The Myths and Merits of MERS

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In 1993, key residential mortgage lending industry participants[1] gathered in order to bring then current developments in technology to the forefront in the establishment of a central, electronic registry for tracking interests in mortgage loans, thereby facilitating the transfer, acquisition and identification of those interests for custodians, servicers, investors and other participants in the industry. The goal was to eliminate the need and administrative expense for paper assignments of various mortgage-related rights as much as possible. The result of these efforts was the creation of the Mortgage Electronic Registration System, known as the MERS® System.[2]

Prior to the development of the MERS® System, when an interest in a mortgage loan was transferred, the parties would often change the mortgagee by assigning and recording the security instrument in the land records.[3] Mortgage loans were frequently originated in the name of one lender and then transferred to aggregators, which might transfer contractual servicing rights to still another party. In each case, an assignment was recorded so that the purchaser or servicer would appear in the land records[4] so that they would receive service of process and other legal notices as the lienholder in the public land records. To complicate matters further, when the servicing remained with the seller, the seller often remained mortgagee of record. If servicing changed hands, the land records were updated only if the new servicer wanted to receive service of process.[5] This process could take a long time to complete—up to six months for a modest loan portfolio. County recorder offices struggled to manage the volume of filings, which threatened the integrity of the land title recordation system and jeopardized the ability of consumers to obtain residential mortgage loans. Error rates as high as 33% were common, with assignments recorded in the wrong sequence or missing altogether—clouding title to properties.[6]

The founders of the MERS® System intended for it to be a system that was open and available to mortgage industry participants, applying information technology to reduce costs and streamline the process, similar to implementation by the securities industry of book entry systems.

The stated benefits of the initially proposed MERS® System concept[7] were:

a. Elimination of the need for subsequent assignments of the mortgage lien following closing of a loan.

b. Significant simplification of the loan tracking process.

c. Improvement of the lien release process.

d. Assistance in fraud reduction.

e. Simplification of procedures for delivering legal notices to mortgagees by providing an accurate database of beneficial owners of mortgage rights.

f. Cost reduction through voluntary immobilization of the mortgage note.[8]

The MERS® System was put into effect with the organization of Mortgage Electronic Registration Systems, Inc. (“MERS Inc.”), which serves as “mortgagee”, “grantee” or “beneficiary” (depending on state law; we will use the term “mortgagee” to refer to all three) in the security instrument, as nominee for the original lender and subsequent beneficial owners of the secured note. MERS Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc. (“MERSCORP Holdings”), which is owned by certain member financial institutions that utilize its services. The industry leaders, having worked hard to develop and achieve these laudable and practical goals, clearly had no idea what would befall the residential mortgage industry, nor how their motives and intentions would be twisted and vilified by critics in the current economic downturn.[9]

The Principles of MERS

The principles behind the MERS® System were derived from similar principles governing the establishment and function of the book entry registration and transfer system for securities established by The Depository Trust Company ("DTC"). Like the MERS® System, DTC is a member-owned institution that was created for the benefit of broker-dealer participants to facilitate transfers of securities in the securities markets. The benefits to the efficiency of securities transfers brought about by DTC have been clearly demonstrated and widely accepted.[10] Much as "Cede & Co." (the nominee holder of title to securities for DTC) does for beneficial owners of securities in the securities markets, MERS Inc. acts as the nominee of the lender (and its successors and assigns), who are beneficial owners of mortgage loans in the mortgage industry. In so doing, MERS Inc. becomes the mortgagee or beneficiary of record for the related mortgages and/or deeds of trust, for the benefit of the lender participants in the MERS® System.

To understand how the MERS® System operates, it is important to clarify the basic elements of a mortgage loan, which typically consists of two documents: (i) a promissory note between the lender and the borrower that sets forth the terms of the loan and establishes the obligation of the borrower to repay the loan secured by real property; and, (ii) a security instrument, which may be called a "mortgage," "deed of trust" or a "security deed" (depending on state law; we will use the term "mortgage" to refer to all three), evidencing the pledge of the purchased or refinanced property as collateral or security for the loan. The mortgage is recorded in the real property records in order to provide public notice to third parties of the security interest encumbering the property. Sometimes the terms "note" and "mortgage" have been used interchangeably, resulting in confusion. They represent two different documents with separate but interrelated functions. For that reason, as discussed below and based on long-standing case law and regulations, it is not necessary that both documents be in the name of the same person or entity.

It is also important to understand what the MERS® System *is* and what it is *not*. Under the MERS® System, MERS Inc. and its parent, MERSCORP Holdings, serve two distinct functions. First, MERSCORP Holdings owns, operates and maintains the MERS® System, which is an electronic database or registry of mortgage loans that tracks changes in servicing rights and beneficial ownership interests in residential mortgage loans. Second, MERS Inc. serves as the mortgagee or beneficiary of record, or holder of the mortgage lien, in the public land records for the benefit of its members.

MERS Inc. claims no right to retain payments made on the promissory notes. It is not a mortgage banker. MERS Inc. does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance or provide any loan servicing functions. MERS Inc. does not lend money or acquire the right to receive payments on mortgage loans. MERS Inc. does not receive compensation from consumers, just fees from its members.[11]

The bifurcation of roles and parties was not instituted by MERS Inc., rather it has a long history in mortgage finance and other developing commercial operations and in fact has been incorporated into state laws and regulations as will be discussed below.[12] Where the mortgage (or an assignment thereof) names MERS Inc. as the mortgagee (or assignee of the mortgagee), then MERS Inc. has legal title[13] to the real estate interest serving as collateral for the repayment of the loan, and the owner(s) of the note owns the beneficial interest in the loan secured by the mortgage. In such capacity, MERS Inc. remains the mortgagee of record, and pursuant to its contractual agreements with its members who are owners of the notes or servicers acting on behalf of the owners, any transfer of ownership or servicing must be communicated to the MERS® System to enable it to track such changes in order to provide the owner and servicer with filings and communications that MERS Inc. receives in its capacity as mortgagee of record. The borrower deals with the loan servicer—not MERS Inc.—in all matters of payment, modification or default on the loan.

In mortgage (non-deed of trust) states, the operative document defining MERS Inc.'s rights and functions is the mortgage. MERS Inc. is neither a party to, nor named in, the promissory note. Representative language can be found in a typical form of mortgage naming MERS Inc. as the original mortgagee[14], which identifies three parties: the borrower, the lender and MERS Inc. MERS Inc. is further described as a separate corporation that is acting as mortgagee *solely as a nominee for lender and lender's successors and assigns*. Under the mortgage, the borrower mortgages, grants and conveys to MERS

Inc. (*solely as nominee for lender and lender's successors and assigns*) and to the successors and assigns of MERS Inc., the property described therein. Furthermore, the mortgage includes an acknowledgment from the borrower that MERS Inc. holds only legal title[15] to the interests granted by the borrower, but if necessary to comply with law or custom, MERS Inc. (*as nominee for lender and lender's successors and assigns*) has the right: to exercise any or all of those interests, including, but not limited to, *the rights to foreclose and sell the mortgaged property*; and to take any action required of the lender, including, but not limited to, releasing and canceling the mortgage. Thus, the express language of the mortgage instrument authorizes MERS Inc. to act on behalf of the lender in serving as the legal titleholder and exercising any of the rights granted to the lender thereunder.

In deed of trust states, the operative document defining MERS Inc.'s rights and functions is the deed of trust. Representative language can be found in a typical form of deed of trust naming MERS Inc. as the original beneficiary[16], which identifies four parties: the borrower, the lender, the trustee and MERS Inc. MERS Inc. is described as a separate corporation that is acting *solely as a nominee for lender and lender's successors and assigns*. In addition, MERS Inc. *and the successors and assigns of MERS Inc.* are further designated as the *beneficiary of the deed of trust* (solely as nominee for lender and lender's successors and assigns). Under the deed of trust, the borrower grants and conveys to the trustee, in trust, with power of sale, the property described therein. Furthermore, the deed of trust includes an acknowledgment from the borrower that MERS Inc. holds only legal title to the interests granted by the borrower, but if necessary to comply with law or custom, MERS Inc. (*as nominee for lender and lender's successors and assigns*) has the right: to exercise any or all of those interests, including, but not limited to, *the rights to foreclose and sell the property*; and to take any action required of the lender, including, but not limited to, releasing and canceling the deed of trust. Thus, the express language of the deed of trust also authorizes MERS Inc. to act on behalf of the lender in serving as the legal titleholder and exercising any of the rights granted to the lender thereunder.

