nominee which allows it to act as American Sterling Bank but not possess any ownership rights.” [Citing to *Ott v. Home Savings & Loan Ass’n*, 265 F.2d 643, 647 (9th Cir. 1958) (citation omitted)]. The Court concluded that the appellants “... have failed to establish that MERS designation as nominee for American Sterling Bank did not include authority to assign the note.” Further, “[t]here is no risk that [borrower-appellants] will be made to answer in a separate action on the note. . . .”

III. BANKRUPTCY

(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.

(ii) Motion for Relief from Stay

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. The motion for relief from stay may be brought either in MERS name alone or in MERS name as nominee for the original lender and its successors and assigns. If MERS is the movant on a motion for relief from stay, in addition to being the mortgagee, MERS must be the note-holder for a particular loan transaction prior to filing a motion from relief from stay. See *In re Fitch*, No. 04-16905, 2009 Bankr. LEXIS 1375, (Bankr. N.D. Ohio 2009). MERS Training Bulletin 2008-06 outlines the requirements for filing MERS Motions for Relief from Stay. Available at www.mersinc.org.

California:

In Re: Viola K. Jackson (Adversary Proceeding – *Jackson v. Saxon Mortgage Services, Inc. et al.*, Bankr. Southern District of California, Adv. Pro. No. 08-90391-LT).

In the *Jackson* adversarial proceeding, the Court held that plaintiff consented to the use of MERS when she executed the Deed of Trust and therefore as a matter of law, the other defendants/movants in motion for relief from stay obtained authority to foreclose through assignment of the Deed of Trust and substitution.

The Court also held that plaintiff's claim against MERS for breach of covenant of good faith and fair dealing failed as a matter of law because no contractual obligations existed between MERS and the plaintiff/debtor.

In re Walker, 10-21656 is a case that involved evidentiary defects by the moving party. The United States Bankruptcy Court for the Eastern District of California disallowed a proof of claim filed in the investors name because the note provided with the filing was not endorsed to the investor. The note was still made payable to the original lender. MERS had assigned its interest in the Deed of Trust to the investor and the court held that the MERS assignment was not sufficient to transfer the promissory note, which is true. Because promissory notes are transferred by endorsement and delivery, MERS can only transfer a promissory note if it is the note holder. MERS was not the note holder in this case. The court noted that in disallowing the proof of claim, it was not altering the terms of the Deed of Trust.

Other courts have recognized the limited and tentative nature of the ruling in *In re Walker*. In *Witt v. CIT Group et al.*, 10-440 (D. Ut. 11/15/10) (discussed in greater detail in the section above on Utah), the court noted that the *Walker* ~~opinion~~ is merely just a preliminary minute entry based on an objection to a proof claim where the opposing party did not file an objection. Furthermore, the *Witt* court noted that the *Walker* order did not alter or amend the rights of the note owner to enforce the note.

Similar to *Walker*, in a case that is no longer good law, the court in *In re Hwang*, 393 B.R. 701, (Bankr. C.D. Cal., 2008), the court said that the note owner was a necessary party to a motion for relief from stay, and denied a motion for relief from stay because the movant was not the owner of the promissory note. Because an assignment from MERS can only assign legal title to the Deed of Trust, MERS interest in the Deed of Trust as beneficiary is consistent with both of these cases. The outcomes in these two cases were due to mistakes made by not presenting the proper evidence to the court. The moving party should have possession of the note with rights to enforce it. *In re Hwang* was subsequently reversed. See 438 B.R. 661 (C.D. Cal. 2010).

Colorado:

In re Roberts, 367 B.R. 677 (Bankr. D. CO 2007), the court found that it is clear from the face of the Deed of Trust that, ~~MERS~~ was empowered to act on behalf of whoever was the equitable owner of the rights in the Deed of Trust.” Furthermore, the Deed of Trust grants MERS all of the necessary authority to exercise all of the substantive rights of the note owner.

In re Smith, 366 B.R. 149 (Bkrtrch.D.Colo. 2007) In the adversary proceeding, the Plaintiff argued, in part, that the securitized trust defendant was not a true party in interest with standing to foreclose since no recorded documents in the county land records reflected its interest. The court granted trust defendant's motion to dismiss, holding that because MERS was the record beneficiary and nominee for the original lender and the lender's successors and assigns, the trust defendant, as note holder, held a valid security interest in the property.

District of Columbia:

In re Stevenson, Case 06-306, (Bankr. D. DC. 2008), the court found MERS, as the beneficiary of the deed of trust, to be a necessary party to a reformation action.

Georgia:

In *James L. Drake, Jr., Trustee v. Citizens Bank of Effingham, Ocwen, and MERS*, Adversary Proceeding, No. 10-4033 (Bankr. S.D. Georgia, Feb. 7, 2011), the U.S. Bankruptcy Court for the Southern District of Georgia, Savannah Division, held that MERS was granted specific rights and duties in the Security Deed including, without limitation, the rights and powers to enforce it. It reasoned that the plain language used established MERS as the Grantee and was ~~sufficient~~ to create an agency relationship” between the lender and MERS. The court held that there was ~~no~~ split of the Note and Security Deed as a matter of contract by any transfer of the Note, because the Security Deed expressly contemplate[d] that the Note [could] be transferred from the original

Lender, and that MERS's role as nominee for the Lender extend[ed] to each successive assignee." The court went further to say that, even if there was a defect caused by the physical separation of the Security Deed from the Note, that any such defect was cured when Ocwen . . . took possession of the Note . . . , remained the Servicer of the Note, took possession of the Security Deed, and became the record owner of the Security Deed." (citing *Nicholson v. OneWest Bank*, 2010 WL 2732325, *4 (N.D. Ga.); *Marty v. MERS*, 2010 WL 4117196, *6 (D. Utah)). The court also reached the same legal conclusion in the companion case, *James L. Drake, Jr., Trustee v. Citizens Bank of Effingham, Ocwen, and MERS*, Adversary Proceeding, No. 10-4039 (Bankr. S.D. Georgia, Feb. 23, 2011) which dealt with another property.

Idaho:

Courts are focused on the documentation submitted (or omitted in some cases) along with the motion such as the payment history and the note. See *In re Darrell Royce Sheridan and Sherry Ann Sheridan* (U.S. Bankruptcy Court District of Idaho, case no. 08-20381-TLM). The complaint did not clearly state MERS standing to move for relief in its capacity as the holder of the mortgage and the note. Just as the *Hawkins* (Nevada) and *Jacobsen* (Washington) decisions hold, 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.

