

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

Case Law Outline

2nd Quarter 2011

MERSCORP Inc. Law Department

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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 refer to Mortgage Electronic Registration Systems, Inc., unless otherwise indicated.

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I. INTRODUCTION TO MERSCORP, INC. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Corporate Structure:

MERSCORP, Inc. is a privately held stock-holder corporation. A complete list of the stock-holder companies can be found on the Corporate Website, www.mersinc.org. MERSCORP, Inc. is the operating company that owns and operates the MERS® System and all other products. It is also the parent company of Mortgage Electronic Registration Systems, Inc. (“MERS”), a wholly owned subsidiary whose sole purpose is to be the mortgagee of record and nominee for the beneficial owner of the mortgage loan. 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.

Basic Business Model:

- **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. Because MERS only holds lien interests on behalf of its Members, when a mortgage loan is sold to a non-MERS member, an assignment of mortgage is required to transfer the mortgage lien from MERS to the non-MERS member. Such an assignment is subsequently recorded in the land records providing notice as to the termination of MERS’s role as mortgagee.

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).

On December 19, 2006, New York's highest court, the New York Court of Appeals, a unanimously 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 facts supplied by Nassau County, NY to the AG's office were incorrect by erroneously concluding that MERS does not hold the mortgage interest to the mortgage and therefore is not the true mortgagee. The AG's office stated that 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, MERSCORP filed a lawsuit against Suffolk County and its then-Recorder, Edward Romaine. MERSCORP 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 MERSCORP 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 MERSCORP, 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 MERSCORP's 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 MERSCORP constituted the kickback or thing of value and that MERSCORP received the referral of business from the mortgage lenders. Therefore, the allegation is that MERSCORP received both the kickback and the business referral, not that MERSCORP 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 MERSCORP 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 MERSCORP received a small fee from member mortgage lenders. In exchange for the fee, MERSCORP 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

Rule 8 of the MERS® System Rules of Membership (“Rules”) governs foreclosure of a mortgage lien when MERS is the mortgagee of record. On March 8, 2011, MERSCORP published proposed changes to Rule 8 that would eliminate the option of commencing foreclosure in MERS’ name that is currently available to members. Under the proposed changes, members would be required to instruct a MERS Signing Officer (“also referred to as a “MERS Certifying Officer”) to execute an assignment of the mortgage lien from MERS to the servicer or a third party, prior to the initiation of the foreclosure proceeding. Once the rule changes are made effective, MERSCORP will no longer allow members to foreclose in MERS’ name. These changes also apply to Motions for Relief from Stay and Proofs of Claim in bankruptcy. Any time that a member needs to file a proof of claim or motion for relief from stay, the member must first instruct a MERS Signing Officer to execute an assignment of the mortgage lien from MERS to the servicer or a third party, prior to filing the document with the bankruptcy court.

Until the changes become effective, MERSCORP has requested that members refrain from commencing foreclosures in MERS’ name. If a member determines that it will initiate a foreclosure in MERS’ name, the member must give MERS two weeks advance notice to permit the verification and current status of the MERS Signing Officer who will participate in the foreclosure proceeding. Members should refer to Announcement 2011-01, issued on February 16, 2011 for additional guidance.

TREATISES

The promissory note and mortgage are **NOT** split because of a limited form of 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 “recognize 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 “cases 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]

See also Walter E. Heller & Co. v. O/S Sonny V, 595 F.2d 968, 974 (5th Cir. 1979) (“The promissory note and the mortgage are inseparable halves of the same contract.”).

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’s 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. The defendants’ motion to vacate or modify the January 18, 2011 summary judgment order was denied on April 18, 2011.

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).

Fannie Mae v. Steele, Jefferson County Circuit Court No. 09-900069 (May 18, 2011) The trial court denied the defendants' motion to set aside the judgment for possession in favor of the plaintiff Fannie Mae. The defendants claimed in their motion that the judgment should be vacated on the grounds it was void because the MERS assignment of mortgage to Everhome Mortgage (who conveyed the property to Fannie Mae through foreclosure deed) was void meaning Fannie Mae had no standing to bring the ejectment action. The defendants claimed that MERS could not assign the mortgage to Everhome because MERS is not a valid mortgagee according to Alabama law. The Court denied the defendants' motion, and held that the MERS assignment was valid because MERS had the ability to assign the mortgage and take other actions as the nominee of the lender and its assigns. The Court in its decision cited to the appellate court decision in *Crum v. LaSalle Bank*, 2009 WL 2986655 (Ala. Civ. App. Sept. 18, 2009) in which the Court upheld the validity of a MERS assignment.

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 September 30, 2010, 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 is being 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) An amended complaint was filed on June 24, 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); *Putkuri 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(" [A]ny 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) (motion for reconsideration denied 10-16628 (June 13, 2011), 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.

See *Warren v. Sierra Pac. Mortg. Servs., Inc.*, CV-10-02095-PHX-NVW, 2011 WL 1526957 at *5 (D. Ariz. Apr. 22, 2011) (recognized the MERS® System and rejecting the plaintiff's theory that the note and deed of trust were "separated").

In *Sparlin v. BAC Home Loans Servicing, LP, MERS, et al*, 2 CA-CV-2010-0173 (Ct. Ap. Az Div. 2, May 24, 2011), the borrowers appealed the trial court grant of summary judgment for MERS. Using a "show me the note" theory, the borrowers argued that MERS was required to prove that it owned the original promissory note to execute a substitution of trustee appointing ReconTrust as the substitute trustee and executing an assignment to BAC. These documents allowed the trustee to initiate foreclosure. In affirming the dismissal, the court found that MERS, as the beneficiary on the Deed of Trust, had the right to enforce the security instrument and that Arizona law does not require MERS to be the note holder.

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. 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 *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 2009 WL 723182 (March 19, 2009) the Arkansas Supreme Court affirmed the lower court’s denial of MERS’ motion to set a decree of foreclosure. MERS as the record beneficiary of the deed of trust did not receive notice of a foreclosure. The Court found that under Arkansas law the lender was the deed of trust beneficiary not MERS because MERS did not receive payment of the debt. The Court ignored the express terms of the mortgage contract which appointed MERS as the deed of trust beneficiary entitled to notice and in its decision it did not offer any legal support for its finding that MERS was not entitled to notice. Despite this ruling, MERS continues to receive notices in Arkansas related to recorded deeds of trust in which MERS is named beneficiary.

In *Kimberly Peace v. Mortgage Electronic Registration Systems, Inc., et al.* (United States District Court, Eastern District of Arkansas, 4:09-cv-00966) (June 11, 2010), 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.”

Coley v. Accredited Home Lenders, Inc. et al. E.D. Ark. No. 4 10 CV01870 (March 29, 2011). The defendants’ motion to dismiss was granted with prejudice as to the plaintiffs’ wrongful foreclosure claims and without prejudice as to their fraud claim. The plaintiffs alleged that the foreclosing lender did not have standing to foreclose because MERS was not authorized to

transfer or assign the mortgage to the foreclosing lender and that the lender named in the security agreement was the only entity that could pursue foreclosure. However, the Court found that MERS was the mortgagee under the security agreement as an agent of the originating lender. The Court held that while the plaintiffs “contend that MERS did not have authority to make the transfer, the security agreement attached to their complaint says otherwise.” MERS acted within its role as agent when it transferred the mortgage to the foreclosing lender, the court held, and ruled that the MERS assignment was valid and therefore dismissed the wrongful foreclosure claim. In addressing the *Southwest Homes of Arkansas* decision, the Court here found that the Court in *Southwest Homes* refused to set aside the foreclosure after MERS was not given notice because the principal had been a party to the foreclosure action and “it was not reasonable for the agent, MERS, to presume that the principal would want the foreclosure to be set aside.”

California

Challenges to MERS ability to foreclose are routinely defeated. Both the 2nd and 4th District Courts of Appeal have recognized MERS as a beneficiary. 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.*, No. D057005, 192 Cal. App. 4th 1149 (Feb. 18, 2011), Cert. denied (May 18, 2011), the Fourth District California Court of Appeal 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 “nowhere 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 "whether 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 "at some point after 2005." The court stated that "the fact remains that MERS continued to be [the] new mortgage 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 "MERS is the named beneficiary in the Deed of Trust. By signing the Deed of Trust, Plaintiff agreed that MERS would be the beneficiary and act as nominee for the lender. The deed explicitly states that "Borrower understands and agrees that MERS holds only legal title . . .[and] has the right: to exercise any or all of those interests, including but not limited to, the right to foreclose and sell the property." (RJN Ex. A 3-4.) Plaintiff explicitly authorized MERS to act as beneficiary with the right to foreclose on the property."

The court stated that while MERS was a foreign corporation, it was exempt from the requirement to be licensed in California because "evidences of debt or mortgages, liens or security interests on real or personal property" and the "enforcement of any loans by trustee's sale, judicial process, or deed in lieu of foreclosure or otherwise" do not constitute the transaction of intrastate business." Also see *Pili v. Mortgage Electronic Registration Systems, Inc., et al.*, KC054036 (Los Angeles County Superior Court, 2009); *Leon Francies Jr., v. Homeq, et al.*, S-1500-CV-267108 (Kern County Superior Court, 2009); *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); and *Hamid v. Chevy Chase Bank, et al*, RG09484550, Superior Court of Alameda County, 2011.

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 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); *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) (“No requirement exists under statutory framework to produce the original note to initiate non-judicial foreclosure.”); *Putkuri v. Recontrust Co.*, No. 08cv1919, 2009 WL 32567, at *2 (S.D.Cal. Jan.5, 2009) (“Production 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); *Pataglunan v. Reunion Mortgage, et al.*, 3:09cv00162 (N.D. Cal., 2009)

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

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

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 is 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]t 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 “prohibit 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 “Plaintiff’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 *Champlae 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 *Champlae*, 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 "[a]s 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 "[a]bsent 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 ". . . 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); *Ultreas 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).

In an order denying plaintiffs' request for a preliminary injunction to enjoin the sale of property, the California federal court in *Perry v. Natl. Default Servicing Corp.*, 2010 WL 3325623 (N.D. Cal. Aug. 20, 2010) (Koh, J.), rejected the plaintiffs' challenge to the validity of the MERS assignment to a subsequent assignee. Citing to the language in the deed of trust as well as prior California decisions regarding MERS capacity, the Court held that the trust deed conferred contractual powers on MERS such that it may execute its terms. The Court concluded that MERS had the authority to assign the trust deed.

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 "prevailing 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."

In *Hollins v. ReconTrust*, Civil No. 2:11-cv-00945-PSG –PLA, Dkt. 19, (C.D. Cal. May 6, 2011) (Gutierrez, J), plaintiffs claim that foreclosure proceedings initiated by Defendants are invalid based on Defendant MERS' alleged lack of authority to assign its interests to another party. MERS filed both a substitution of trustee and assignment of deed of trust with the county recorder's office. The Central District of California court noted that "federal and state courts in California have repeatedly rejected similar challenges to MERS in cases where the plaintiff expressly authorized MERS to act as a beneficiary." Regarding plaintiffs' allegation that US Bank is not authorized to foreclose due to lack of "documentation evidencing the proper status of [US Bank] as a party in interest[.]", the Court found the allegation "negated by a judicially noticeable record of assignment from MERS to US Bank." In response to the plaintiffs' claims of wrongful foreclosure, the Court determined that "...courts have consistently held that plaintiffs bringing claims for wrongful foreclosure must offer to tender the full amount owed to sustain a cause of action regarding any aspect of the foreclosure sale procedure."

In *Ferguson v. Avelo Mortgage, LLC*, No. B223447 (Cal. App. 2d, June 1, 2011), the California Court of Appeal, Second District, held that a party seeking to vacate a non-judicial foreclosure and to quiet title must allege prior tender of the full amount due, including where the entity foreclosing on the property was assigned its beneficial interest from MERS. The plaintiffs were tenants in a home that was purchased by the borrower. The borrower executed a promissory note, secured by a deed of trust on the property. The defendant, Avelo Mortgage, LLC ("Avelo"), was assigned the beneficial interest under the deed of trust by the original beneficiary, MERS. Prior to the assignment, Avelo executed a substitution of trustee replacing the original trustee with Quality Loan Service Corporation ("Quality"). Quality then initiated a non-judicial foreclosure proceeding against the borrower, and Avelo purchased the property at a trustee sale. Subsequently, the borrower executed a quitclaim deed in favor of plaintiffs. The plaintiffs then sued Avelo to quiet title. The trial court sustained Avelo's demurrer without leave to amend. The plaintiffs argued that Avelo was not the holder of the note and therefore could not invoke the tender rule against them. The plaintiffs claimed that while MERS had the authority to transfer its beneficial interest under the deed of trust, there was no evidence that MERS held the note and was authorized to assign the note itself to Avelo. In ruling against the plaintiffs, the appellate court noted that the "role of MERS [was] central to the issues in [the] appeal." In finding that Avelo had standing to foreclose, the court cited *Gomes v. Countrywide Home Loans, Inc.*, [discussed above]. The court reasoned that, because Avelo had the right to initiate the foreclosure proceedings, based on the assignment from MERS, it follows that it could "seek tender from a defaulting borrower attempting to set aside the foreclosure."