The Myths of MERS

In this section, we will address some of the more prevalent myths surrounding the MERS® System that have been perpetuated by various MERS' critics and we will explain the facts and legal analysis that clarify and dispel such myths.

MYTH: The MERS® System is fraudulent and illegal.

FACT: The MERS® System is based upon sound legal principles and its legal validity has been upheld by a vast majority of the courts.[17] The MERS® System relies on established principles of real property law, the law of negotiable instruments, and basic contract law that will be discussed herein.[18] Rules governing security interests in personal property under the Uniform Commercial Code (UCC) also support the legal model for the MERS® System.[19] Courts have long recognized the validity of using a nominee or agent as mortgagee as may appear in the mortgage instrument for recording purposes on behalf of the note owner.[20] Agency relationships may be established by private contract, and common law principles of principal and agent shall supplement the rules governing secured transactions pursuant to UCC §1-103(b). Under Article 9 of the UCC, it is not necessary to record a mortgage assignment when the mortgage note is transferred or sold.[21] Moreover, under real estate law, legal title can remain in a mortgagee (such as MERS Inc.) without invalidating the security instrument even though another party owns or holds the related promissory note.[22] Significantly, the original recorded mortgage remains in place and provides sufficient notice of the lien to third parties, which is the primary purpose of such lien recording provisions.[23]

State legislatures have also recognized the validity and appropriateness of the MERS® System. For example, as a result of questions raised about the MERS® System, the Minnesota Legislature passed an amendment to the Minnesota Recording Act that expressly permits nominees to record "[a]n assignment, satisfaction, release, or power of attorney to foreclose."[24] The amendment, frequently called"the MERS statute," went into effect on August 1, 2004.[25]

The Minnesota "MERS statute" provides that:

"An assignment, satisfaction, release, or power of attorney to foreclose is entitled to be recorded in the office of the county recorder or filed with the registrar of titles and is sufficient to assign, satisfy, release, or authorize the foreclosure of a mortgage if:

> (1) a mortgage is granted to a mortgagee as nominee or agent for a third party identified in the mortgage, and the third party's successors and assigns;
>
> (2) a subsequent assignment, satisfaction, release of the mortgage, or power of attorney to foreclose the mortgage, is executed by the mortgagee or the third party, its successors or assigns; and
>
> (3) the assignment, satisfaction, release, or power of attorney to foreclose is in recordable form."[26]

In addition, under the Texas Property Code, the definition of "mortgagee" expressly includes a "book entry system," which is defined as a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns. [27] The definition of "book entry system" has been construed by several Texas courts to specifically include the MERS® System.[28]

MYTH: MERS Inc. lacks authority to act as mortgagee/beneficiary of record.

FACT: The authority of MERS Inc. to act as mortgagee/beneficiary of record is delegated by MERS' members pursuant to well-established principles of property and agency law. Under general agency law, an agent has authority to act on behalf of its principal where the principal "manifests assent" to the agent "that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents to so act."[29] Under the terms of the FNMA/FHLMC Uniform Security Instrument form of mortgage, MERS Inc. has the right to exercise any or all rights of the lender and its successors and assigns, including, but not limited to, the rights to foreclose and sell the mortgaged property, and to take any action required of the lender including, but not limited to, releasing and canceling the mortgage. Courts throughout the country have recognized that a lender who holds the beneficial interest in a loan may lawfully designate MERS Inc. as its nominee to hold legal title to the mortgage and serve as mortgagee of record, and have routinely enforced the provisions of mortgages in which MERS Inc. is named the mortgagee of record.[30]

MYTH: MERS Inc. does not have standing or authority to foreclose or seek relief from an automatic stay in bankruptcy.[31]

FACT: The concept of standing means that a party must have a legal interest or claim or the right to seek judicial enforcement of an obligation or action for relief in order to initiate a lawsuit or proceed in a legal action. Numerous courts have considered whether MERS Inc. is a real party in interest with standing to foreclose on a property or to move for relief from the automatic stay in bankruptcy (which prohibits creditors from pursuing any remedies upon a debtor's bankruptcy filing). MERS Inc. has such interest and authority both (1) by express contractual terms, and (2) by law. First, the form of mortgage that appoints MERS as mortgagee and the MERS member agreement each grants MERS Inc. the authority to take action on behalf of a lender and its successors and assigns, including the enforcement of the rights and remedies under the mortgage. Specifically, the express language of a typical mortgage (where MERS Inc. is the mortgagee) provides that "if necessary to comply with law or custom, MERS Inc. (as nominee for lender and lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the [mortgaged property]; and to take any action required of lender including, but not limited to, releasing and canceling this [mortgage]." Second, Section 5.4(c) of the Restatement (Third) of Property (Mortgages) specifically provides that "[a] mortgage may be enforced only by, *or on behalf of*, a person who is entitled to enforce the obligation the mortgage secures".[32] Courts throughout the country have routinely and consistently held that MERS Inc. has both standing and authority to foreclose and seek relief on behalf of the beneficial owners of mortgage loans.[33] The court in *In re Huggins* identified four reasons why MERS Inc. has standing to seek relief from an automatic stay in bankruptcy. "First, MERS is acting as nominee for [the noteholder], which holds the note . . . second, MERS is the record mortgagee under the

Mortgage with the powers expressly set forth therein, including the power of sale . . . 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 . . . 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 [the noteholder] can foreclose though not named as a mortgagee or no one can foreclose, outcomes not reasonably or demonstrably intended by the parties."[34]

However, there are also several minority decisions that, in some form, have taken issue with MERS Inc.'s authority to foreclose.[35] None of them, to our knowledge, has invalidated a mortgage for which MERS is the nominee, and none of these decisions has challenged MERS Holdings' ability to operate as a central system to track changes in the ownership and servicing of loans. Several decisions adverse to MERS Inc. have been reversed upon appeal, vacated or clarified by other court decisions.[36]

Notwithstanding the foregoing, in July 2011, MERS revised its Rules of Membership to prohibit the initiation of foreclosures in the name of MERS Inc. Under the revised rule[37], MERS members are required to cause MERS Inc., through a MERS signing officer, to execute an assignment of the mortgage lien from MERS Inc. to the servicer, investor or a third party, prior to the initiation of a foreclosure proceeding or the commencement of an action for relief of an automatic stay in bankruptcy.

MYTH: The MERS® System creates an impermissible "split" between the mortgage and the note.

FACT: There is no "split" between the mortgage and the note because MERS Inc. holds the mortgage as mortgagee and nominee or agent for the Lender and its successors and assigns.[38] MERS Inc. only appears in the security instrument and acts as a mortgagee of record in a nominee or agency capacity for the beneficial owner of the note.[39]

While litigants and critics continue to raise the issue that the use of MERS Inc. results in a purported impermissible split of the note from the mortgage, thereby rendering both unenforceable, their arguments have been consistently rejected by the courts. For example, in a recent Ninth Circuit case, *Cervantes v. Countrywide Home Loans Inc., et al.*,[40] the plaintiff class alleged conspiracies by their respective lenders and others to use MERS Inc. to commit fraud as a sham beneficiary, among other things. The court found that plaintiffs failed to identify any representations made about the MERS® System and its role in their loans that were false and material; none of the plaintiffs' allegations indicated that they were misinformed either about MERS Inc.'s role as a beneficiary or the possibility that their loans would be resold and tracked through the MERS® System; and they failed to show that the designation of MERS Inc. as beneficiary caused them any injury by, for example, affecting the terms of their loans, their ability to repay the loans or their obligations as borrowers.[41] The court reviewed the express language of the documents the borrowers signed containing the substance of disclosure explained above and found that by executing the documents the plaintiffs agreed to the terms and were on notice of their content.[42] "[T]he notes and deeds [mortgages] are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders."[43] This distinction goes to the crux of the argument and the MERS critics. If a debt represented by a note is secured by collateral, then such collateral may not be separated from the note; although it may be held in the name of a different party as nominee or agent for the owner of the note; that is, the security follows the debt and in fact is released upon payment in full of such debt. MERS Inc. does not contend it acts in any capacity other than as mortgagee holding as agent or nominee for the lender. In a similar vein, recently a multi-district litigation (MDL) case involving MERS Inc. in Arizona was dismissed, citing in part the plaintiffs' express agreement in the mortgages that MERS Inc. is the lienholder of record as agent for the lender and its assigns.[44]

The use of an agent to hold legal title in the mortgage while another holds a beneficial interest in the mortgage loan has a long history in the residential housing industry. For example, starting in the 1930s, mortgage lenders would originate and sell mortgage loans to investors under the Federal Housing Administration's ("FHA") insured loan program. The originating lenders would service and hold the mortgage loans, as mortgagee of record on behalf of the beneficial owners, whose names were not recorded in the county land records. Prior to the advent of residential mortgage securitization in the 1960s, it was common for two or more savings and loan associations to acquire a portfolio of mortgage loans and take participation interests therein. The participated mortgage loans were typically serviced by a mortgage loan servicer, as mortgagee of

record on behalf of the various participants, whose names were also not recorded in the county land records. With the development of residential mortgage securitization in the late 1960s and early 1970s, Ginnie Mae, under its guarantee agreement, became the equitable owner of pooled loans while the originator or aggregator of the loans either remained or became the mortgagee of record and serviced the loans as an independent contractor for the benefit of investors in the Ginnie Mae mortgage-backed securities.[45] Fannie Mae and Freddie Mac followed suit using a similar model.