Likewise, in *In re Wilhelm*, the moving parties failed to prove their standing with the evidence attached to the motions for relief from stay. 407 B.R. 392, (Bankr.D.Idaho, 2009). The motions were all denied because of the lack of evidence presented to establish each movant's ownership or possession of the promissory notes. *Wilhelm* appears to be a consolidation of five cases in which the movants were loan servicers or perhaps investors. MERS was not the movant in any of the cases. In each case, the moving parties filed a motion for relief from stay and attached a promissory note, a deed of trust, declarations and in some cases assignments of the deeds of trust. The Court stated that in four of the five cases the movants incorrectly assumed that an assignment of mortgage from MERS, standing alone, was sufficient to establish ownership of the note. MERS has never argued this and MERS Members should not make such an argument. An assignment from MERS does not transfer any interest in the note to the assignee. In denying each motion, the Court observed that none of the notes submitted named the respective movants as a payee, nor were they indorsed directly to the movants or indorsed in blank. The Court held that the ~~movants~~ failed to establish possession of and an ownership in the notes," and therefore lacked standing to pursue the requested relief.

In re Scott, 376 B.R. 285 (Bankr D. ID 2007). In *Scott*, the court found that MERS had standing to seek relief from stay where it was the beneficiary under the Deed of Trust and is an agent of Countrywide, the lender.

Kansas:

The United States Bankruptcy Court for the District of Kansas granted U.S. National Bank Association, as Trustee, motion for relief from stay in the bankruptcy case of *In re Paul Brown*, Bankruptcy Petition 10-40147. The trustee objected to the motion for relief from stay claiming among other things that 1) the note and mortgage were split; 2) MERS did not have the authority to assign the mortgage because it is a mere nominee and 3) the person executing the MERS

assignment is an attorney at the law firm that filed the Motion for U.S. National Bank. MERS provided an affidavit explaining MERS and its agency relationship to the note-holder and MERS authority to act on behalf of each of the beneficial holders. MERS, through its agency relationship with the beneficial holders had the authority to assign the mortgage out of its own name to U.S. Bank as Trustee. The Bankruptcy Trustee withdrew his objection and Judge Karlin granted the motion for relief from stay so that U.S. Bank was authorized by the court to foreclose its security interest. It is important to note that the Supreme Court of Kansas has found that a transfer of a note transfers the mortgage as well, and that a perfected claim to the note is equally perfected as to the mortgage. *Army National Bank v. Equity Developers, Inc.*, 245 Kan. 3, 774 P.2d 919, at 929.

In *In re Martinez*, 10-7027 (Bankr. D. KS 2/11/11), the borrower alleged that MERS being named as the mortgagee caused a splitting of the mortgage and note. MERS fully briefed the issue and argued that under Kansas law the mortgage and note were not split because MERS held the mortgage as an agent of the note holder. MERS explained its relationship with its members and that by signing the MERS Membership Application, the member agrees that MERS will act as the mortgagee in the land records and hold legal title to the mortgage on behalf of the note holder. Having reviewed all of the evidence, the court found that the mortgage was fully enforceable and not split. The *Martinez* decision followed a decision regarding the same borrower and property where the Kansas Court of Appeals found that MERS did not have standing to foreclose because it was not the note holder when it filed a foreclosure action. *Martinez* shows that when presented with all of the evidence and having MERS role fully describe to the courts, Kansas courts will uphold MERS ability to be the mortgagee.

Kentucky:

In re Rothacre, 326 B.R. 398, 400 (2005). The *Rothacre* court held that the bankruptcy trustee had notice of MERS' interest in the property where the security instrument contained a provision that MERS, as the mortgagee of record, was vested with the power of sale and that, because the mortgage was recorded, the Plaintiff was charged with notice of the fact that MERS had an interest in the mortgaged property.

Likewise, in *In re Jessup*, 09-5229 (Bankr. E.D. KY 2010), MERS and CitiMortgage's Motion for Summary Judgment was granted and the court held that ~~the~~ language in the Lender's own instrument is sufficient to identify MERS as [the mortgagee]." The court rejected the Trustee's allegations that despite the language in the mortgage, there was no proof of MERS authority to act as mortgagee. ~~In~~ short, the Trustee's attempt to require extrinsic evidence to validate the terms of the mortgage is without merit." The court went on to note ~~that~~ as a general matter, the Plaintiff's complaint seeks to impose proof requirements on a creditor holding an otherwise facially valid mortgage of which he had constructive notice." In addition to finding that MERS was mortgagee, the court also found that MERS had the authority to execute an assignment of the mortgage lien to CitiMortgage.

Massachusetts:

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.

The Court rejected the debtor's arguments and granted the Motion for Relief. The Court observed that the debtor's contentions regarding MERS' standing ~~mis~~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. The Court held 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." 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" See also, *e.g.*, *In re McCoy*, Bankr. # 06-48716 (E.D. Mich. September 18, 2006).

The bankruptcy court in *In re Schwartz*, 366 B.R. 265, 268-269 (Bankr. D. Mass. 2007), recognized the power of MERS as nominee to assign a mortgage, but invalidated the assignment because it was signed after the foreclosure sale.

In re Cushman Bakery, 526 F.2d 23, 30 (1st Cir. 1975), *cert. denied*, 425 U.S. 937 (U.S. 1976), recognized the use of nominees as a common occurrence in real estate transactions and ~~has~~ long been sanctioned as a legitimate practice." *Id.*, citing *Eastern Milling Co. v Flanagan*, 152 Me. 380 (1957); *Amherst Factors v Kochenburger*, 4 N.Y.2d 203 (1958); *Richardson v Stewart*, 216 Iowa 683 (1933); *First National Bank of Bridgeport v National Grain Corp.*, 103 Conn. 657 (1925); *Newton Savings Bank v Howerton*, 163 Iowa 677 (1914); *Industrial Packaging Products Co. v Fort Pitt Packaging International Inc.*, 399 Pa. 643 (1960).

The *Cushman* court further stated,

The Uniform Commercial Code does not require that the secured party as listed in such statement be a principal creditor and not an agent . . . The purpose of filing this financing statement is to give notice to potential future creditors of the debtor or purchasers of the collateral. *It makes no difference as far as such notice is concerned whether the secured party listed in the filing statement is a principal or an agent*, and no provision in the Uniform Commercial Code draws such a distinction.

Id. at 30 (emphasis added).

The decision in *In re Moreno*, No. 08-17715-FJB, 2010 WL 2106208, at *4 (Bkrtcy.D.Mass. May 24, 2010), implicitly recognizes MERS' authority as nominee to assign its interest.

In *In re Lopez*, Case No. 09-10346-WCH (E.D. Massachusetts, Feb. 9, 2011), the debtor opposed Aurora's Motion for Relief on two grounds (1) that Aurora failed to follow HAMP guidelines and (2) that Aurora lacked standing to file a Motion for Relief based on an assignment of the

mortgage from MERS. The debtor specifically cited *Carpenter v. Longan*, contending that an assignment of the mortgage, without the note, is a nullity. (~~The~~ note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”). The debtor also argued that MERS, as nominee of Shelter, could not assign the Mortgage to anyone because it is merely a title holding entity and that the current holder of the Note is unknown (endorsed in blank), making it unclear who authorized MERS to assign the Mortgage.