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. A temporary restraining order and then a preliminary injunction was obtained 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.

Connecticut

Long before the existence of MERS, the Connecticut courts held that a mortgage may designate a person to serve as mortgagee of record other than the obligee or beneficial owner of the debt secured thereby. *See First Nat. Bank v. National Grain Corp.*, 131 A. 404, 406-7 (Conn. 1925) (“a mortgage may be held for the security of the real creditor, whether he is the party named as mortgagee or some other party, for the provisions of a mortgage are not necessarily personal to the mortgagee named. The real party in interest may be an assignee of the mortgagee or some one subrogated to his rights under the mortgage, or even a third person not answering either of these descriptions”)

Connecticut judges have upheld MERS right to foreclose. *Mortgage Electronic Registration Systems, Inc. v. Ventura*, No. CV 054003168S, 2006 WL 1230265 (Conn. Super. Ct. April 20, 2006); *Mortgage Electronic Registration Systems, Inc. v. Leslie*, No. CV044001051, 2005 WL 1433922 (Conn. Super. Ct. May 25, 2005). *Book v. Mortg. Elec. Reg. Sys., Inc.*, 608 F. Supp. 2d 277, 287 (D. Conn. 2009)(observing state court affirmation of MERS foreclosure and rejecting plaintiff’s claims because “[t]hese claims essentially challenge MERS’ legal authority to foreclose on the Fairfield property, an issue that was necessarily raised and settled in MERS’ favor in state court.”)

In *Ventura*, MERS brought a foreclosure action and moved for summary judgment. 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 when 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

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 allowed members to commence foreclosures in MERS’ name in Florida. The Company was 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.

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, “[t]o the extent that courts have encountered difficulties with the question . . . the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law.” Although MERS does not actually “own” the note it is foreclosing, the Third DCA stated “[w]e simply don’t think this makes any difference” and noted that the Florida rules of civil procedure allow an action to be brought by an authorized agent on behalf of the real party in interest. The Third DCA concluded that, since “no substantive rights, obligations, or defenses are affected by the use of the MERS device” there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business.” As a result of these two decisive victories in the Florida appellate courts, the right of MERS to foreclose in Florida is now firmly established, although MERS no longer forecloses in Florida as a business practice

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 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 Fifth 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

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. Meismer*, 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.

See also: *Browder v. MERS, GMAC*, No. 09-CV-10350, Superior Court of Dekalb County, Georgia (June 20, 2011), (The court granted MERS and GMAC's motion for summary judgment stating that "MERS, in its capacity as nominee for the Lender and grantee of the Security Deed, had legal authority and standing to initiate foreclosure proceedings and that [it had] fully complied with Georgia's statutory foreclosure requirements").

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 Kante v. Countrywide Home Loans, N.D. Georgia* No. 1 09 cv 01233 (Mar. 24, 2010) ("MERS unambiguously had authority to [enforce] the power of sale."); *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."); *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.")

Otosuhene v. Johnson & Freeman, LLC et al, N.D. Georgia No. 11 CV 0979 (April 22, 2011). The Plaintiff sued defendants alleging wrongful foreclosure, slander of title, violations of the FDCPA and sought declaratory relief. The defendants moved to dismiss the complaint on the grounds that the MERS security deed was a valid encumbrance and that the MERS assignment of the security deed did not violate Georgia's foreclosure statutes.. The defendants also argued in the motion to dismiss that under Georgia law the enforcement of a security interest through the foreclosure process is not a debt collection activity for the purposes of the FDCPA. The Court's order of dismissal held that the defendants' motion was supported by both law and evidence and dismissed plaintiff's complaint with prejudice.

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.

Beazie v. AmeriFund Financial, et al D. Hawaii No. 09-00562 (April 14, 2011) Summary judgment on all counts was granted in favor of MERS and Deutsche Bank. Plaintiff's claims against MERS included TILA and RESPA violations as well as state law claims of fraud and declaratory judgment seeking to void the MERS mortgage and assignment. The Court in its

decision found that MERS is the mortgagee and was acting as nominee for the originating lender, Amerifund. The Court also found no evidence to support plaintiff's allegations that the MERS assignment to Deutsche Bank was fraudulent. *Hoilien v. Bank of America, MERS et al.*, D. Hawaii No. 10-00712 (April 18, 2011) This action against MERS and the other defendants was dismissed in its entirety on April 18, 2011. The complaint contained a specific count directed at MERS; Count XII "Lack of Standing" alleges MERS is an artificial entity and the MERS assignment is illegal because MERS does not have a beneficial interest in the note. The Court rejected this argument.

Pagano v. OneWest Bank, et al., D. Hawaii No. 11-00192 (April 22, 2011). Plaintiff's motion for preliminary injunction to stop non-judicial foreclosure sale was denied. The plaintiff's complaint and motion for preliminary injunction alleged that OneWest has no legal authority or standing to claim an interest in the Mortgage and Note because "the purported Assignment of Mortgage...makes no mention of the Assignment of Note." In its Order the Court found that the Mortgage was executed in favor of MERS and that it was later assigned to OneWest. The Court ruled that a promissory note is a negotiable instrument and therefore need not be recorded to be transferred and that OneWest had the right to foreclose on the Mortgage.

Casino v. Bank of America et al, D. Hawaii No. 10-00728 (May 4, 2011) Lack of Standing/Fictitious Entity Count against MERS dismissed with leave to amend. The Court found that a claim for "lack of standing" may not be alleged against a defendant in this wrongful foreclosure lawsuit because standing is a requirement for a *plaintiff* in order to proceed in a civil lawsuit. The plaintiffs failed to amend and MERS was dismissed from the action on July 1, 2011.

In re the Matter of Fred and Ruby Rich, L.C. #08-0053, Land Court for the State of Hawaii (April 6, 2009). 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

Hall v. Pioneer Lender Trustee Services, et al Jefferson County District Court No. CV 2010-859 (Feb. 1, 2011) This was a complaint for wrongful foreclosure seeking injunctive relief to stop a non-judicial foreclosure sale. Plaintiffs claimed the defendants did not have the authority to initiate the non-judicial foreclosure and committed violations of Idaho's consumer protection statute claiming that the MERS substitution of trustee was somehow fraudulent because MERS did not hold the note and did not have the authority or power to appoint the successor trustee, Pioneer. The Court held that MERS was a proper beneficiary according to Idaho's Deed of Trust Act and was not required to hold the note in order to appoint a successor trustee or direct a non-

judicial foreclosure under Idaho law. The plaintiffs' complaint was dismissed with prejudice by the Court.

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 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. *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.

Indiana

In *CitiMortgage, Inc. v. Shannon Barabas*, 48A04-1004-CC-00232 the Court of Appeals of Indiana held that the lower court did not abuse its discretion in finding that MERS was not entitled to notice of a foreclosure lawsuit. MERS, the mortgagee of record as nominee for Irwin and its successors and assigns, was not named as a defendant and was not given notice of the foreclosure. A motion to reconsider, which emphasized that MERS had a constitutional right to notice of the foreclosure, has been filed.

Hutchens v. Mortgage Electronic Registration Systems, Inc., No. 29A02 1010 MF 1085, Court of Appeals of Indiana (June 24, 2011). The Court of Appeals affirmed the trial court's entry of summary judgment in favor of MERS on the borrower's cross-claim for failing to discharge a subordinate mortgage. The cross-claim was filed against MERS in response to a judicial foreclosure initiated by a senior lien holder. The borrower sought damages for MERS' alleged failure to release the subordinate mortgage on his property after he reached a settlement with the owner of the related mortgage note. The Court found that neither the borrower nor the note owner informed MERS of the settlement agreement, and that the borrower never informed MERS that a satisfaction was not filed. The Court held that MERS could not have, without the consent of the note owner, filed a satisfaction of the mortgage and therefore MERS was not liable to the plaintiff for failing to release the mortgage. *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."

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 of the subject mortgage loan as defined under the Truth in Lending Act (TILA) and therefore cannot be found in violation of TILA.

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.

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.

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.

In *Deutsche Bank National Trust Company as Indenture Trustee v. Moody*, 09-CI-4463 (Fayette County Kentucky Circuit Court, 4/11/11). The court granted MERS’ Motion for Summary Judgment on cross-claims filed by the borrowers alleging RESPA, FRCA, FDCPA and other state statutory violations. The borrowers also challenged Deutsche Bank’s authority to foreclose by challenging the assignment of mortgage from MERS. The court specifically found that the borrowers lack standing to challenge the assignment. “The Court has now reviewed the relevant case law regarding who has standing to challenge an assignment and find MERS position to be correct. The Moodys do not have standing to contest the validity of the assignment from MERS to AHMS. The Moodys are not parties to the assignment.” Further, on the borrowers’ cross-claims against MERS alleging RESPA, FDCPA, RICO, and FCRA violations, as well as a host of state statutory violations, the court held that an order dismissing many of the same claims in the case of *GMAC Mortgage LLC v. Heather Boone McKeever*, US District Court, Eastern Division of Kentucky, No. 08-510, was dispositive of the claims raised against MERS in this case.

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 *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).

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 "Complaint contains assertions which are utterly fanciful, without the slightest foundation in law." See also *Jean Kelly v. Novastar, et al.*, (2006) civil action No. AW-06-2616 ([n]owhere in the fragmented statements contained in the Complaint can the Court glean a cognizable legal theory."); *Freeman v. HSBC Mortgage Services*, (2006) Civil Action No. AMD-06-02259 ("[t]he gravamen of the plaintiff's claims appear to be the alleged unenforceability of the mortgage note, but for reasons that defy comprehension."); *Jones v. EMC Mortgage Co.*, (2007) civil action No. DKC-06-3038 ("[t]he complaint itself... lack[s] not only detail, but clarity, appear[s] to rest on faulty premises, and rely on fanciful legal theories."); *Jones v. Indymac Bank, et al.* (2008), Civil Action No. AW-06-2350.

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 *Arnold v. Citimortgage*, Case #10-1233, United States Court of Appeals for the Fourth Circuit (Nov. 15, 2010), the plaintiffs alleged that MERS and co-defendants colluded in a civil conspiracy to defraud, engaged in predatory lending practices and knowingly violated multiple state and federal statutes. On appeal to the federal Fourth Circuit, the court rejected the plaintiff's arguments and affirmed the decision of the United States District Court for the District of Maryland, dismissing all claims against MERS with prejudice.

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 *Aliberti v. GMAC Mortgage, LLC*, 1:11cv10174 (D. Mass., 4/28/11), the court rejected the plaintiff's argument that the assignment from MERS to GMAC was insufficient to establish GMAC's standing to foreclose. The held that “the mortgage executed by the Alibertis explicitly granted the statutory power of sale to MERS and its successors and assigns. MERS assigned the mortgage to GMAC which now holds the mortgage and has the authority to foreclose under the statutory power of sale.” The court also rejected the plaintiff's allegations regarding the MERS Certifying Officer, discussed below in Section V., Grant Of Signing Authority.

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 to obtain an assignment from MERS prior to foreclosing. 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.

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 *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, "plaintiff'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.” Plaintiff has appealed the decision to the United States Court of Appeals for the First Circuit. As of the date of this publication, no decision has been rendered on appeal.

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.

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

Long before the existence of MERS, Michigan courts held that a mortgage may designate a person to serve as mortgagee of record other than the obligee or beneficial owner of the debt secured thereby. *See Adams v. Niemann*, 8 N.W. 719, 720 (Mich. 1881) (“A mortgage to a third person would be as valid as a mortgage to a creditor. The choice of a mortgagee is a matter of convenience....”)

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 that MERS is “an organization of lending institutions established to serve as mortgagee of record for mortgage lenders who participate in the MERS system.” 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. 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 “[t]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 “[u]nfortunately 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.”

In *Bundy v. Fed. Natl. Mort. Assoc.*, No. 10-12678 (E.D.Mich., March 17, 2011) (J. Friedman), the court held that

“plaintiff has lost standing to object to any irregularities which may have occurred in connection with the sheriff’s sale because the redemption period has expired. Plaintiff had six months during which to challenge the sheriff’s sale, or to redeem her interest in the property. Instead of taking action during that time, plaintiff waited until the very last day of the redemption period to file the instant lawsuit. As the magistrate judge noted, the filing of a lawsuit does not toll the redemption period. Once that period expires, any rights in the property which may have been held by the previous title holder are extinguished. In the present case, the redemption period expired on July 6, 2010, the same day plaintiff commenced the instant action. Plaintiff has offered no reason in her objections, and the court is aware of none, as to why she has had standing after this date to challenge the foreclosure.”

In arriving at the above conclusion, the magistrate judge relied, in part, on the rulings in *Overton* and *Mission of Love* (discussed above). See *Bundy*, Report and Recommendation (Dkt. #34) (Feb. 25, 2011).

