John Christian Barlow, #12438

40 North 300 East, Suite 101

St. George, UT 84770

Telephone: (435)634-1200

Fax: (435)215-2420

Email: [jcb@johnchristianbarlow.com](mailto:jcb@johnchristianbarlow.com)

*For Plaintiffs*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

|  |  |
| --- | --- |
| KERRY DAVID HOME OWNER, an  individual, and TAMMARA HOME OWNER, an individual,  Plaintiffs,  vs.  RECONTRUST COMPANY NA.; BAC HOME LOAN SERVICING, LP. FKA COUNTY WIDE HOME LOANS SERVICING, LP; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; CHASE BANK USA, N.A.; GUARDIAN TITLE INSURANCE AGENCY; SECURITY NATIONAL MORTGAGE COMPANY; CHICAGO TITLE INSURANCE COMPANY; FULL SPECTRUM LENDING; CHERISH RIDING; and DOES 1-5.  Defendants. | **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**  Civil No. 100503673  Judge: James L. Shumate |

Plaintiff, pursuant to Utah Rules of Civil Procedure 65A, hereby respectfully moves this Court to issue a Temporary Restraining Order in this matter against Defendant ReconTrust Company and BAC Home Loans Servicing L.P., disallowing Defendants form conducting a foreclosure sale scheduled for February 10th 2011. Plaintiffs request that a Temporary Restraining Order be given that will encompass the time span of this litigation.

In order to obtain preliminary injunctive relief in the form of a Temporary Restraining Order or Preliminary Injunction, a movant generally must establish: (1) irreparable injury to it if the injunction is denied, (2) that the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction, (3) that the injunction would not be adverse to the public interest, and (4) a substantial likelihood of success on the merits of their claim. *See, e.g.,* Utah Medical Products v. Searcy, 958 P.2d 228 (Utah 1998).

**I.**

**GROUNDS FOR GRANTING A TEMPORARY RESTRAINING ORDER AND OR A PRELIMINARY INJUNCTION**

1. Plaintiff will suffer irreparable injury if the Temporary Restraining Order is not granted because Plaintiff’s home will be foreclosed upon. It is obvious that a foreclosure action brings with it injury to that party who is living in the home. Plaintiff will incur substantial costs, including but not limited to relocation costs. Plaintiffs’ family will suffer mentally and emotionally. Plaintiffs have been working with the Defendant BAC to obtain a mortgage modification. For unknown reasons Plaintiffs have been unsuccessful in obtaining such modification. See Exhibit 1, Plaintiffs’ affidavit describing Plaintiffs’ efforts in obtaining a modification.
2. The injury to applicant outweighs whatever damage the proposed order may cause the Defendants because the nature of the action depends upon Plaintiff’s retained ownership of the home. Furthermore, neither BAC nor ReconTrust, nor any other party named has an interest in the subject property. Already Plaintiffs can prove that parties named have no interest in the subject property. See Answer of Cherish Riding; see also Security National Mortgage Letter dated December 21st, 2010, Exhibit 2; and Defendant Guardian Title’s Motion to Dismiss wherein they state they have no interest in the property.
3. The Temporary Restraining Order will not be adverse to the public interest because it is in the best interest of the public for its members to retain ownership of their homes. Foreclosure is adverse to the public interest because foreclosed homes create a lower property value for the surrounding homes, and increase the crime rate in the general area due to vandalism of vacant homes. Foreclosure also creates a greater strain on the already over taxed State resources used for assisting homeless families, and on the population at large foreclosure creates a stagnate economy.
4. This case presents serious issues on the merits which should be the subject of further litigation as outlined below. Furthermore, the Plaintiffs have already received responses which clearly prove the merits of their case. See Answer of Cherish Riding; see also Security National Mortgage Letter dated December 21st, 2010, Exhibit 2; and Defendant Guardian Title’s Motion to Dismiss wherein they state they have no interest in the property.