Citing to the 1st Circuit Court of Appeals decision in *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994), the Court held that a relief from stay hearing should not involve a full adjudication of the merits of claims, but merely a determination of ~~whether~~ a creditor has a colorable claim to property of the estate.” Citing *Grella*, the Lopez Court says the First Circuit explained:

~~The~~ statutory and procedural schemes, the legislative history, and the case law all direct that the hearing on a motion to lift the stay is not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims. Rather, it is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor's property. If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere without violating the automatic stay.”

Based on the MERS assignment, the *Lopez* Court stated, —. . . I find that Aurora has established a colorable claim to the Property as Mortgagee” and that Aurora is a party in interest with standing to seek stay. The court noted “. . . the Mortgage specifically identified MERS as the mortgagee under the instrument and granted it and its 'successors and assigns' a power of sale." Regarding the debtor’s challenge that the assignment was a nullity without a transfer of the note, the Court cited *Boruchoff v. Ayvasian*, 323 Mass. 1, 10, 79 N.E.2d 892 (1948) and *Kiah v. Aurora Loan Servs., LLC*, No. 10-40161-FDS, 2010 WL 4781849 (D. Mass. Nov. 16, 2010) to state that ~~under~~ Massachusetts law, where a mortgage and the obligation secured thereby are held by different persons, the mortgage is regarded as an incident to the obligation, and, therefore, held in trust for the benefit of the owner of the obligation.” Accordingly, even though MERS never had possession of the Note, it was legally holding the Mortgage in trust for the Note holder.” Further, ~~Though~~ MERS never held the Note, it could, by virtue of its nominee status, transfer the Mortgage on behalf of the Note holder. Indeed, such a transfer appears to have been contemplated by the Mortgage, as the power of sale provision specifically identifies ~~the~~ successors and assigns of MERS.”

Regarding the debtor’s various arguments pertaining to whether the assignment and travel of the note were properly authorized or undertaken, the court responds, ~~As~~ explained at the outset, a party in interest need only demonstrate a colorable claim to property of the estate,‘ which Aurora has done by providing a complete and facially valid chain of title establishing that it holds the Mortgage with a power of sale. In the context of a motion for relief from stay, which

the First Circuit instructs is a summary proceeding akin to a hearing on a preliminary injunction, the Court need not, and indeed should not, seek out latent defects of the kind now proposed by the Debtor. To do so would subject every motion for relief from stay to a full evidentiary hearing, even where the Debtor, as here, has not articulated an affirmative objection but an investigatory inquiry. [citing to *Valerio v. U.S. Bank, N.A.*, 716 F.Supp.2d 124 (D. Mass. 2010) (application for injunctive relief denied where plaintiffs did nothing more than contend there was a “substantial question” regarding U.S. Bank’s right to enforce the promissory note at the time of foreclosure).] The court also noted that “[a]lthough the Assignment contains language purporting to assign both the Note and Mortgage, MERS lacked an assignable interest in the Note. While this surplusage evidences poor drafting, it does not affect the validity of MERS’s assignment of the Mortgage.” *Footnote 34.*

Michigan:

Renata Hukic, et al. v. MERS as nominee for Countrywide Home Loans Inc., et al., #08-5702-mbm, Bkrtcy.E.D.Michigan (February 23, 2010). In granting summary judgment to MERS, the *Hukic* court rejected the Plaintiffs' allegation that MERS did not own the mortgage and was not, therefore, a real party in interest with the right to file a proof of claim in Plaintiff-Debtors' bankruptcy.

Missouri:

On 9/20/10 decision *In re Tucker*, (Case. No. 10-61004) Missouri Bankruptcy Judge for the Western District of Missouri finds that the language of the deed of trust clearly authorizes MERS to act on behalf of the Lender in serving as the legal title holder and exercising any of the rights granted to the lender. The fact that MERS is identified as the beneficiary under a deed of trust for the benefit of the note-holder does not create a split between the note and deed of trust because of MERS agency relationship to the note-holder. The court concludes that the mortgage loan is a valid enforceable secured mortgage loan. *Tucker* effectively overturned the *In re Box* case, 10-20086 (Bankr. D. Mo.) where the same judge who later decided *Tucker* raised questions about MERS and its authority to act as the beneficiary. The *Box* court, however, did not have all of the evidence about MERS and the agency relationship between MERS and its members, when the court issued its rulings.

Nevada:

In re Hawkins, 2009 WL 901766 (Bankr. D. Nev. 2009) involved a question of standing to obtain relief in bankruptcy court. The Court held that parties, such as MERS, must have the requisite constitutional and prudential standing, and be the real party in interest under Fed.R.Civ.P.17, in order to be entitled to lift-stay relief. See 2009 WL 901766, at *2. The Court further held that, under Nevada law, a promissory note is enforceable by either the holder of the note or by one in possession of the note who has the rights of a holder. Because the proper evidence was not provided to the Judge, the Court concluded that MERS was not the real party in interest because MERS failed to demonstrate that it was the holder of the note or that it was authorized by the holder of the note to proceed with the request to lift the bankruptcy stay. See *In re Mitchell*, 07-16226-LBR (Bankr. D. Nev. 2007).

The Hawkins and Mitchell cases were part of 18 cases with a similar ruling that were appealed by MERS to the United States District Court. The *In re Hawkins* Decision was reversed and vacated by the District Court on 11/6/09 due to the Bankruptcy Court not having jurisdiction at the time Judge Reigle issued her March 31, 2009 Memorandum Order because the bankruptcy case was closed. See United States District Court, District of Nevada, Case No. 2:09-CV-00892-KJD-GWF.

Six judges heard oral argument on these appeals in a consolidated 11/10/09 hearing and rendered separate opinions. United States District Court Judge Dawson finds that MERS has standing to file Motions from Relief from Stay when the proper evidence is presented and that MERS should re-file its motions. He issued his decision in 5 of the 18 cases (*In re Chong*, *In re Pilatich*, *In re Cortes*, *In Re Medina* and *In re O'Dell*) on appeal and found that MERS can be a real party in interest if MERS identifies the holder of the note or provides sufficient evidence of the source of its authority. Also see Judge Jones decision in *In Re Atkerson*, United States District Court, District of Nevada 09-cv-00673

These five Decisions affirm the holding of the Bankruptcy Court which found that MERS did not have standing because the proper evidence was not presented. MERS acknowledged to the bankruptcy court that in 16 of the 18 cases its corporate procedures were not followed by the law firms retained to file the motions for relief from stay and the proper evidence was not presented to the Court. In fact, MERS attempted to withdraw its motions, but the court denied this because the Trustee opposed the withdrawals. MERS filed the appeals in all 18 cases, even though in 16 of the cases we agree that MERS did not have standing due to evidentiary defects. But, the Bankruptcy Court erred as a matter of law in all 18 cases when it determined that MERS could not be a beneficiary under the deeds of trust. Critical to Judge Dawson's Ruling is that he does not hold that MERS cannot be the beneficiary, but rather MERS just need to make sure the evidence presented to prove its standing.