The Authority of MERS to Foreclose and Assign Mortgages in Michigan

On April 21, 2011, the Michigan Court of Appeals issued a consolidated Opinion in the cases entitled *Residential Funding Corporation v. Saurman* and *Bank of New York Trust Co. v. Messner*, Nos. 290248 and 291443 (Mich. Ct. App., April 21, 2011). In a 2-to-1 decision, the Court held that Mortgage Electronic Registration Systems, Inc. (MERS) in these two cases did not meet the requirements to non-judicially foreclose by advertisement (although the opinion does not preclude MERS from pursuing a judicial foreclosure) because MERS did not own an “interest in the indebtedness” as required by the foreclosure statute. The majority decision determined that in order to own an interest in the indebtedness, a party “must have a legal share, title, or right in the note.” The Court concluded that the foreclosure proceedings in both cases were void *ab initio* (or void) rather than voidable. Despite this holding, the Court did recognize the legal right of MERS as the mortgagee of the security instrument and nominee of the lender and lender’s successors and assigns. The Court also recognized that MERS may exercise its interests in the mortgage as mortgagee by assigning the mortgage to the note holder so that the note holder may avail itself of the foreclosure by advertisement process. Further, the dissenting judge found MERS to be a contractual owner of an interest in the notes with the right to foreclose by advertisement.

The *Saurman/Messner* appellate ruling is currently on appeal to the Michigan Supreme Court. Since the decision, several courts have considered its application to other foreclosures of other mortgages identifying MERS as mortgagee.

In *Chahine v. First Magnus Fin. Corp.*, Case No. 10-13456 (E.D.Mich., June 1, 2011) (J. O’Meara), the Plaintiffs sought to have their case reopened in light of the *RFC v. Saurman* decision. The Plaintiffs alleged MERS foreclosed on the mortgage they granted. In denying the

Plaintiffs' motion for a new trial, the Court determined that while "[p]laintiffs have identified a change in the case law, which, in itself, does not provide a basis for relief ... Plaintiffs have not identified other facts and circumstances that weigh against the important policy interest in the finality of judgments."

In *Williams v US Bank Nat'l Ass'n*, No 10-14967, 2011 US Dist LEXIS 62047, (ED Mich, June 9, 2011) (J. O'Meara) (unpublished), the Court granted US Bank's motion for judgment on the pleadings. Based on Michigan law, the Court determined that "[o]nce the redemption period following foreclosure of property has expired, the former owner's rights in and title to the property are extinguished. [citing to *Piotrowski v. State Land Office Bd.*, 302 Mich. 179, 187 (1942)]." Here, "[t]he redemption period expired September 2, 2010; and Plaintiffs failed to redeem the property." Since the borrowers did not redeem within the allowable time frame, "Plaintiffs lack standing to challenge the foreclosure absent a showing of fraud or irregularity, neither of which Plaintiffs have shown." In response to US Bank's motion, the Plaintiffs argued for the applicability of the Michigan appellate court's decision in *Residential Funding Co., L.L.C. v. Saurman*, ___ Mich. App. ___, 2011 Mich. App. LEXIS 719 (Mich. Ct. App. Apr. 21, 2011). The *Williams* Court concluded, however, that "Saurman does not apply here. In this case U.S. Bank, not MERS, initiated the foreclosure by advertisement. To the extent Plaintiffs challenge any assignment from MERS to U.S. Bank, Plaintiffs lack standing to do so because they were not a party to those assignments. See *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 F. Appx. 97, 102-03 (6th Cir. 2010)."

In response to the plaintiff's challenge that MERS cannot be both nominee and mortgagee; therefore, MERS is not a holder in due course of the mortgage, the court in *Knox v. Trott & Trott, P.C.*, NO. 10-13175 (E.D. Mich., April 21, 2011) (Battani, J.), determined that the argument "ignores the plain language in the mortgage, in which the mortgagor and lender agreed to name MERS as the 'mortgagee under the Security Agreement' ... the mortgage designates MERS to act 'as nominee for the Lender and Lender's successors and assigns.' Further, Knox agreed to convey to MERS the power of sale." In this case, MERS assigned the mortgage to Aurora Loan Servicing prior to Aurora's mortgage foreclosure by advertisement. On June 10, 2011, the Court denied the plaintiff's motion for reconsideration in part by finding that the Michigan Court of Appeals decision in *Residential Funding Co. v. Saurman/Bank of New York Trust v. Messner* did not apply to the facts in the *Knox* case. According to the Court, "[t]he *Residential Funding* case...dealt with a narrow issue—whether the Mortgage Electronic Registration Systems, Inc. (MERS) could foreclose by advertisement or whether it must use judicial process." After walking through the reasoning of the *Residential Funding* Court, the judge determined that it does not apply in the *Knox* case. "Here, MERS was not the foreclosing party ... Plaintiff asks the Court to use the state appellate decision as a springboard for holding a MERS mortgage is void at its inception. This the Court declines to do...Moreover, the appellate panel noted that MERS could assign its security interest before foreclosure, which is what happened in this case."

In *March v. Countrywide Home Loans Servicing*, No. 10-12650 (E.D.Mich., July 12, 2011) (Battani, J.), the Court denied Plaintiffs' motion to reconsider the May 2011 judgment entered in favor of defendants that denied plaintiffs' wrongful foreclosure claims. MERS was the successful high bidder at the January 2010 foreclosure sale and subsequently transferred its interest in the mortgaged property to co-defendant Fannie Mae. The redemption period expired

in July 2010 and Plaintiffs did not redeem. In their Motion, Plaintiffs argued that the judgment should be reversed based on the Michigan appellate court's April 2011 decision in *RFC v. Saurman*. According to the court, "[t]his showing does not trump the important policy interest in the finality of judgments. Moreover, under Michigan law, once the redemption period following foreclosure of property has expired, the former owner's rights in and title to the property are extinguished. [citing to *Piotrowski v. State Land Office Bd.* and *Overton v. Mortgage Electronic Registration Systems, Inc.* (citations omitted)]." As such, "[p]laintiffs lack standing to challenge their foreclosure under [*Residential Funding Corp. v. Saurman*,] where here, the statutory redemption period has expired, and the circumstances to not fall within the recognized exceptions to challenge a foreclosure after the redemption period expires."

Prior to the *Saurman/Messner* decision, many Circuit and District Court judges 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. Circ. 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 (14_B 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) *Affd.*, #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 "[to] do so would seem to go against the vast history of agency law supported by this state." *Id.* at p. 2. MERS further demonstrated that it had standing to act as mortgagee and enforce notes under both MCR 2.201.(B)(1) and MCL 600.2041. Michigan law, like the laws of many other States, permits a party "with whom or in whose name a contract has been made for the benefit of" to file suit. MERS also cited case law from the Michigan Supreme Court holding that a corporate entity can be the mortgagee without having any beneficial interest in the underlying debt. See *Canvasser v. Bankers Trust Company of Detroit*, 284 Mich. 634, 280 N.W. 71 (1938).

In *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 upheld MERS foreclosures by advertisement. *See, e.g., Roper v. Mortgage Electronic Registration System*, No. 07-CV-10002, 2007 WL 3244754 (E.D. Mich., Nov 1, 2007) (Steeh, J.) (“MERS, as nominee, is the owner of the indebtedness, and thus has a right to foreclose via advertisement.”); *English v. Flagstar Bank*, 2009 U.S. Dist. LEXIS 97427 (E.D. Mich. Oct. 21, 2009) (Cohn, J.) (“Plaintiff’s argument that MERS did not have the right to initiate foreclosure proceedings is belied by the record. The mortgage contains an express provision giving MERS the authority to foreclose as nominee for Flagstar. In light of this provision, plaintiff cannot claim MERS lacked authority.”); *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) (Duggan, J.), the court noted that, "Plaintiff, having expressly given to MERS the right to foreclose as nominee for the lender, cannot now contend that MERS did not have the right to institute foreclosure proceedings.".

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, “[e]ven 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.”

In *Kuttkuhn v. Quicken Loans, Inc.*, Case No. 10-cv-14629 (E.D.Mich., April 26, 2011) (Borman, J.), the plaintiff based its fraud claim in part on the allegation that MERS has no rights or standing as a mortgagee, citing to the *Landmark Nat. Bank v. Kesler* decision from the Kansas Supreme Court. In response, the Court found the fraud claims without merit to the extent that they alleged MERS lacked standing to initiate foreclosure proceedings. “... [T]his District has held that MERS has the right to institute foreclosure proceedings. [citing to *Hilmon* and *Corgan*.]”

Minnesota

The Supreme Court of Minnesota in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009), recognized that it is entirely permissible for MERS to be the legal titleholder of the mortgage without any interest in the underlying debt. The Court held the

underlying debt could be assigned without separating the mortgage from the note, as the noteholder would hold equitable title to the mortgage while MERS retained legal title. The legal titleholder, MERS, has rights in the mortgage and that transfer of the note did not carry with it legal title to the mortgage.

The Plaintiffs in Jackson asserted that MERS had not complied with §580.02 of the Minnesota statutes which requires “that the mortgage [be] recorded and, if it has been assigned, that all assignments thereof [be] recorded...” The plaintiffs argued that the assignment of the underlying indebtedness was equivalent to the assignment of the mortgage itself and, thus all assignments of the underlying indebtedness must be recorded before MERS can commence foreclosure proceedings. The court flatly rejected this argument:

“We affirm today the principles set 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 *In re Sina*, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006), the appellate court 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 moved 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 were 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 that defendant U.S. Bank as assignee of MERS was a 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 “[b]ecause 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.*, Case No.10-3942 (Dist. of Minn., Dec. 10, 2010)

In *OneWest Bank v. JPMorgan Chase & Friederichs v. MERS*, Case No. 62-cv-10-6961 (Ramsey County District Court, Minnesota, Apr. 1, 2011), the court granted summary judgment in favor of OneWest and MERS. It upheld the validity of the MERS assignment stating that, “[t]he right to foreclose follows the mortgage (*citing Jackson*).” It further noted that, “absent an assignment by MERS to OneWest, only MERS can foreclose on the Friederichs Mortgage.”

Deutsche Bank Trust Company v. Souza, 2010 WL 3958671 (Minn. App.) (Oct. 12, 2010) (UNPUBLISHED OPINION) District Court order directing issuance of a new certificate of title in the name of plaintiff affirmed. The Court, citing to *Jackson*, found that MERS’ non-judicial foreclosure was valid and that MERS did not need to produce the original promissory note or transfers of the note in order to show that MERS had standing or authority to foreclose the mortgage.

Citing to the *Jackson* decision, the court in *Allen v. Wilford & Geske, MERS, et al.*, Case No. 70-CV-10-29502 (Scott County District Court, Minnesota, May 9, 2011), held that MERS has legal title and authority to foreclose. It also stated that “MERS is not required to register every assignment of the loan or to track that history in its foreclosure documents . . . [and] . . . it is not a misrepresentation for MERS to identify itself as the mortgagee in the foreclosure documents and not to identify all past and present lenders.”

Montana

In *Waide v. US Bank*, Case No. 10-1763, the District Court for the Thirteenth Judicial District of Montana, granted summary judgment for the defendants. The borrowers had argued that MERS was not a valid beneficiary on the Deed of Trust under Montana law and did not have the authority to execute an appointment of successor trustee. The court, however, wrote: “MERS, in its capacity as the nominee for the lender and the lender's successors and assigns, was the beneficiary under the Deed of Trust pursuant to statute and by agreement of the parties.” MERS has the right to take any action that the lender can take, the court noted, including the right to foreclose and appoint a trustee.

