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Case Number 385,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANCH BANKING AND TRUST COMPANY, a bank organized under the laws of the State of North Carolina existing under the laws of the State of North Carolina; Assignee of Mortgage Electronic Registration Systems, Inc. as nominee, a corporation organized and existing under the laws of the State of Delaware,	No. 385, 2014
Plaintiff Below, Appellant/Cross-Appellee,	On Appeal From the Superior Court in and for New Castle County
v.	C.A. No. N11L-12-270-CEB
HATEM G. EID A/K/A HATEM EID; YVETTE EID,	
Defendants Below, Appellees/Cross-Appellants	

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This is an appeal by the Plaintiff of the lower court's order vacating a Final Judgment, and a Cross-Appeal by the Defendants of the ultimate re-entry of Final Summary Judgment entered by the Superior Court.

The action below was previously filed by Mortgage Electronic Registration Systems, Inc. (hereafter "MERS") as to the same Mortgage Record, Assignment Record, and Defendants (hereafter the "Eids") as in the action herein below. The plaintiff in that action, MERS, filed in its own name but under a different civil action number (C.A. 09L-06-063 MMJ). MERS voluntarily dismissed that action when the Eids filed their opposition to MERS' Motion for Protective Order which was directed to discovery propounded by Eids. The action was thereafter re-filed with Branch Banking and Trust (hereafter "BB&T") as the named plaintiff, claiming to be the assignee of MERS.

On February 1, 2013, BB&T filed a Motion for Summary Judgment Under Rule 56 (the "Motion for Summary Judgment") (A063.[1]) which was opposed by two separate briefs filed by the Eids, the second of which was submitted at request of the trial court judge. (A0150; A0171.) The Superior Court ultimately granted BB&T's Motion for Summary Judgment (A206) and the Eids appealed. (A217.) The parties, through counsel, stipulated to dismiss the first appeal without

[1] Citations to "A___." refer to Appellant's Appendix.

prejudice to allow the Superior Court to enter a final order on BB&T's Motion for Summary Judgment including a damages award. (A221.) On March 13, 2014, BB&T presented to the Superior Court a proposed form of order granting summary judgment. Despite negotiating the stipulation to dismiss the appeal with Bayard attorneys Stephen Brauerman and Kara Swasey and despite BB&T's actual knowledge that Colin Robinson, Esquire, had left Bayard and was no longer involved in the case, counsel for BB&T served attorney Colin Robinson with the proposed form of order because Mr. Robinson was listed as the attorney of record on LexisNexis. (A328.) On March 20, 2014, the Superior Court entered a final order on Plaintiff's Motion for Summary Judgment (the "First Final Order") (A223) and counsel for the Eids did not receive a copy of the First Final Order.

The Eids moved to vacate the First Final Order pursuant to Superior Court Civil Rule 60(b)(1) and 60(b)(6). (A225.) The Superior Court granted the Eids' Motion to Vacate the Judgment and Reopen the Case Pursuant to Superior Court Rule 60(b) (the "Rule 60(b) Motion) after counsel for BB&T agreed with the Superior Court that the court was authorized to grant the relief requested during oral argument on the Rule 60(b) Motion. (A249.) On July 21, 2014, the Court entered its Final Judgment Order (the "Final Judgment Order"). (A250.) BB&T filed its Notice of Appeal of the Order on the Rule 60(b) Motion and the Eids timely cross-appealed the Final Judgment Order.

SUMMARY OF ARGUMENT

1. Denied. BB&T waived or abandoned any Rule 77(d) argument by stipulating on the record that the relief requested could be granted.

2. Denied. The Court decided the Rule 60(b) Motion based on the contents of the Rule 60(b) Motion which included the proper standard for deciding Rule 60(b) Motions.

3. Denied. The Court decided the Rule 60(b) Motion based on the contents of the Motion which included the factual background to support a finding pursuant to Rule 60(b)(1).

4. Denied. The Court decided the Rule 60(b) Motion, in part, based on the interests of justice pursuant to Rule 60(b)(6) which permits the Court to consider any reason justifying relief. BB&T did not disagree with the Court's broad power to make a decision based on the interests of justice.