Ohio:

MERS filed a statement in response to an Order to Show Cause issued by a bankruptcy judge in Ohio. See below *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.

FILED

2008 Jun 12 PM 05:27

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

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.

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

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

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

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

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

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 foreclosure 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.

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 be 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);

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. Q54003168S, 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

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'

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'

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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In re Gemini Services, Inc. (Bankr. S.D. Ohio 2006), 350 B.R. 74, 82. The validity of an assignment of mortgage from MERS was challenged on the ground that the assignment did not state that MERS was acting as a nominee or agent for the loan holder. Rejecting that argument, the court observed that "[T]here is no statutory requirement that an agent to an assignment explicitly state that it is acting as an agent, nor does the failure to do so invalidate the assignment. Ohio Revised Code §5301.291 specifically provides a mortgage release, cancellation or satisfaction is not deemed defective because ~~the~~ executor, administrator, guardian, assignee or trustee signed it individually instead of in his representative or official capacity." To the extent this statute does not specifically include the terms ~~assignment~~," the court cannot find any basis to hold the assignment of a mortgage to a higher standard than a ~~mortgage~~ release, cancellation or satisfaction."

In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008). The court rejected the argument that failing to record an assignment of mortgage from the mortgagee to the note holder allowed the trustee to void the lien. Citing *In re Gemini*, the court held "where the notes are legally transferred, the mortgagee and all claiming under him, will hold the mortgaged property in trust for the holder of the notes." Further, "The Mortgage was properly recorded in favor of MERS, as agent for [lender] its successors and assigns. MERS holds the legal interest in the Mortgage, as agent for the Note holder, whomever it may be, who, under Ohio law, because security follows the debt, holds the equitable title thereto"

Under *In re Fitch*, No 04-169051, 2009 Bankr. LEXIS 1375 (Bankr. N.D. OH 2009), the court found MERS has standing to seek relief from stay when MERS is the note holder and is also the mortgagee.

Rhode Island:

In re Akalarian, No. 09-bk-12681, (Bankr. R.I. 2010) involved a challenge to MERS assignments of two mortgages against two different properties owned by the debtor. The assignee of those mortgages filed motions for relief from stay in the debtor's bankruptcy. In opposition to the motions, the debtor argued, in part, that ~~the~~ assignments of Mortgage . . . are without authority and amount to a break in the chain of title." MERS filed a brief in support of the motions and pointed out its authority to foreclose its mortgages under Rhode Island statutory and common law. In recognizing MERS authority to assign mortgage liens, the bankruptcy court granted the motions for relief.

Washington:

In re Jacobsen, 402 B.R. 359 (W.D. Wash. 2009) holds that in order to seek relief from bankruptcy stay, party must show it has an interest in the note or the right to enforce the note.

The Court held that for purposes of Rule 17, ~~setting~~ forth that the holder may act through agents. . . is appropriate." *Id.* at 366. And the Court held that ~~to~~ have standing, [a party] must establish its authority to act for the holder of the Debtor's note." *Id.* at 367. But the Court found that ~~UBS AG~~ has submitted no evidence that it is authorized to act for whomever holds the note." *Id.* at 366. The Court only mentions MERS because, not only did UBS AG present no evidence that it could act on behalf of ACT Properties LLC, the alleged note holder, but UBS AG presented no evidence that ACT Properties LLC actually held the note. *Id.* at 367-68. There

was only an assignment of the deed of trust from MERS to ACT Properties LLC. *Id.* at 3362. Once MERS proffers the necessary evidence showing that it has authority to act on behalf of the holder of the note or the legal right to enforce the note, MERS (and any other party similarly situated) would have standing to seek a lift of the bankruptcy stay. *See Hawkins*, at *4 (—Motions brought by MERS as nominee could meet the threshold test of standing, and MERS might be the ‘real party in interest’ under Fed.R.Civ.P. 17, if MERS is the actual nominee of the present Member who is entitled to enforce the note.”)

Wyoming:

In re Relka, No 09-20806, 2009 WL 5149262 (Bankr. D. Wyo. Dec. 22, 2009). The bankruptcy court upheld the validity of a MERS assignment of mortgage. The court stated that, “[t]he issue regarding the [MERS] Assignment, is whether MERS had authority to assign the mortgage to the Creditor, on behalf of the Lender, Lehman Brothers Bank.” The Court cited language from the mortgage, reciting that MERS may exercise any rights granted in the mortgage, then noted that “[o]ne of the actions that this Court would include in this non-exclusive listing of rights, is the right to assign the mortgage. The mortgage was assigned and properly recorded under Wyoming law . . .” Further, —The assignment of the mortgage was, by the authority of the language of the original mortgage, assigned and properly recorded . . .”

In re Martinez, Bankr. D. Wyo. No. 09-21124 (Mar. 16, 2011). The debtors opposed the note holder’s motion for relief from stay claiming that MERS did not have any rights or authority regarding the mortgage and its assignment to the note holder/moving party. The Court allowed the note holder’s motion finding that fundamental mortgage law and the fact that the debtors agreed and granted MERS the authority outlined in the mortgage meant that MERS had the authority to assign the mortgage to the note holder on behalf of the original lender.

IV. SERVICE OF PROCESS

Arkansas

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).

California

In *Mortgage Electronic Registration Systems, Inc., as Nominee for J.P. Morgan Chase Bank, as Trustee, and as Nominee for LaSalle Bank National Association, v. Theresa Lynne Murphy, et al.*, CGC-08-473497 (San Francisco County Superior Court, 2010), the court recognized MERS’s right to notice of an action affecting its lien interest. The court overturned a judgment obtained by the defendant in a separate case, in which MERS was not named as a party or provided notice of the action. Notwithstanding Murphy’s claims that MERS lacked standing to seek to have her judgment vacated, the court held that Murphy’s judgment was “null and void as the parties purportedly affected thereby had not been named as defendants or served with the Summons...” In this case, the defendant filed a declaratory relief action against the borrower seeking to be declared the owner of the property by virtue of a private agreement between them. The borrower was the only named defendant in the declaratory relief action. After the borrower

failed to appear, Murphy obtained a default judgment, and later obtained an amended judgment from the court declaring her the fee simple owner of the property ~~free~~ from encumbrances done, made, or suffered by the Grantor..." Once MERS became aware of Murphy's judgment, an action to void the judgment was filed. Of note, the same judge who granted Murphy's amended judgment in the declaratory relief action was the same judge who later voided that judgment in favor of MERS.