In addition, the Restatement (Third) of Property (Mortgages) confirms that an agent may be used to enforce a mortgage on behalf of a note owner and even instructs that "[c]ourts should be vigorous in seeking to find such [an agency] 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."[46]

Moreover, even the U.S. Bankruptcy Code accounts for this bifurcated structure by making it clear that a mortgage that is recorded in the name of a servicer that becomes a debtor in bankruptcy while it holds bare legal title to the mortgage does not become an asset of that servicer/debtor's bankruptcy estate: "property in which a debtor holds . . . only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."[47]

MYTH: A transfer of the note requires a corresponding assignment of the mortgage.

FACT: A transfer of the mortgage note does not require a corresponding assignment of the mortgage. Under the MERS® System, MERS Inc. is named in the mortgage as nominee for the lender *and its successors and assigns*. The UCC, which has been adopted, with slight variations, by all 50 states, governs the transfer or sale of notes (whether they are determined to be negotiable or non-negotiable).[48] However, the recordation of mortgages and requirements for their enforcement are governed by real estate law. This bifurcation of applicable law does not render their application mutually exclusive; rather, both the UCC and applicable real estate law in the respective jurisdiction must be complied with in order to have an enforceable note representing an obligation to pay, and an enforceable lien on the real property that is collateral for the note.

Under the UCC, a note sale or transfer is effective and enforceable upon meeting three criteria: (i) the buyer giving value, (ii) to a seller with rights in the note and (iii) execution of a security or purchase agreement that either describes the note or is accompanied by possession of the note.[49]

Once the note is sold or transferred such that the conveyance is enforceable or "attaches" as described above, there is a corresponding automatic transfer of the seller's interest in the mortgage to the buyer. Section 9.203(g) of the UCC states "The attachment of a security interest [which includes the right of a buyer of the note] in a right to payment or performance secured by a security interest or other lien on personal *or real property* is also attachment of a security interest in the security interest, mortgage or other lien."[50] These UCC rules do not address priorities of the security interest in the underlying property, enforcement of the mortgage, or the impact of filing or non-filing.[51] Those issues are governed by the real estate law of the jurisdiction in which the property is located. But it is clear that under the UCC, the transfer or sale of the note includes conveyance of seller's interest in the underlying mortgage.[52] In order for the buyer of the note to be comfortable about its ability to foreclose or take any other necessary steps to realize on the collateral, it must have a contractual relationship with the mortgagee of record. Under the MERS® System, that contractual relationship exists, and MERS Inc. has been granted the right and authority to act on behalf of the owner(s) of the note as well as the servicer of the note. The roles are outlined by contract among the parties which specifies their duties and responsibilities under both the UCC framework as well as the real property recordation system.

MYTH: The MERS® System makes it harder for home owners to identify the servicer and beneficial owners of their mortgage loans.

FACT: The MERS® System actually makes it easier for home owners to identify the servicer and beneficial owner of loans that are registered on the MERS® System. The servicer is the party primarily responsible for negotiating loan modifications and conducting foreclosure proceedings. If a mortgage loan has been securitized, the "owner" of the mortgage loan will typically be a trust, which under the terms of the related pooling and servicing agreement, has delegated all loan servicing authority to the servicer. Consequently, the servicer is the crucial contact for homeowners seeking to modify or renegotiate the terms of their loans due to financial hardships, and the identity of the servicer is readily available to troubled borrowers if their mortgage loan is registered with the MERS® System. The MERS® System maintains a toll-free number (888.679.6377) and an Internet website (www.mers-servicerid.org) that enable borrowers to identify the servicer, and in most cases, the beneficial owner of their mortgage loan, if their mortgage loan is registered on the MERS® System.[53] New servicers and beneficial owners of a loan are required to identify themselves on the MERS® System within days of the actual transfer of interests.

In addition, homeowners have other statutorily-mandated access to such information. Under the Real Estate Settlement Procedures Act (RESPA)[54], mortgage loan servicers are required to notify borrowers when the servicing of their loan changes, and under recent changes to the Truth in Lending Act (TILA)[55], transferees of mortgage loans are now required to notify borrowers when the ownership of their mortgage loan changes. This seems axiomatic since otherwise the borrower would not know where to send payments. Furthermore, the Dodd–Frank Wall Street Reform and Consumer Protection Act[56] amended RESPA to require mortgage loan servicers to respond to qualified written requests from borrowers for the identity and address of the owner, or assignee, of their loan within ten business days after receipt thereof.[57] These legislative and regulatory provisions validate and preserve the goals and intent of the original MERS system concept.

MYTH: MERS signing officers lack authority to act on behalf of MERS Inc.

FACT: MERS Inc. is a Delaware corporation and its actions are governed by its bylaws and the Delaware General Corporation Law (DGCL). Under the DGCL, there is no requirement that an officer of a corporation be an employee of that corporation.[58] In addition, under the DGCL, there is no requirement that individuals serving as officers of a corporation be employed or compensated by that corporation.

Under Delaware law, a corporation may by board resolution appoint officers to carry out the corporation's business.[59] In addition, Section 142(a) of the DGCL provides that "any number of offices may be held by the same person unless the certificate of incorporation or bylaws otherwise provide."

Since MERS Inc. has no employees, a majority of the actions taken by MERS Inc. in its capacity as mortgagee under mortgages and/or deeds of trust are taken by designated officers commonly referred to as "certifying or signing officers." The signing officers are generally officers of MERS' members that are responsible for carrying out servicing functions on behalf of such MERS members.

The MERS Inc. signing officers are appointed pursuant to a corporate resolution, duly adopted pursuant to authority granted by the Board of Directors of MERS Inc. Pursuant to the corporate resolution, these signing officers are appointed as assistant secretaries, assistant vice presidents and vice presidents of MERS Inc. and their authority is limited to: (1) executing lien releases, (2) executing mortgage assignments, (3) executing foreclosure documents, (4) executing proofs of claims and other bankruptcy related documents (e.g., motions for relief of the automatic stay), (5) executing modification and subordination agreements needed for refinancing activities, (6) endorsing over checks made payable to MERS Inc. (in error) by borrowers, (7) taking such other actions and executing documents necessary to fulfill the MERS member's servicing duties, and (8) taking such ministerial actions and, in such ministerial capacity, executing and delivering all such instruments and documents as the officer(s) of MERS Inc. deem necessary or appropriate in order to effectuate fully the purpose of each and all of the foregoing powers, in each case only with respect to the loan owned by the related member.[60] In order to be eligible for appointment as a signing officer of MERS Inc., a person must demonstrate a basic knowledge of the MERS®

System and pass an annual certifying examination administered by MERSCORP Holdings.

We are not aware of any relevant case law that would suggest that the MERS Inc. business model of appointing signing officers is either inappropriate or illegal. In fact, several courts have upheld the MERS Inc. signing officer business model.[61]

The propriety of the MERS Inc. signing officer business model has also been upheld in an ethics opinion from the New York State Bar Association[62] which found that no conflict of interest exists in violation of New York state bar professional conduct rules when an attorney serves as an officer of the mortgagee of record/assignor for the purpose of executing a mortgage assignment and also represents the assignee in the prosecution of the subsequent foreclosure action.

Courts have consistently upheld the authority of MERS Inc., in its capacity as mortgagee, to assign mortgages.[63] When plaintiffs have challenged the authority of MERS Inc. signing officers to execute assignments in connection with foreclosure or bankruptcy proceedings, courts have consistently found that such plaintiffs lack standing to challenge such assignments because they are not parties thereto and are not the intended beneficiaries thereof.[64] Significantly, such plaintiffs have failed to articulate any correlation between the alleged lack of authority and a resulting harm to the plaintiff occasioned thereby.