**II.**

**ARGUMENT**

**NO STANDING TO FORECLOSE**

1. Plaintiffs incorporate herein by reference all proceeding paragraphs.

A. RECONTRUST LACKS STANDING TO BRING FORECLOSURE ACTIONS.

1. ReconTrust does not have the ability to foreclose on Plaintiff’s property because ReconTrust was not properly substituted as a Trustee. ReconTrust must be appointed as a Trustee through a valid Substitution of Trustee performed by a valid Beneficiary according to Utah Statute. Utah Code Section 57-1-22 states “A substitution of trustee must be done by the beneficiary.”[[1]](#footnote-2) In this instance that never happened. Here is what did happen:

* Security National Mortgage was named Trustee on the First Deed of Trust. See First Amended Complaint, Exhibit 2.
* MERS created a Corporation Assignment of Deed of Trust, wherein MERS purported to transfer all beneficial interest to BAC. See First Amended Complaint, Exhibit 6.
* BAC then purportedly substituted ReconTrust as Trustee of the First Trust Deed. See First Amended Complaint, Exhibit 7.
* ReconTrust then created and filed a Notice of Default of the First Trust Deed. See First Amended Complaint, Exhibit 8.

1. The Substitution of Trustee is no good because MERS did not have a beneficial interest in the First Deed of Trust, or any other Deed of Trust for that matter, so as to give them authority to create a Corporation Assignment of Deed of Trust to BAC. According to the MERS website which allows an individual to determine who the investor and who the servicer is, BAC is not the beneficiary, but only the servicer. See print out of MERS Servicer ID page, Exhibit 3. BAC did not have authority to substitute a new trustee, and thus, ReconTrust lacks standing to foreclose.
2. Furthermore ReconTrust is not authorized to exercise the power of sale under Utah Code Section 57-1-21 because ReconTrust is not a Member of the Utah Bar, nor is ReconTrust a Title Insurance Company.

B. MERS HAS NO STANDING TO CREATE A CORPORATION ASSIGNMENT OF DEED OF TRUST.

**a. What is MERS?**

1. Under Section (E) of the First Deed of Trust, Exhibit 2 of the First Amended Complaint, it states: “MERS” is Mortgage Electronic Registration Systems Inc. MERS is a separate corporation that is acting solely as nominee for Lender and Lenders Successors and Assigns. MERS is the Beneficiary under this Security Instrument.” The second sentence asserts that MERS is some sort of agent—a “nominee”—of the actual mortgagee, yet the third sentence flatly asserts that MERS is the Beneficiary. Which is it? Or is it both?

**b. MERS is not a Beneficiary of the Deed of Trust.**

1. MERS does not meet the statutory definition of Beneficiary. Utah Code Section 57-1-19 states that “’Beneficiary’ means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest.”
2. If MERS is a Beneficiary then surely MERS can show evidence of payments received from the Plaintiffs, or some sort of right to receive funds due MERS for its own benefit that resulted from the loan entered into by Plaintiffs. However, if MERS cannot show any beneficial interest, then how is it that they can “For Value Received” transfer and assign an interest in the Deed of Trust as they have purported to do in the Corporation Assignment of the Deed of Trust. See Exhibit 6 of the First Amended Complaint.

**c. What is a Nominee?**

1. No contractual definition of Nominee is contained in the Deed of Trust, or Utah Code. The Deed of Trust does not expressly state that MERS is an agent of its members, so no agency relationship has been created. Thus the Black’s Law Dictionary definition[[2]](#footnote-3) of ‘Nominee’ does not even apply here, and even if it did, the definition still gives MERS no legal standing to create a Corporation Assignment of Deed of Trust.

**d. What does MERS have to say about its ability to transfer interest in a   
 Deed of Trust?**

1. The Corporation Assignment of Deed of Trust, Exhibit 6 of the First Amended Complaint, clearly indicates that MERS is the entity that transferred the beneficial interest.
2. By its own admission, MERS cannot transfer a beneficial interest in the Deed of Trust because it has no interest in any Deed of Trust.

