RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 05, 2012, 4:23 pm
BY RONALD R. CARPENTER
CLERK

No. 86206-1

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE
(CASE NO. C09-0149 JCC)

KRISTIN BAIN,

Plaintiff,

v.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., *et al.*,

Defendants.

RESPONSE BRIEF OF DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Russ Wuehler, WSBA No. 37941
DLA PIPER LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104
Phone: 206.893.4800
Fax: 206.839.4801

Robert J. Pratte (*Pro Hac Vice*)
FULBRIGHT & JAWORSKI L.L.P.
80 South Eighth Street, Suite 2100
Minneapolis, MN 55402
Phone: 612.321.2244
Fax: 612.321.2288

Counsel for Defendant Mortgage Electronic Registration Systems, Inc.

ORIGINAL

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 1

II. ARGUMENT 4

A. CONTRARY TO *AMICI'S* ARGUMENTS, MERS IS A LAWFUL BENEFICIARY UNDER WASHINGTON LAW. 4

1. *Amici* disregard the plain language and context of the definition of beneficiary in the DTA. 4

2. *Amici* disregard the contractual agreement in the deeds of trust that MERS is the beneficiary as the agent for the note holder. 14

3. *Amici* disregard the overwhelming case law holding that MERS is a proper beneficiary. 20

a. *Amici* ignore the weight of authority in Washington and across the country. 20

b. The cases relied upon by *Amici* are largely inapposite. 25

4. Contrary to *Amici's* assertions, MERS' role as beneficiary does not impermissibly split the deed of trust from the note. 36

5. Amici's fabricated and false *ad hominem* attacks on MERS are unwarranted distractions akin to media sound bytes. 38

B. THERE IS NO CPA CLAIM AGAINST MERS 47

III. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. Kelleher,
124 Wn. 517 (1923) 19

Bank of Am., N.A., v. Prestance Corp.,
160 Wn.2d 560 (2007) 44

Bank of New York v. Silverberg,
86 A.D.3d 274 (N.Y. Sup. Ct., App. Div. 2011) 35

Bellistri v. Ocwen Servicing, LLC,
284 S.W.3d 619 (Mo. Ct. App. 2009) 32

Bhatti v. Guild Mortgage Company,
No. C11-0480JLR, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011) 22

Birkland v. Silver State Fin. Serv., Inc.,
2010 WL 3419372 (D.Nev. Aug. 25, 2010) 28

Buse v. First Am. Title Ins. Co.,
2009 WL 1543994 (W.D. Wash. 2009) 18

Carr v. Cohn,
44 Wn. 586 (1906) 18

Cebrun v. HSBC Bank USA, N.A.,
No. C10-5742BHS, 2011 WL 321992 (W.D. Wash. Feb. 2, 2011) 5, 21

Cervantes v. Countywide Home Loans, Inc.,
656 F.3d 1034 (9th Cir. 2011) 37, 48

Coley v. Accredited Home Lenders, Inc.,
2011 WL 1193072 (E.D. Ark. Mar. 29, 2011) 30

Commonwealth Prop. Advocates, LLC v. MERS,
Nos. 10-4182, 10-4193, 2011 WL 6739431 (10th Cir. Dec. 23, 2011) 24

TABLE OF AUTHORITIES

Page(s)

Corales v. Flagstar Bank, FSB,
--- F. Supp. 2d ---, No. C10–1922JLR, 2011 WL 4899957
(W.D. Wash. Oct. 24, 2011) 5, 21

Cox v. Helenius,
103 Wn.2d 383, 693 P.2d 68 (1985) 11

Daddabbo v. Countrywide Home Loans, Inc.,
No. C09-1417RAJ, 2010 WL 2102485 (W.D. Wash. May 20,
2010) 5, 21

In re Doble,
2011 WL 14465559 (S.D. Cal. Bankr. Apr. 14, 2011) 33

Ernestberg v. Mortgage Investors Group,
2009 WL 160241 (D.Nev. Jan. 22, 2009) 28

Felton v. Menan Starch Co.,
66 Wn.2d 792 (Wash. 1965) 20

Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.,
943 P.2d 710, 88 Wn.App. 64 (Wash.App. Div. 1 1997) 45

Fontenot v. Wells Fargo Bank, N.A.,
198 Cal. App. 4th 256 (Cal. Ct. App. 2011) 34, 35

Fraternal Order of Eagles, Tennio Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224 (2002) 7

Godfrey v. Hartford Casualty Ins. Co.,
142 Wn.2d 885, 16 P.3d 617 (Wash. 2001) 16

Gomes v. Countrywide Home Loans, Inc.,
192 Cal. App. 4th 1149 (Cal. Ct. App. 2011) 34

Gomez v. Countrywide Bank, FSB.,
2009 WL 3617650 (D.Nev. Oct. 26, 2009) 28

Hague v. Wells Fargo Bank,
2011 WL 3360026 (N.D. Cal. Aug. 2, 2011) 34

TABLE OF AUTHORITIES

Page(s)

Horvath v. Bank of New York, N.A.,
641 F.3d 617 (4th Cir. 2011) 37

In re Huggins,
357 B.R. 180 (Bankr. Mass. 2006) 31

IMPAC Warehouse Lending Group v. Credit Suisse First Boston,
270 Fed. Appx. 570 (9th Cir. 2008) 45

Jackson v. Mortgage Elec. Registration Sys., Inc.,
770 N.W.2d 487 (Minn. 2009) 25, 31

In re Jacobson,
402 B.R. 359 (W.D. Wash. Bankr. Mar. 6, 2009) 35

Kiah v. Aurora Loan Servs., LLC,
No 11-1010 (1st Cir. Dec. 14, 2011) 24

Kudina v. CitiMortgage, Inc.,
No. CV10–5887RBL, 2011 WL 5101670 (W.D. Wash. 2011
Oct. 26, 2011) 12

Kulovic v. BAC Home Loans Serv., L.P.,
2011 WL 1483374 (E.D. Mo. Apr. 19, 2011) 33

Kwok v. Reconstrust Co., N.A.,
2010 WL 3894183 (D. Nev. Sept. 29, 2010) 27, 28

Landmark Nat'l Bank v. Kesler,
216 P.3d 158 (Kan. 2009) 30

In re: Martinez,
444 B.R. 192 (D. Kan. Bankr. 2011) 31

Michak v. Transnat'l Title Ins. Co.,
148 Wn.2d 788 (2003) 16

Moon v. Countrywide Home Loans, Inc.,
2010 WL 522753 (D.Nev. Feb. 9, 2010) 28

TABLE OF AUTHORITIES

Page(s)

Moon v. GMAC Mortgage Corp.,
2008 WL 4741492 (W.D. Wash. 2008).....5, 22, 23

Mortg. Elec. Registration Sys., Inc. v. Coakley,
41 A.D.3d 674 (N.Y. Sup. Ct. App. Div. 2007).....36

Mortgage Elec. Registration Sys. Inc. v. Barnes,
940 N.E.2d 118 (Ill. App. 2010).....27

Mortgage Electronic Registration Sys., Inc. v. Chong,
2009 WL 6524286 (D. Nev. Dec. 4, 2009).....27, 28

Mortgage Electronic Registration Sys, Inc. v. Estrella,
390 F.3d 522 (7th Cir. 2004).....26

Mortgage Electronic Registration Sys., Inc. v. Saunders,
2 A.3d 289 (Maine 2010).....31, 32

Mortgage Electronic Registration Sys., Inc. v. Southwest Homes of Arkansas, Inc.,
301 S.W.3d 1 (Ark. 2009).....29

Mortgage Electronic Registrations Sys., Inc. v. Nebraska Dept. of Banking and Finance,
704 N.W.2d 784 (Neb. 2005).....26

Mortgage Electronic Registrations Sys, Inc. v. Graham,
247 P.3d 223 (Kan. Ct. App. 2010).....30, 31

Nat'l Bank of Wash. v. Equity Investors,
81 Wn.2d 886 (1973).....16

Peace v. Mortgage Electronic Registration Systems, Inc.,
2010 WL 2384263 (E.D. Ark. Jun. 11, 2010).....29

In re Reinke,
2011 WL 5079561 (W.D. Wash. Bankr. Oct. 26, 2011).....37

Residential Funding Co., L.L.C. v. Saurman,
805 N.W.2d 183 (Mich. 2011).....23

TABLE OF AUTHORITIES

Page(s)

RMS Residential Props., LLC v. Miller,
32 A.3d 307 24

Salmon v. Bank of America Corp,
No. CV–10–446–RMP, 2011 WL 2174554 (E.D. Wash. May 25, 2011) 5, 21

SBKC Serv. Corp. v. 1111 Prospect Prtns, L.P.,
969 F. Supp. 1254 (D. Kan. 1997), *aff'd in part, vacated in unrelated part,* 153 F.3d 728 (10th Cir. 1998) 30

Sherman v. Millikin,
9 Wn.2d 339 (1941) 17

St. John v. Northwest Trustee Services, Inc.,
No. C11-5382BHS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) 5, 21

State v. Lively,
130 Wn.2d 1 (1996) 17

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (Wash. 2005) 7, 10

Torgerson v. One Lincoln Tower, LLC,
166 Wn.2d 510 (2009) 16

Trotter v. Bank of N.Y. Mellon,
--- P.3d ----, 2012 WL 206004 (Idaho Jan. 25, 2012) 24

In re Tucker,
441 B.R. 638 (W.D. Mo. Bankr. 2010) 33

Udall v. T.D. Escrow Servs., Inc.,
159 Wn. 2d 903 (2007) 10, 18

Vawter v. Quality Loan Service Corp. of Wash.,
707 F. Supp. 2d 1115 (W.D. Wash. 2010) 5, 21

TABLE OF AUTHORITIES

Page(s)