MYTH: The MERS® System creates a cloud on real estate titles.

FACT: The servicer (acting on behalf of the beneficial owner(s) of the note) is the entity responsible for initiating and completing foreclosure actions and, as such, the servicer (not MERS Inc.) is the entity that is responsible for assuring that mortgage assignments and mortgage notes are properly assigned to the real party in interest (i.e., the servicer or the note owner) prior to the commencement of foreclosure proceedings. MERS® System members have a substantial interest in providing accurate and current information because they rely on the MERS® System to obtain current information about note owners and servicers, as well as to obtain or receive legal notices served on MERS Inc. as mortgagee of record.[65] Using MERS Inc. as the mortgagee of record actually reduces the possibility of missed or incorrect assignments that would create an unclear "chain of title" as to who is the actual mortgagee or beneficiary of the security instrument. When MERS Inc. serves as mortgagee, the recorded chain of title to the mortgage starts with MERS Inc. at origination and ends with MERS Inc. when it either releases the lien or assigns the lien to another entity.[66] The MERS® System also streamlines the lien release process, reducing research time and recording fees.

MYTH: The MERS® System usurps the function of local recording officials to track changes in ownership of real property.

FACT: The land records have never been an authoritative source for who owns beneficial interests in and servicing rights to mortgages.[67] The primary purpose of land records was not to track mortgage loan ownership rights, but to provide public notice of liens filed against the property in order to protect the lienholder (and not the debtor).[68] A mortgage and any assignment of mortgage is typically recorded to protect the lienholder, and is generally not required by the county; rather there are incentives to record and disincentives for not recording.[69] When a loan is registered on the MERS® System, the MERS member is required to record the mortgage (or assignment of mortgage) in the name of MERS Inc., at the loan owner's expense, in the appropriate recording office.[70] Thus, the public is placed on notice that MERS Inc. is the mortgagee of record for the benefit of its members, and MERS Inc., in its capacity as lienholder, holds a perfected security interest in the real property that is valid against other lenders, judgment creditors or potential purchasers of the mortgaged property. More importantly, the role of the MERS® System is not to record or track changes in ownership of real property; rather the MERS® System tracks non-recordable contract interests in servicing rights and ownership of promissory notes secured by the related property for the benefit of MERS Inc. members. Consequently, the land records system continues to perform the services of recording ownership changes without usurpation by MERS Inc., and MERS Inc. performs the functions its members designed and created, both of which facilitate real estate ownership and financing by fulfilling their separate but interrelated roles.

One court considering the allegation of usurpation of a government function concluded: "Since the law does not require payment of a recording fee when new assignments are not recorded, and since the public is not using the 'MERS private recording system' to determine the true nature of encumbrances upon real estate, MERS is not usurping any governmental authority or power."[71]

MYTH: The MERS® System is a revenue evasion tool that deprives counties of needed revenues.

FACT: Recording fees are paid upon filing the original mortgage naming MERS Inc. as mortgagee. The MERS® System merely reduces the need to pay additional recording fees associated with subsequent transfers of mortgage loans or mortgage loan servicing rights among MERS members. Avoidance of these fees (which is not illegal) does not constitute revenue evasion. Fees are paid in exchange for a service. If the service is not required or necessary, then there is no "lost" revenue.[72] As even one of the most vocal critics of MERS acknowledges, the real property records have become voluminous and difficult and expensive to search.[73] Many county recording offices have not kept up with advances in technology or efficiency as other industries have, and simply were unable to efficiently and effectively handle the increasing volume of mortgage transactions as access to capital markets gave more consumers the ability to buy homes. Thus spawned the innovations and creativity of the private market and the development of the MERS® System. However, it is also important to note that the transaction volume for which county recorders would receive a fee should not decrease due to the use of the MERS® System from pre-securitization levels. MERS facilitates transfers of the note from originator to aggregator to depositor to trust—a minimum of three transfers in a short period of time—that did not occur prior to the development of the securitization market. A new mortgage or a release of mortgage must still be recorded any time that the borrower refinances or pays off her mortgage. Therefore, filing fees will still be paid for the several ongoing transactions requiring a filing in the public records. In a recent case brought against MERS Inc. by a county to recover damages for alleged intentional failure to record assignments and claiming unjust enrichment and civil conspiracy, the District Court held that, "There is simply no requirement to record assignments under Iowa law. To the extent the County's claims rely on such a requirement, they fail to state a claim upon which relief can be granted."[74]

MYTH: The MERS® System created or enabled securitization.

FACT: Securitization existed long before the development of the MERS® System. The earliest securitized transactions date back to the early 1970s and were the sales of pooled mortgage loans by the Government National Mortgage Association (Ginnie Mae). These transactions were followed by the Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae) in the early 1980s. The MERS® System did not originate until the mid-1990s. It is true that the MERS® System has facilitated the ease and efficiency with which securitization transactions are conducted, and this has been positive for bringing affordable financing options to more people. Securitization itself is not an evil to be vilified or destroyed. As Treasury Secretary Timothy Geithner said in announcing the Term Asset-Backed Securities Loan Facility (TALF) in February 2009, "No financial recovery plan will be successful unless it helps restart securitization markets for sound loans made to consumers and businesses."[75]

The Merits of MERS

To hear some commentators characterize the MERS® System,[76] one might think that it is a nefarious scheme of the financial oligarchy to obfuscate real property records, deprive tax-paying citizens of knowledge concerning the ownership of their mortgage loans and divest overburdened county recorders of direly needed revenue from recording fees. That is simply not the case. The MERS® System is a perfectly legal and valid system for the electronic registration and tracking of beneficial ownership of mortgage loans and servicing rights. It was created by some of the leading participants in the mortgage industry[77] for the purpose of facilitating the operation of the secondary mortgage market. It has substantially increased the efficiency of mortgage loan transfers within the secondary mortgage market, and has played a significant role in establishing the U.S. housing market, despite recent troubles, as the envy of the free market world.[78]

Since its inception in 1995, the MERS® System has become a critical component of the American mortgage finance industry.[79] More than 74 million mortgages have been recorded in the name of MERS Inc., of which 27 million are currently active. The MERS® System has streamlined the way residential and commercial mortgage loans are sold, traded and securitized by eliminating the need to prepare and record separate assignments of the mortgage lien. By doing so, the MERS® System has saved consumers, investors, and the mortgage industry millions of dollars each year in recording fees and related costs as well as reduced the problems and errors associated with multiple filings, and reduced delays in transactions.[80]

In addition to providing an electronic registration and tracking system to track conveyances of mortgage loans and servicing rights in the secondary market, the MERS® System creates accountability and transparency, helps reduce recordation costs (which may ultimately benefit the borrower), reduces the risk of errors in recordkeeping, eliminates breaks in the chain of title and makes it easier to keep track of liens as loans are sold to other investors.[81] In addition, the MERS® System fills an information void that county recorders cannot provide—the identity of the current servicer and beneficial owner of the mortgage loan. Furthermore, the current and easily accessible information on the MERS® System assists homeowners, lenders and title insurers in arranging for consolidations, loan modifications, payoff statements, deeds in lieu of foreclosure, short sales and releases.

The MERS Mortgage Identification Number, or "MIN", which assigns a unique identifying number to each loan for the life of the loan, and the MERS® System have been fully integrated into the U.S. mortgage loan industry, and together they are the single most important existing tools for tracking loan level data in the home loan process.[82] Through its use of MIN, the MERS® System helps:

- Identify for homeowners the servicer and, in most cases, the beneficial owner of their mortgage loans;
- Investors and credit rating agencies analyze the credit quality of mortgaged-backed securities;
- Regulators monitoring compliance with the law;
- Public agencies track housing and economic trends;
- Local governments identify the parties responsible for maintaining vacant properties in connection with neighborhood preservation efforts;[83]
- Keep distressed borrowers in their homes by speeding up the modification process; and
- Law enforcement officials fight fraud by tracking down criminals who attempt to obtain multiple loans secured by the same property.

Conclusion

While the recent recession brought one of the worst economic calamities experienced in several generations, it is disingenuous to attribute its cause, even in part, to a process and structure designed to facilitate efficiency and home ownership and bring about modernization long overdue in the mortgage finance industry, particularly one that had been modeled after a similar system successfully implemented by DTC in the securities industry. Homeowners who are facing foreclosure for failure to pay their respective mortgage loans may present a sympathetic cause, but the fact of the matter is that many participants in the residential mortgage process share in the blame for an overheated and unsustainable market. But none of this should overshadow the legitimate benefits brought to the mortgage industry by the MERS® System.