Kansas

The August 2009 Kansas Supreme Court Opinion in the *Landmark National Bank v. Boyd A. Kesler* case is quite limited as it involves the vacating of a final judgment. The Kansas Supreme Court did not want to disturb the final judgment entered and held that the trial court judge did not abuse his discretion in not setting the judgment aside. The Court did not find, as some undoubtedly will suggest, that MERS is not entitled to notice and service of foreclosure actions when MERS is the mortgagee. In fact, the Court went out of its way to iterate the narrow scope of its holding by stating: ~~Even if~~ "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..." The Court held that in this particular case, because a default judgment had already been issued, and the property sold to a third party, the trial court did not abuse its discretion in denying a motion to vacate a default judgment and allow MERS to intervene in the lawsuit. While the Kansas Supreme Court claimed confusion over the nature of MERS' relationship to the Lender, and went outside the four corners of the mortgage to impose the Court's own definitions, the Court in Arizona in the Blau decision (discussed above under the section entitled Foreclosure/Arizona), examined the Kansas Court's reasoning and found there was little confusion because the deed of trust was clear. In the context of Blau's Deed of Trust, the Court considers the status of MERS to be more closely analogous to an agent than the mere straw man referred to in *Landmark*. Blau's Deed of Trust states that MERS is both the lender's nominee and the "beneficiary" of the agreement. For example, MERS is explicitly referred to as the beneficiary under the section of the document titled "Transfer of Rights in the Property."

This Kansas Ruling does not impact MERS ability to foreclose or assign the mortgage lien. The mortgage loan remains secured and enforceable. The Court cites to the Missouri case *Bellistri v. Ocwen Loan Servicing LLC*, 284 S.W.3d 619, 623 (Mo. App. 2009) as supporting its statement in the Opinion that ~~in~~ "in the event that a mortgage loan somehow separates interests of the note and deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable." Neither Kansas nor Missouri made a conclusion that under the facts of the cases before them, the interests were separated and the mortgages were unenforceable.

Further, the Kansas Legislature completed a comprehensive overhaul of the Kansas Code of Civil Procedure. On May 13, 2010, the governor signed into law HB 2656, which contains the following amendment to K.S.A. 60-219:

~~In~~ "In an action in which any relief sought would determine title or affect a security interest in real property, a person who is subject to service of process must be joined as a party if the person is a

nominee of record on behalf of a beneficial owner of a claimed interest in the property that is the subject of the action.”

K.S.A 60-219, section (e).

Maryland

In the case of *Sussman v. Baer*, Carroll County Circuit Court No. C 2010 56482, the Court dismissed the plaintiff’s complaint without prejudice for failing to join MERS as a necessary party/defendant. The Court found that service of process on the substitute trustee was not proper service on the beneficiary – MERS. The complaint was one for declaratory judgment, trespass to land and possession of property and accordingly MERS as a mortgagee of the subject property was a necessary party under Maryland law.

Missouri

In a recent decision, the United States District Court of the Eastern District of Missouri in *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 272080 *6, ¶ 37 (E.D. Mo. July 1, 2010) recognized that MERS’s role as beneficiary on a deed of trust, as nominee for the lender and its successors and assigns, gave MERS the right to enforce the deed of trust. *Bellistri*, 2010 WL 2720802. In that case, MERS sought a declaration that a tax purchaser’s failure to provide MERS with notice of redemption rights violated Missouri statute and deprived MERS of due process rights protected by the 5th and 14th Amendments. The district court agreed. With respect to the constitutional issues, the district court affirmed that due process protects MERS’ interest as nominee for the lender on the deed of trust. The court found that MERS’ status as beneficiary under a deed of trust, ~~as~~ nominee for the Lender and Lender’s successors” was a property right entitled to due process. *Bellistri*, 2010 WL 2720802, at *13 (noting that a ~~nominee~~” is defined in Black’s as a ~~party~~ who holds bare legal title for the benefit of others”). The district court stated that ~~MERS~~ has a legal right to file suit to foreclose the mortgage under § 443.190” and ~~the~~ right to enforce the lien on the property via a power of sale in the trustee.” *Bellistri*, 2010 WL 2720802, at *14. The court held that since MERS’ interest was sufficient to bring an action at law, *i.e.*, a foreclosure action, it was a property interest entitled to due process protection. *Id.* The tax purchaser had argued that the deed of trust was invalid due to a splitting of the note and deed of trust. Though the district court never expressly addressed that issue, it necessarily rejected the argument and found the deed of trust valid when it held that MERS’ rights to foreclose and enforce the lien under the deed of trust were ~~substantial~~” property rights. *Id.*

The District Court’s case results from the Missouri court of appeals’ decision in *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. App. 2009). This case arose from the same tax sale at issue in *MERS v. Bellistri*, but the evidence presented and issues decided were quite different. In *Ocwen*, the court of appeals held only that Ocwen lacked standing to challenge a quiet title judgment following a tax sale, because there was no evidence in that case regarding the ownership of the promissory note securing the deed of trust. *Id.* at 623-24.

The Missouri Court of Appeals in *Bellistri* is a holding that is also quite narrow and turns solely upon Ocwen's lack of standing to challenge the tax sale. The Missouri Court discusses the assignment from MERS to Ocwen and acknowledges that if there is an agency relationship between the holder of the deed of trust and the note-holder, then the note and deed of trust are effectively not split and the note is secured by the deed of trust. The MERS Terms and Conditions at Paragraph 2 state that “MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time.” Similar language is also found in the security instrument. This establishes our agency relationship with the note-owner. Ocwen’s attorney did not present to the Missouri Court the established MERS agency relationship to the note-owner. This was a fatal evidentiary defect for Ocwen in the case.

Oklahoma

In November 2006, the Oklahoma House of Delegates adopted a title standard recommended by the Oklahoma Title Examination Standards Committee, which recognized the potential for a wide distribution of interests in debt represented by mortgage notes. *See* 77 O.B.J. 3438 (December 2, 2006). The Committee recognized that lenders frequently designate one party to hold record title to the lien of a mortgage in order to facilitate commerce in the multiple and/or derivative interests in the debt. Accordingly, Title Standard 24.12 affirms that, where the beneficial owner(s) or principal(s) are not identified of record, a title examiner shall consider a mortgage lien held of record by a nominee or agent as assigned or released, if the assignment or release is executed by the nominee or agent. *See* Section 24.12, Oklahoma Title Examination Standards, Title 16 O.S. 2001, Ch. 1, App. The Committee specifically took note of nominee/agency relationships much like that of MERS, for its creation of this title standard. *See* Comment to Section 24.12. In looking at this standard, one must bear in mind that the beneficial owner(s) or principal(s) of the debt at the time an assignment or release is executed are very rarely of record. Beneficial interests in promissory notes change hands frequently and, in most cases, almost immediately following the loan’s origination and recording of the mortgage securing the loan. The purpose of land records and the benefit of recording is to establish the priority and *existence* of a lien interest to interested parties—not to identify the identity of the current beneficial owner(s) or principal(s) to the debt.