In re Veal,
450 B.R. 897 (9th Cir. BAP 2011) 33

In re: Walker,
2010 Bankr. LEXIS 3781 (E.D. Cal. Bank. May 20, 2010) 35

In re Walker,
Case No. 10-21656-E-7 (E.D. Cal. Bankr.) (Dec. 13, 2011) 35

Wayne v. HomEq Servicing, Inc.,
2008 WL 4642595 (D.Nev. Oct. 16, 2008) 28

Weingartner v. Chase Home Fin., LLC,
702 F 28

Whatcom County v. City of Bellingham,
128 Wn.2d 537 (Wash. 1996) 7

RULES AND STATUTES

Mich. Stat. § 600.3204(1)(d) 23

NRS § 107.080 27

RCW 65.08.070 45

RCW § 61.12.020 17

RCW § 61.24.005 10

RCW § 61.24.005(2) 5, 8, 9. 10

RCW § 61.24.020 18

RCW §§ 61.24.030(7)(a) & 61.24.163(8)(b)(iii) 8

RCW § 61.24.031 18

RCW § 61.24.100 47

TABLE OF AUTHORITIES

Page(s)

RCW § 61.24.130 13

RCW § 62A.9A-203 (g) 38

RCW § 65.04.030 45

OTHER AUTHORITIES

18 Wm. B. Stoebuck, WASH. PRAC., REAL ESTATE § 17.8 (2d ed. 2011) 17

Final Bill Report, ESSB 6191 (June 11, 1998) 11

RESTATEMENT (3d) OF PROPERTY 18, 32, 38

I. INTRODUCTION

Mortgage Electronic Registration Systems, Inc. ("MERS") submits this response to the separate briefs filed in support of plaintiff Kristin Bain[1] by four *amici curiae*—the Washington Attorney General ("Attorney General"), Homeowners Attorneys, National Consumer Law Center ("NCLC"), and Organization United for Reform ("OUR") (collectively, "*Amici*"). To the limited extent *Amici* actually focus on the questions certified to this Court, their position is dead wrong. The answer to the first and most critical certified question – whether MERS is a proper deed of trust "beneficiary" as defined under the Washington Deed of Trust Act ("DTA") – is clearly and unequivocally "yes." In nevertheless arguing that MERS is not a proper beneficiary merely because MERS is not the actual holder of the promissory note, *Amici* commit four fundamental errors:

- *Amici* disregard the plain textual meaning of the statutory definition of "beneficiary";
- *Amici* fail to read the statutory definition in the context of the purpose of the DTA and consistent with Washington contract and agency law;
- *Amici* ignore the express contractual language in the deed of trust at issue, expressly naming MERS as beneficiary as the agent for the holder of the note; and

[1] MERS notes that the arguments herein are also germaine to the separate appeal involving plaintiff Kevin Selkowitz, appeal case no. 86207-9, which has been consolidated with this case for oral argument.

- *Amici* overlook the time-honored and entirely lawful practice in residential mortgage lending for an agent to hold legal title to the security on behalf of the debt holder.

And perhaps most fatal to *Amici's* arguments, they never explain *why* this Court should disregard the plain language of both the statute and the deed of trust at issue, which would only *create* havoc and chaos in the residential mortgage field. In a word, the Court should ***not***.

MERS is a lawful beneficiary under Washington law, which moots the second and third questions certified to the Court. But even if MERS did not fit the definition of beneficiary under the DTA, with respect to the second certified question, there is no legal effect, because Washington law allows the parties to contractually agree – as they did in the deeds of trust – that the note holder may act through an agent (*i.e.,* MERS) and, in any event, the debt remains secured in favor of, and enforceable by, the note holder.

With respect to the third certified question, there is no CPA claim even if MERS does not fit the DTA's definition of beneficiary because, among other things, there has been no misrepresentation. Rather, there is a full disclosure of MERS' role as deed of trust beneficiary as agent for the note holder, and MERS' role as beneficiary caused no injury to plaintiffs or any other Washington consumers.

Ultimately, *Amici* reveal that there is no merit in their argument that MERS is not a lawful beneficiary by spending the vast majority of their briefs attempting to demonize MERS with hyperbole and a parade of hypothetical horribles allegedly caused by MERS. Boiled down, *Amici* want to blame MERS for the national (if not global) economic downturn and the resulting rise in residential mortgage loan foreclosures over the last several years. Much of the *Amici* briefing is more akin to media sound bytes than legal reasoning or analysis. Indeed the Attorney General brief is so filled with unfounded accusations and inconsistencies that it is shocking. As a signatory to the much ballyhooed national settlement agreement reached by all 50 state attorneys general with the mortgage industry, it seems undeniable that the Washington Attorney General is fully aware that the ***only*** party with whom consumers deal in connection with loan modifications, foreclosure abatement, and general dispute resolution on residential mortgage loans is the loan servicer (not the ultimate holder of the promissory note or MERS). Yet in the Attorney General's brief, *Amici* assert that MERS somehow interferes with the ability of a consumer to deal with these issues when MERS has zero involvement in loan servicing.

Amici's unsupported assertions are not remotely relevant to the issues certified to this Court, and further they are demonstrably and

categorically not true. MERS has provided many benefits to consumers; it has not caused, and indeed has lessened, the mortgage uncertainty, mortgage fraud, and foreclosure issues over the past few years. By contrast, if *Amici's* position were to be accepted by this Court, it likely would lead to difficulty obtaining mortgage loans, increased foreclosure litigation and administrative burden, and instability in the land records, which in the end would only do harm to both consumers and the residential mortgage market in Washington.

II. ARGUMENT

A. CONTRARY TO *AMICI'S* ARGUMENTS, MERS IS A LAWFUL BENEFICIARY UNDER WASHINGTON LAW.

1. *Amici* disregard the plain language and context of the definition of beneficiary in the DTA.

Amici castigate MERS for taking the (correct) position that MERS satisfies the definition of beneficiary in the DTA, calling MERS' reading of the definition "absurd," Attorney General Br. 3-4, and a "gross[] distortion." NCLC Br. at 6. *Amici* then accuse MERS of "expanding" the definition of beneficiary to encompass the holder of "***only the deed of trust*** and not the promissory note." NCLC Br. at 6 (emphasis added); *see also* Attorney General Br. at 3-4. In reality, it is *Amici* who advance an interpretation that is not true to the statutory text and then blatantly distort MERS' interpretation. And this is not only MERS' opinion; the existing

federal case law interpreting Washington's DTA overwhelmingly recognizes that MERS is a proper beneficiary. *See, e.g., Corales v. Flagstar Bank, FSB*, --- F. Supp. 2d ---, No. C10–1922JLR, 2011 WL 4899957, *5 (W.D. Wash. Oct. 24, 2011); *St. John v. Northwest Trustee Services, Inc.*, No. C11-5382BHS, 2011 WL 4543658, *3 (W.D. Wash. Sept. 29, 2011); *Salmon v. Bank of America Corp*, No. CV–10–446–RMP, 2011 WL 2174554, *6 (E.D. Wash. May 25, 2011); *Cebrun v. HSBC Bank USA, N.A.*, No. C10-5742BHS, 2011 WL 321992, *3 (W.D. Wash. Feb. 2, 2011); *Daddabbo v. Countrywide Home Loans, Inc.*, No. C09-1417RAJ, 2010 WL 2102485, *5 (W.D. Wash. May 20, 2010); *Vawter v. Quality Loan Service Corp. of Wash.*, 707 F. Supp. 2d 1115, 1125-26 (W.D. Wash. 2010); *Moon v. GMAC Mortgage Corp.*, 2008 WL 4741492 (W.D. Wash. 2008).

According to *Amici*, the "plain meaning" of "beneficiary" under RCW § 61.24.005(2) means "the 'holder' of the promissory note," Attorney General Br. at 2; *see also* NCLC Br. at 5, 34, or the "note holder." Homeowners Attorneys Br. at 3, 9, & 12. In fact, RCW § 61.24.005(2) says nothing of the sort. Section 61.24.005(2) provides that, "unless the context otherwise requires," the term "'beneficiary' means the holder of the ***instrument or document*** evidencing the ***obligation*** secured

by the deed of trust[.]" *Id.* (Emphasis added). Nowhere does the statutory definition use the phrase "promissory note."

Instead, as explained in MERS' principal appeal briefs, the legislature's chosen definition uses the far broader terms "instrument or document," unmistakably meaning any and all of the loan documents, including the promissory note, the deed of trust, any riders thereto, and other documents, such as occupancy certifications that evidence and establish the entirety of the borrower's obligation under the loan transaction in which she entered. These "instruments" and "documents" make up in total the "obligation" secured by the deed of trust. *See* MERS Bain Br. at 22; MERS Selkowitz Br. at 14-15.

Amici even concede that the deed of trust and riders include obligations of the borrower that are secured by the deed of trust. *See* NCLC Br. at 7.[2] If the Washington legislature had wanted to limit the definition of beneficiary to the note holder, it could and would have done so explicitly. To presume, as *Amici* demand, that the legislature is incapable of using a straight-forward approach is nonsense.

Amici's reading of "instrument or document" as meaning ***only*** the promissory note, and not other loan documents, is insupportable. It reads

[2] *Amici's* argument that amounts owed under the deed of trust are ultimately owed to the lender and not MERS ignores that MERS, as the agent for the holder of the debt, is the holder of legal title to the security instrument with authority to exercise the note holders'

the statute too narrowly, and disregards the much broader, plain meaning of these terms. *See Fraternal Order of Eagles, Tennio Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 229 (2002) ("in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary"). As explained in MERS' principal appeal briefs, it cannot seriously be disputed that the terms "instrument or document," as ordinarily defined and commonly understood, have far broader meanings than just promissory note. *See* MERS Bain Br. at 21 and MERS Selkowitz Br. at 13-14.