In sum, through thousands of lawsuits, many of which were held to be without merit, MERS Inc. has established that the process and structure of the MERS® System are based upon sound legal principles. Mistakes have been made, and improvements to the process have been implemented to ensure that the MERS® System will continue to serve and advance the goal of providing efficient and effective mortgage tracking. But those detractors who allege deceptive practices, flawed systems, and conspiracies have been, and will continue to be, proven without merit. In some cases, they seem to be more interested in obfuscating the issue of a lender pursuing its rightful claim to collateral upon default of a loan rather than bringing transparency or improvement to a process that, while not perfect, functioned fairly well. In those areas where deficiencies have been discovered or improvements identified, MERS Inc. and its members have been quick to respond. We

would all do well to learn the lessons from the recent fiscal calamity and work to bring about prudent and appropriate changes to rebuild a vibrant and transparent mortgage finance market that continues to include, and benefit from, the MERS® System.

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1. Participants included the Mortgage Bankers Association (MBA), the Federal National Mortgage Association (Fannie Mae), the Government National Mortgage Association (Ginnie Mae), the Federal Housing Administration (FHA), and the Department of Veterans Affairs (VA).

2. *See* Phyllis K. Slesinger & Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho Law Review 805 (1995).

3. Allen H. Jones, Setting the Record Straight on MERS, MORTGAGE BANKING 34 (May 2011).

4. Slesinger & Mclaughlin, *supra* note 2, at 809.

5. Jones, *supra* note 3 at 36.

6. R.K. Arnold, Yes, There is Life on MERS, 11 PROB. & PROP. 33, 34 (1997); Jones, *supra* note 3, at 36.

7. Slesinger & Mclaughlin, *supra* note 2, at 817.

8. *Id*. Under the initial MERS concept, the mortgage note would be immobilized through the development of standardized document custodian eligibility requirements or ratings to increase confidence in any particular custodian. Due to resistance by mortgage loan servicers, this aspect of the MERS concept was eliminated.

9. *See* Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 William and Mary Law Review 1 (October 2011); *see also*, Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 University of Cincinnati Law Review 4 (Summer 2010); David. E. Woolley and Lisa D. Herzog, MERS: The Unreported Effects of Lost Chain of Title on Real Property Owners, 8 Hastings Business Law Journal, 365 (Summer 2012).

10. According to its website (www.dtcc.com/about/business), DTC provides custody and asset servicing for more than 3.6 million securities issues from the United States and 121 other countries and territories, valued at US$36.5 trillion. In 2010, DTC settled nearly US$1.66 quadrillion in securities transactions.

11. *See* Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance, 704 N.W.2d 784, 787 (Neb. Oct. 21, 2005).

12. *See infra* notes 24-28 and accompanying text.

13. As described below, in deed of trust states, the trustee technically holds legal title to the property, in trust, and MERS Inc. is named as beneficiary in the deed of trust, in a nominee capacity for the owner of the note. For purposes of this discussion, it is important to understand that one party may hold legal title to a mortgage while another party owns the beneficial interest therein. *See infra* note 15 and notes 38-47 and accompanying text.

14. A sample form of the FNMA/FHLMC Uniform Instrument with MERS as original mortgagee is available on the FHLMC's website at http://www.freddiemac.com/uniform/unifmers.html.

15. According to *BLACK'S LAW DICTIONARY* (9th ed. 2009), "legal title" is "a [form of] title that evidences apparent authority but does not necessarily signify full and complete title or beneficial interest" in property. This differs from equitable title, or beneficial ownership, which gives the holder thereof the right to the use and economic benefit of the property.

16. A sample form of the FNMA/FHLMC Uniform Instrument with MERS as original beneficiary is available on the FHLMC's website at http://www.freddiemac.com/uniform/unifmers.html.

17. *See, e.g.*, MERSCORP, Inc. v. Romaine, 861 N.E.2d 81 (N.Y. 2006) (N.Y. court of appeals found that recording MERS instruments did not violate New York recording statutes and ordered the county clerk to accept MERS mortgages, MERS assignments and other MERS instruments); Jackson v. Mortgage Electronic Registration System, Inc., 770 N.W.2d 487 (Minn. 2009) (court held that case law establishes that a party can hold legal title to the security instrument without owning 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 [under the Minnesota statutory foreclosure scheme]); In re Mortgage Electronic Registration Systems (MERS) Litigation, 744 F. Supp. 2d 1018, 1029 (D. Ariz. 2010) (court dismissed plaintiff's claims alleging that the MERS system was fraudulent and that the MERS system facilitated fraudulent activity); In re Tucker, 441 B.R. 638 (Bankr. W.D. Mo. 2010) (finding that the language of the deed of trust clearly authorized MERS to act on behalf of the lender in serving as the legal title holder); Cervantes v. Countrywide Home Loans Inc., et. al., 656 F.3d 1034 (9th Cir. 2011) (court upheld that MERS is a legitimate system for tracking transfers of home mortgage loans and that MERS' interposition as record title holder to the deed of trust does not invalidate the transaction); Taylor v. Deutsche Bank Nat'l Trust Co., 44 So. 3d 618 (Fla. 5th DCCA 2010) (found that the mortgage granted to MERS legal status as mortgagee, which MERS could assign to the foreclosing bank under the UCC); Mortgage Elec. Registration Sys., Inc. v. Bellestri, 2010 WL 2720802 (E.D. Mo. 2010) (finding that Bellistri's failure to provide notice to MERS violated MERS' constitutional due process rights); Deutsche Bank Natl. Trust Co. v. Traxler, 2010-Ohio-3940 (court recognized MERS' authority to assign mortgage when designated as both nominee and mortgagee); Fuller v. Mortgage Elec. Registration Sys. Inc., United States District Court, Middle District of Florida, Jacksonville Division (Case No. 3:11-cv-1153-J-20MCR) (June 27, 2012) (court found that "MERS has not committed an unlawful act, or a lawful act by unlawful means" and that "the Florida courts have consistently affirmed the use of MERS as the designated mortgagee of record and the principle that MERS may serve as mortgagee or as nominee for the lender and the lender's successors and assigns."); Smith v. Saxon Mortgage, 446 Fed. Appx. 239 (11th Cir. 2011) (appellate court found that district court correctly held that the Security Deed granted MERS the power of sale and the authority to assign the security deed); Volkes v. BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing, LP, 2012 WL 642673 (appellate court found that district court correctly held that the MERS assignment was valid).

18. Clark and Clark, MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota, CLARKS' SECURED TRANSACTIONS MONTHLY, February 2010, at p.2.

19. *Id.*

20. *Id.* at 2, citing In re Cushman Bakery, 526 F.2d 23 (1st Cir. 1975), cert. denied, 425 U.S. 937 (1976). *See also,* Residential Funding Co., v. Saurman, 490 Mich. 909; 805 N.W.2d 183 (Mich. 2011) ("It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. The choice of a mortgagee is a matter of convenience.") (*quoting* Adams v. Niemann, 46 Mich. 135, 137 (Mich. 1881)); Jackson v. MERS, Inc., 770 N.W.2d 487 (Minn. 2009) ("A party can hold legal title to the security instrument without holding an interest in the promissory note."); Boruchoff v. Ayvasian, 323 Mass. 1, 10 (Mass. 1948) ("[W]here 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."); First Nat'l Bank v. Nat'l Grain Corp., 131 A. 404, 406-07 (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 someone subrogated to his rights under the mortgage, or even a third person not answering either of these descriptions."); Commercial Germania Trust and Sav. Bank v. White, 81 SO. 753, 754 (La. 1919) ("a mortgagor may make a mortgage in favor of a nominal . . . mortgagee"); 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 owners, does not affect the validity of the mortgage."); Lawrenceville Cement Co. v. Parker, 15 N.Y.S. 577, 578 (Sup.Ct. 1891) (holding that bank official

could hold mortgage, as mortgagee, for bank, which held the underlying promissory note).

21. *See* §9-203(g) of the UCC, which codifies the common law principle that the "mortgage follows the note." In addition, by analogy, §9-310(c) of the UCC provides that if a secured party assigns a perfected security interest, an Article 9 filing is not required to continue the perfected status of the security interest against creditors from the original debtor. The original filing provides sufficient notice of the lien.

22. *See infra* notes 38-47 and accompanying text.