Nevada

Much like California, Nevada has also experienced a surge in complaints that appear to be filed to delay 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 “[c]ourts around the country have held the same.”; *Khalil v. Fidelity National Default Solutions Tustin*, No. A560582, slip. op. at 3 (Dist. Ct. Clark County Nov. 24, 2008) (“MERS, as a lender’s nominee and the named beneficiary [on the Deeds of Trust], ha[d] standing to foreclose on the Deeds of Trust”); *Gonzalez v. Home American Mortgage Corp.*, No. 2:09-cv-00244, slip op. at 6 (D. Nev. Mar. 12, 2009) (upholding right of MERS, as the named beneficiary on the Deed of Trust, and ReconTrust, as successor trustee, to initiate non-judicial foreclosure without presenting the note); *Wayne v. HomEq Servicing*, 2008 WL 4642595-RCJ (D. Nev. Oct. 16, 2008) (“authorization to proceed with foreclosure is one of the functions of a loan servicer”); *Sagaydoro v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1331 (D. Nev., 2008); *Pantoja v. Mortgage Electronic Registration Systems, Inc., et al.*, A561317 (Clark County Nevada District Court, 2008); *Medina v. Countrywide Home Loans, Inc., et al.*, 2:08cv00133 (D. Nev., 2009); *Mendiola v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv01138 (D. Nev., 2009); *Carlson v. EMC Mortgage, et al.*, A566830 (Clark County Nevada District Court, 2008); *Razon v. Mortgage Electronic Registration System, Inc., et al.*, 2:08cv00949 (D. Nev., 2008); *Rios v. Mortgage Electronic Registration System, Inc., et al.*, A566524 (Clark County Nevada District Court, 2009); *Munoz v Mortgage Electronic Registration Systems, Inc., et al.*, A567999 (Clark County Nevada District Court, 2009); *Esteban v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1616 (D. Nev. 2009); *Orata v. Mortgage Electronic Registration System, Inc., et al.*, A573676 (Clark County District Court, 2009); *Balino v. Countrywide Home Loan, et al.*, 2:09cv00049 (D. Nev. 2009); *Vargas v. Mortgage Electronic Registration System, Inc., et al.*, A573625 (Clark County Nevada District Court, 2009); *Montes v. Litton Loan Servicing, et al.*, 2:09cv00012 (D. Nev., 2009); *Arciosa v. Mortgage Electronic Registration Systems, Inc., et al.*, 2:08cv1147 (D. Nev., 2008); *Aganon v. Mortgage Electronic Registration Systems, Inc., et al.*, (2:08cv1372 (D. Nev., 2008); *Balaoro v. GMAC Mortgage, et al.*, 2:09cv00155 (D. Nev., 2009); *Birkland v. Silver State Fin. Servs., Inc.*, No. 2:10-CV-00035-

KJD-LRL, 2010 WL 3419372, at *3 (D. Nev. Aug. 25, 2010) (“MERS, as nominee on a deed of trust, is granted authority as an agent on behalf of the nominator (holder of the promissory note) as to the administration of the deed of trust, which would include substitution of trustees”); *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 *Naqghband v. American Gold Mort. Corp., MERS, et al.*, Case No. Case No. A-10-623587-C, (Dist. Ct. Clark County, Dec. 13, 2010) (there was no splitting of the note and deed of trust and MERS properly substituted the trustee); *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.”); *Coward v. First Magnus Financial Corp.*, 2:09-cv-01143-RCJ-GWF U.S. District Court, District of Las Vegas (Oct. 14, 2009) (U.S. District Court granted MERS’ motion for summary judgment in defense to a claim of wrongful foreclosure. The Court upheld the validity of the substitution of trustee by MERS, as nominee on the deed of trust. In doing so, the Court wrote, “so long as the note is in default and the foreclosing trustee is either the original trustee or has been properly substituted by the holder of the note or the holder’s nominee, there is no defect in foreclosure.”)

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).

See *Manderville v. Litton Loan Servicing*, No. 2:10-cv-1696, 2011 WL 2149105, at *3 (D.Nev. May 31,2011) (Mahan, J.) ("As the court has determined that the 'split the note' theory is unfounded and dismissal of it is warranted, and since declaratory relief 'does not create a substantive cause of action,' plaintiff's derivative claim for declaratory relief against MERS is dismissed.")

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 "[i]t 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 "[c]ontrary 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.

In *Cooney v. Bank of America*, 1:10cv4066, (D.N.J., June 22, 2011), the court granted Bank of America and MERS' Motion to Dismiss this putative class action alleging that improper fees were charged to the plaintiffs in connection with reinstating mortgages after default. The court found that the plaintiffs failed to sufficiently allege how any of the fees were improper. The plaintiffs were given leave to amend, but warned that they need to adhere to the pleading standards. The judge also specifically noted that the plaintiffs' counsel filed many similar complaints that were also insufficiently plead and cautioned that "[i]f Plaintiffs decide to continue to retain [counsel] to file their amended pleadings, then [counsel] should take care in drafting the proposed pleadings to avoid continuing to make the errors he has been alerted to by this and other opinions. At some point, such errors and disregard for the modern pleadings standards will begin to evi[d]nce bad faith on his part."

New Mexico

In 2008, the New Mexico Court of Appeals upheld as valid a MERS post-foreclosure sale assignment to a third-party in which MERS assigned its right of redemption as a junior mortgagee 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, 2010 N.Y. Misc. Lexis 511 (March 12, 2010). New York Supreme Court Justice Whelan upheld MERS' authority to assign a mortgage. The court found 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 was no disconnection between the note and mortgage when MERS acted, 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.

The court 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 - the assignment from MERS to LaSalle was dated after the commencement date of the foreclosure and 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 June 19, 2007 appellate court's decision in *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 2007 *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.

In 2009 after the Coakley case was remanded to the trial court, MERS assigned its interest in the mortgage and judgment of foreclosure and sale was entered in favor of Saxon Mortgage Services

Inc. The borrower again appealed the decision of the trial court, this time challenging Saxon's standing to foreclose claiming MERS did not have the authority to assign the mortgage. On April 26, 2011, the Second Department of the Appellate Division again affirmed the trial court and issued a favorable MERS ruling finding MERS was free to assign the mortgage, "absent any language which expressly prohibited the assignment."

Following the 2007 *Coakley* decision 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 contrast to *Coakley*, evidentiary defects resulted in a different outcome in *Bank of New York v. Silverberg*, No. 17464-08, Supreme Court of New York, Appellate Division: Second Judicial Dept. (June 7, 2011). The Court reversed the trial court's decision denying the Silverbergs' motion to dismiss Bank of New York's (the "Bank") foreclosure action because the Bank lacked standing. The borrowers argued that the foreclosure complaint failed to establish a chain of ownership of the notes and mortgages from the original lender to the plaintiff. The Bank submitted a copy of the assignment of mortgage from MERS with its opposition to borrowers' motion to dismiss. It does not appear that there was any evidence before the court that the Bank was the holder of the note at the time the foreclosure was commenced. The Court found that MERS could assign the mortgage to the Bank, but this power to assign the mortgage did not give MERS the authority to transfer the note to the Bank. The Court distinguished this case from its 2007 decision in *Mortgage Electronic Registration System Inc. v. Coakley*, 41 AD3d 674, and pointed out that MERS had standing to foreclose in *Coakley* because MERS was mortgagee and holder of the note at the time the foreclosure was commenced.

In *Aurora Loan Servs, LLC v Weisblum*, 2011 NY Slip Op 04184, New York Appellate Division, Second Department (May 17, 2011). The Court held that the plaintiff lacked standing to foreclose because there was no evidence before the court that Aurora was the holder of the note. The only evidence before the court was an assignment of mortgage from MERS to Aurora. Although the court found that MERS was the mortgagee of the borrowers' first and second lien mortgages, and then the mortgagee of the consolidated CEMA lien, the assignment from MERS did not also assign the underlying note to Aurora.

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.”

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.

MERSCORP 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.

In *Berta v. Mortgage Electronic Registration Systems, Inc.*, #1:08cv322 (U.S. Dist. Ct. for Middle Dist. Of North Carolina, Mar. 31, 2009) the Court dismissed with prejudice the borrowers' complaint alleging violations of federal statutes and multiple tort claims. In recommending dismissal, the U.S. magistrate judge wrote that the claims against MERS were without support and relied only on "unwarranted inferences, unreasonable conclusions,' and a great deal of speculation". Citing to *Eastern Shore Markets, Inc. v. J.D. Associates. Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000).

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

The following 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. Oties 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 foreclosure 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..."

In *U. S. Bank Natl. Assn., v. Spicer, et al.*, 2011 Ohio 3128 (June 27, 2011), the Court of Appeal denied as untimely the borrower's motion to vacate a foreclosure judgment, which was filed almost two years after the foreclosure case was filed. The borrower also alleged that the servicer or the investor perpetrated a "fraud upon the court" by having a MERS signing officer assign the mortgage at issue. The appeals court stated that the borrower "failed to provide any relevant evidence to demonstrate misconduct on the part of U.S. Bank or its servicing agent."

Oklahoma

Oklahoma trial courts have ruled in favor of MERS' standing to foreclose. *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*, Clackamas County Circuit Court of Oregon, 5th District, Case No. LV08040727 (letter opinion) (2009), Plaintiff claimed MERS was not a real party in interest with standing to seek attorney's fees in a lien priority lawsuit against the plaintiff which MERS won. The Court found MERS had standing because it was listed as beneficiary in the trust deed and the parties to the contract agreed MERS would act as agent for the original lender and later holders of the rights of original lender. The Court also found MERS was entitled to the protection of the Oregon lien statutes and that MERS role as designated agent is not in violation of Oregon's recording laws.

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."

Niday v. GMAC Mortgage LLC, et al Clackamas County No. 10-020001 (Nov. 19, 2010). This was a complaint for injunctive and declaratory relief alleging that the defendants did not have standing to foreclose non-judicially under Oregon law because MERS was not the deed of trust beneficiary. Defendants moved for summary judgment and the plaintiff opposed arguing that MERS has no rights to the mortgage instrument and therefore cannot be the beneficiary of the plaintiff's deed of trust making any non-judicial foreclosure by the trustee void. At the summary judgment hearing plaintiff's counsel provided the Court with copies of the *Rinegard-Guirma* and *In re Allman* decisions in further support of plaintiff's opposition. In both *Rinegard-Guirma* and *In re Allman*, the Courts in their decisions questioned the ability of MERS to act as beneficiary under Oregon's Deed of Trust Act, however neither opinion involved a final order and the Court's opinion in *In re Allman* has been stricken from the record. The Court here refused to give any weight to the two decisions and found that MERS was listed as the beneficiary in plaintiff's deed of trust. The Court found nothing wrong with MERS role as beneficiary or MERS' substitution of trustee and held that the non-judicial foreclosure complied with Oregon law and was valid. The Court granted the defendants' motion for summary judgment.

Buckland v. Aurora Loan Services, Josephine County No. 10 CV 1023 (Judge Wolke) (March 18, 2011) (MERS is not a party) This was a wrongful foreclosure complaint which alleged among other claims that Aurora did not prove it was the note holder before directing the trustee to non-judicially foreclose and that MERS did not have the power to appoint the trustee because it was not the beneficiary of the plaintiff's deed of trust. The plaintiffs cited to several non-Oregon decisions involving MERS to support their claims against Aurora. The Court refused to give any weight to these decisions. Aurora's motion to dismiss cited to the Oregon federal court decision *Stewart v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1055131 (D. Or. 2010) (ruling presentment of note not required and MERS is a valid deed of trust beneficiary) and argued that Oregon's non-judicial foreclosure statute does not require presentment of the note. Aurora's motion to dismiss also cited to an Oregon state court decision *Parkin Electric v. Saftencu* Clackamas County Circuit Court No. LV 08040727 (March 12, 2009) (ruling MERS as deed of trust beneficiary was a real party in interest in a lien priority dispute) for the proposition that MERS as beneficiary of the plaintiff's deed of trust had the power and authority to appoint the successor trustee. The plaintiff's complaint was dismissed with prejudice.

In *Spencer v. Guaranty Bank, et al.*, Case No. 10CV0515ST (Deschutes Co. Circuit, May 5, 2011) (Tiktin, J.), Plaintiff sought an injunction to prevent MERS and the other defendants from non-judicially foreclosing the plaintiff's deed of trust, after Plaintiff received a Notice of Default and Election to Sell. The court granted the defendants' Motion to Dismiss with prejudice for the plaintiff's failure to state a claim. In addition to noting that the Plaintiff "makes no claim that she is not in default nor that any requirement of ORS 86.735 is not met", the court found that MERS

satisfied the statutory definition of "beneficiary" under ORS 86.705. Specifically, the court stated that it "is unpersuaded that Mortgage Electronic Registration Systems cannot act in that capacity, *even if it is not the holder of the note.*" (emphasis added). The court also rejected the Plaintiff's contention that the trust deed can only be foreclosed if the note and deed are both held by the same person or entity, noting that ORS 86.770(2) protects the Plaintiff from a lawsuit seeking enforcement of note after the non-judicial sale. "The bottom line is that plaintiff seeks to retain ownership, apparently forever, of a property for which she has not paid nor even alleges that she intends to pay for. She has not stated a claim."

Nigro v. Northwest Trustee Services and Wells Fargo Bank, Josephine County No. 11 CV 0135. (May 12, 2011) (MERS is not a party) Plaintiff's motion seeking a preliminary injunction to stop the non-judicial foreclosure sale is denied. The Court found that the plaintiff did not establish the four elements necessary for a preliminary injunction including likelihood of success on the merits. The plaintiff's complaint and motion alleged that the defendants violated the Oregon Deed of Trust Act by failing to record all transfers of the note and assignments of trust deed. The plaintiff's complaint and motion citing to the In re McCoy decision also alleged that MERS involvement as beneficiary of the plaintiff's trust deed invalidated the non-judicial foreclosure. The defendants' opposition to the plaintiff's preliminary injunction request cited to a federal court decision contrary to the holding in McCoy, Bertrand v. SunTrust Mortgage, Inc. In Bertrand the Court found MERS is specifically designated by all parties as the beneficiary and had the authority to assign the deed of trust. The Court here in Nigro followed the Bertrand decision ruling MERS role as beneficiary is not inconsistent with the purpose of Oregon's non-judicial foreclosure statute while finding the McCoy decision "is an obstacle to that purpose." The Court also found that the Oregon Deed of Trust Act did not require the recording of note transfers. The Court denied the plaintiff's preliminary injunction request finding that the plaintiff "is not likely to prevail on his MERS-based argument."