To read the definition of beneficiary more narrowly than the plain meaning of the text, as *Amici* do here, is directly contrary to the bedrock statutory construction principle that prohibits reading a statute in a manner that renders words meaningless or superfluous. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (Wash. 1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). As this Court explained in *State v. Roggenkamp*, a "fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms." 153 Wn.2d 614, 624, 106 P.3d 196, 201

---

rights under the deed of trust.

(Wash. 2005). The legislature would not have used the multiple terms "instrument ***or*** document" in § 61.24.005(2) if what it meant was "only the promissory note." (Emphasis added.) Indeed, as *Amici* point out, *see* Homeowners Attorneys Br. 3, the legislature knew how to use the term "promissory note," and used that term in amendments to the DTA in both 2009 and 2011. *See* RCW §§ 61.24.030(7)(a) & 61.24.163(8)(b)(iii). Tellingly, the legislature, which was well aware of MERS and its role as beneficiary and holder of legal title to the security interest as the agent on behalf of the owner of the indebtedness, did not go back and amend the 1998 definition of beneficiary to exclude MERS or to limit who may serve as beneficiary to either the note holder or owner. Simply put, the legislature knew how to use the term promissory note, but did not do so when it defined beneficiary in RCW § 61.24.005(2). The legislature intended a broader meaning than that posited by *Amici.*

After concocting a strained and conveniently narrow reading of "beneficiary," *Amici* proceed to distort MERS' analysis of the definition of this term. *Amici* claim that MERS seeks to "expand" the definition of "beneficiary" to mean "a party holding ***only the deed of trust,***" but not the promissory note. *See* Attorney General Br. at 3-4 (emphasis added); *see also* NCLC Br. at 6 (arguing that MERS wants beneficiary to mean "an entity holding ***only the deed of trust and not the promissory note***")

(emphasis added). Of course MERS claims nothing of the sort; this is a straw-man argument. As explained above, and as set forth in MERS' principal appeal briefs, the definition of "beneficiary" in § 61.24.005(2) includes any entity that holds an interest in any of the loan documents – including, but not limited to, the promissory note, deed of trust, and any riders – that evidence the obligation secured by the deed of trust. MERS falls within this broad statutory definition of "beneficiary" because MERS, as the agent of the holder of the promissory note, is the named beneficiary and holder of legal title to the security interest under the deed of trust, and may exercise all the note holder's rights under the deed of trust. *Amici's* arguments to the contrary fail.[3]

Further, the legislature left it to the parties to identify contractually who would be the beneficiary in each transaction. Under this flexibility authorized by the legislature, the parties to the transactions at issue agreed – expressly and specifically – that MERS would be the beneficiary of these deeds of trust. Certainly, the lender could be the beneficiary, and if the parties had so elected, the lender would have been specifically named in the deed of trust. In these transactions, the parties lawfully agreed that

[3] *Amici* confusingly argue that MERS does not satisfy the definition of beneficiary because MERS is also acting as the trustee, which is prohibited. *See* Homeowners Attorneys Br. 9. This claim is not raised by plaintiffs and thus is not at issue. Nor is it true; MERS has never acted as the trustee.

they would bring MERS into the transaction to fill that role as the agent of the lender, its successors and assigns – nothing more, nothing less.[4]

The legislature intended a definition that is flexible in its application. Indeed, in its preamble in RCW § 61.24.005, the legislature provided that: "The definitions in this section apply throughout this chapter ***unless the context clearly requires otherwise***." (emphasis added). By asking this Court to ignore this express cautionary language, *Amici* disregard the singular goal of statutory construction: "to ascertain the legislature's intent." *Roggenkamp*, 106 P.3d at 205.

Amici unfairly twist MERS' argument that the definition of beneficiary must be read in "context," as expressly required by § 61.24.005(2). *Amici* would have this Court believe that it is MERS' position that "context" means reading the definition of beneficiary consistent with the "MERS database system," NCLC Br. at 5, rather than the public policy purpose that underlies the DTA. *See* Attorney General Br. at 5-6. Nothing could be further from the truth. MERS reiterates that "context" means the Court should read the definition of beneficiary in "the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Udall v. T.D. Escrow Servs., Inc.*,

[4] *Amici* also contend that, by amending its procedures in 2011 so that it would no longer allow foreclosures in its name, MERS concedes that it was not a beneficiary under the DTA. *See, e.g.*, NCLC Br. at 14. This is nonsense – the argument is akin to claiming

159 Wn. 2d 903, 909 (2007). "Context" also should consider Washington law permitting the use of agents and freedom of contract. *See infra* § I.B. In this context, in the specific transactions at issue, the parties thereto specifically and unequivocally agreed to designate MERS as the beneficiary in its capacity as the agent of the lender, its successors and assigns. [5]

With the DTA, the legislature intended to create:

(1) an "efficient and inexpensive" non-judicial foreclosure process,

(2) with "adequate opportunity for [interested parties] to prevent wrongful foreclosure,"

(3) that would "promote stability of land records."

See Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 68, 686 (1985); *see also* Final Bill Report, ESSB 6191 (June 11, 1998) ("The [DTA] . . . was designed to ***avoid time consuming and expensive judicial foreclosure proceedings*** and to save time and money for both the borrower and the lender.") (emphasis added). Contrary to the apparent position of *Amici*, the DTA is ***not*** a consumer protection statute; the DTA's express and

---

that an amendment to a statute is a concession that it was unconstitutional.

[5] *Amici's* assertion that the role of MERS is dependent on the electronic database maintained by its parent corporation MERSCORP Holdings, Inc. (f/k/a MERSCORP, Inc.) is baseless. The electronic registry is unrelated to the role of MERS as beneficiary; it represents a completely different functionality provided to the mortgage lending industry by the parent company of MERS – just as the electronic promissory note aspect of the overall business model of the parent company of MERS is completely different from the role of MERS as beneficiary.

intended purpose is to create an efficient foreclosure remedy. The legislature never intended the DTA to be used as a sword by defaulting consumers based on a supposed technical violation of the DTA, and the purpose of the DTA is not to allow borrowers who are indisputably and irreconcilably in material default to erect unwarranted obstacles to the specific remedy provided in their loan documents and instruments – foreclosure. *See Kudina v. CitiMortgage, Inc.*, No. CV10–5887RBL, 2011 WL 5101670, at *2 (W.D. Wash. 2011 Oct. 26, 2011) ("[e]njoining facially legitimate foreclosure sales is not in the public interest"). But this is the goal sought both by *Amici* and by plaintiffs Bain and Selkowitz, and allowing them to needlessly complicate and delay foreclosure frustrates not only the contractual bargain to which plaintiffs agreed, but also the legislative purpose behind the DTA.

As aptly explained in the Amicus Brief of the Washington Bankers Association in Support of Defendants, it is MERS' reading of the definition of "beneficiary," not plaintiffs or their *Amici*, that fits with the purposes and public policy behind the DTA. *See* Washington Bankers Ass'n Br. at 7-11. Indeed, contrary to the ***first*** statutory goal of creating an "efficient and inexpensive" alternative to judicial foreclosure, adopting the view of plaintiffs and their *Amici* would unquestionably lead to

widespread delays in foreclosures, adding more time and costs, ultimately increasing judicial foreclosures. *Id.* at 7-8.

Similarly, adopting the view of plaintiffs and their *Amici* is not necessary to achieve the ***second*** purpose of the DTA – providing an "adequate opportunity [] to prevent wrongful foreclosure." Neither Bain nor Selkowitz claim that foreclosure is "wrongful" – they do not dispute they have defaulted on their loans, that those loans were secured by deeds of trust, and that foreclosure is therefore appropriate. In any event, the DTA provides a statutory mechanism for enjoining foreclosure that are truly "wrongful." *See* RCW § 61.24.130.

Finally, plaintiffs' and their *Amici's* position runs afoul of the ***third*** statutory purpose – stability of land records. Adopting the position of plaintiffs and their *Amici* would actually cause ***instability*** in the land records, calling into question and clouding title on properties where there was a prior foreclosure, or even a loan satisfaction and release, if MERS was involved. Moreover, county recorders would be inundated and overwhelmed with recording of documents to reflect assignments away from MERS and reflecting every transfer of loan ownership. *See* Washington Bankers Ass'n Br. at 8-11.

In sum, MERS satisfies the DTA's definition of beneficiary. *Amici's* arguments to the contrary are inconsistent with the DTA's purposes, and should be rejected by this Court.

2. *Amici* disregard the contractual agreement in the deeds of trust that MERS is the beneficiary as the agent for the note holder.

After construing the statutory definition of beneficiary too narrowly, *Amici* next ask this Court to look past the express contract provision at issue. The deeds of trust for both Bain and Selkowitz appoints MERS as the "beneficiary" in its capacity as the agent (*i.e.* "nominee") for the original note holder (*i.e.* the lender) and its successors and assigns with the specific authority to exercise all the note holder's rights under the deed of trust:

> *"MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as* **a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument.** *MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.*
>
> * * *
>
> **The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns)** *and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security*

> *Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County of King.*
>
> * * *
>
> *Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that* **MERS holds only legal title to the interests granted by Borrower in this Security Instrument**, *but, if necessary to comply with law or custom,* **MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property**; **and to take any action required of Lender** *including, but not limited to, releasing and canceling this Security Instrument.*

Bain Dkt. No. 131-2, at 2-3, 4 (emphasis added).[6]

This contractual agreement, stipulated to by the parties, specifically provides that, as agent of the holder of the note, MERS is the beneficiary and holder of legal title to the security interest, and can exercise all the note holder's rights under the deed of trust. *Amici* concede that the note holder could be the beneficiary under the deeds of trust, *see, e.g.*, Attorney General Br. at 2. But *Amici* conspicuously fail to explain why the note holder, as principal, cannot authorize MERS – or any other

[6] This is a Fannie Mae/Freddie Mac Uniform Instrument. The language of the Selkowitz

agent – to serve as beneficiary. The reasons for *Amici's* failure is obvious: the argument is unavailable. Contractual delegation of authority by a principal to an agent is part of the bedrock of Washington's contract and agency law.