Oregon

In the *Parkin Electric* case previously cited (see section on Foreclosures), the court determined that MERS was entitled to notice of actions that would affect its recorded security interests in real property. The plaintiff, in its lien foreclosure action, failed to provide notice to MERS. Instead, plaintiff initially named as a necessary party and provided notice of the suit to the original lender identified in the recorded MERS deed of trust. Despite the fact that the MERS lien was recorded prior to the plaintiff’s lien, the plaintiff also alleged that its lien was in parity or superior to that of the MERS lien. At the summary judgment stage, plaintiff argued that MERS was incapable of appearing in court as a foreign corporation, was not a real party in interest, and the MERS deed of trust was void or without benefit of the Oregon recording statutes. MERS prevailed on summary judgment as to the plaintiff’s claims and a subsequent application for attorney’s fees because, —. . in naming MERS as a defendant in its foreclosure

suit without alleging facts to support relief against [MERS as] a prior lienholder, Plaintiff acted in derogation of clearly established Oregon case law.” The court also stated,

—[The lien statutes] look only to notices to and the states of 'mortgagees' and only the beneficiary of a trust deed is treated as a mortgagee under [Oregon statute]. The statutes do not prevent agency arrangements as agreed upon among borrowers, lenders, trustees and beneficiaries . . . Plaintiff proceeded to name in its complaint Bank of America--a 'beneficiary' [of another recorded trust deed against the property]--but did not initially name MERS, the other listed 'beneficiary.' Instead, Plaintiff named the original lender who initially was the principal for MERS as agent or nominee and did not name MERS . . . This action, for which Plaintiff has only itself to blame . . . cannot affect the rights of MERS. The notice provisions in the lien statutes do not direct notices be given to lenders but rather direct that they be given to 'mortgagees.’”

The court went on to note that MERS had the protection of Oregon's priority statutes.

Virginia

In *Clarence J. Hamlin v. Kathleen Harps, et al.*, #4:07-cv-66 (E.D. Va., September 18, 2007) (J. Friedman), the federal court stated that ~~the~~ Virginia Supreme Court has held that an entity named as a beneficiary under a deed of trust is considered a necessary party where the lien of a deed of trust may be defeated or diminished. [citing *James T. Bush Constr. Co. v. Patel*, 243 Va. 84, 97 (1992) and *Mendenhall v. Cooper*, 239 Va. 71, 76 (1990)]” and that ~~the~~ absence of the beneficiary to a case in which the deed of trust is subject to defeat or diminution may provide the basis for the voiding of any order in that case [citing *Atkisson v. Wexford Assocs*, 254 Va. 449, 455 (1997)”. Here, the plaintiff filed the original complaint without initially naming MERS as a defendant or providing service of process to same. A defendant filed a motion to dismiss for failure to join an indispensable party, under Rule 12(b)(7) of the Federal Rules of Civil Procedure. Though the plaintiff argued in response to the motion that MERS is a ~~legal~~ fiction”, the court specifically found that MERS was the named beneficiary on the deed of trust at issue and that ~~the~~ Virginia Supreme Court has repeatedly emphasized that MERS must be joined in a case in which a plaintiff seeks to defeat or diminish the deed of trust . . . [t]hus, to the extent that the plaintiff is attempting to defeat or diminish the deed of trust, MERS is a necessary party.”

V. GRANT OF SIGNING AUTHORITY

Borrowers now frequently raise challenges to the form and circumstances surrounding the execution of an assignment by MERS to a subsequent assignee. The written assignment itself is a form of contract and the law limits generally the litigation of contracts to the contract's parties and intended beneficiaries.

TREATISES

Richard A. Lord, 29 Williston on Contracts § 74:50 (4th Ed.) (~~“T~~he debtor has no legal defense [based on invalidity of the assignment] ... for it cannot be assumed that the assignee is desirous of avoiding the assignment.”).

6A C.J.S. Assignments § 132 (~~“T~~he only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice.”). A debtor cannot raise alleged acts of fraud or question the motive or purpose underlying an assignment. *Id.*

Restatement (Third) of Property, Section 5.4 comment c (~~“The~~ trust or agency relationship may arise from the terms of the assignment [of the mortgage to the mortgagee of record], from a separate assignment or from other circumstances. Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the note owner's] expectation of security.”)

CASE LAW

The U.S. Supreme Court has addressed the principle regarding prohibitions against parties generally asserting the rights or claims of another and why those prohibitions are necessary –

Warth v. Seldin, 422 U.S. 490, 499 (1975)(~~“even~~ when the plaintiff generally has alleged injury sufficient to meet the ‘_case or controversy’ requirement . . . a plaintiff generally must assert *his own legal rights and interests*, and cannot rest his claim to relief on the legal rights or interests of third parties.”)

Plaintiffs cannot seek to enforce the rights of another, particularly where that other party has not made a claim of its volition. This prudential standing consideration serves to ensure that the party with the ~~“a~~appropriate incentive” to raise a challenge (or to choose not to) does so with ~~the~~ necessary zeal and appropriate presentation.” Exceptions to this standing requirement occur only when ~~the~~ party asserting the right has a ‘_dose’ relationship with the person who possesses the right” and when ~~there~~ is a hindrance to the possessor's ability to protect his own interests.” See *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

California

In *Phillips v. Wells Fargo Bank, N.A.*, 2009 WL 3756698, at *4 (S.D. Cal. Nov. 6, 2009), the court dismissed a complaint and found plaintiff's allegation that the MERS assignment was

unauthorized because the MERS signatory ~~was~~ not and is not a Vice President of MERS” as entirely unsupported by factual allegations. (~~Plaintiff~~ does not support this allegation with facts, but instead states that this allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”).

Florida

In *Kapila v. Atlantic Mortgage & Investment Corp.*, 184 F.3d 1335, 1338 (11th Cir.1999), the 11th Circuit affirmed the holding the decision of the District Court, holding that

The [Florida recording statute] is not intended to protect one claiming under a mortgagor--against whose property there is already a perfected mortgage--with respect to subsequent assignments of the mortgage. The mortgagor has actual notice of the original mortgage, and anyone claiming under the mortgagor has constructive notice if the mortgage is recorded. From the point of view of the mortgagor or someone standing in his shoes, a subsequent assignment of the mortgagee's interest--whether recorded or not--does not change the nature of the interest of the mortgagor or someone claiming under him.