Hooker v. Northwest Trustee Services, et al D. Oregon 10-3111 PA (May 25, 2011) The Court denied defendants' MERS and Bank of America motion to dismiss and granted judgment for the plaintiffs on their claim for wrongful foreclosure. The Court found that the defendants violated Oregon's non-judicial foreclosure statute because all transfers of the beneficial interest in the mortgage loan were not recorded in the county land records before foreclosure was commenced. As an initial matter, the Court found that the plaintiffs' deed of trust was not given for the benefit of MERS and that the lender and not MERS is the beneficiary of the deed of trust. The positions taken by the Court are inconsistent with several Oregon state and federal court decisions affirming MERS' role as beneficiary of the deed of trust. See Burgett v. Mortgage Electronic Registration Systems, Inc., D. Oregon No. 09-6244 (Deed of trust specifically designates MERS as the beneficiary); McDaniel v. BAC Home Loans Servicing, LP D. Oregon No. 10-6143 (Mar. 31, 2011)(Plaintiff's signature on deed of trust explicitly authorizes MERS to act as a beneficiary with the right to foreclose) and Barnett v. BAC Home Loan Servicing, D. Or. No. 11-CV-213-ST (MERS is not a party) (temporary restraining order in which Judge Brown cites to Burgett and finds that MERS is a valid deed of trust beneficiary but that there are missing deed of trust assignments in the chain of title.) The state court decisions in conflict with Hooker are Parkin Electric, Spencer, Nigro, Niday and Buckland all discussed above. We have appealed the Court's decision in Hooker to the 9th Circuit Court of Appeals.

US Bank National Assoc. v. Flynn, No. 11-8011, Circuit Court of Columbia County, Oregon (June 23, 2011). The Court entered judgment against the plaintiff in its action to evict the borrower/defendant after a completed non-judicial foreclosure sale. The Court cited to the recent *Hooker* decision from the federal district court and the *In re McCoy* decision from the bankruptcy court. The Court found that the lender named in the subject deed of trust was the beneficiary of the defendant's deed of trust, not MERS. The Court also held that Oregon's non-judicial foreclosure statute was violated because a deed of trust assignment was not recorded in the county land records when the note was sold to a new lender in 2009. This decision is contrary to several state and federal court decisions which have found MERS is a valid beneficiary under Oregon's Deed of Trust Act and/or that transfers of the note do not constitute "assignments of the trust deed" under Oregon law. For example, see *Burgett v. Mortgage Electronic Registration Systems, Inc.*, D. Oregon No. 09-6244 (Deed of trust specifically designates MERS as the beneficiary); *Bertrand v. Suntrust Mortgage*, D. Oregon No. 09-CV-857-JO (Mar. 23, 2011) (holding MERS may serve as beneficiary under Oregon's Trust Deed Act); *Parkin Electric, Inc. v. Saftencu*, Clackamas County No. LV08040727 (letter opinion) (2009), (MERS is the real party in interest and MERS deed of trust is valid and the MERS registration system does not circumvent Oregon's recording system.); *Spencer v. Guaranty Bank*, Case No. 10CV0515ST (Deschutes Co. Circuit, May 5, 2011) (MERS meets the statutory definition of "beneficiary" under the Deed of Trust Act.); *Nigro v. NW Trustee Services and Wells Fargo Bank*, Josephine County No. 11 CV 0135 (May 11, 2011) (rejecting the Court's holding in McCoy and following the Court's holding in Bertrand finding MERS is a valid beneficiary under Oregon law); and *Niday v. GMAC Mortgage*, Clackamas County Circuit Court Case No. CV 10-02-0001 (summary judgment granted in favor of MERS and other defendants permitting MERS to serve as beneficiary and foreclose in its own name).

In *Somers v. Deutsche Bank*, Circuit Court of Clackamas County No. CV11020133 and FE110027 (July 6, 2011) the Court dismissed all counts of plaintiffs' wrongful foreclosure complaint with leave to amend. Count I of the complaint alleged that the completed foreclosure sale was wrongful because the beneficial interest of the trust deed was assigned multiple times without recording those assignments as required by ORS 86.735, therefore the trustee lacked authority to conduct the sale. Count I also alleged that MERS did not have authority to assign the Deed of Trust to Deutsche Bank; and the recital of MERS as the beneficiary in the Deed of Trust is a "sham". The Court found that MERS "is expressly designated to be the beneficiary under the Security Instrument" and that MERS is identified as the beneficiary "in bold typeface". The Court held that MERS role as beneficiary as nominee of the Lender and its successors "is not contrary to Oregon law and is consistent with the express terms of the Deed of Trust" made and delivered by the Somers." The Court further held that the assignment from MERS to Deutsche Bank was recorded in due course and the fact that Deutsche Bank as holder of the Note is the trustee of a mortgage-backed security pool does not in any way impact the borrowers' "rights and privileges under their transaction documents or Oregon statutes".

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 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.” In effect, the Court found that the MERS agency relationship does not separate the note from the corresponding mortgage.

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

In *MERS v. Young*, 2-08-088, Tx. Ct. App. 2nd Dist, June 4, 2009, t MERS was the beneficiary on a DOT recorded in 2002. On 1/3/06, a substitute trustee conveyed the property to MERS, after a non-judicial foreclosure sale. On 1/12/06, MERS conveyed the property to HUD, and then on 5/10/07, HUD conveyed the property to Wells Fargo Home Prudential. In 2007, a forcible detainer action was filed in MERS name. The Justice Court granted possession of the property to MERS, but then the County Court reversed this that decision and denied MERS forcible detainer. The decision was then appealed to the Texas Court of Appeals and the argument made before the court was that MERS had ownership of the property and thus could bring the forcible detainer action on Wells Fargo's behalf because they are a member of MERS and that we could act on behalf of the lender and the lender's successors and assigns. The court found that MERS did not own the property because MERS had already deeded it out prior to bringing the forcible detainer action, and dismissed the appeal. We agree with this reasoning since MERS must be named as either the beneficiary on a Deed of Trust or be in title to a piece of property to have an interest in the property.

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.

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 Athneys' 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].”

Citing to the *Athey* decision discussed above, the Court in *Richardson v. CitiMortgage et al.*, No. 6:10cv119 (E.D. Tex.) (Nov. 22, 2010) (Guthrie, J.) 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. “Under Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale. [citation omitted]. MERS was the nominee for Southside Bank and its successors and assigns. MERS had the authority to transfer the rights and interests in the Deed of Trust to CitiMortgage. The Plaintiffs' complaints about the role of MERS in this matter lack merit.”

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

Long before the existence of MERS, Utah courts held that a mortgage may designate a person to serve as mortgagee of record other than the obligee or beneficial owner of the debt secured thereby. *See Ogden State Bank v. Barker*, 40 P. 769, 769 (Utah 1895) (“The mere fact that the mortgagee was not the real owner of the notes, but was simply a trustee or agent for the owner, does not affect the validity of the mortgage.”).

In *Commonwealth Property Advocates, LLC v. MERS*, 2011 UT App 232 (July 14, 2011) the Utah Court of Appeals affirmed the dismissal of a lawsuit brought against MERS and CitiMortgage, Inc., and wrote that under Utah law, “The plain language of the statute does nothing to prevent MERS from acting as nominee for Lender and Lender’s successors and assigns when it is permitted by the Deed of Trust.” The court noted that the borrowers agreed to the terms of the Deed of Trust and that the Deed of Trust allows MERS to foreclose or assign the Deed of Trust. Furthermore, the court rejected the borrower’s argument that the securitization of the borrowers’ promissory note somehow rendered the Deed of Trust unenforceable, and noted that the plain language of the Deed of Trust gives MERS authority to act as a nominee for the lender.

In addition to this appellate ruling, many state and federal trial 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), *Legrand J. Van Gass, Liberti Van Gass v. Security 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); *Anderson v. Homecomings Financial, et al.*, 11-332 (D. UT. 6/20/11); *Commonwealth Property Associates v. MERS*, (3rd Jud. Dist. Salt Lake County, UT 6/2/11, ("The terms of the Trust Deed maintaining MERS' status as nominee for successors to the debt is completely consistent with, and in fact complements, Utah's statute providing that security is transferred along with debt."); *Davis v. Homecomings, et al.*, 11-141 (D. Ut. 5/2/11); *Nielsen v. Aegis, et al*, 10-606 (D. UT. 5/4/11) ("Contrary to plaintiff's argument, MERS has established its rights with respect to foreclosure on the security and MERS has at all relevant times been entitled to act as beneficiary under the First Deed of Trust."); *Queensberry v. First Franklin*, (4th Jud. Dist., UT. County, UT 5/5/11) (court upheld MERS ability to be beneficiary on the Deed of Trust and substitute a trustee).

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 FDPDA 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 action’ 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 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), MERS was the record beneficiary of the deed of trust. The Bank of New York, holder of the promissory note subsequent to the original lender, executed an Appointment of Substitute Trustee through its loan servicing agent, thereby initiating the foreclosure process. In response to the borrower's wrongful foreclosure and quiet title claims, 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) ("the so-called 'split' of the Deed from the Note alleged by Plaintiffs does not render the Deed unenforceable nor does it leave the Note unsecured."). On May 19, 2011, the U.S. Court of Appeals for the Fourth Circuit, affirmed the trial court decision in *Horvath*, noting that "... the deed of trust named MERS as the beneficiary 'for Lender and Lender's successors and assigns,' establishing a consistent beneficiary and thereby further enhancing the ease with which the deed of trust could be transferred." On appeal, borrower argued that, under the MERS deed of trust, the note, and Virginia law, only the original lender had authority to foreclose on his home and the securitization of the loan effectively stripped or split the note from the security lien, thereby rendering the lien void. The Fourth Circuit viewed this argument as "seriously flawed ... the note and the deed of trust are *contemporaneous* documents that reflect a singular understanding between the parties ... it is equally clear that 'notes and contemporaneous written agreements executed as part of the *same transaction* will be construed together as forming one contract.' [citing to *Va. Hous. Dev. Auth. v. Fox Run Ltd. P'ship*, 497 S.E.2d 747, 752 (Va. 1998) (quoting *Richmond Postal Credit Union v. Booker*, 195 S.E. 663, 665 (Va. 1938) (emphasis added)]. *Horvath* at 11. Where "neither document varies or contradicts the terms of the other, [the] terms of one document which clearly contemplate the application of terms in the other may be viewed together as representing the complete agreement of the parties." [Citing *Booker* at 752-53]." *Id.* The Fourth Circuit also found that Bank of New York, as the subsequent holder of the note, had authority to have the deed of trust foreclosed on its behalf. *Horvath* at 8. In connecting the note holder to the recorded lien, The Fourth Circuit expressly viewed the "Lender" definition in the MERS deed of trust to apply "not only to [the original lender] but to any subsequent purchaser of the [promissory note]" (citing to *Chi. Ry. Equip. Co. v. Merchants' Bank*, 136 U.S. 268, 281 (1890) (provisions of a contract should "be construed in connection with the other provisions, so that if possible, or so far as is possible, they may all harmonize"); *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 493 S.E.2d 516, 519 (Va. 1997) ("A contract must be construed as written and as a whole with all parts being harmonized whenever possible."); *Paramount Termite Control Co., Inc. v. Rector*, 380 S.E.2d 922, 925 (Va. 1989) (same))." *Horvath* at 13. Horvath also argued that the transfer of the note was invalid because the transfer was not recorded in the land records, causing a "break in the chain of title" on the property. As such, Bank of New York had no right to enforce the deed of trust not assigned to it. The Fourth Circuit found this theory to be inconsistent with Virginia law.

"While Virginia allows parties to transfer securities like the deed of trust, it does not require them to record such transfers in the land records. Indeed, Va. Code Ann. § 55-66.01 suggests that the assignor of a deed of trust 'at its option, *may*

cause the instrument of assignment to be recorded,' but goes on to make clear that '[n]othing in this statute shall imply that recordation of the instrument of assignment or a certificate of transfer is necessary in order to transfer to an assignee the benefit of the security provided by the deed of trust.'" (emphasis added). *Horvath* at 14-15.

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.

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) (J. O'Grady), 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.

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 denying the plaintiffs leave to amend the complaint, the District Court noted that "Plaintiffs' attempt to simply add media reports of widespread use of 'robo-signers' does not cure Plaintiffs' inability to plead Defendants MERS' and GMAC's lack of standing to foreclose." See *Lara*, Dkt. 115, (April 11, 2011).

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 18, 2010) (C.J. Horne), 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 . . . Moreover, Plaintiff conceded at oral argument that there is no statute, case, or other authority requiring that such a transfer be recorded in the land records." Countrywide was found to be the servicer of the loan which was also in possession of a blank-endorsed note. The court found that, under Va. Code Ann. § 8.3A-301, a note holder may enforce an instrument, even if the person is not the owner of the instrument. In dismissing plaintiff's claims of wrongful foreclosure with prejudice, the trial court also found that "[e]ven if Countrywide was not the Note Holder, **it is still authorized, under the contract and agency law**, to initiate foreclosure proceedings on the Property." (emphasis added). As demonstrated throughout this Outline, MERS as beneficiary and nominee on the deed of trust is the express agent of the owner(s) of the note. The Supreme Court of Virginia refused the petition for appeal, finding that "there is no reversible error in the judgment complained of." See *Rosales*, Record No. 102289 (Sup. Ct. Va., April 12, 2011).