As this Court has held, "one is bound by a contract that he voluntarily and knowingly signs," *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-13 (1973), even if the party later claims "that he did not read it, or was ignorant of its contents." *Michak v. Transnat'l Title Ins. Co.*, 148 Wn.2d 788, 799 (2003); *see also Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517 (2009) ("It is black letter law of contracts that the parties to a contract shall be bound by its terms."). Here, in return for loan proceeds they have not repaid, plaintiffs Bain and Selkowitz executed deeds of trust expressly and conspicuously designating MERS as beneficiary as the agent for the holder of the note.

Amici try to avoid the plain terms of the deeds of trust by claiming that parties cannot in their contract change the requirements of the DTA. *See, e.g.,* Attorney General Br. at 5. First, MERS satisfies the definition of beneficiary, and thus the argument is immaterial.[7] But beyond this,

---

deed of trust is identical. Selkowitz Dkt. No. 9-1, at 3-4.

[7] The Attorney General cites to *Godfrey v. Hartford Casualty Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (Wash. 2001), as a supposedly "analogous case" which stands for the proposition that "parties may not vary the terms [of a statute] by contract." Attorney General Br. at 5. All that *Godfrey* held is that when parties agree to arbitrate their

nothing in the DTA prevents the note holder from acting through a designated agent, particularly where, as here, plaintiffs expressly agreed to the designation in their deeds of trust. Indeed, this Court has long held that "whatever one may lawfully do for himself, he may lawfully authorize an agent to do for him," *Sherman v. Millikin*, 9 Wn.2d 339, 341 (1941), and that "[i]f the statute . . . provides no indication of the legislature's intent to overrule common law, the statute will be presumed to follow judicial precedent." *State v. Lively*, 130 Wn.2d 1, 11 (1996).

Tellingly, the DTA does not contain any provision which prohibits the parties to a mortgage contract to agree in a deed of trust that an agent, such as MERS, will act as beneficiary on behalf of the holder of the note. Quite the contrary, the DTA gives the parties to a mortgage contract broad discretion to shape the terms of their agreed-upon mortgage contract. *See* RCW § 61.12.020 ("parties may insert in [a] mortgage any lawful

---

dispute, they may not simultaneously allow the party which lost at arbitration to receive a "do over" in a court trial. *See Godfrey*, 16 P.3d at 622-23. As a technical matter, the parties' agreement to submit their dispute to an arbitration panel stripped the court of jurisdiction for anything other than a limited review of the arbitrator's decision. *See id.* at 623 (noting that "'Litigants cannot stipulate to jurisdiction nor can they create their own boundaries of review'"). Far from holding that the contractual parties are powerless to control the scope and nature of arbitration, the *Godfrey* Court emphasized that arbitration is entirely a creature of contract. Not only must the parties agree by contract to arbitrate in the first place, but "the parties may control the issues to be arbitrated," *id.* at 621. Similarly, homeowners in foreclosure routinely reach agreements that are not expressly provided for by statute, ranging from loan modifications which take the property out of foreclosure entirely, to short sales and other creative resolutions which allow the homeowner a greater degree of control over the transition of ownership. Once again, the Attorney General's position, if adopted, would inevitably (and devastatingly) harm the

agreement or condition"); *see also* 18 Wm. B. Stoebuck, WASH. PRAC., REAL ESTATE § 17.8 (2d ed. 2011) ("There is hardly a limit to the imaginable clauses that may be added to a mortgage or to the accompanying obligation, usually clauses for the protection of the mortgagee."); RCW § 61.24.020 ("[A] deed of trust is subject to all laws relating to mortgages on real property.").

The DTA also expressly permits the use of agents. *E.g.*, RCW § 61.24.031 (recognizing the use of agents of beneficiaries in a variety of capacities); *Buse v. First Am. Title Ins. Co.*, 2009 WL 1543994, at *2 (W.D. Wash. 2009) (DTA incorporates agency principles). And this Court has recognized that the DTA permits the use of agents. *See Udall*, 159 Wn.2d at 914-15 (upholding the use of agent in foreclosure under DTA).

Finally, it is a long-standing practice for an agent to hold and enforce a deed of trust on behalf of the holder of an indebtedness. *See* MERS Bain Br. at 30-31 and MERS Selkowitz Br. at 23-24 (citing cases and RESTATEMENT (3d) OF PROPERTY (MORTGAGES). Indeed, for more than 100 years, this Court has approved of the use of agents in a role similar to that of MERS. *See Carr v. Cohn*, 44 Wn. 586, 588 (1906) (where property is deeded to nominee as title holder for grantors, nominee

---

consumers for whom he purports to advocate.

can bring quiet title action on deed); *see also Andrews v. Kelleher*, 124 Wn. 517, 534-36 (1923) (bond holders' agent had authority to bring suit).

In a last-ditch effort to avoid the express contractual language of the deed of trust, *Amici* point to the fact that MERS' terms and conditions provide that MERS does not typically hold notes. *See, e.g.,* NCLC Br. at 10. But these terms and conditions are in no way inconsistent with the deeds of trust; they say nothing about MERS serving as the ***agent*** of the note holder. And this agency is the role served by MERS, as agreed to in the deed of trust. *Amici* further ignore those portions of the MERS' terms and conditions which provided that, in jurisdictions in which the mortgagee or beneficiary must be the holder of the note to establish standing to foreclose (typically in judicial foreclosures or bankruptcy proceedings), the promissory note ***had to be*** transferred to MERS ***before*** commencement of the foreclosure action to lift the automatic stay.[8]

Amici also claim that the deeds of trust are MERS "form" documents drafted by MERS that must be construed against MERS. *See, e.g.,* NCLC Br. at 11. Rubbish. The deeds of trusts are uniform instruments created and maintained by the two government sponsored enterprises established to provide funding and liquidity to the housing

[8] MERS recently eliminated its members' authority to bring these types of proceedings in MERS' name.

market – the Federal National Mortgage Association, better known as "Fannie Mae," and the Federal Home Loan Mortgage Corporation, better known as "Freddie Mac." MERS is not the drafter. Regardless, this maxim of contract construction only applies where a contract is ambiguous. *See Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797 (Wash. 1965). Here, the terms could not be more clear: MERS is the beneficiary and holder of legal title to the security interest as the agent of the note holder. Bain Dkt. No. 131-2, at 2-4; Selkowitz Dkt. No. 9-1, at 3-4.

There is nothing in the DTA that suggests that the legislature intended to overrule and prohibit the long standing practice of a note holder designating an agent (such as MERS here) to act on its behalf as beneficiary. *Amici's* arguments to the contrary are wrong and should be rejected by the Court.

3. *Amici* disregard the overwhelming case law holding that MERS is a proper beneficiary.

a. *Amici* ignore the weight of authority in Washington and across the country.

The *Amici* briefs give the impression that *Bain* (and *Selkowitz*) the first time the issues before this Court had been raised before a Washington court. It is easy to understand why *Amici* do not acknowledge the case law on this issue; the weight of authority is overwhelmingly on the side of MERS. As MERS set forth in its principal appeal briefs (*see* MERS Bain

Br. at 35-37 and MERS Selkowitz Br. at 27-29), the federal courts sitting in Washington have examined the issues here certified numerous times, and each time found MERS a proper beneficiary under Washington law:

> ***Vawter v. Quality Loan Service Corp. of Washington***, 707 F. Supp. 2d 1115, 1125-26 (W.D. Wash. 2010) (holding that plaintiffs' allegations "**challeng[ing] MERS' role as beneficiary on the Deed of Trust" fail as a matter of law**.). (Emphasis added.)
>
> ***Corales v. Flagstar Bank, FSB***, --- F. Supp. 2d ---, No. C10–1922JLR, 2011 WL 4899957, *5 (W.D. Wash. Oct. 24, 2011) (dismissing plaintiffs' claim that MERS was not a proper beneficiary of the deed of trust under the DTA because "**MERS is a proper beneficiary under the Deed**."). (Emphasis added.)
>
> ***St. John v. Northwest Trustee Services, Inc.***, No. C11-5382BHS, 2011 WL 4543658, *3 (W.D. Wash. Sept. 29, 2011) ("This Court has previously and consistently ruled that, when a plaintiff affixes a deed of trust that he/she signed wherein MERS is named as a beneficiary with the right to transfer such rights, **the plaintiff's arguments that MERS is not a beneficiary under the security instrument are without merit.**") (citations omitted). (Emphasis added.)
>
> ***Salmon v. Bank of America Corp***, No. CV–10–446–RMP, 2011 WL 2174554, *6 (E.D. Wash. May 25, 2011) (rejecting argument that MERS is a "ghost beneficiary" and not a beneficiary as that term is defined by the DTA).
>
> ***Cebrun v. HSBC Bank USA, N.A.***, No. C10-5742BHS, 2011 WL 321992, at *3 (W.D. Wash Feb. 2, 2011) ("**The Cebruns' claims regarding MERS not being a beneficiary under the security instrument are without merit**."). (Emphasis added.)
>
> ***Daddabbo v. Countrywide Home Loans, Inc.***, No. C09-1417RAJ, 2010 WL 2102485, *5 (W.D. Wash. May 20, 2010) ("The deed of trust, of which the court takes judicial notice,

> explicitly names MERS as a beneficiary. **The deed of trust grants MERS not only legal title to the interests created in the trust, but the authorization of the lender and any of its successors to take any action to protect those interest, including the 'right to foreclose and sell the Property.'**") (Emphasis added.)