23. *See* Clark and Clark, *supra* note 18, at p. 3; Plymouth County, Iowa v. Merscorp, Inc. et. al. (Case No. C-12-4022-MWB) (U.S. Dist. Ct., No. Dist. of Iowa, Western Div.) (Aug. 21, 2012) (there is no statute in Iowa that requires the recording of mortgages or assignments of mortgages, but the failure to record will render the mortgage or assignment void in favor of subsequent purchasers and existing creditors who are without notice). *See also infra* note 68 and accompanying text.

24. Act of Apr. 6, 2004, ch. 153, §2, 2004 Minn. Laws 76, 76-77 (codified at Minn. Stat. §507.413 (2008)).

25. *Id.*

26. Minn. Stat. §507.413(a).

27. *See* Tex. Prop. Code §§51.0001(4) and 51.0001(1).

28. *See e.g.,* Richardson v. CitiMortgage, 2010 WL 4818556 (E.D.Tex. Nov. 22, 2010).

29. RESTATEMENT (THIRD) OF AGENCY §1.01 (2006).

30. *See, e.g.*, Romaine, 861 N.E.2d 81, 97 (MERS is a "proper mortgagee" and MERS Mortgages are "proper conveyance[s]' for purposes of the recording statute."); Deutsche Bank National Trust Co. v. Pietranico, 928 N.Y.S.2d 818 (Sup. Ct. Suffolk Cty. 2011) (The mortgage "expressly grants MERS the right to act on behalf of the lender as required by law and custom, including, but not limited to, the right to foreclose and sell the property and the right to take any action required of the Lender such as releasing and canceling the mortgage."); U.S. Bank N.A. v. Flynn, 897 N.Y.S.2d 855, 857 (Sup. Ct. Suffolk Cty. 2010) ("MERS is acting as the nominee of the owner of the note and mortgage in which MERS is additionally designated as the mortgagee of record."); Trent v. Mortg. Elec. Reg. Sys., Inc., 288 F. Appx. 571 (11th Cir. 2008) ("[MERS] is the mortgagee."); In re MERS Litig., 744 F. Supp. 2d 1018, 1027 (D. Ariz. 2010) (""[F]rom the very language of the deeds of trust, to which Plaintiffs agreed in entering into their home loan transaction, MERS is still acting as the nominee for the current holder of the promissory note . . . Nevada case law universally holds that [MERS security instruments] are enforceable."); Calif. ex. rel. Bates v. Mortg. Elec. Reg. Sys., 2011 WL 892646, at *3 (E.D. Cal. Mar. 11, 2011) (The mortgage is "recorded in the public land records, making MERS the mortgagee of record."); In re Tucker, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010) ("The language of the recorded Deed of Trust clearly authorizes MERS to act on behalf of the Lender in serving as the legal title holder to the beneficial interest under the Deed of Trust and exercising any of the rights granted to the Lender thereunder."); Wade v. Meridias Cap., Inc., 2011 WL 997161, at *2 (D. Utah Mar. 17, 2011) ("MERS was appointed as the beneficiary and nominee for the Lender and its successors and assigns and granted power to act in their stead."); Ciardi v. Lending Co., 2010 WL 2079735, at *3 (D. Ariz. May 24, 2010) ("To the extent Plaintiffs rely on a theory that the beneficiary must have an interest in the actual note, Plaintiffs have failed to cite any law so requiring.").

31. As of July 22, 2011, MERS formally amended and implemented its Rules of Membership to provide that members are no longer authorized to initiate foreclosures in the name of MERS Inc. and an assignment of the mortgage from MERS Inc. to the foreclosing party must be recorded (informally suspended in February 2011).

32. *Supra* note 29 (emphasis added).

33. *See, e.g.*, Eaton v. Federal National Mortgage Association, SJC-11041, 2012 WL 2349008 (Mass. June 22, 2012) (In order to exercise the statutory power of sale in Massachusetts, a mortgagee must either be the holder of the underlying promissory note or be acting under the authority of the note holder; physical possession of the mortgage note is not required in order to foreclose); Residential Funding Co. v. Saurman, 490 Mich. 909; 805 N.W.2d 183 (2011) (MERS Inc. is the owner of an interest in the indebtedness secured by the mortgage for purposes of Michigan statutory requirements and may thus conduct nonjudicial foreclosures by advertisement); Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, at 1156-57 (Cal. Ct. App. 2011) (The court concluded that even if there was a legal basis for an action to determine if MERS had the authority to initiate foreclosure, the language in the deed of trust granted MERS authority to initiate a nonjudicial foreclosure); Payette v. Mortgage Elec. Registration Sys., Inc., No. PC-2009-5875 (R.I. Supp. Ct. Aug. 22, 2011) (As a matter of contract, the mortgage signed by plaintiffs recognized MERS' rights to act as nominee for IndyMac and for IndyMac's "successors and assigns"); In re Mortgage Elect. Registration Sys., Inc. (MERS) Litig., No. 2:09-md-2119, 2010 WL 4038788, at *8 (D. Ariz. Sept. 30, 2010) ("Plaintiffs have not cited any legal authority where the naming of MERS . . . was cause to enjoin a non-judicial foreclosure as wrongful."); Commonwealth Property Advocates, LLC v. Mortgage Elect. Registration Sys., Inc., Nos. 10-4182, 10-4193, 10-4215, 2011 WL 6739431, at *7 (10th Cir. Dec. 23, 2011) (affirming that MERS may foreclose as nominee for lender and its successors and assigns); Trent v. Mortg. Elec. Reg. Sys., Inc., 288 Fed. Appx. 571, 572 (11th Cir. 2008) ("Under the mortgage contracts, [MERS] has the legal right to foreclose on the debtors' property. [MERS] is the mortgagee."); Johnson v. Mortg. Elec. Reg. Sys., Inc., 252 Fed. Appx. 293, 294 (11th Cir. 2007) (affirming summary judgment to MERS on foreclosure of plaintiff's property); Nicholson v. OneWest Bank, 2010 WL 2732325, at *4 (N.D. Ga. April 20, 2010) ("[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."); Orzoff v. Mortgage Elec. Registration Sys., 2009 WL 4643229, at *9-10 (D. Nev. March 26, 2009) ("This Court has previously determined that MERS does have such standing [to participate in foreclosure proceedings, and] . . . Courts around the country have held the same."); Swanson v. EMC Mort. Corp., Case No. CV F 09-1507 LJO DLB (E.D. Cal. Oct. 29, 2009) ("MERS correctly notes that as [deed of trust] beneficiary, MERS is empowered to commence foreclosure proceedings . . ."); In re: Sina, No. A06-200, 2006 WL 2729544, at *2 (Minn. App., Sept. 26, 2006) ("Because MERS is the record assignee of the mortgage, we conclude that MERS had standing to foreclose); Silvas v. GMAC Mortgage, LLC, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at *8 (D. Ariz. Jan. 5, 2010) (MERS empowered to foreclose where MERS is designated on deed of trust as beneficiary); Diessner v. Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187-91 (D. Ariz. 2009) (MERS and trustee under deed of trust are authorized to institute non-judicial foreclosure proceeding); Reynoso v. Paul Financial, LLC, No. 09-3225 SC, 2009 WL 3833298, at *2 (N.D. Cal. Nov. 16, 2009) (naming of MERS as initial beneficiary under deed of trust, as nominee for the lender, and the subsequent transfer of the deed of trust from MERS to a transferee was effective and did not hinder transferee's right to foreclose); Blau v. America's Servicing Co., No. CV-08-773, 2009 WL 3174823, at *8 (D. Ariz. Sept. 29, 2009) (MERS authorized under deed of trust to act on behalf of lender and transfer its interests); Farahani v. Cal-Western Recon. Corp., No. 09-194, 2009 WL 1309732, at *2-3 (N.D. Cal. May, 2009) (MERS authorized to pursue non-judicial foreclosure action); Vazquez v. Aurora Loan Servs., No 2:08-cv-01800-RCJRJJ, 2009 WL 1076807, at *1 (D. Nev. Apr. 20, 2009) (loan documents sufficiently demonstrate MERS' standing "with respect to the loan and the foreclosure"); Pfannenstiel v. Mortgage Elect. Registration Sys., Inc., No. CIV S-08-2609, 2009 WL 347716, at *4 (E.D. Cal. Feb. 11, 2009) (dismissing plaintiff 's claim that MERS lacked authority to foreclose); Trent v. Mortg. Elec. Reg. Sys., Inc., 288 Fed. Appx. 571, 572 (11th Cir. 2008) (MERS "has the legal right to foreclose on the debtors' property" and "is the mortgagee"); Peyton v. Recontrust Co., No. TC021868, Notice of Ruling, at 2 (Cal. Super. Ct. County of Los Angeles S. Cent. Dist. Oct. 15, 2008) (MERS may foreclose under California law); Johnson v. Mortgage Elect. Registration Sys., Inc., 252 Fed. Appx. 293, 294 (11th Cir. 2007) (summary judgment for MERS on its action for foreclosure of plaintiff 's property); In re Smith, 366 B.R. 149, 151 (Bankr. D. Colo. 2007) (MERS has standing to conduct foreclosure on behalf of the beneficiary); Mortgage Elect. Registration Sys., Inc. v. Revoredo, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007) ("Because, however, it is apparent – and we so hold – that no substantive rights, obligations or defenses are affected by 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."); Mortgage Elect. Registration Sys., Inc. v. Ventura, CV054003168S, 2006 WL 1230265, at *1 (Conn. Super. Apr. 20, 2006) (MERS is proper party in foreclosure); King v. American Mortgage Network, et. al., Case No. 1:09-CV-125 TS (D. Utah, Aug. 16, 2010) (court, interpreting the language of the deed of trust, held that