In the judicial foreclosure action of *BAC Home Loans Servicing, LP v. Galan*, Case No. 2010CA3149 (Osceola Cty. Cir., Feb. 22, 2011) (J. Miller), the court granted a protective order preventing the deposition of a MERS officer by the borrower for inquiry into the facts underlying the MERS officer's execution of a MERS mortgage assignment to the plaintiff. The court found that ~~“t~~here is no dispute between the assignor MERS and any parties to the assignment as to the meaning and effectiveness of the assignment(s).” Further, ~~“t~~he assignment transferred rights under the mortgage, not under the Note . . . [i]n that Plaintiff is the holder of the Note endorsed in blank, Plaintiff is entitled to enforce its terms and any defenses based upon the validity of the Assignment of the mortgage are moot.” (underscore in original). The Court further cited to case law from around the country [and reflected throughout this Outline] in holding that MERS as mortgagee and nominee has the capacity to confer good title to an assignee. The Court also cited to other Florida court decisions granting Motions for Protective Order on similar grounds. See *U.S. Bank National Association v. Kelly*, Case No. 2010-CA-004290-0 (Orange Cty. Cir.) (J. Conrad); *HSBC Bank USA, N.A. v. Davydova*, Case No. 50-2009-CA-04261 XXXXMB (Palm Beach Cty. Cir.) (J. Hoy); *BAC Home Loans Servicing, LP v. Munoz*, Case No. 09-69411 CA 24 (Miami-Dade Cty. Cir.) (J. Rodriguez); *BAC Home Loans Servicing, LP v. Taylor*, Case No. 36-2009-CA-064485 (Lee Cty. Cir.) (J. Starnes).

Illinois

Though MERS was not a party to the litigation, the case of *Liu v. T&H Mack, Inc.*, 191 F.3d 790, 797 (7th Cir. 1999) is an example of the legal standard requiring a party to first have standing to challenge assignments of contract (such as a mortgage). The Seventh Circuit held that a party to an underlying contract lacked standing to attack reassignment of that contract to another. Appellee Liu brokered a tube mill manufacturing contract between Appellant T&H Mack (T&H) and Liu's business associates in China. In exchange, T&H agreed to pay Liu a brokerage fee. Liu wanted his payments split between himself and several associates who assisted him in

arranging the manufacturing contract. Pursuant to that understanding, T & H executed four agreements to pay Liu and his three associates. At some point, Liu filed suit from unpaid brokerage fees. After filing the complaint, Liu received reassignments from three associates, giving Liu the right to proceed against T & H for any monies due the associates under the agreements to pay. Among other objections, T&H disputed the authority of the signatories of the agreements to pay and the bona fides of their notarized signatures, including a claim that the associates who executed the original agreements to pay lacked authority to do so. In response, the Court stated, —. . it is unclear why anything pertaining to the parties' authority concerning the agreements to pay . . . would bear upon the authority of the parties to reassign their rights to Liu.”

Kentucky

Though MERS was not a party to this litigation, *Rogan v. Bank One*, 457 F.3d 561 (6th Cir.2006), is another example related to a party's need to have standing before being able to challenge the effectiveness of a contract assignment. In *Rogan*, the plaintiff, acting as trustee for a bankruptcy estate, challenged the assignment of the original creditor's interest in the mortgage to another bank. The Sixth Circuit agreed with the bankruptcy court that found the assignment to be immaterial —because neither the debtors nor the Trustee [were] parties to the [assignment].... They lack standing to enforce it; they cannot claim to have relied on it.” *Id.* at 567.

Maryland

MERS was not a party to the case of *Lovell Land, Inv. V. State Highway Admin.*, 408 Md. 242, 260-61, 969 A.2d 284, 295 (2009) but the Court of Appeals of Maryland addressed the issue of who does and does not have standing to enforce a contract. It stated that —before a stranger to a contract can avail himself of the exceptional privilege of suing for a breach thereof, he must at least show that it was intended for his direct benefit.” (citing *Mackubin v. Curtiss-Wright Corp.*, 190 Md. 52, 56-57 A.2d 318, 320-21 (1948)).

See *Miles, Jr., et al. v. Sydnor, et al.*, #24-O-08-3542, (Baltimore City Circuit Court (Jan. 8, 2011) discussed in Section II. —FORECLOSURES” above.

Massachusetts

See *Kiah v Aurora Loan Services, LLC*, cited in the FORECLOSURES Section above, (— . . it is difficult to see why plaintiff has standing to assert such a claim [that the mortgage assignment was void for lack of consideration], and how in any event he has suffered a compensable injury if the consideration was not paid.”) See also *BAC Home Loans Serving v. Kay* cited in the FORECLOSURES Section (“MERS had the authority to assign the mortgage without need to demonstrate the direction of its principal, and its assignee had the right to rely on that authority.” Any objection to MERS' exercise of those powers must be timely, and can only come from the principal itself.”)

See *Citibank, N.A., as trustee v. Collette*, cited in the FORECLOSURES Section above, —[employee of law firm], as an Assistant Secretary and Vice President of MERS, had authority to

execute the assignment on behalf of MERS and was not disqualified from doing so because she was also a member of the [law firm] engaged in foreclosure-related proceedings against the defendant. [citing to SJC Rule 3:07, Rules 1.7, 1.8, 1.9 & 3.7]”

In the case of *In re Almeida*, 417 B.R. 140 (Bankr.D.Mass.2009), the debtor asserted that an assignment of the mortgage that was sought to be foreclosed on was invalid because it failed to comply with certain terms of a pooling and servicing agreement. The bankruptcy court determined that the debtor lacked standing to challenge the validity of the assignment since the debtor was not a third party beneficiary of the agreement and lacked standing to object to any breaches of the terms of that agreement.

In response to a borrower challenge to the validity of a MERS assignment, the Massachusetts Land Court in *JP Morgan v. Lord, et al.*, #cited in the FORECLOSURES Section above,, decided the issue of whether ~~an~~ assignee from MERS (the mortgagee of record) [has] standing to bring a servicer’s action without first needing to show express authorization for that assignment from the party for whom MERS was nominee.” The court held that MERS had standing for multiple reasons, primarily because MERS was the original mortgagee and further stated that,

~~–[t]~~he language [in the mortgage] that followed—as nominee for First Franklin—was descriptive, not limiting. In the absence of anything of record containing any limitations, and certainly in the absence of a challenge from *First Franklin*, MERS . . . had full power to act with respect to the mortgage, including the power to assign it. . . [o]nly First Franklin or *its* assignees have standing to object to that assignment, and they have not done so. The Lords cannot, since they themselves granted the mortgage to MERS.” (emphasis in original).

Michigan

In *Golliday v. Chase Home Finance LLC*, cited in the FORECLOSURES Section above, the plaintiffs challenged the authority of the person who executed the assignment to do so on behalf of MERS and further alleged fraud. The court determined that ~~–[t]~~he parties to the corporate resolution do not dispute [the assignment’s] authenticity . . . Moreover, Plaintiffs offer no basis for finding that they, as non-parties to the assignment, have standing to challenge it. (citing to *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings*, discussed below).”

~~–[W]~~here a corporation has authorized or ratified the signature of its name in such manner as to bind the corporation itself, whether such authority or ratification were express and formal or arose from acquiescence and inaction, the signature cannot be disputed by any third party for the purpose of invalidating the [document] which the corporation itself cannot or does not attack.” *Yuille v. American Home Mortgage Servicing, et al.*, #09cv11203, (Eastern Dist. of Michigan, Sept. 22, 2010), citing, *Long v. City of Monroe*, 265 Mich. 425, 441 (1933). Citing the above, the court found that ~~–Plaintiff~~, being a stranger to the transaction, is without standing to challenge its validity.”