5. The Superior Court erred by entering summary judgment in favor of BB&T for the following reasons:

a. B&T was legally precluded from instituting the action below. BB&T's standing was allegedly derived from a legally infirm assignment by a third party which was not the lender and had no interest in either the Note or the Mortgage and is not a statutorily authorized party to institute a foreclosure.

b. The Affidavit supporting BB&T's Motion for Summary Judgment was legally defective and should have been stricken or disregarded. Further, the Superior Court itself admitted the presence of genuine issues of material fact arising out of the matters in the subject Affidavit.

c. BB&T failed to meet its burden on summary judgment. BB&T failed to demonstrate the absence of any genuine issues of material fact, which precluded summary judgment as a matter of law.

d. The Superior Court demonstrated, on the record, numerous reasons why summary judgment was improper, including the presence of genuine issues of disputed material facts; the need for additional testimony; and the need to more fully develop the facts presented.

STATEMENT OF FACTS

The Eids generally agree with the recitation of the Statement of the Facts set forth in BB&T's Third Corrected Opening Brief as to the procedural history of the case other than the exclusion of the following portion of the colloquy between the Superior Court and counsel for BB&T at the June 18, 2014 hearing on the Rule 60(b) Motion:

THE COURT: I have the right under the interest of justice provisions to make this thing right, right?

MR. WOODS: I wouldn't disagree with that.

* * *

MR. WOODS: The bank's position is that this happens that attorneys leave law firms, and while their cases are pending, someone should be extra vigilant in checking any mail that comes in addressed to that attorney and making sure it gets re-routed to whoever is taking over the case.

THE COURT: Well, I can agree with you and still grant the relief, right?

MR. WOODS: You can.

THE COURT: I think that's what I'll do. Thank you very much.

MR WOODS: Thank you.

* * *

(A246.)

At no time did counsel for BB&T (a) raise any argument that the Superior Court could not grant the relief requested due to some alleged preclusion under Rule 77(d); (b) ask the Superior Court to "define" any interest of justice standard for purposes of making a record of any such challenge on appeal; or (c) make any argument that the Eids did not satisfy the Rule 60(b) standard. Counsel for BB&T's sole argument at the hearing was "the bank's position" that someone at a law firm should monitor mail directed to an attorney who had left that firm and re-route that mail.

ARGUMENT

I. BB&T WAIVED ANY RULE 77(d) ARGUMENT BY STIPULATING THAT THE COURT WAS ENTITLED TO GRANT THE RELIEF REQUESTED

A. Question Presented

Whether BB&T waived its argument pursuant to Superior Court Civil Rule 77(d) when it stipulated that the Superior Court was entitled to grant the relief requested? (A246).

B. Standard of Review

Stipulations in the form of judicial admissions and their effect are reviewed for an abuse of discretion. *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201 (Del. 2008).

C. Merits of the Argument

BB&T waived its arguments under Superior Court Civil Rule 77(d) by agreeing that the Court has the authority to grant relief under Rule 60(b). It is without dispute, as evidenced by the colloquy between the Superior Court and counsel for BB&T at the June 18, 2014 hearing, that when asked by the Superior Court if it could grant the relief requested despite any agreement with "the bank's position" that someone should monitor mail of an attorney who left the firm, counsel for BB&T responded "You can," and when questioned by the Superior Court as to whether the Superior Court had the right under the interest of justice

provisions to grant the relief requested, counsel for BB&T replied: "I wouldn't disagree with that." (A246-A247.) This admission is dispositive. BB&T's entire argument, which *disagrees* that the Superior Court could grant the requested relief, is diametrically opposed to the position taken by BB&T's counsel at the hearing. (A246-A247.) BB&T cannot have it both ways, and the law in Delaware binds the effect of counsel's admission to the Superior Court upon BB&T.

Knowing and voluntary concessions of fact made by a party during judicial proceedings, which include counsel's statements to the court, constitute judicial admissions and that these admissions should be given conclusive effect. *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201-1203 (Del. 2008) (holding that tribunal abused its discretion in disregarding judicial admission). It is not necessary that the party seeking to establish the effect of a judicial admission ask the court to do so, as a party is entitled to expect that a tribunal will give conclusive effect to such admissions. *Id.* at 1201.

Notwithstanding any argument in its papers opposing the Rule 60(b) Motion, counsel for BB&T conceded and admitted to the Superior Court at the hearing that it could grant the relief requested under the interest of justice provisions of the Rule (subsection (6) of Rule 60(b)), even though agreeing with "the bank's position" that someone should monitor mail of a former attorney of a firm after he leaves that firm. The judicial admissions are binding on BB&T. The

Eids have a right to expect that the Superior Court would give conclusive effect to these admissions; and as such, BB&T has not and cannot demonstrate any abuse of discretion on the part of the Superior Court in granting the very relief which counsel for BB&T conceded could be granted, and thus this Court should disregard any Rule 77(d) argument.