These are only a few of the cases MERS cited in its principal appeal briefs, and even those cases represent only the tip of the iceberg. *See* MERS Bain Br. at 37 n.125 and MERS Selkowitz Br. at 29 n.98. In the short time since MERS' briefing was filed, the Western District has again recognized MERS' role as an appropriate beneficiary of a deed of trust. In *Bhatti v. Guild Mortgage Company*, No. C11-0480JLR, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011), the plaintiff argued, as *Amici* do here, that MERS' role as nominee on the deed of trust was "improper" and any transfers of beneficial interest by MERS "invalid." *See id.* *4. Judge Robart disagreed: "The court concurs with the reasoning and conclusions set forth in *Vawter, Daddabbo, Ceburn,* and *Moseley*. ***MERS has the authority to act as a beneficiary under the Deed of Trust where such authority is explicitly granted upon execution of the instrument.***" *Id.* at *5 (emphasis added).[9]

---

[9] Judge Coughenour's Order to Show Cause [Doc. No. 26] (Oct. 6, 2010) referenced several federal court decisions in this district, including *Moon v. GMAC Mortgage Corp.*, 2008 WL 4741492 (W.D. Wash. 2008). In *Moon,* MERS had assigned a deed of trust to GMAC Mortgage, and the plaintiff sued in state court to avoid a foreclosure. *See Moon,* 2008 WL 4741492, at *2. Following removal, the district court dissolved the state-court issued injunction which had temporarily suspended the foreclosure, *id.* at *4-5, and

Appellate courts from other jurisdictions continue to recognize and confirm MERS' role as beneficiary of a deed of trust or mortgage. For example, in *Residential Funding Co., L.L.C. v. Saurman*, 805 N.W.2d 183 (Mich. 2011), the Michigan Supreme Court reversed a decision by a divided panel of the Michigan court of appeals holding that MERS could not bring a non-judicial foreclosure because it did not own an interest in the underlying debt. Notably, the Michigan statute at issue in *Saurman*, Mich. Stat. § 600.3204(1)(d), is the statute that plaintiffs claim is ***"most analogous to Washington's [DTA]."*** Bain Opening Br. at 38 (emphasis added); *see* Selkowitz Opening Br. at 22. That statue provides, in relevant part: "The party foreclosing the mortgage is either the owner of the indebtedness or an interest in the indebtedness secured by the mortgage...." Mich. Stat. § 600.3204(1)(d). In reversing the court of appeal, the Michigan Supreme Court held that, by virtue of the language in the standard mortgage, MERS was the "record holder of the mortgage" and thus had an "interest in the indebtedness" under § 600.3204(1)(d). *Id.* at 184. "This interest in the indebtedness—*i.e.*, the ownership of legal title

---

further declined to require that the foreclosure process be restarted from scratch. *Id.* at *5. The court noted that Washington's "deeds of trust act allows a beneficiary, such as MERS, to appoint a successor trustee, which MERS did in this case." *Id.* Rejecting the argument that MERS "cannot be a beneficiary," the court explained that "[s]imply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument." *Id.* To the contrary, "plaintiff fail[ed] to show that defendants did not comply with the deeds of trust act." *Id.* at *6.

to the security lien whose existence is wholly contingent on satisfaction of the indebtedness—authorized MERS to foreclose under MCL 600.3204(1)(d)." *Id.* at 183.

In addition, in the past few months, the following decisions have issued from the Idaho Supreme Court, the Connecticut Supreme Court, and the First and Tenth United States Courts of Appeal:

> ***Trotter v. Bank of N.Y. Mellon***,--- P.3d ----, 2012 WL 206004, at *1-5 (Idaho Jan. 25, 2012) (upholding dismissal of plaintiff's claims that under non-judicial foreclosure statute trustee had to show that beneficiary held the note, and that MERS was not proper beneficiary and therefore could not assign deed of trust)).
>
> ***Commonwealth Prop. Advocates, LLC v. MERS***, Nos. 10-4182, 10-4193, 10-4215, 2011 WL 6739431, at *5-6 (10th Cir. Dec. 23, 2011) (MERS is proper beneficiary and nominee for debt owner and may foreclose even though underlying debt was sold to another party).
>
> ***Kiah v. Aurora Loan Servs., LLC***, No 11-1010 (1st Cir. Dec. 14, 2011) (affirming district court order dismissing claims that MERS could not assign mortgage because MERS did not have an interest in the note) (attached hereto as Appendix A).
>
> ***RMS Residential Props., LLC v. Miller***, 32 A.3d 307, 311-17 (Conn. 2011) (MERS is proper mortgagee and nominee for lender's successors and assigns).

Amici do not meaningfully address any of these cases because they cannot refute them, and instead repeatedly cite (and mis-cite) to a handful

of decisions reflecting the tiny minority view they urge this Court to adopt.[10]

b. The cases relied upon by *Amici* are largely inapposite.

Much of the authority cited by *Amici* is either inapposite or, indeed, opposite of their proffered construction. For example, in the brief submitted by the NCLC, *Amici* cite to a hodge podge of cases for the proposition that courts routinely hold that "MERS is not a beneficiary," and that "MERS could not transfer or assign the right to enforce a note because MERS itself never held this right." NCLC Brief at 15-16 & nn. 30-34. An overview of this authority demonstrates that *Amici's* house is built on shifting sand:

---

[10] *Amici* have feebly attempted to distinguish Washington law from the overwhelming majority view by raising distinctions without differences. *See, e.g.*, Homeowners Attorneys Br. 2 (arguing that *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009), may be ignored because Washington has no "MERS amendment" like Minnesota). Minnesota has two different systems that operate side by side for land title records – the abstract system, which, like that in Washington, is administered by County Recorders, and the "Torrens System." In the Torrens System, the Registrar of Title acts as a gate keeper for Certificates of Title, and is charged with the responsibility for passing on the legal impact and sufficiency of all documents which are recorded. Subsequent to the creation of MERS, in connection with recordation of mortgage releases and satisfactions, certain of the Registrars of Title raised issues as to the exact meaning of the terms "nominee" or "mortgagee" in the mortgages. After consultation with these Registrars of Title as well as with other government officials and real estate lawyers, legislation was introduced and enacted with the full support of the Registrars of Title, the Minnesota State Bar Association Real Property Section, and the title insurance industry which resolved this concern. All of this, however, had little to do with the *Jackson* Court's analysis. Rather, the Minnesota Supreme Court based its analysis of MERS' standing to serve as a mortgagee on common law going back a century, as well as a textual analysis of the statute apart from the MERS amendment. *See Jackson*, 770 N.W.2d at 493-495.

- ***Mortgage Electronic Registrations Sys., Inc. v. Nebraska Dept. of Banking and Finance***, 704 N.W.2d 784 (Neb. 2005).

Amici ignores the context of this case; it has nothing to do with the rights of MERS either to bring foreclosures in its own name, or to be named the beneficiary in a deed of trust, or to assign its rights to another party. Rather, the suit was brought by MERS seeking a declaration that it was not a mortgage banker for purposes of a Nebraska registration and licensing statute. MERS is not a mortgage banker, as the Nebraska Supreme Court held. *Id.* at 788. The Court also noted that: "MERS serves as legal title holder in a nominee capacity, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction." *Id.* Nowhere did the Court hint this was improper or invalidated the chain of title to the deeds of trust so held.

- ***Mortgage Electronic Registration Sys, Inc. v. Estrella***, 390 F.3d 522 (7th Cir. 2004).

Estrella was a case applying Illinois law initiated in federal court under diversity jurisdiction. The appeal cited by *Amici* was dismissed for lack of appellate jurisdiction because "it has long been established that orders denying confirmation to judicial sales are not final decisions." *Id.* at 524. The subsequent comments in the decision are purest *arbiter dicta*, sprinkled with annoyance that none of the parties had flagged the jurisdictional issue. *See generally id.* at 524-25. In fact, it is well

established under Illinois law that MERS has standing to pursue foreclosures in its own name as the holder of legal title to the mortgage. *Mortgage Elec. Registration Sys. Inc. v. Barnes*, 940 N.E.2d 118, 124 (Ill. App. 2010) ("[T]he record establishes that MERS had standing to bring this foreclosure action. A plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person. . . . [T]he mortgage signed by the parties indicated that MERS was the mortgagee, and MERS satisfied the statutory definition of a mortgagee, which goes beyond just note holders to also encompass 'any person designated or authorized to act on behalf of such holder.'") (citations omitted).

- ***Mortgage Electronic Registration Sys., Inc. v. Chong***, 2009 WL 6524286 (D. Nev. Dec. 4, 2009).

Chong arose on the appeal of a bankruptcy court's denial of a motion to lift the automatic stay in an adversary proceeding, a procedural *context* which *Amici* ignore. Yet this procedural context is crucial, as subsequent District of Nevada decisions make clear. In *Kwok v. Reconstrust Co., N.A.*, 2010 WL 3894183 (D. Nev. Sept. 29, 2010), Chief Judge Hunt rejected a challenge to MERS' ability as the legal title holder of the mortgage to pursue a non-judicial foreclosure, explaining: "the ever-expanding body of case law within this district holds that the Nevada law governing nonjudicial foreclosure, NRS § 107.080, does not require a

lender to produce the original note as a prerequisite to non-judicial foreclosure proceedings." *Id.* at *2. The court cited ample, on-point authority:

- *Weingartner v. Chase Home Fin., LLC*, 702 F .Supp. 2d 1276, 1280 (D.Nev. 2010)
- *Birkland v. Silver State Fin. Serv., Inc.*, 2010 WL 3419372 (D.Nev. Aug. 25, 2010)
- *Moon v. Countrywide Home Loans, Inc.*, 2010 WL 522753 (D.Nev. Feb. 9, 2010)
- *Gomez v. Countrywide Bank, FSB.*, 2009 WL 3617650 (D.Nev. Oct. 26, 2009)
- *Ernestberg v. Mortgage Investors Group*, 2009 WL 160241 (D.Nev. Jan. 22, 2009)
- *Wayne v. HomEq Servicing, Inc.*, 2008 WL 4642595 (D.Nev. Oct. 16, 2008).