MERS does not create or transfer beneficial interests in mortgage loans or create electronic assignments of the mortgage. What MERS does do is eliminate the need for subsequent recorded assignments altogether. The transfer process of the beneficial ownership of mortgage loans does not change with the arrival of MERS. Promissory notes still require an endorsement and delivery from the current owner to the next owner in order to change the beneficial ownership of a mortgage loan.

The foregoing is quoted out of the MERS Recommended Foreclosure Procedures. The relevant pages are attached as Exhibit 4.[[3]](#footnote-4)

Although MERS tracks changes in ownership of the beneficial rights for loans registered on the MERS® System, MERS cannot transfer the beneficial rights to the debt. The debt can only be transferred by properly endorsing the promissory note to the transferee.

The foregoing is quoted out of the MERS Procedures Manual, Release 19.0, June 14th, 2010, page 63. The relevant pages are attached as Exhibit 5.[[4]](#footnote-5)

1. Even though, according to MERS “it is a key MERS rule that the note must be present in a foreclosure,”[[5]](#footnote-6) MERS cannot bring forth any note of Plaintiffs to show that the note has been endorsed and transfers any beneficial interest to MERS so that MERS can create a Corporation Assignment of Deed of Trust.

**e. MERS perceived beneficial interest does not exist.**

1. What value did MERS receive when it transferred the Beneficial Interest? Where is the Deed of Trust or the Note? What endorsement on the Note or Deed of Trust gives MERS the authority to transfer the beneficial interest?
2. MERS’ claim that it has authority to create Corporation Assignment of Deed of Trust rests on an argument that it holds only legal title to the mortgage rather than legal title to the debt. This claim is contrary to the Supreme Court Jurisprudence that “an assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.” *Carpenter v. Longan* 83 US 271 at 274 (1872). (Where negotiable note is secured by mortgage “the note and the mortgage are inseparable…, that assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”).
3. Since MERS only holds Legal Title to the Deed of Trust and not the debt, then MERS holds nothing and can assign nothing.

**III.**

**DISCOVERY IS REQUIRED.**

1. Conduct of a sale prior to resolution of such issues will create further, separate controversies involving persons not presently before the Court, including claims regarding the right to possession, which controversies may be rendered moot by final resolution of the present matter.
2. Failing to address such controversies may injure the rights of plaintiff, including the right to possession, and the right to deal with the real parties in interest to modify the underlying debt, and may injure the rights of such real parties in interest to deal with plaintiff.

**IV**

**CONCLUSION**

1. Plaintiffs meet the qualifications set forth in Utah Rules of Civil Procedure 65A to obtain a Temporary Restraining Order against Defendants to prevent the foreclosure sale of their home during the course of this litigation.

WHEREFORE, Plaintiff respectfully request that this Court grant the relief sought in the Temporary Restraining Order submitted herewith, along with such other and further relief as the Court deems just in the premises.

DATED:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Your name

Attorney for Plaintiff

1. A substitution of trustee must be done by the beneficiary. The code section gives no authority to a ‘nominee’ or ‘agent’ of a beneficiary. BAC is not the beneficiary, but only the servicer. [↑](#footnote-ref-2)
2. Black’s Law Dictionary defines ‘Nominee’ as: A person designated to act in place of another, usu. in a very limited way; A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others. [↑](#footnote-ref-3)
3. The document is too large to attach, but is available at: www.mersinc.org/filedownload.aspx?id=176&table=ProductFile [↑](#footnote-ref-4)
4. The document is too large to attach, but is available at: www.mersinc.org/filedownload.aspx?id=240&table=ProductFile [↑](#footnote-ref-5)
5. The relevant pages are attached as exhibit 3. *Remarks and Testimony of R.K. Arnold President and CEO of MERSCORP, Inc., Before the Subcommittee on Housing and Community Opportunity Housing Financial Services Committee*, November 18, 2010. The document is too large to attach, but is available at: http://www.mersinc.org/news/index.aspx [↑](#footnote-ref-6)