A waiver is the intentional relinquishment of a known right which by conduct clearly indicates an intention to renounce a known privilege, and is based on the idea of either express or implied consent. *Nathan Miller, Inc. v. Northern Ins. Co. of N.Y.*, 39 A.2d 23, 26 (Del. Super. 1944). Abandonment occurs when a party relinquishes its right to enforce something. *Penn Mart Supermarkets, Inc. v. New Castle Shopping, LLC,* 2005 WL 3502054 (Del. Ch. Dec. 15, 2005)(discussing abandonment where beneficiaries relinquish rights to enforce a particular or general plan of covenants).

Counsel for BB&T made no argument at the June 18, 2014 hearing that Rule 77(d) precludes the Superior Court from granting a motion to vacate based on counsel's failure to receive notice of entry of a final judgment. Counsel for BB&T conceded to the Superior Court that it could grant the relief requested, and did not state, in response to the Superior Court's questions, anything regarding Rule 77(d). BB&T thus waived and abandoned any such Rule 77(d) argument by virtue of the conduct and statements of its own counsel to the Superior Court. BB&T cannot

now take an inconsistent position on appeal. BB&T thus has not and cannot demonstrate any abuse of discretion. The Superior Court's grant of the Rule 60(b) Motion must thus be affirmed.

II. THE SUPERIOR COURT APPLIED THE PROPER STANDARD TO DETERMINE THE RULE 60(b) MOTION

A. Question Presented

Whether the Superior Court applied the proper standard in determining the Rule 60(b) Motion? (A225-A230, A244-A247.)

B. Standard of Review

The grant or denial of relief under Rule 60(b) is reviewed for an abuse of discretion. *Jewell v. Division of Social Services*, 401 A.2d 88 (1979).

C. Merits of the Argument

As set forth in the Rule 60(b) Motion, Superior Court Civil Rule 60(b) ("Rule 60(b)"), provides that "[o]n motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect... or (6) any other reason justifying relief from the operation of the judgment." (A225-232.)

The Rule 60(b) Motion further advocates that "[w]hile the Court liberally construes Rule 60(b), the movant still must satisfy three elements before a motion under [Rule 60(b)(1)] will be granted: (1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and (3) a showing that substantial prejudice will not be suffered by the

plaintiff if the motion is granted." *Mendiola v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 1173898, at *2 (Del. Super. Apr. 27, 2006) (internal citations omitted).

The Rule 60(b) Order indicates that the trial court relied on the arguments made in the Rule 60(b) Motion and good cause shown to arrive at its conclusion. (A249). The Rule 60(b) Motion sets forth the undisputed and proper standard for making Rule 60(b) Motions. (A225-A232.) The Court's reliance on the Rule 60(b) Motion, therefore, indicates reliance on the proper standard.

Additionally, Counsel for BB&T did not dispute the Court's comment that it had the power to "make this thing right" in the interest of justice under Rule 60(b). BB&T failed to argue that the Court was applying the wrong standard based on the Court's on-the-record comments. Supreme Court Rule 8 requires that "[o]nly questions fairly presented to the trial court may be presented for review." Supr. Ct. R. 8. BB&T never argued or disputed which standard the trial court should apply to decide the Rule 60(b) Motion at the hearing and therefore cannot make such argument to this Court on appeal.

III. THE SUPERIOR COURT FOUND THAT THE EIDS WERE ENTITLED TO RELIEF

A. Question Presented

Whether the Eids were entitled to relief under Rule 60(b)(1) or 60(b)(6)? (A225-A230, A244-A247.)

B. Standard of Review

The grant or denial of relief under Rule 60(b) is reviewed for an abuse of discretion. *Jewell v. Division of Social Services*, 401 A.2d 88 (1979).

C. Merits of the Argument

The Eids argued they were entitled to relief under Rule 60(b)(1) ("Mistake, inadvertence, surprise, or excusable neglect...") or, in the alternative, pursuant to Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment.").

1. The Eids Successfully Demonstrated Cause for Relief Pursuant to Rule 60(b)(1).

In its comments during argument on the Rule 60(b) Motion, the Court indicated its reliance on the Rule 60(b)(1)'s mistake or excusable neglect standard by referring to "a little boo boo" (A244 at line 19), a "bugaboo" (A247 at line 13) or "miscommunication between the law firms" (A246 at line 7). The Court went on to confirm that the Eids' counsel took steps to address the issue and prevent similar instances in the future. (A247 at lines 12-16).