Id. at *2 & n.11. The court rejected the borrower's reliance on *Chong*, explaining the procedural posture of the lift of the automatic stay in a bankruptcy adversary proceeding has nothing to do with compliance with state foreclosure law.

> Mr. Conway misinterprets the court's distinction between standing to lift an automatic stay in a bankruptcy proceeding and statutory authority to commence nonjudicial foreclosure proceedings. . . . [This] Court has consistently held that NRS § 107.080 does not require MERS or any other similar entity to show it is the real party in interest to pursue nonjudicial foreclosure actions. The weight of authority in this district clearly debunks this oft repeated claim.

Id. (citations omitted).

- ***Mortgage Electronic Registration Sys, Inc. v. Southwest Homes of Arkansas, Inc.***, 301 S.W.3d 1 (Ark. 2009).

In *Southwest Homes*, the property at issue was encumbered by two deeds of trust, and the holder of the second deed of trust foreclosed, but served notice only on the bank holding the first note, and not on MERS, which held the first deed of trust. The court held that MERS was not a "necessary party" which had to be served in the action, and allowed the foreclosure to stand. *Id.* at 7-8. In later federal cases interpreting *Southwest Homes*, courts clarified that this decision *does not* mean that MERS is a stranger to the security instrument. Rather, MERS, as the nominee and agent for the lender, can hold the deed of trust and transfer its interest to others. *Peace v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 2384263, at *3 (E.D. Ark. Jun. 11, 2010); *Coley v. Accredited Home Lenders, Inc.*, 2011 WL 1193072, at *3-4 (E.D. Ark. Mar. 29, 2011). As Judge Holmes explained in *Coley*:

> The Coleys contend that MERS, as a mere agent for Accredited, was not authorized to transfer or assign the mortgage to HSBC. The security instrument, which was attached to the complaint, states that "MERS is ... acting solely as nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." . . . Although the Coleys contend that MERS did not have authority to make the transfer, the security agreement attached to their complaint says otherwise. . . . [T]he exhibits attached to the complaint indicate that MERS acted within its role as agent when it transferred the note and mortgage from its principal to HSBC. Thus,

> HSBC was within its rights in attempting to collect on the mortgage, and the claims against it must be dismissed.

Coley., 2011 WL 1193072, at *3-4 (citations omitted).

Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (Kan. 2009).

Kesler, again, is a procedurally inapposite case – the Kansas Supreme Court held that the trial court had not abused its discretion in declining to set aside a default or to allow MERS to intervene in a judicial foreclosure action. *See id.* at 162 (standard of review) & 170 ("We find that the district court did not abuse its discretion in denying the motions to vacate and for joinder and in holding that MERS was not denied due process."). But even more fundamentally, *Kesler* has nothing to say about MERS' standing to bring a non-judicial foreclosure because in Kansas, foreclosures may only proceed by court action. *SBKC Serv. Corp. v. 1111 Prospect Prtns, L.P.*, 969 F. Supp. 1254, 1263 (D. Kan. 1997) ("there is no statutory or common law basis in Kansas permitting a non-judicial foreclosure"), *aff'd in part, vacated in unrelated part,* 153 F.3d 728 (10th Cir. 1998).

- ***Mortgage Electronic Registrations Sys, Inc. v. Graham***, 247 P.3d 223 (Kan. Ct. App. 2010).

In *Graham*, a procedurally complex case involving a renewed foreclosure action following the dismissal of a bankruptcy petition, the Kansas Court of Appeals held that MERS lacked standing to bring a

judicial *foreclosure* action in its own name. *See id.* at 229. In a subsequent and related bankruptcy court decision, however, Judge Karlin clarified that the security interest was valid and could be enforced by the lender, Countrywide. MERS "was holding the Mortgage in question as an agent" of the Countrywide, and therefore "the Note and Mortgage were never split, and remain enforceable." *In re: Martinez*, 444 B.R. 192, 206 (D. Kan. Bankr. 2011). Because "MERS is required to act on behalf of and at the direction of Countrywide," the "concerns raised in the Restatement (Third) of Property (Mortgages) about the enforceability of the Note are eliminated." *Id.*

- ***Mortgage Electronic Registration Sys, Inc. v. Saunders***, 2 A.3d 289 (Maine 2010).

Similar to Kansas, non-judicial foreclosures are not allowed under Maine law – a point the *Saunders* court stressed in concluding that MERS lacked standing to file a lawsuit in its own name to bring a judicial foreclosure action:

> In other jurisdictions utilizing non-judicial foreclosure, MERS has been able to institute foreclosure proceedings based on its designation in the mortgage as the "mortgagee of record." *See, e.g., In re Huggins*, 357 B.R. 180, 184 (Bankr. Mass. 2006) (concluding that MERS had standing to institute foreclosure proceedings pursuant to the statutory power of sale in Massachusetts); *Jackson v. Mortg. Elec. Registration Sys. Inc.*, 770 N.W.2d 487, 500-01 (Minn. 2009) (approving MERS' ability to commence foreclosure as the legal title holder of the mortgage in non-

> judicial foreclosure proceedings in Minnesota). These cases are inapposite because non-judicial foreclosures do not invoke the jurisdiction of the courts. Non-judicial foreclosures proceed wholly outside of the judiciary, typically utilizing local law enforcement to evict a mortgagor and gain possession of the mortgaged property.

Saunders, 2 A.3d at 296. In a *judicial* foreclosure, however, "like any other plaintiff filing suit within our courts, [MERS] must prove its *standing* to sue." *Id.* Under Maine's prudential standing rules, the court concluded, MERS was not the party "best suited to assert a particular claim." *Id.* at 296-97 (quotations omitted).

- ***Bellistri v. Ocwen Servicing, LLC,*** 284 S.W.3d 619 (Mo. Ct. App. 2009).

Bellistri reflected a procedural misstep; a foreclosure was premised on the assignment by MERS of a mortgage and note, but MERS' ownership was not reflected in the chain of title to the note, and its purported assignment of the note was therefore invalid. *See id.* at 623-24. In subsequent federal cases interpreting *Bellistri*, courts clarified that assignments by MERS of a deed of trust are valid and enforceable, and that subsequent assignees have standing to foreclose.

> The deed of trust grants MERS, "nominee" serving as legal title holder to the beneficial interest under the deed of trust, the right to exercise any or all of the lender's interests. This language contained in the deed of trust is more than sufficient to create an agency relationship between MERS and the original lender and its successors in Missouri. The deed of trust designates MERS as the nominee and

> authorizes MERS to take any action to enforce the loan, including the right to foreclose and sell the property. As nominee of the original lender and the original lender's successors and assigns, MERS has bare legal title to the note and the deed of trust securing it.

Kulovic v. BAC Home Loans Serv., L.P., 2011 WL 1483374, at *5-6 (E.D. Mo. Apr. 19, 2011) (quotations and citations omitted); *see also In re Tucker*, 441 B.R. 638, 646 (W.D. Mo. Bankr. 2010) ("MERS was the agent for New Century under the Deed of Trust from the inception, and MERS became agent for each subsequent note-holder under the Deed of Trust when each such noteholder negotiated the Note to its successor and assign. When Aurora acquired the right to enforce the Note as the note-holder, MERS held the beneficial interest in the Deed of Trust on behalf of Aurora and had the right to enforce all the rights granted to New Century and its successors and assigns in the Deed of Trust. Therefore, as of the date of bankruptcy, Aurora held both the Note and the right, through its agent MERS, to foreclose.").

- ***In re Veal***, 450 B.R. 897 (9th Cir. BAP 2011) & ***In re Doble***, 2011 WL 14465559 (S.D. Cal. Bankr. Apr. 14, 2011)

Amici's reliance on *In re Veal* and *In re Doble* for their contention that California does not recognize MERS as a proper beneficiary is particularly disingenuous. *In re: Veal* addresses the procedurally specific issue of standing for a party seeking relief from an automatic stay in a

bankruptcy proceeding, which is irrelevant to the certified questions before this Court. *See, e.g.*, *Hague v. Wells Fargo Bank*, 2011 WL 3360026, at *3 (N.D. Cal. Aug. 2, 2011) ("*In re Veal* is irrelevant to this case because standing is not an issue"). But more critically, California courts repeatedly have confirmed that MERS may serve as a beneficiary and may bring non-judicial foreclosures in its own name. "MERS was entitled to initiate foreclosure despite having no ownership interest in the promissory note because it was the beneficiary under the deed of trust." *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 269 (Cal. Ct. App. 2011) (construing *Ferugson v. Avelo Mortgage, LLC*, 195 Cal. App. 4th 1618, 1626-27 (Cal. Ct. App. 2011)); *see also Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1152 (Cal. Ct. App. 2011). And just as MERS could, as the beneficiary under a deed of trust, initiate a foreclosure in its own name, so could it validly assign the note to another party:

> [MERS'] lack of a possessory interest in the note did not necessarily prevent MERS from having the authority to assign the note. While it is true MERS had no power in its own right to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which did possess an assignable interest. A "nominee" is a person or entity designated to act for another in a limited role – in effect, an agent. The extent of MERS' authority as a nominee was defined by its agency

> agreement with the lender, and whether MERS had the authority to assign the lender's interest in the note must be determined by reference to that agreement. Accordingly, the allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender.