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 *Mata v. OneWest Bank FSB*, No. CL-2010-6961 (Fairfax Cty. Cir. Ct., Sept. 17, 2010) (J. Brodie), the Court dismissed with prejudice the Plaintiff's claims that OneWest had no authority to initiate foreclosure or that OneWest must prove its right to foreclose. In granting the dismissal, the Court rejected Plaintiff's assertion that "MERS was not the beneficiary" of the Plaintiff's deed of trust assigned by MERS to OneWest prior to foreclosure. The Court also tacitly recognized the validity of the MERS assignment.

In *Van v. BAC Home Loan Servicing LP, et al.*, Case 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) (J. 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 "i" 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.

In *Elhady v. Mortgage Electronic Registration Systems, Inc.*, Case No. CL-2010-7226 (Fairfax Cir. Ct., Feb. 18, 2011) (J. Williams), by granting MERS' demurrer and dismissing with prejudice, the court rejected Plaintiff's claim that MERS had no legal or equitable interest in the property through the MERS deed of trust and that MERS had no authority to enforce the security instrument.

In *Graves v. Mortgage Electronic Registration Systems, Inc.*, Case No. CL-2010-17101 (Fairfax Cir. Ct., June 29, 2011) (J. Thacher), the plaintiff challenged the validity of the Appointment of Substitute Trustee Deed executed by MERS prior to the substitute trustee scheduling the foreclosure sale. The plaintiff argued MERS could not substitute the trustee b/c MERS lacked authority to enforce the terms of the deed of trust. In particular, the plaintiff argued that MERS

could not act because it was not the lender and could not act on behalf of the lender unless "necessary to comply with law or custom". Judge Thacher rejected this argument by noting that

"... MERS has two roles: beneficiary and nominee for lender. By signing the Deed of Trust, Graves agreed that MERS, as nominee for lender and lender's successors and assigns, has the right to foreclose ... and recognizes that MERS could take any action required of lender. Deeds of trust are treated as contracts, and nothing under Virginia law appears to prohibit a lender and borrower from agreeing to allow a third party ... to enforce the terms of a deed of trust."

Plaintiff argues further that MERS may only act on behalf of the lender "if necessary to comply with law or custom". The Court rejected this argument and concluded, "the nominee may act on behalf of the lender as authorized by the Deed of Trust ... and the Deed of Trust ... specifically authorizes MERS to appoint a substitute trustee whenever the lender could act."

Plaintiff then argues that Virginia foreclosure statutes¹ prohibited MERS from appointing a substitute trustee because the statutes allow only a party entitled to greater than fifty percent of the obligations due under the Note may enforce the trust deed. In response to this challenge, the Court held that "Graves ... signed the Deed of Trust [] which clearly states that MERS is also the nominee of the lender and may act on behalf of the lender to foreclose ... [f]urthermore, when a deed of trust provides otherwise the statutory requirements in § 55-59 are inapplicable."

The Court also rejected the plaintiff's final argument that trust deed did not specifically extend the powers of sale and appointment beyond the defined lender, in contrast against the extension of other powers to the lender and lender's agents. "The better reading—and the one that comports with common sense—is to read the Deed of Trust as a whole ...[c]onsidering the Deed of Trust as a whole, it is clear that its terms grant MERS authority to appoint a substitute trustee and enforce the terms of the Deed of Trust."

Regarding the plaintiff's allegation that the Appointment of Substitute Trustee Deed is void because the document falsely identified MERS as the "Beneficiary" of the Deed of Trust, the Court found it unavailing. "The term 'beneficiary,' as set forth in the Deed of Trust, includes MERS's nominee [status] ... Graves signed and agreed to the Deed of Trust, which expressly provides that the beneficiary, MERS, was also the nominee of the lender. Accordingly, by executing the [appointment of substitute trustee deed] and identifying itself as the 'beneficiary,' MERS was complying with the designation and status provided in the Deed of Trust."

Washington

In *Cebrun v. HSBC Bank USA, N.A.*, 2011 WL 321992, *3 (W.D. Wash. 2011), the court granted defendant HSBC's motion to dismiss and discussed MERS's role as beneficiary. The court stated that not only did "[plaintiffs] acknowledge that 'MERS is the beneficiary under this Security Instrument'" but that "courts consistently hold, when evaluating similar deeds, that

¹ Va. Code § 55-59(9)

MERS acted as a beneficiary and possessed the rights [of the lender including but not limited to, foreclosure and selling the property]" (*citing Vawter*).

Klinger v. Wells Fargo Bank, W.D. Wash. No. 10 CV 05546 (Dec. 9, 2010) Plaintiff's action to stop trustee's sale claimed among other allegations that Wells Fargo caused false filings, specifically the Assignment of Deed of Trust from MERS to Wells Fargo. The Court granted summary judgment in favor of Wells Fargo finding that MERS is authorized to serve as deed of trust beneficiary under Washington law and an assignment by MERS is authorized and in accordance with Washington law. In support of its decision here the Court cited to two other favorable MERS decisions from the Western District of Washington, Daddabbo v. Countrywide Wide Home Loans, Inc., 2010 WL 2102485 (W.D. Wash May 20, 2010) and Vawter v. Quality Loan Service Corp. of Washington, 707 F. Supp. 2d (W.D. Wash. 2010) finding the analysis of the MERS issue by those two Courts was "well reasoned".

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.

In *Kucheynik v. Mortgage Electronic Registration Systems, Inc.*, No. 10cv451TSZ, (W.D.Wash., Dec. 15, 2010) (Zilly, J.), the Court notes that MERS was not involved in the loan origination, and therefore the origination based claims are deficient as to MERS since the complaint lacks sufficient allegations triggering assignee liability. (“Plaintiffs argue that these particular Defendants may be liable as assignees, yet the complaint lacks factual allegations that can establish assignee liability . . . the complaint must contain more than conclusory allegations.”) Plaintiffs further argued that MERS could be liable as assignees under RESPA citing to 16 C.F.R. § 433.2 (the “FTC Holder Rule”) but the Court determined that the FTC Rule does not apply. Finally, the Court held that MERS could not be held liable under the Washington Consumer Protection Act based on the actions of the mortgage broker or originator.

Brown v. CitiMortgage, Inc. et al, Pierce County Superior Court Case No. 10-2-09509-3 (April 15, 2011). The Defendants’ motion to dismiss was granted with prejudice by the Court on April 15, 2011. Plaintiff’s wrongful foreclosure complaint alleges that MERS is not a valid beneficiary under Washington’s deed of trust statutes because MERS and is not the lender and that the MERS assignment to the foreclosing lender is illegal and void, failing to give the lender standing to foreclose. Defendants’ motion to dismiss argued that MERS is entitled to serve as deed of trust beneficiary under Washington law and that the plaintiff agreed to have MERS serve as beneficiary when plaintiff executed the deed of trust. The motion to dismiss cited to two decisions from the District Court of Washington, *Moon v. GMAC Mortgage Corp.* and *Vawter v. Quality Loan Service Corp.* which both held that MERS could act as beneficiary in a nominee capacity for the lender under Washington’s Deed of Trust Act. The Court here dismissed the plaintiff’s complaint with prejudice.

Harvey v. Cal-Western Reconveyance Corp., Snohomish County Superior Court No. 10-2-06133-7 (Dec. 3, 2010). Plaintiffs alleged in their complaint that MERS did not meet the definition of “beneficiary” under Washington’s deed of trust statutes. Therefore, the defendants wrongfully foreclosed because the substitute trustee appointed by MERS did not have authority to act and the substituted trustee made misrepresentations in the notice of trustee’s sale because the notice stated the deed of trust was in favor of MERS. All claims against MERS were dismissed in their entirety and with prejudice.

Townley v. BAC Home Loans, W.D. Wash. No. C10-1720 (June 29, 2011)(Coughenour, J.) All counts of the plaintiffs’ against MERS and the other defendants were dismissed by the Court. The claims in the complaint for wrongful foreclosure and injunctive relief were dismissed because the trustee’s sale was completed on December 3, 2010 and the plaintiffs did not request a restraint of the sale after they filed their complaint on November 16, 2010. The Court held that under Washington law a homeowner can challenge an impending trustee’s sale in one of two ways, curing the default or restraining the sale. The plaintiffs did neither and the Court found the plaintiffs waived their rights to challenge the completed trustee sale. The plaintiffs requested a stay of this case based on this Court’s stay of two other cases before it where the Court recently certified the MERS as beneficiary question to the Washington Supreme Court, *Bain v. OneWest Bank* and *Selkowitz v. First American Title Insurance*. The Court here refused to stay this case because the plaintiffs in *Bain* and *Selkowitz* restrained the trustee’s sales. The Court also refused to grant the plaintiffs injunctive relief to stop the Bank of New York from seeking to secure possession of the property through an eviction action. Lastly, the Court dismissed the plaintiffs’

claims that the foreclosure violated Washington's Consumer Protection Act because the Court found the plaintiffs failed to allege a required element of this claim – a public interest impact.

In *Salmon v. Bank of America, MERS, et al.*, (D. Wa. 10-446, 5/25/11), the court dismissed claims against MERS and Bank of America. The plaintiffs argued that MERS is a “ghost beneficiary” and cannot be the beneficiary of a Deed of Trust under Washington law because MERS does not have an interest in the note. However, the court noted that the beneficiary of a Deed of Trust is not required to be the note holder. The court characterized the borrowers claim as a “show-me-the-note” argument and noted that other courts have dismissed these claims. Relying on the language in the Deed of Trust, the court noted that MERS had both the authority to foreclose or to assign the Deed of Trust. Concluding, the court dismissed the case without prejudice.

West Virginia

In *Wittenberg v. First Independent Mort'g Co., MERS, et al.*, Case 3:10-cv-00058-JPB (Northern Dist. WV, Apr. 11, 2011), the court dismissed plaintiff's allegations of fraud against MERS stating that, “[a]ny representation that MERS has the authority to initiate foreclosure is not false . . .” and that the language in the DOT gave MERS that authority.

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 mortgagor 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

As discussed above, proposed revisions to Rule 8 would eliminate the option Members have to file proofs of claim or motions for relief from stay in MERS’ name. Members would be required to instruct one of their MERS Signing Officers to execute and send for recording an assignment of the mortgage lien from MERS to the loan servicer or other third party.

Alabama

See *In re Frank*, Case No. 10-84435, 2011 WL 846125, *1 (Bkrtcy N.D. Ala March 8, 2011) (Caddell, J.) (“MERS executed an assignment of mortgage, transferring and assigning the mortgage . . . to Wells Fargo . . . [b]ased upon the foregoing, the Court finds that Wells Fargo is the actual holder of both the note and mortgage.”).

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 the MERS 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).

In re Salazar S.D. Cal. (Bankr.) No. 10-17456 (April 11, 2011) The Court denied the lender US Bank’s motion for relief from automatic stay with prejudice. The Court found that the borrower held equitable title to his property because he demonstrated a “prima facie case that the foreclosure sale was void.” The facts of the case are that MERS is the record beneficiary of the deed of trust and executed the substitution of trust in anticipation of a non-judicial foreclosure sale, however US Bank did not get an assignment from MERS prior to the foreclosure sale. US Bank identified itself on the trustee’s deed as the “foreclosing beneficiary”. The Court found that MERS was the beneficiary of record but that US Bank conducted the non-judicial foreclosure as beneficiary. The Court ruled that even if MERS was the foreclosing beneficiary, MERS had no authority to foreclose based on the express terms of the borrower’s deed of trust. The Court found that the original lender, Accredited Home Lenders, not MERS had the right to invoke the power of sale. The Court found that it was not bound by the recent *Gomes v. Countrywide Home Loans*, state appellate court decision which held that MERS possessed the power and authority to foreclose based on the terms of the borrower’s deed of trust because it believes the California Supreme Court would have ruled differently. However, more than a month after the *In re Salazar* ruling, the California Supreme Court denied certification of the *Gomes* appeal. The terms related to MERS in the *Gomes* deed of trust and the *Salazar* deed of trust here are identical. The MERS member is appealing the *In re Salazar* decision to the District Court.

In *Doble v. Deutsche Bank, et al* S.D. Cal (Bankr.) AP No. 10-90308 (April 14, 2011), (which MERS is not a party to) the Court denied the defendants’ motion to dismiss regarding borrower’s standing claims against the lender and the servicer. The Court held that neither of the defendants

had standing to foreclose because the MERS assignment to the servicer was invalid making the servicer's assignment to the lender invalid. The Court found that MERS did not assign any enforcement rights to either of the defendants because the Lender and not MERS had the power and authority to enforce the terms of the deed of trust because MERS is not mentioned in the Note and the Lender not MERS is entitled to receive all loan payments. The Court differentiated this case from the favorable MERS ruling in *Gomes* discussed above because it found MERS had no such authority under this deed of trust (same deed of trust language in both cases). The Court also held that until the Note is properly endorsed, assignments of the deed of trust do not serve to transfer enforcement rights.