"Under Rule 60(b)(1), excusable neglect is defined as 'neglect which might have been the act of a reasonably prudent person under the circumstances.' But, a defendant 'cannot have the judgment vacated where [the defendant] has simply ignored the process.'" *Senu-Oke v. Broomall Condo., Inc.,* 77 A.3d 272 (Del. 2013). In its Rule 60(b) Motion, the Eids set forth the factual basis for the argument that the circumstances were either mistake or excusable neglect and, based on the Rule 60(b) Motion, the Court ultimately found the Eids were entitled to relief.

The Eids' Rule 60(b) Motion set forth the basis for counsel's reasonable belief that they would receive notice of any filings or proceedings in the action. (A225-A232.) Namely, the direct involvement of counsel for BB&T with Bayard, P.A. attorneys Stephen Brauerman and Kara Swasey since Mr. Robinson left Bayard, the Court and opposing counsel's recognition of Mr. Brauerman as the counsel for the Eids, Mr. Brauerman's presence on the signature block of pleadings, motions and papers filed with the Court before and after Mr. Robinson left Bayard, P.A., the Court's acknowledgment of Mr. Brauerman in its Memorandum Opinion on Summary Judgment, and the absence of Mr. Robinson's involvement in this matter on paper or otherwise. (A225-A232.)

The Eids agree with BB&T that the "meritorious defense" prong of analysis for Rule 60(b) motions filed based on default judgments does not apply here.

Here, the Eids sought to give effect to the parties' stipulation dismissing the first appeal where mistake, inadvertence or excusable neglect denied them the opportunity to appeal as the parties intended.

2. The Eids Successfully Demonstrated Cause for Relief Pursuant to Rule 60(b)(6).

The Eids sought relief under Rule 60(b)(6), in the alternative. Under Rule 60(b)(6), a final order may be set aside for "any other reason justifying relief from the operation of the judgment." Super. Ct. Civ. R. 60(b)(6). As set forth in the Eids' Rule 60(b) Motion, the Court has "adopted the extraordinary circumstances test for Rule 60(b)(6) motions. The 'extraordinary circumstances' standard defines the words, 'any other reason justifying relief, in Rule 60(b)(6) as 'vest[ing] power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Senu-Oke v. Broomall Condo., Inc.,* 77 A.3d 272 (Del. 2013) (emphasis added). The Court asked BB&T's counsel whether the Court had the authority under the interest of justice provisions to "make this thing right" (A246.). BB&T's counsel agreed. (A246.). Upon information and belief, in addressing the "interest of justice," the Superior Court was referring to its ability to relieve the Eids from a final judgment upon such terms as are just, as required by Rule 60(b) and to its ability to relieve the Eids from a final judgment for any other reason, including the interests of justice.

Rule 60(b)(6) is "a grand reservoir of equitable power to do justice in a particular case" and that the Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Rembrandt Techn., L.P. v. Harris Corp.*, 2009 WL 2490873 (Del. Super. 2009). Given this broad spectrum of relief, BB&T was right to waive its argument that the Superior Court is barred from granting the relief requested under Rule 60(b). The parties and the Court agree that the Court can "make this thing right" based on the interests of justice.

IV. THE SUPERIOR COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF BB&T

A. Question Presented.

Did the Superior Court err in entering final summary judgment of foreclosure in favor of BB&T because BB&T did not have standing to maintain this action, the affidavit in support of the Motion for Summary Judgment was legally defective, and there were genuine issues of material fact that precluded summary judgment? (A150-A159, A160-A170,A171-A182.)

B. Standard of Review.

When reviewing the grant of summary judgment, this Court reviews all facts in the light most favorable to the non-moving party. *E. Sav. Bank, FSB v. CACH, LLC*, 55 A.3d 344, 347 (Del. 2012). The *de novo* standard is applied to both the facts and the law, and on this appeal, this Court is free to draw its own inferences in making factual determinations and evaluating the legal significance of the evidence with the facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, being viewed in the light most favorable to the non-moving party. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. Super. 1995).