In *Livonia Property Holdings v. Farmington Road Holdings*, 2010 WL 1956867 (E.D. Mich. 2010), the court determined that the validity of the assignments of the mortgage or the negotiations/transfers of the promissory note do not affect whether the borrower owes its obligations, but only to whom the borrower is obligated. (Citing *Bowles v. Oakman*, 246 Mich. 674, 225 N.W. 613 (1929)(the maker of the note may not attack the validity of a transfer of that note; the maker of a note cannot, in an action brought against him, litigate questions that properly arise only between the holder and his immediate endorser. *Id* at 225 N.W. at 614). The *Livonia Property* court further noted, that the Michigan Uniform Commercial Code (“UCC”) provides that the obligor of the Note may not assert against the person entitled to enforce the instrument, a defense of another person. MCL § 440.3305(3), and stated, “for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who was not a party to an assignment lack standing to challenge that assignment,” *Livonia Property* at 8. The court then noted that as long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignment cannot do so. *Id.* at page 9.

In a subsequent Opinion and Order denying the plaintiff’s Motion for Reconsideration, the *Livonia* court responded to the issue that the court “was misled about certain transfers of the Loan Documents” and whether or not parties complied with provisions of the Pooling and Servicing Agreement referencing the promissory note. The court noted that,

The [foreclosure by advertisement] statute did not create a system inviting mortgagors to delve into the business dealings of their lenders to determine their compliance with all of their contractual obligations. It offers certain protections to mortgagors, sufficient to ensure they are not at risk of competing claims. And, it offers certain protections to purchasers at a foreclosure sale so that they may purchase a clean title. Those protections are satisfied in this case . . . regardless of what contracts exist between which entities, Plaintiff was not and is not a party to any of those contracts (including the assignments), and lacks standing to challenge their validity or the parties’ compliance with those contracts here.

(emphasis in original). *Livonia Property Holdings v. Farmington Road Holdings*, #10-cv-11589, Dkt. 30, (E.D.Michigan, June 14, 2010).

New Jersey

CitiMortgage v. Lee, Essex County Superior Court No. F-50138-09 (Mar. 14, 2011): Borrower’s motion to reconsider foreclosure judgment was denied. The Court found no evidence to support the borrower’s allegation that the MERS certifying officer did not have authority to execute the mortgage assignment on behalf of MERS; rather the Court found that the evidence before it demonstrated that the MERS certifying officer, who was nominated to MERS by CitiMortgage, had authority to execute the assignment.

New York

In re Holden, 2 N.E.2d 631 (N.Y. 1936) (“The assignments were valid upon their face. The assignee was the legal owner of the claims assigned. No one could question the validity of the assignments except the assignors.”)

Ohio

In *Bridge v. Aames Capital Corp.*, 2010 WL 3834059 (N.D. Ohio), the plaintiff asserted two causes of action: (1) a cause of action for declaratory judgment that the assignment of the Mortgage Note from Aames Capital Corporation to Deutsche Bank was “insufficient as a matter of Ohio law to create a valid debt and security interest in the Property”; and (2) a cause of action to quiet title in the name of Plaintiff, and to declare the Mortgage and the assignment of the Mortgage to be void and unenforceable. In response to a Motion to Dismiss, the Magistrate Judge recommended that the case be remanded to state court as improvidently removed on the ground that Plaintiffs lacked standing to bring the action and that this court lacked subject matter jurisdiction over the action. Defendant Aames Capital filed an objection to the Report and Recommendation. On *de novo* review of the Magistrate's recommendation, the court granted the Motion to Dismiss for failure to state a claim in the diversity action. Citing a number of federal opinions, including the *Livonia* case, the court found that the plaintiff did not have standing to assert her claim. The court noted that

In the instant case, there is no dispute between Deutsche Bank and Aames as to whether the Mortgage was properly assigned. Ms. Bridge is the only party challenging the validity of the assignment . . . Whether Plaintiff is challenging the 'transfer' of the Mortgage or challenging 'various transactions engaged in' related to the Mortgage, her role in the exchange between Aames and Deutsche Bank and how it affects her contractual obligations remains the same-uninvolved and unaffected.

Further,

[r]egardless of the outcome of this litigation, Plaintiff is still in default on her mortgage and subject to foreclosure. As a consequence, Plaintiff has not suffered any injury as a result of the assignment between Aames and Deutsche Bank nor is there any likelihood that Plaintiff's requested relief will prevent her alleged injury.

Pennsylvania

In *Ifert v. Miller*, 138 B.R. 159 (Bankr.E.D.Pa.1992), the court explained that a debtor lacks standing to challenge an assignment under Texas law because:

[The underlying contract] is between [Debtor] and [Assignor]. [Assignor's assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment of the contract, [Debtor's] rights and duties under the [underlying] contract remain the same: The only change is to *whom* those duties are owed.... [Debtor] was not a party to [the assignment], nor has a cognizable interest in it. Therefore, [Debtor]

has no right to step into [Assignor's] shoes to raise [its] contract rights against [Assignee]. [Debtor] has no more right than a complete stranger to raise [Assignor's] rights under the assignment contract.

Id. at 166 n. 13 (applying Texas law).

Rhode Island

Brough v. Foley, 525 A.2d 919, 921 (R.I. 1987) (affirming dismissal of challenge to sale of property because plaintiffs lacked standing to challenge right of first refusal or assignment of that right in purchase and sale agreement; holding that “[t]he plaintiffs were, in substance, strangers to those transactions and were given no rights under the contract to challenge the transactions”)

Virginia

See *Moore v. BAC Home Loans Servicing LP* [in Foreclosures section of the Outline above], (–Plaintiffs’ right [to challenge MERS’ grant of authority] should be carefully limited to those cases in which they can allege facts which would render MERS’ actions invalid. Allegation that Plaintiffs have not been shown MERS’ authority, or written record does not contain it, are insufficient.”)

Washington

In *Bain v. Metropolitan Mortgage Group, Inc.*, 2010 WL891585 (W.D. Wash. Dist. Ct., March 2010), the plaintiff raised issues concerning the execution of a mortgage assignment by a person designated as an officer of MERS but who was not also an employee of same. In rejecting the arguments that the assignment was executed fraudulently, the court noted that,

–[t]he non-employee signors] did not commit an affirmative misrepresentation of fact, because of the simple fact that, for purposes of signing these papers, [the non-employee signors] misrepresented nothing: [the IndyMac signor] and [the MERS signor] *did* bear the titles that they used. The employees' use of the titles was expressly authorized by contracts with IndyMac and MERS . . . There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.” (emphasis in original) . See, e.g., *Russell v. Lundberg*, 120 P.3d 541, 544 (Utah Ct.App.2005) (–[I]t appears to be accepted practice for [deed of trust] trustees to use third parties to perform foreclosure activities”); *Buse*, 2009 WL 1543994, at *2.