In re Gonzalez v. HSBC Bank National Association, et al., 9th Circuit Court of Appeal, No. 11-60031 (June 29, 2011). The Court of Appeal declined to exercise jurisdiction over the debtor's appeal of the dismissal of his adversary complaint. The bankruptcy court for the Central District of California previously dismissed the complaint which alleged various violations of TILA and challenged the parties standing to foreclose after receiving relief from stay in relation to three properties because of a lack of interest in the promissory note. The Bankruptcy Appellate Panel for the 9th Circuit ("Panel") affirmed the dismissal held that there was no requirement under California law to produce the note in order to proceed with non-judicial foreclosure. Further, the Panel noted that the debtor failed to appeal the orders granting the motions for relief from stay and that it was an improper collateral attack to attempt to do so in his adversary complaint. In dismissing the appeal, the 9th Circuit stated that it was untimely as it was not filed within 30 days of the order issued by the Panel.

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 (Bkrch.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 (*In re: Corley*) (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 (*In re: Corley*) (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 described 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 “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.*

In *In re Marron*, Case No. 10-45395, (Bankr. D. Mass., June 29, 2011), the bankruptcy trustee objected to HSBC Bank’s motion for relief from automatic stay, arguing that the assignment of mortgage HSBC obtained from MERS was invalid and thus HSBC may not legally foreclose the mortgage. Citing to *In re Agard*, the trustee contended that because MERS was merely a nominee for the original lender, with limited legal authority, and because MERS never had the right to enforce the promissory note associated with the debtors’ mortgage, it did not have a sufficient interest in the debtors’ property to foreclose the mortgage. The trustee goes on to argue that since MERS did not have the right to foreclose, MERS could not have assigned that right to HSBC and it does not have standing to seek relief from the automatic stay. Citing to the Massachusetts Supreme Court decision in *U.S. Bank Nat’l Ass’n v. Ibanez* and the Superior Court decision of *Adamson v. MERS*, the *Marron* Court concluded that,

“Massachusetts law does not require a unity of ownership of a mortgage and its underlying note prior to foreclosure … a mortgagee who is not the note holder may exercise the power of sale and foreclose the mortgage, but as a fiduciary for the note holder, to whom it must account for the foreclosure sale proceeds.” Further, “[a]s Massachusetts law allows a mortgagee with no interest in the underlying obligation to foreclose, the trustee’s argument that MERS did not have a sufficient interest in the debtors’ property to foreclose the mortgage fails … To the extent MERS held only bare legal title to the mortgage on the debtors’ residence in its capacity as trustee for the note owner, MERS was able to assign its interest to HSBC. The fact that the debtors’ promissory note passed like a hot potato down a line of owners, including some in bankruptcy and liquidation, with no accompanying assignment of the note owner’s beneficial interest in the mortgage, changes nothing. Through all of these transfers right up until it finally

assigned the mortgage to HSBC, MERS remained the mortgagee in its capacity as trustee and as nominee for whomever happened to own the note.”

The Court further refused to apply the reasoning found in the *In re Agard* decision (Bankr. NY) which suggested that a MERS assignment is only valid if MERS can prove its nominee relationship with whomever happens to be the current holder of the beneficial interest in the mortgage (i.e. the note owner), and that such note owner authorized MERS to assign the mortgage. The *Marron* Court pointed out that “...under Massachusetts law, an assignment of a mortgage is effective without the need to independently establish the authority of the assignor to make the assignment.” Mass. Gen. Laws ch. 183, § 54B provides that an assignment of a mortgage executed before a notary public is “binding” and entitled to be recorded. “The existence of the Massachusetts statute renders *Agard*’s analysis inapposite and the trustee’s argument unavailing with respect to assignments of Massachusetts mortgages.”

As to HSBC’s standing, the Court determined that “[i]n order to have standing to file a motion to lift the stay ... a movant must be a party in interest ... [a] mortgagee armed with the power of sale is a party in interest by virtue of having a substantive right to enforce the instrument.” Citing to the First Circuit Court of Appeals decision in *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994), the Court further notes that, under *Grella*, “a bankruptcy court need not fully adjudicate the merits of the creditor’s claims but rather determine ‘whether a creditor has a colorable claim to property of the estate.’” Citing to the MERS Rules of Membership and information obtained from the MERS® System identifying HSBC as the investor, the Court holds that ‘HSBC has a colorable claim that it was listed in the MERS system as the beneficial owner of the debtors’ mortgage at the time the mortgage was assigned by MERS to HSBC in compliance with the MERS Rules.’ It is noteworthy that an identical copy of the MERS Rules of Membership was also before the *Agard* court.

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

In the September 20, 2010 decision *In re Tucker*, (Case. No. 10-61004) a Missouri Bankruptcy Judge for the Western District of Missouri found 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 MERS agrees 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.

New York

Judge Grossman in the *In re Ferrell Agard* decision found that the language of the mortgage document itself and MERS role as mortgagee did not provide MERS with the authority to “effectuate a valid assignment of mortgage.” This finding ignores the New York case-law which has ruled MERS as mortgagee can assign its interest in the mortgage and has the authority to take other actions on behalf of the lender (outlined in the mortgage itself) including but not limited to the right to foreclose and sell the property. The Court chose to rely on a few contradictory decisions from New York trial courts and decisions from other jurisdictions which do not address MERS authority to assign the mortgage.

Several New York trial level and appellate level courts have held MERS as mortgagee has the authority to assign the mortgage. *See Saxon Mortgage v. Coakley*, 2011 Slip Op 03578 (2nd Dept., April 26, 2011)(holding that MERS was free to assign the mortgage, absent any language which expressly prohibited the assignment); *U.S. Bank, N.A. v. Flynn*, 897 N.Y.S.2d 885 (Suffolk Co. Supreme Court, March 12, 2010)(finding that language in the mortgage instrument conferred broad authority on MERS to act in all ways that the original lender could act, including “releasing...the mortgage” was sufficient to confer authority to MERS as nominee to assign the mortgage.); *The Bank of New York v. Sachar*, Supreme Court, Bronx County, Index No. 380904/2009 (Mar. 3, 2011)(Assignment from MERS as mortgagee of record gave the plaintiff standing to foreclose); *U.S. Bank v. Mancini*, 2010 NY Slip Op. 20093 at *4 (“[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.”); *HSBC v. MacPherson*, Supreme Court, Suffolk County, No. 08-29742 (May 24, 2010)(“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 *CitiMortgage v. Campbell*, Supreme Court, Westchester County No. 28175/2009 (June 10, 2011)(Borrower’s motion to dismiss foreclosure complaint challenging validity of MERS mortgage assignment denied).

The Court here also chose to ignore other New York state case-law finding MERS is the mortgagee of the mortgage and has standing to foreclose under New York law. *See MERSCORP, Inc. v. Romaine*, 861 N.E. 2d 81 (N.Y. Ct. App. 2006).(MERS is mortgagee of record as nominee of the lender and the defendant County Clerk is required to record MERS mortgages, assignments and lien releases in the county land records.); and *Mortgage Elec. Registration Sys. v. Coakley*, 41 A.D.3d 674, 838 N.Y.S.2d 622 (2d Dep’t 2007)(The court sustained the standing of MERS to sue as a foreclosing plaintiff as mortgagee and holder of the note in the face of a challenge thereto.);

The Court’s findings here in *In re Agard* also conflict with findings from bankruptcy courts in other jurisdictions. *See In re Marron*, Case No. 10-45395, (Bankr. D. Mass., June 29, 2011)(“...under Massachusetts law, an assignment of a mortgage is effective without the need to independently establish the authority of the assignor to make the assignment.”); *In re Martinez*, D. Kansas, Bankr. No. 10-7027 (Feb. 11, 2011)(MERS as mortgagee and agent for the lender has authority to act on behalf of the lender); *In re Lopez*, D. Mass., Bankr. No. 09-10346 (Feb. 9, 2011)(MERS as legal holder of the mortgage in trust for the Note Holder can transfer its interest in the mortgage and this transfer is contemplated by the Mortgage). Lastly, Judge

Grossman's views on MERS do not appear to be consistent with other bankruptcy judges in his own district. See *In re Edward Green*, E.D. New York, Bankr. No. 10-72024 (June 16, 2011). (Servicer's motion for relief from stay allowed over trustee's opposition to the servicer's motion citing to the *In re Agard* decision as grounds for denial of the motion.). We have appealed the *In re Agard* opinion to the District Court.

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.

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

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) Case No. 04-15754
THERESA A. CARTIER,)
Debtor) Chapter 13
) Judge Morgenstern-Claren
)
) 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 foreclose or seek relief from stay. Ohio law expressly gives the holder of a promissory note the right to enforce the note. *See* O.R.C. § 1303.31 (person is entitled to enforce a negotiable instrument if the person is a holder of the instrument or a non-holder in possession of the instrument with the rights of a holder, regardless of whether the person is the "owner" of the note); O.R.C. § 1303.03 (definition of negotiable instrument encompasses promissory notes); *Provident Bank v. Taylor*, 2005 Ohio 2573 (Delaware Cty. 2005) (statement by bank, in its affidavit in support of its summary judgment motion, that it was holder of promissory note secured by mortgage, was evidence that bank was proper party to bring foreclosure action, where maker of note did not contradict such evidence in his memorandum contra or his affidavit). Endorsing a promissory note, even in blank, and delivering it to a party is sufficient to make that party the note holder entitled to enforce the note.²⁰ *See* O.R.C. § 1303.22 (transfer of negotiable instruments); 1303.24 & 1303.25 ("blank endorsement" of note and delivery makes recipient lawful holder of note); *see also* Anderson, *Uniform Commercial Code* § 3.301:9 (3d. 1994) (holder of a negotiable instrument "may sue in his own name to enforce payment, even if he is not the owner").

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

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

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

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

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

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

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

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-Claren 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-Claren, 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-Claren. 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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Dated: June 12, 2008

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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 "[t]he 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 "[t]o 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.

Connecticut

In *Myrtle Mews Association, Inc. v. Charles Bordes et al.*, AC 31098 (Appeal from Superior Court, judicial district of Stamford-Norwalk, J.R. Downey, J., 2010), MERS appealed the trial court’s denial of its motion to open the judgment of strict foreclosure. MERS argued that the court never acquired personal jurisdiction over it because delivery of the writ of summons and complaint to addresses in Michigan and Florida did not comport with Connecticut’s corporate long arm statute, General Statutes § 33-929, or with General Statutes § 52-57(c), because MERS is a Delaware corporation with its principal place of business in Virginia. Additionally, MERS argued that process was insufficient because the summons listed the incorrect address and named “MERS, Inc.” instead of “Mortgage Electronic Registration Systems, Inc.”. The appellate court disagreed with plaintiff’s contention that MERS had consented to personal jurisdiction, but ultimately affirmed the trial court’s decision due to an inadequate record for review.

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 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 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 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

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 “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 ‘close’ 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 *Harvey v. Deutsche Bank Nat'l Trust Co.*, No. 4D10-674 (Fla. App., June 29, 2011), Plaintiff argued, in part, that the assignment from MERS was fraudulent because Deutsche did not file the assignment until twenty days after it filed the foreclosure. The trial judge rejected Plaintiff's contention and entered a final foreclosure judgment on January 14, 2010. Plaintiff filed a motion for reconsideration, arguing that (1) Deutsche did not have standing to enforce the note because the assignment of mortgage was signed and recorded after the complaint was filed; and (2) the validity of Deutsche's assignment of mortgage contained questionable authorized signatures. In particular, Plaintiff took issue with the capacity of the MERS signatory to execute the assignment on behalf of MERS. The appellate court determined that because the note at issue was indorsed in blank, and because Deutsche possessed the original note and filed it with the circuit court, its standing may be established from its status as the note holder, regardless of any recorded assignments. As to Plaintiff's argument regarding "questionable signatures," the appellate court noted that "[e]ven if Harvey could prove this, *the dispute would be between [the original lender] and Deutsche*. Importantly, Harvey has never denied that she was in default as to her mortgage payments." (emphasis added). Thus, the Florida appellate court concluded that the mortgagor lacked standing to challenge the validity of the MERS mortgage assignment

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 reassessments 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. Also See *Deutsche Bank National Trust Company as Indenture Trustee v. Moody*, 09-CI-4463 (Fayette County Kentucky Circuit Court, 4/11/11), discussed above in Section II Foreclosures where a

challenge by the borrowers to an assignment from MERS to the loan servicer was rejected. “The Court has now reviewed the relevant case law regarding who has standing to challenge an assignment and find MERS position to be correct. The Moodys do not have standing to contest the validity of the assignment from MERS to AHMS. The Moodys are not parties to the assignment.”

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 servicemember’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).

In *Aliberti v. GMAC Mortgage, LLC*, 1:11cv10174 (D. Mass., 4/28/11), discussed above in Section II, Foreclosures, the court rejected the plaintiff’s allegations that the MERS Certifying Officer could not be an officer of MERS and an officer of GMAC. “Through formal corporate resolutions, MERS typically authorizes employees of MERS member firms to execute assignments on its behalf. *Kiah v. Aurora Loan Servs., LLC*, 2011 WL 841282, *1 n.1 (D. Mass. March 4, 2011) (citation omitted). Pursuant to Mass. Gen. Laws ch. 183, § 54B, an assignment executed before a notary public by a person purporting to hold the position of vice president of the entity holding such mortgage shall be binding upon such entity. Id. at *7. It is undisputed that Stephan purported to be a Vice President of MERS at the time of the assignment and was named as a Certifying Officer in a Corporate Resolution from the Board of Directors of MERS. Moreover, the assignment was executed before a notary public. Thus, it is clear that the assignment is binding. See *id.* (finding assignment binding under similar circumstances).”