MERS had the authority to initiate foreclosure proceedings, appoint a trustee and foreclosure and sell the mortgaged property); Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674 (NY App. 2007) (court held that MERS had right to foreclose pursuant to the clear and unequivocal terms of the mortgage instrument).

34. 357 B.R. 180, 183 (Bank. D.Mass. 2006).

35. *See* Niday v. GMAC Mortgage, LLC, Case No. A147430 (Or. Ct. App., Jul. 18, 2012) (appellate court held that, in connection with a non-judicial foreclosure, Oregon law requires a beneficiary of a trust deed to be a party to whom the underlying loan repayment obligations is owed) (*Editor's Note*: as of the date of this article, the Niday case is on appeal to the Oregon Supreme Court); Mortgage Elec. Registration Sys., Inc. v. Graham, 44 Kan. App. 2d 547, 229 P.3d 420 (Kan. App. 2010) (having suffered no injury, MERS lacked standing to bring a foreclosure action); Mortgage Elec. Registration Sys., Inc. v. Saunders, 2 A.3d 289, 297 (Me. 2010) (finding that MERS could not enforce the note and that the substitution of Deutsche Bank for MERS was proper); In re Box, No. 10-20086, 2010 WL 2228289, at *5 (Bankr W.D. Mo. June 3, 2010) (finding that MERS, as beneficiary and nominee under the deed of trust lacked authority to assign the mortgage note because it never "held" the note itself); In re Hawkins, No. BK-S-07-13593-LBR, 2009 WL 901766, at *3 (Bankr. D. Nev. Mar. 31, 2009) (finding that MERS was not a true "beneficiary" under a deed of trust, that, under the UCC, MERS was not entitled to enforce the note, and that "[i]n order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note's holder"); Bain v. Metropolitan Mortgage Group, Inc. et. al. and Selkowitz v. Litton Loan Servicing, LP et. al. (No. 86206-1) (Wash. August 16, 2012). The Washington Supreme Court held that MERS Inc. is not a lawful beneficiary under the Washington Deed of Trust Act because it is not "the holder of the instrument or document evidencing the obligations secured by the deed of trust" as required thereunder; that is, if MERS Inc. never held the note, then it is not a lawful beneficiary. However, in response to MERS Inc.'s argument that lenders and their assigns may name it as their agent, the court stated, "That is likely true and nothing in this opinion should be construed to suggest that an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." No doubt that point will be made forcefully when the lower court proceeding resumes.

36. *See, e.g.*, Residential Funding Corporation v. Saurman, 292 Mich. App. 321, 807 N.W.2d 412 (Mich. Ct. App. Apr. 21, 2011) (court held that MERS did not meet the requirements to non-judicially foreclose by advertisement because MERS did not own an "interest in the indebtedness" as required by the foreclosure statute), r*ev'd*, 490 Mich. 909, 805 N.W.2d 183 (Mich., 2011); Mortgage Electronic Registration Systems Inc. v. George Azize, et. al., NO. 2D05-4544 (Fla. App. 2 Dist. Sept. 19, 2005) (trial court held that MERS was not a proper party to bring a foreclosure action), *rev'd*, 965 So.2d 151 (Fla. App. 2 Dist. Feb. 21, 2007); Mortgage Electronic Registration Systems Inc. v. Oscar Revoredo, et. al., NO. 3D05-2572 (Fla. App. 3 Dist. Nov. 4, 2005) (trial court held that MERS must establish ownership of the note in order to have standing to foreclose), *rev'd*, 955 So.2d 33 (Fla. App. 3 Dist. Mar 14, 2007); U.S. Bank National Association v. Salazar, 448 B.R. 814 (S.D. Ca. Apr. 12, 2011) (bankruptcy court concluded a foreclosure sale was void because MERS, as record deed of trust beneficiary, failed to record a deed of trust assignment to U.S. Bank prior to the foreclosure sale and U.S. Bank was identified on the trustee's deed as the "foreclosing beneficiary"), *rev'd*, 470 B.R. 557 (Bankr. S.D. Cal. Mar. 15, 2012); In re Agard, 444 B.R. 231 (Bankr. E.D.N.Y. Feb 10, 2011) (bankruptcy court 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"), *vacated in part by* Agard v. Select Portfolio Servicing, Inc., 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012); *see also*, U.S. Bank v. Howie, *infra* note 43 (interpreting the Kansas Supreme Court's decision in Landmark Nat'l Bank v. Kesler).

37. *See* MERSCORP, Inc. Rules of Membership, Rule 8 – Required Assignments for Foreclosure and Bankruptcy, Section 1(e).

38. *See* RESTATEMENT (THIRD) PROPERTY (MORTGAGES), §5.4, comment e (1997). *See also* Residential Funding Co. v. Saurman, 490 Mich. 909; 805 N.W.2d 183 (2011) (Michigan Supreme Court held that a mortgage and note are to be construed together and that "the trust and the beneficial interest need not be in the same hands . . . The choice of mortgagee is a matter of convenience."); Horvath v. Bank of New York, N.A., et al., No. 1:09-cv-1129, Dkt No. 38 (E.D. Va.

Jan. 29, 2010) (aff'd., 4th Cir., No. 10-1528, May 19, 2011) (court held that "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 . . .").

39. *See* Joyce Palomar, 3 Patton & Palomar on Land Titles §5.67.50 (3d ed. 2009) ("[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.").

40. 656 F.3d 1034 (9th Cir. 2011).

41. *Id*. at 1042.

42. *Id*.

43. *Id*. at 1044, citing Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 167 (Kan. 2009). *See also*, U.S. Bank v. Howie, No. 106,415 (Kans. App. June 8, 2012) in which an appellate court interpreted the Kansas Supreme Court's decision in Landmark as supporting MERS Inc.'s role as agent of the lender under the plain language of the mortgage. The Howie court further held that because MERS Inc. was acting as agent of the lender, the mortgage and the note were never severed and the lender, as present holder of both the note and mortgage, was entitled to foreclose on the mortgage. Some people misunderstand the term "unenforceable" as confirming fraudulent or illegal behavior on the part of the lender. But this is not necessarily the case. A mortgage may be declared unenforceable due to a mistake or unanticipated occurrence without fault by the lender, with the inequitable result that the lender/creditor who lent money to the borrower secured by a mortgaged property would be unable to foreclose and realize on its collateral.

44. In re MERS Litigation, 744 F. Supp. 2d 1018 (D. Ariz. 2010); *see also* Martinez v. Mortgage Elec. Registration Sys., Inc. (In re Martinez), 444 B.R. 192 (Bankr. D. Kan. 2011) (the court found that the language in the mortgage, the MERS membership agreement, and the affidavit of MERS' treasurer, were sufficient to establish that MERS was clearly acting as an agent for Countrywide at all relevant times while holding the mortgage; the mortgage and the note were never split and remained enforceable); Drake v. Citizens Bank of Effingham (In re Corley), 447 B.R. 375 (Bankr. S.D. Ga. 2011) (the note and the mortgage were not split; they were executed together at inception and remain linked via the language in the documents that contemplate the agency relationship formed by the designation of MERS as nominee).

45. *See, e.g.*, Consol. Mortg. & Fin. Corp. v. Landrieu, 493 F. Supp. 1284, 1286-87 (D. D.C. 1980) (discussing the Mortgage Backed Securities Program and Ginnie Mae's role).

46. *Supra* note 38.

47. *See* U.S. Bankruptcy Code, 11 U.S.C. §541(d).

48. *See* UCC §§9.109(b); 3.102 and 3.201-204.