198 Cal. App. 4th at 270-71 (citations omitted).[11]

What remains of *Amici's* authority is a smattering of cases from the small minority of jurisdictions which have eschewed the recognition by the overwhelming majority of states that MERS may act as the beneficiary under a deed of trust or a mortgagee as nominee for the lender under a mortgage. Even with respect to this limited authority, there are disparate views of the law – as is reflected in two decisions by New York's intermediate appellate court. *Compare, e.g., Bank of New York v. Silverberg,* 86 A.D.3d 274,283 (N.Y. Sup. Ct., App. Div. 2011) (MERS

---

[11] Judge Coughenour's Order to Show Cause [Doc. No. 26] (Oct. 6, 2010) also referenced *In re Jacobson*, 402 B.R. 359 (W.D. Wash. Bankr. Mar. 6, 2009), as well as *In re: Walker*, 2010 Bankr. LEXIS 3781 (E.D. Cal. Bank. May 20, 2010). *In re Jacobson*, similar to *In re Veal*, concerned a party's standing to move for relief of the automatic stay in a bankruptcy proceeding, *see* 402 B.R. at 366-67, and is inapposite outside of the bankruptcy context. *In re Walker* is also a bankruptcy case, and concerned an interim order disallowing without prejudice a proof of claim. *See* 2010 Bankr. LEXIS 3781, at *7. In further proceedings in that matter, CitiBank, N.A. demonstrated its ownership of the note at issue, and the Bankruptcy Court's subsequent order lifted the automatic stay. Civil Minute Order, *In re Walker*, Case No. 10-21656-E-7 (E.D. Cal. Bankr.) [Doc. No. 263] (Dec. 13, 2011) at 2. In so doing, the court – consistent with California law – expressly confirmed that Citibank, its agents, and "any other beneficiary or trustee, and their respective agents ***and successors under any trust deed*** which is recorded against the property to secure an obligation," were authorized "to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 3830 Whitney Oaks, Rocklin, California." *Id.*

could not assign mortgage) *with Mortg. Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674-75 (N.Y. Sup. Ct. App. Div. 2007) (MERS could bring non-judicial foreclosure in own name). If the Court were to decide this issue by counting noses, MERS would win in a land-slide.

4. Contrary to *Amici's* assertions, MERS' role as beneficiary does not impermissibly split the deed of trust from the note.

Amici apparently contend that because MERS does not actually hold the note, MERS role as beneficiary under the deeds of trust impermissibly "splits" the deeds of trust from their related promissory notes in violation of the common law rule that the deed of trust generally follows the note. *See, e.g.,* OUR Br. at 5; Attorney General Br. at 5-8. But this ***general*** rule stands for nothing more than the limited and unremarkable proposition that the deed of trust and note are related and, where they are held by unrelated parties, the note holder cannot enforce the security instrument, and the holder of the security instrument cannot enforce the note. *See* RESTATEMENT (3d) OF PROPERTY (MORTGAGES) § 5.4. This common law rule is also codified in the U.C.C. *See, e.g,* RCW § 62A.9A-203 (g) ("Lien securing right to payment."). But there is no such separation in the case of MERS because MERS remains a party to the transaction documents in its capacity as the agent of the note holder its

---

(emphasis added).

successors and assigns. The note and deed of trust are executed contemporaneously as part of a unified transaction, each referring to and incorporating the other.

Because the note and deed of trust are never separated, courts routinely have rejected the "split" argument advanced by *Amici* here. For example, in *Cervantes v. Countywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), the Ninth Circuit held that, where MERS is the beneficiary under the deed of trust, the note and deed of trust are ***not*** split because MERS remains then nominee/agent to the lender. *See id.* at 1044; *see also Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 624 (4th Cir. 2011) ("[i]f [plaintiff] were correct that [] that the transfer of the note splits it from the deed of trust, there would be little reason for notes to exist . . . . [O]ne of the defining features of notes is their transferability, but on [plaintiff's] view, transferring the note would strip it from the security that gives it value and render the security that gives it value and render the note largely worthless. This cannot be – and is not – the law."). This same result applies under Washington law. *See, e.g.*, *In re Reinke*, 2011 WL 5079561, at *6 (W.D. Wash. Bankr. Oct. 26, 2011) ("This Court concludes that there is nothing inherent in the use of MERS as nominee under a deed of trust which irreparably splits the note from a deed of trust so as to render the note unsecured.").

Amici's "split" argument is incorrect and should be rejected in this case, too.

5. Amici's fabricated and false *ad hominem* attacks on MERS are unwarranted distractions akin to media sound bytes.

In tacit recognition of the weaknesses in their position, *Amici* resort to *ad hominem* attacks on MERS, blaming it for creating "havoc" in the marketplace. *See, e.g.,* Attorney General Br. at 6-8. *Amici* fault MERS for all sorts of assorted problems in the residential mortgage lending industry, including, among other things: the secondary market sale and securitization of loans; the rise in loan defaults and foreclosures, and the increase in foreclosure related litigation; lost promissory notes; the inability of borrowers to determine the holder of their promissory note; the inability of borrowers to obtain loan modifications or other foreclosure workouts; and even predatory lending. *See* Attorney General Br. at 6-8, 12; NCLC Br. at 11; OUR Br. at 2, 5. Of course, none of this is relevant to the three issues certified to the Court.

Moreover, all these assertions are based on hyperbole and made up hypothetical circumstances, none of which have been shown to exist as to plaintiffs' Bain or Selkowitz, or any other Washington consumers. Indeed, plaintiffs Bain and Selkowitz do not even allege that these supposed problems occurred in connection with their loans. Rather, after

readily admitting that they borrowed the money and then defaulted on their repayment obligations justifying foreclosure, Bain and Selkowitz merely allege that foreclosure is inappropriate based on the technical argument that MERS is not a proper beneficiary under the DTA. In other words, none of *Amici's* assertions are true.

To begin, much of *Amici's* complaints have to do with blaming MERS for the secondary mortgage market and loan securitizations. *See, e.g.,* Attorney General Br. at 8; OUR Br. at 1-2, 5; NCLC Br. at 2; Homeowners Attorneys Br. 2, 10, 14. *Amici* conveniently and irresponsibly ignore the undisputed fact that both Fannie Mae and Freddie Mac have been issuing mortgage backed securities for decades, and that the Government National Mortgage Association, or "Ginnie Mae," has been insuring mortgage backed securities for FHA & VA loans in that same period. As explained in MERS' principal briefs, *see* MERS Bain Br. at 9-13 (incorporated by reference into MERS Selkowitz Br. at 9), and by the *Amicus Curiae* the Washington Bankers Association, *see* Washington Bankers Ass'n Br. at 19, the secondary market sale and securitization of loans was occurring long before MERS was created, as part of a national policy goal set by Congress. Indeed, Fannie Mae and Freddie Mac were specifically created by Congress to provide liquidity to the residential mortgage market and have been issuing mortgage backed securities for

decades. The notion that the secondary market sale and securitization of loans is inherently bad is nonsensical. Securitization in fact increased available financing and innovation, making it possible for millions of Americans to realize the dream of home ownership. *See* Washington Bankers Ass'n Br. at 19. Prohibiting securitization of loans could have the immediate impact of driving out a substantial number of mortgage lenders from this market, making it difficult for many and impossible for some would-be borrowers to receive home loans at all. And for those who could secure financing, the cost and burden undoubtedly would increase. If *Amici* want to make sure than lenders do not sell and securitize any loans made to Washington citizens, they ought take it up with the state legislature and with the Congress of the United States.[12] But this is certainly not an issue properly before this Court in this case.

Amici's attempt to blame MERS for the rise in loan defaults and foreclosures, inefficiency in administration of foreclosures, and the increase in foreclosure related litigation, is equally misguided. MERS does not originate or service loans and is not responsible for the terms of

[12] Absurdly, *Amici* contend that the Washington Legislature "did not intend or want Washington residences to secure trillions of dollars of pooled debts," Homeowners Attorneys' Br. at 15, but they fail to cite a stitch of legislation or legislative history to support this mind-reading. *See id.* Nor is there any reason why the Washington Legislature should take such a position; securitization of a loan has ***no impact*** on the borrower. Only the parties to the securitization – that is, the lender and the new buyer – are affected by the sale of the securities.

the loans or for the economic downturn or other events that precipitated the increase in foreclosures. The increased foreclosure litigation, like that at issue here, has not been caused by MERS. The Attorney General boasts that it is currently involved in litigation and enforcement actions relating to mortgage lending and foreclosures. *See* Attorney General Br. at 1. What the Attorney General fails to point out is that the case cited – *State of Washington v. ReconTrust* – relates to the "trustee following foreclosure" requirements. That case has nothing at all to do with whether MERS is a proper beneficiary under the DTA, which, of course, is the actual issue before this Court. If anything, the increased foreclosure litigation has largely been caused by borrowers who, like plaintiffs, are irreconcilably in default on their loans, but want, somehow, to retain all of the benefits of their home loan while avoiding all responsibility for repayment. Although they struggle not to come right out and say it, given the obvious inequities of their position, it is clear that what *Amici* ultimately want is that loans for hundreds of thousands of dollars be forgiven, that plaintiffs and countless borrowers like them be given their homes for free, and that lenders bear the entire weight of *Amici's* generosity. *See, e.g.,* Homeowners Attorneys Br. at 9 ("deed of trust not owned by the Note Holder is a ***nullity***") (emphasis added). But there are no free lunches, nor free houses – and there must be consequences for a

borrower who secures a loan with a mortgage or deed of trust and then fails to repay the loan. The suggestion that the legislature intended, or that it would be a good thing for Washington, to have thousands of unsecured loans is absurd on its face. *Amici* claim the note holder can still sue on the note, but they know full well that without the property as security, there is little chance that the lender will ever collect from the defaulting borrower.