See the *In re Marron* decision discussed above in Section III, Bankruptcy. (“...under Massachusetts law, an assignment of a mortgage is effective without the need to independently establish the authority of the assignor to make the assignment.”).

Michigan

As a matter of Michigan law, the fact that a document was recorded in the land records is conclusive as to the absence of procedural defects. Pursuant MCLS § 565.201(4), “Any instrument received and recorded by a register of deeds shall be conclusively presumed to comply with this act.”

See Wood v Ayres, 39 Mich 345 (1878) (holding that where parties to an assignment act in accordance to the assignment without objection, a third party cannot challenge the validity of the assignment where there is no evidence of hostile title)

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); 2010 U.S. Dist. LEXIS 47595 (E.D. Mich., May 13, 2010); 399 Fed. Appx. 97, 2010 U.S. App. LEXIS 22764 (6th Cir.) (6th Cir. Mich., *aff'd.*, 2010); *cert denied* 2011 U.S. LEXIS 2242 (2011), 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).

In affirming the lower trial court decision, the Sixth Circuit explained:

Regardless of this point, even if there were a flaw in the assignment, Livonia does not have standing to raise that flaw to challenge Farmington's chain of title. As recognized by the district court, there is ample authority to support the proposition that "a litigant who is not a party to an assignment lacks standing to challenge that assignment." An obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void." These defenses include nonassignability of the instrument, assignee's lack of title, and a prior revocation of the assignment, none of which are available in the current matter. Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the same debt twice. In this case, Livonia is not at risk of paying the debt twice, because Farmington has established that it holds the original note. Farmington has produced ample documentation that it was in possession of the note and had been assigned all rights therein prior to the initiation of foreclosure proceedings. The district court reviewed the copies in exhibits and the originals produced by Farmington and was satisfied that they were authentic. Without a genuine claim that Farmington is not the rightful owner of the loan and that Livonia might therefore be subject to double liability on its debt, Livonia cannot credibly claim to have standing to challenge the First Assignment.

Michigan case law provides further support for the district court's conclusion that Livonia lacks standing to challenge the assignment. In *Bowles v. Oakman*, the Michigan Supreme Court held that the maker of a promissory note could not challenge his obligations under the note by asserting that an invalid assignment had occurred. The court emphasized that the challenge to the transfer was inappropriate where the maker "had no defense of his own to the note." The *Bowles* decision then quotes *Gamel v. Hynds*, for the point that "the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee." More recently, the Michigan Court of Appeals determined that a lessee of property did not have standing to challenge the lessor's assignment of certain rights in the lease to a subsequent purchaser because "the parties to the assignment . . . [did] not contest its validity." In the instant case, if the assignment were in fact irregular, that would be an issue between the assignor and assignee, not between Livonia and Farmington.

Livonia Props. Holdings, LLC v 12840-12976 Farmington Rd. Holdings, LLC, 399 F App'x. 97, 102-03 (CA 6, 2010) (unpublished) (applying Michigan law) (emphases added); *see also Stein v US Bancorp*, No 10-14026, 2011 US Dist LEXIS 18357, *31-37 (ED Mich, Feb 24, 2011) (unpublished) (holding that the plaintiffs lacked standing to challenge an assignment of a mortgage on the basis that the assignor entity had ceased to exist as of the date of the assignment) (attached as Exhibit 22); *Jarbo v BAC Home Loan Servicing*, No 10-12632, 2010 US Dist LEXIS 132570, *31 (ED Mich, Dec 15, 2010) (unpublished) ("The *Livonia Properties*

court also rejected an argument imbedded in Plaintiffs' claims here, i.e., a defective or flawed assignment corrupts the chain of title and precludes the defendant's standing to foreclose under Michigan's foreclosure by advertisement statute").

Williams v. US Bank Nat'l Ass'n, No. 10-14967, 2011 US Dist LEXIS 62047 (ED Mich, June 9, 2011) (J. O'Meara) [discussed in the Foreclosures Section above] ("To the extent Plaintiffs challenge any assignment from MERS to U.S. Bank, Plaintiffs lack standing to do so because they were not a party to those assignments. See *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 F. Appx. 97, 102-03 (6th Cir. 2010)."). [Discussed in the Foreclosures Section above].

Minnesota

Ostigaard v. Deutsche Bank National Trust Company, et al., 0:10cv1557 (D. Minn., 5/2/11). The court granted the defendants' motion to dismiss the complaint with prejudice and held that *Jackson v. Mortgage Electronic Registration Systems, Inc.*, discussed above in Foreclosures, controlled. The plaintiff alleged that the foreclosure was invalid because the signatories on the assignment were officers of more than one entity. In rejecting that theory, the court found that "In *Jackson*, the Minnesota Supreme Court reviewed the operation of MERS and noted 'legislative approval of MERS practices' by the Minnesota Legislature. The *Jackson* court also recognized that MERS shares officers with some of the lenders with which it works. Therefore, Ostigaard's argument fails." The court also rejected the plaintiff's argument that his inability to contact the MERS Certifying Officer who executed the assignment denied him due process.

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.

In *Turner v. Lerner, Sampson & Rothfuss*, No. 1:11-CV-00056, 2011 WL 1357451, the plaintiffs claimed FDCPA and Ohio unfair practices act violations, based on the law firm's filing of foreclosure lawsuits where its clients allegedly lacked proper standing because the law firm client's employees executed allegedly fraudulent assignments of mortgages from non-party MERS. In following the *Bridge* and *Livonia Properties* decisions (above), the court dismissed the case due to plaintiffs' lack of standing the validity of the assignments of mortgages, noting that "I]t is generally accepted law that 'a litigant who is not a party to an assignment lacks standing to challenge [] assignment' of a note."

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”)

Baxendale v. Martin, No. 94-2303, 1997 WL 1051072, at *2, (R.I. Super. Ct. Aug. 14, 1997) (“one who is not a party and has no right to enforce a contract lacks standing to seek a declaration of rights under that contract”)

State v. Med. Malpractice Joint Underwriting Ass'n, No. 03-0743, 2005 WL 1377493, at *2 (R.I. Super. Ct. June 7, 2005) (“Only parties to the contract or intended third party beneficiaries may seek to have rights declared under a contract.”)

In the Magistrate’s Report and Recommendation for *Fryzel v. Mortgage Electronic Registration Systems, Inc.*, No. CA 10-352 (D.Ri., June 10, 2011) (J. Martin), the Plaintiff was determined not to have standing to challenge the transfer of the promissory note or assignment of mortgage granted by Plaintiff.

“[u]nder Rhode Island law, only parties to a contract may seek to have rights declared under a contract ... Plaintiffs’ Complaint disputes AHMSI’s power to foreclose by challenging the validity of the assignments of their mortgage and by claiming that AHMSI is not entitled to foreclose under the terms of the [Pooling and Servicing Agreement (PSA)]. However, it is undisputed that Plaintiffs are not parties to the assignment agreements or to the PSA. Thus, Plaintiffs do not have standing to assert legal rights based on these documents.”

To further distinguish, the Magistrate notes that,

“Plaintiffs here do not base their challenge to foreclosure on alleged non-compliance with the mortgage agreement to which they are parties. Rather, Plaintiffs argue that Defendants do not have authority to foreclose by challenging the validity of the assignments of their mortgage... [based on the Complaint, however] ... Plaintiffs are clearly attempting to invoke rights under agreements to which they are not parties.”

Lastly, the Magistrate observes,

“Plaintiffs characterize Defendants’ position as ‘abhorrent,’ [] and assert that Plaintiffs ‘are defending themselves from strangers to the title of their home[], who manufacture fraudulent documents to create standing for themselves,’ [] Totally absent from Plaintiffs’ filings is any acknowledgment of the apparently

undisputed fact that they have been in default since April 2009 on the \$985,000 loan which they obtained to purchase their residence, a residence which, as far as the Court is aware, they continue to occupy. Given these circumstances, Plaintiffs' castigation of Defendants' position as 'abhorrent' strikes the Court as a case of the pot calling the kettle black."

In *Cosajay v. Mortgage Electronic Registration Systems, Inc.*, No. 10-442 (D.Ri., June 23, 2011) (J. Martin), the Plaintiff challenged the validity of the assignments on multiple grounds, including MERS' authority to execute the assignment. Citing to the Rhode Island Supreme Court decision in *Brough v. Foley*, the Magistrate determined that "[u]nder Rhode Island law, only parties to a contract may seek to have rights declared under a contract." Further, the magistrate notes that

"Plaintiff disputes that she is seeking to be a third-party beneficiary of the [Pooling and Servicing Agreement (PSA)] ... [h]owever, the [Plaintiff's] allegations ... fairly read, challenge Defendants' compliance with the PSA or the validity of one or more of the assignments based on non-compliance with the PSA. This Court is satisfied that Plaintiff is attempting to invoke rights under agreements to which she is not a party."

The Magistrate also notes that,

"[Plaintiff] has not been injured by any alleged fraud or wrong-doing by Defendants. Plaintiff granted the mortgagee both the right to assign the mortgage and the right to foreclose upon default. [citation to Plaintiff's complaint]. Whether a subsequent assignee enforces the right to foreclose or the original mortgagee, Plaintiff will not be harmed so long as she was in default."

Texas

In *Eskridge v. Fed. Home Loan Mortgage Corp. et al.*, Case No. 6:10-CV-00285-WSS (W.D.Tex. Feb. 24, 2011) (Smith, J.); (2011 WL 2163989 (W.D.Tex.)), the Court dismissed Plaintiff's claims pertaining to challenges to MERS' authority to assign its lien interest to a subsequent party. Plaintiff argued that she had superior title because the Note and Deed of Trust were "split," as MERS had no authority under the Note to transfer either the Note and/or the Deed of Trust. As a result, any transfer of the Note to BAC was purportedly void. The Court determined, however, that "[p]laintiff has no standing to contest the various assignments as she was not a party to the assignments. Even if she has standing, her allegations are without merit because MERS was given the authority to transfer the documents in the Deed of Trust." Further,

The Restatement (3d) of Property offers no support for Plaintiff's claims. As MERS is a beneficiary and nominee for both the originating lender and its successors and assigns by the express language in the Deed of Trust, the situation falls within an exception to the general rule that a party holding only the deed of trust cannot enforce the mortgage. See Comment e to the Restatement (3d) of Property (Mortgages) § 5.4. Section 5.4 additionally notes that a "transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to

the transfer agree otherwise.” Plaintiff makes no allegations that the parties in this case agreed otherwise.

The Court also noted that,

while the Note may not specifically mention MERS, the Note and Deed of Trust must be read together in evaluating the terms. “The general rule is that separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be considered as one instrument, and are to be read and construed together.” [citing to *CA Partners v. Spears*, 274 S.W.3d 51, 66 n. 9 (Tex.App.-Houston [14th Dist.], 2008); *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex.1982)]. Here, the Note and the Deed were both executed on July 6, 2006, for the purpose of securing a loan for the purchase of the property. Thus, the Note and the Deed are construed together as a single instrument. *See id.*; *see also The Cadle Co. v. Butler*, 951 S.W.2d 901, 908–09 (Tex.App.-Corpus Christi 1997, no writ).

In *McAllister v. BAC Home Loans Servicing LP*, No. 10-504 (E.D.Tex., Apr. 28, 2011) (Mazzant, J.); (*Adopted* Jun. 5, 2011) (2011 WL 2200672), the court granted a dismissal of claims pertaining to challenges of MERS’ authority to assign its lien interest to a subsequent party. MERS assigned the Deed of Trust to Defendant in September 2009. Plaintiffs asserted a breach of contract claim against the Defendant, claiming it wrongfully attempted to foreclose on the Property because it lacked standing to foreclose. Plaintiffs further alleged that MERS never held the Note and purportedly split the Note and the Deed of Trust, which resulted in a subsequent faulty assignment of the Note and Deed of Trust to Defendant. Defendant asserted that the Note could transfer without a written assignment or an endorsement and that the Note was endorsed in blank and the foreclosure notice of sale identified Defendant as the mortgagee. Defendant argued that a person in possession of a note endorsed in blank is entitled to enforce it irrespective of any assignments. Defendant further asserted that Plaintiffs lacked standing to challenge the assignment because Plaintiffs do not allege they are parties to the assignment they purport to contest. “... the Court agrees that Plaintiffs lack standing to contest any assignment ... Plaintiff has no standing to contest the various assignments as she was not a party to the assignments. [citing to *Eskridge v. Fed. Home Loan Mortgage Corp. et al.* (citations omitted)].” Further, “[p]laintiffs have alleged no facts that would allow Plaintiffs to enforce a contract in which they are not a party and there is no allegation that the contract was entered into for the benefit of Plaintiffs ... they cannot plead facts showing the existence of a valid contract between Plaintiffs and Defendant ... [t]herefore, Plaintiffs' breach of contract claim based upon a ‘split the note’ theory should be dismissed.”

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,

“[the 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.