49. *See* UCC §9.203. For a thorough review of the issues under the UCC discussing rights of the "owner" of a note, the party entitled to enforce the note, transfer of the note, and the impact of transfer on the underlying mortgage, see Report of the Permanent Editorial Board for the Uniform Commercial Code Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes (Nov. 14, 2011), Amer. Law Institute and National Conf. on Uniform State Laws.

50. UCC §9.203(g) (emphasis added); *See also* UCC §9.308(e), providing the same rule for perfection.

51. *See* Official Comment 6 to UCC §9.308.

52. For an excellent discussion and survey of relevant state case law on this issue, see Transfer and Assignment of Residential Mortgage Loans in the Secondary Market, ASF White Paper Series (November 16, 2011) at http://www.americansecuritization.com/uploadedFiles/ASF_White_Paper_11_16_10.pdf.

53. Although the disclosure of the identity of the note owner is optional, 97% of the over 3,000 MERS® System members make such disclosure.

54. *See* 24 C.F.R. §3500.21(d).

55. *See* 12 C.F.R. §226.39.

56. Pub.L. 111-203, H.R. 4173.

57. *See* 12 U.S.C. §2605(k) (1) (D).

58. *See* Haft v. Dart Group Corp., 841 F. Supp. 549, 572 (D.Del. 1993).

59. Del. Code. Ann. Title 8, Sections 122 and 142.

60. Exercise of authority granted under clauses (3) and (4) is subject to rule changes effective July 22, 2011, limiting the member's ability to initiate foreclosures and make filings in bankruptcy proceedings in the name of MERS Inc.

61. *See* Bain v. Metro Mortg. Grp., 2010 WL 891585, at *6 (W.D. Wash. Mar. 11, 2010) (holding that MERS's designation of Members' employees as "vice president" and "assistant vice president" was not deceptive within the meaning of the Washington State Consumer Protection Act). *See also* Jackman v. Hasty, 2011 WL 5599075, at *3 (N.D. Ga., Nov. 15, 2011) (Defendants "were appointed as agents of MERS by a corporate resolution . . . According to the resolution, [Defendants] have authority to, among other things, "[a]ssign the lien of any mortgage loan registered on the MERS® System' . . . and "[e]xecute any and all documents necessary to foreclose upon the property securing any mortgage loan registered on the MERS® System' . . . The evidence thus shows that Defendants . . . although not employees of MERS, were duly appointed agents of MERS who had authority to assign the Security Deed to LaSalle on behalf of MERS. LaSalle thus had legal authority to foreclose on the Property."); Ocwen Loan Servicing LLC v. Kroening, 2011 WL 5130357, at *5 (D. Ill. Oct. 28, 2011) ("The assignment was executed for MERS by Scott Anderson. Anderson is an employee of Ocwen, but was designated by Corporate Resolution as an assistant secretary and vice president of MERS, and as such had the authority to assign any mortgage naming MERS as the mortgagee.").

62. New York State Bar Association, Committee on Professional Ethics, Formal Opinion #847 (12/21/2010).

63. *See, e.g.*, Davis v. U.S. Bank Nat'l Ass'n, 2012 WL 642544 (Nev. Feb. 24, 2012); Bertrand v. SunTrust Mortgage, Inc., 2011 WL 1113421, at *4 (D. Or. Mar. 23, 2011) (stating that the language in the Deed of Trust "grants MERS the power to initiate foreclosure and to assign its beneficial interest . . ."); Wade v. Meridias Cap., Inc., 2011 WL 997161, at *2 (D. Utah Mar. 17, 2011) ("Under the plan terms of the Trust Deed, . . . 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.") (emphasis in original); Germon v. BAC Home Loans Servicing, L.P., 2011 WL 719591, at *2 (S.D. Cal. Feb. 22, 2011) (stating that under the Deed of Trust "MERS had the legal right to initiate nonjudicial foreclosures and could assign such right."); Saxon Mortg Servs., Inc. v. Coakley, 921 N.Y.S.2d. 552, 553 (App. Div. 2011) (rejecting foreclosure defendant's contention that MERS's assignment of mortgage was improper); Perry v. Nat'l Default Serv'g Corp., 2010 WL 3325623, at *4 (N.D. Cal. Aug. 20, 2010) (observing that numerous courts have held that "MERS had the right to assign its beneficial interest to a third party."); Rogan v. CitiMortgage, Inc. (In re Jessup), 2010 WL 2926050, at *3 (Bankr. E.D. Ky. July 22, 2010) (MERS had authority to execute an assignment as nominee of lender because "the language in the Lender's own instrument is sufficient to identify MERS as such."); GMAC Mortg., LLC v. Reynolds, 2010 WL 7746836, at *2 (Mass. Land Ct. Nov. 30, 2010) ("MERS, as mortgagee of record, has the authority to assign the mortgage."); In re Relka, 2009 WL 5149262, at *4-5 (Bankr. D. Wyo. Dec. 22, 2009) (The Deed of Trust granted MERS "the right to assign the mortgage."); Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618, 623 (Fla. 5th DCCA 2010) (The mortgage granted MERS the "explicit and agreed upon authority to make . . . an assignment.").

64. *See, e.g.*, Williams v. U.S. Bank Nat'l Ass'n, 2011 WL 2293260 at *1 (E.D. Mich. June 9, 2011) ("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."); Bridge v. Aames Capital Corp., 2010 WL 3834059, at *3 (N.D. Ohio Sept. 29, 2010) ("Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee"); Livonia Prop. Holdings, LLC, 717 F. Supp. 2d 724, 735 (E.D. Mich. 2010) ("Borrower disputes the validity of the assignment [of mortgage] documents. But, as a non-party to those documents, it lacks standing to attack them.").

65. Jones, *supra* note 3, at 36.

66. Jones, *supra* note 3, at 36, 38.

67. *Id*.

68. *See* Amoskeag Bank v. Chagnon, 572 A2d 1153, 1155 (N.H. 1990) ("The purpose then of the recording statutes…is to provide notice to the public of a conveyance of or encumbrance on real estate."); Corpus v. Arriaga, 294 S.W.3d 629, 635 (Tex. App. 2009) ("The purpose of recording statutes in Texas is to give notice to persons of the existence of the instrument."); Burnett v. County of Bergen, 968 A.2d 1151 (N.J. 2009) ("The very purpose of recording and filing [assignments of mortgages, deeds, discharges of mortgages, and other public records] is to place the world on notice of their contents.").

69. *See* Fuller v. Mortgage Electronic Registration Systems, Inc., (U.S. Dist. Ct., Middle District of Fla.,Jacksonville Div.) (Case No. 3:11–CV–1153–J–20MCR) (June 27, 2012) at p. 3, fn. 1.

70. MERSCORP Holdings, Inc. Rules of Membership, Rule 2 - Registration on the MERS System, Section 5(a).

71. *See* Fuller, *supra* note 69, at pp. 18-19.

72. Joe Murin, MERS: Myths, Misconceptions and Realities, July 22, 2010 (available at http://mortgagenewsdaily.com/channels/voiceofhousing/164078.aspx); *see also* Fuller, *supra* note 69 and accompanying text.

73. Peterson, Foreclosures and MERS, *supra* note 9 at 1365-66.

74. Plymouth County, *supra* note 23 at p. 17.

75. Remarks of Treasury Secretary Timothy Geithner Introducing the Financial Stability Plan, February 10, 2009 (available at http://www.treasury.gov/press-center/press-releases/Pages/tg18.aspx).

76. *See* Christopher L. Peterson articles, *supra* note 9.

77. MERS' principal owners are the Mortgage Bankers Association, Fannie Mae, Freddie Mac, Bank of America, JPMorgan Chase Bank, HSBC, CitiMortgage, GMAC, American Land Title Association and Wells Fargo Bank.

78.*See*, http://www.aei.org/article/economics/financial-services/housing-finance/housing-affordability-us-is-the-envy-of-the-developed-world; *see also* http://absalonproject.com/wp-content/uploads/2010/12/Harvard-Lea-110v5.pdf.

79. Jones, *supra* note 3, at 40.

80. For an excellent discussion of the background, issues and certain case law developments regarding the MERS® System, *see* Beau Phillips, MERS: The Mortgage Electronic Registration System, 63 Consumer Fin. L.Q. Rep. 262 (Fall Winter 2009).

81. Murin, *supra* note 72.

82. *Id.*

83. Over 600 government institutions (cities, municipalities and states) utilize the MERS System free of charge to locate property preservation contacts for loans registered on the MERS System.