Amici's contention that MERS "conceals" the note holder, *see* Attorney General Br. at 4, or presents an obstacle for borrowers in default to obtain loan modifications is likewise nonsense. First, there is no allegation or evidence that plaintiffs or any other Washington consumers were ever unable to learn the identity of their note holder for any reason, much less because of MERS. Second, as demonstrated by the Attorney General's recitation of the complexity of the secondary market loan securitization process, knowing the identity of the note owner, which is often a numbered bankruptcy proof trust entity with no employees, telephone number or office, would be meaningless to the borrower. *See* Attorney General Br. at 8. Indeed, if *Amici* could identify actual examples of borrowers dealing directly with the note holder of any loan which has been pledged as collateral in a mortgage backed securities pool, that would be remarkable. Rather, the information that is important is the identity of the ***loan servicer***. This is the party to whom the borrowers make their

payments. It is the loan servicer who, as the specifically designated agent of the note holder charged with administering the entire process of collecting payments due on the loan, provides all billing, escrow, loan administration and other services to the borrower each month. *See* Washington Bankers Ass'n Br. at 18-19 (citing authority). Lastly, the suggestion by *Amici* that borrowers who do not know the identity of their note holder risk losing their right under the DTA, RCW § 61.24.130, to seek to enjoin the trustees' sale is completely disingenuous. *See* Attorney General Br. at 12. As *Amici* well know, § 61.24.130 allows a borrower to bring an action to enjoin the sale by the ***trustee***, and nothing therein requires the borrower to know the identity of the note holder prior to or as a condition of seeking such an injunction.

Amici go so far as to contend that Washington needs a "public record" of note holders. *See* Attorney General Br. at 17. *Amici* apparently want this Court to conclude that every transfer of ownership in a promissory note must be recorded in the county land records. *See, e.g.*, *id.* at 16. This argument evidences a fundamental misunderstanding of the purpose of land records. At no point in history have promissory notes been recorded in the land title records of the State of Washington (or in any other state). *See, e.g.,* RCW § 65.04.030 (describing "instruments to be recorded or filed," including "Deeds, grants and transfers of real

property, mortgages and releases of mortgages of real estate, instruments or agreements relating to community or separate property, powers of attorney to convey real estate, and leases which have been acknowledged"). The purpose of recording security instruments or other conveyances of interest in real property is manifestly to put the outside world on notice of the interests of the parties, and to protect mortgagees and other secured parties against further alienation of the property in derogation of their interests therein. It most certainly is ***not*** for the protection of the borrower who is presumed to be fully aware that she has subordinated her interest in the property as security for the repayment of the money borrowed. In short, land records are not meant to provide information on loan ownership; these records are meant to provide notice of liens and establish their priority. RCW 65.08.070; *Bank of Am., N.A., v. Prestance Corp.*, 160 Wn.2d 560, 570 (2007). *see also* Washington Bankers Ass'n Br. at 17. Promissory notes, which are negotiable instruments under the UCC, are not recorded in county land records, have never been recorded in county land records, and cannot be recorded in county land records. They are not susceptible to recordation as they are not conveyances of interests in real property. And, as MERS demonstrated in its principal appeal briefs, long before MERS existed, notes were transferred, without the recording of a corresponding

assignment of the deed of trust, which continued to be held by an agent. *See* MERS Bain Br. at 10; (incorporated by reference into MERS Selkowitz Br. at 9).

Nor is there any legitimacy to *Amici's* professed concern about borrowers having liability to multiple lenders because of "double selling" of loans. Attorney General Br. 6-7, 10-11. This argument is pure fallacy. To begin, neither plaintiff has alleged this to be an issue with respect to their loan and *Amici* can point to no Washington consumer who has actually had this purported problem. Not surprisingly, none of the cases cited by *Amici* involved MERS; indeed, most were decided decades before MERS came into being. *See id.* at 6-7. The two decisions issued after MERS was created are wholly inapposite. *Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.*, 943 P.2d 710, 88 Wn.App. 64 (Wash.App. Div. 1 1997), involved a forged promissory note in which the putative borrowers were not in default under the valid note, and had an "absolute defense to any foreclosure action" brought based on the forgery. *See id.* at 88 Wn.App. at 65 & 69. While these are not the circumstances before this Court, *Fidelity* demonstrates that Washington's judicial system is entirely capable of protecting borrowers who are actually the victims of wrongdoing. The other case, *IMPAC Warehouse Lending Group v. Credit Suisse First Boston*, 270 Fed. Appx. 570 (9th Cir. 2008), affirmed the

dismissal of a suit based on alleged fraud arising from a reverse repurchase agreement. Impac was "unable to plead claims that reach these defendants, and therefore the complaint was properly dismissed." *Id.* at 572. Not only was MERS not involved, but the case stands for nothing beyond the need to adequately plead a complaint. Finally, under the DTA, RCW § 61.24.100, a borrower cannot be sued for a deficiency judgment following nonjudicial foreclosure; and any deed of trust can only be foreclosed once. *Amici*'s made-up concern about supposed double liability for consumers has no basis in fact and should be rejected.

Finally, while making baseless attacks on MERS, *Amici* simply ignore the many benefits MERS has brought to borrowers and the state of Washington. *See* MERS Bain Br. at 13-15 (incorporated by reference into MERS Selkowitz Br. at 9); Washington Bankers Ass'n Br. at 4, 7-10. Before MERS, the public land records system could not keep up, leading to delays and errors in recordings, title problems, and inefficiencies that ultimately increased the costs of residential mortgage lending. Without MERS, the current problems would be much worse, with lost, missed, incorrect, or delayed recordings of assignments of deeds of trust preventing the efficient operation of the residential mortgage lending system.

In truth, it is the position of *Amici* that, if adopted by this Court, would create "havoc" (Attorney General Br. at 6) in the Washington marketplace. Indeed, this is precisely what happened in Michigan during the six months between the court of appeals holding in *Saurman* (discussed *supra* § I.D) that MERS could not foreclose under Michigan's nonjudicial foreclosure statute because MERS did not own an interest in the underlying indebtedness and the Michigan Supreme Court's reversal of the court of appeals decision. As explained by the Washington Bankers Association, during those six months in Michigan, there was confusion and market illiquidity (*e.g.*, title insurers stopped insuring properties making it difficult to obtain mortgage loans) and widespread litigation challenging already completed foreclosures, including 11 separate class actions. Washington Bankers Ass'n Br. at 8-9. MERS submits that adopting the position of plaintiffs' *Amici* will likely lead to similar problems in Washington. This Court should not let that happen.

B. THERE IS NO CPA CLAIM AGAINST MERS

The answer to the third certified question (like the second certified question) is moot because, as shown above, MERS is a lawful beneficiary. But even if the third certified question were not moot, the Court should hold that there is no CPA claim, for the reasons stated in MERS principal

appeal briefs. *See* MERS Bain Br. at 45-49 and MERS Selkowitz Br. at 37-42.

Amici's arguments to the contrary are misplaced and should be rejected. First, *Amici* ignore that MERS' role as beneficiary as the agent for the note holder was fully disclosed in the deeds of trust. Bain Dkt. No. 131-2, at 2-3; Selkowitz Dkt. No. 9-1, at 3-4. Thus, there was no misrepresentation, which is an essential element of a CPA claim.

Second, MERS' role as beneficiary caused no harm to plaintiffs Bain or Selkowitz and *Amici* can point to no other Washington consumers who have actually been harmed by MERS acting as beneficiary. *Amici* can only come up with hypothetical injuries. *See* Attorney General Br. at 19 (claiming there are "many ***scenarios***" where consumers may be injured by MERS serving as beneficiary) (emphasis added). In truth, there is no injury caused by MERS. Any injury suffered by plaintiffs – or any other defaulting borrowers – was caused by their default on their loan obligations. *See Cervantes*, 656 F.3d at 1042 ("the plaintiffs have failed to show that the designation of MERS 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").

If the Court reaches the third certified question, it should rule that there is no CPA claim against MERS.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in MERS' principal appeal briefs and in the amicus brief of the Washington Bankers Association, the arguments of plaintiffs' *Amici* are incorrect and should be rejected by this Court. Ultimately, whether they recognize it or not, it is the position of plaintiffs' *Amici* that would harm Washington and its consumers, much as occurred in Michigan prior to the Michigan Supreme Court's recent *Saurman* decision holding that MERS is a proper mortgagee under what plaintiffs here contend is the statute most analogous to Washington's DTA.

In answer to the first certified question, this Court should hold that MERS is a proper beneficiary under Washington law, thereby mooting the second and third certified questions. But even if MERS did not fit the definition of beneficiary under the DTA because it does not typically hold the note, the answer to the second certified question is that there is no legal effect, because nothing in Washington law prohibits – in fact the law permits – the note holder to designate an agent such as MERS to serve as beneficiary. Similarly, if the Court reaches the third certified question, it should hold that there is no CPA claim against MERS because MERS' role as beneficiary as the agent for the note holder was fully disclosed and caused no injury to plaintiffs or any other Washington consumers.

RESPECTFULLY SUBMITTED this 5th day of March, 2012.

/s/ Russ Wuehler
Russ Wuehler, WSBA No. 37941
DLA PIPER LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104
Phone: 206.893.4800
Fax: 206.839.4801

Robert J. Pratte (*Pro Hac Vice*)
FULBRIGHT & JAWORSKI L.L.P.
80 South Eighth Street, Suite 2100
Minneapolis, MN 55402
Phone: 612.321.2244
Fax: 612.321.2288

Counsel for Defendant Mortgage Electronic Registration Systems, Inc.

APPENDIX

A *David Kiah v. Aurora Loan Services, LLC, et al.* 24

EAST\48062017.1

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 11-1010

DAVID KIAH,

Plaintiff, Appellant,

v.

AURORA LOAN SERVICES, LLC, ET AL.,

Defendants, Appellees.

Before

Torruella, Boudin and Thompson,
Circuit Judges.

JUDGMENT

Entered: December 14, 2011

Appellant David Kiah filed this removed and dismissed action to void a mortgage and its assignment to defendant Aurora Loan Services, LLC, and to obtain damages for "fraudulent conveyance and slander of title." Essentially for the reasons explained in the district court's Amended Memorandum and Order, entered March 4, 2011, the judgment of dismissal and the denial of post-judgment relief are affirmed. We add only that removability is determined under federal, not state law; and that there is no meaningful overlap between the service members action and the removed action such as would justify abstention under any doctrine.

Affirmed.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
David Francis Kiah
John A. Doonan
Reneau Jean Longoria
Erin P. Severini
Stephen M. Valente