C. Merits of the Argument.

1. BB&T Was Precluded From Instituting this Action By Delaware Law

In Delaware, foreclosures *scire facias sur mortgage* are governed by 10 *Del. C.* § 5061(a) (the "Statute"), which expressly provides that the only parties entitled

to institute a foreclosure action are: the mortgagee and the heirs, executors, administrators, successors, or assigns thereof. This Statute, which was enacted in 1953 when Delaware abolished common law pleading and is the vehicle by which the Delaware legislature specifically set forth which parties may legally institute foreclosure proceedings, must be strictly construed. *Gee v. Rose,* 405 A.2d 143, 146 (Del. Super. 1979) citing, *inter alia*, *Saunders v. Hill*, 202 A.2d 807 (Del. 1964). The Statute conforms with the intent of Superior Court Civil Rule 17 (which is almost identical to Federal Rule 17) and provides that all actions must be prosecuted in the name of the real party in interest. *Hendry v. Hendry*, 2006 WL 1565254, at *11 (Del. Ch. May 26, 2006).

BB&T, as the claimed assignee of MERS, does not fall into any of the statutory categories. As MERS has admitted in prior judicial proceedings, MERS is nothing more than an entity which tracks the transfer of ownership interests and servicing rights in mortgage loans. It is without dispute that MERS was not the original lender; is not and was never owed any money; did not advance any money, and was thus not the original mortgagee notwithstanding any boilerplate language in the mortgage, and is also not an heir, executor, administrator, successor, or assign of the original lender (the true mortgagee). MERS is precluded, by its prior judicial admissions, case law, and its own self-imposed terms and conditions, from either creating or transferring any beneficial interest in mortgage loans (which

transfer is what a MERS assignment purports to be). Absent any legal assignment of either the Note or the Mortgage to BB&T, BB&T is not a party who is legally permitted to foreclose. 10 *Del. C.* § 5061(a).

The Delaware appellate courts have not thoroughly analyzed the role of MERS in mortgage foreclosure actions or MERS' lack of legal rights to institute or further foreclosures as many other state and Federal courts have done. Delaware will look to the law of other jurisdictions to resolve questions of first impression, so long as both jurisdictions are dealing with similar situations. *Thomas v. Veltre*, 381 A.2d 245, 247 (Del. Super. 1977) (looking to statutes of other states to interpret statutory intent of similar statutes enacted by sister states).

BB&T admitted below that MERS is nothing more than a nominee. This limiting language, which comes from the mortgage document, is legally significant and circumscribes MERS' authority. Further, even assuming such denomination gave MERS some claim to the Mortgage, it does not give MERS any rights to the Note, which is necessary in order to institute a foreclosure action. These issues have been addressed by numerous courts throughout the United States which have consistently held that MERS lacks the authority which it claims in mortgage documents as it has no interest simply as "nominee". *See, e.g. Mortgage Elec. Registration Sys., Inc. v. Johnston, et. al.*, Docket No. 420-6-09-Rdcv, slip op. (Vt. Oct. 28, 2009); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009);

Mortgage Elec. Registration Sys., Inc. v. Neb. Dept. of Banking and Fin., 704 N.W. 2d 784 (Neb. 2005).

In order to understand what MERS is, and what it is not, it is helpful to first examine the structure of MERS as defined by the Supreme Courts of Kansas and Nebraska and the Court of Appeals of New York:

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS system, MERS becomes the Mortgagee of record for participating members through assignment of the Member's interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. *The lenders retain the promissory notes, as well as the servicing rights to the mortgages.* The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating members.

Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 164 (Kan. 2009) (emphasis supplied), quoting *Mortgage Elec. Registration Sys., Inc. v. Neb. Dept. of Banking & Fin.*, 704 N.W.2d 784, 785 (Neb. 2005) (where MERS disclaimed a position in order to avoid registration as a mortgage banker).

> In 1993, members of the real estate mortgage industry created MERS, an electronic registration system for mortgages. Its purpose is to streamline the mortgage process by eliminating the need to prepare and record paper assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the mortgage itself, may

> be transferred. MERS hopes to register every residential and commercial home loan nationwide on its electronic system.

Merscorp, Inc. v. Romaine, 861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J. dissenting in part).

In analyzing this defined role of MERS against the standard MERS language in a mortgage document, the Superior Court of Rutland County, Vermont in the matter of *Mortgage Electronic Registration Systems, Inc. v. Johnston, et. al.*, Docket No. 420-6-09-Rdcv, slip op. (Vt. Oct. 28, 2009), conducted an exhaustive analysis of the facts and law as to MERS, first noting that "Black's Law Dictionary defines nominee as 'a person designated to act in place of another, usu. in a very limited way' and as 'a party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.'" *Id.* at 6-7, citing BLACK'S LAW DICTIONARY 1076, 1523 (8th ed. 2004). "Legal title is defined as 'a title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest.' This is in contrast to equitable title, which is 'a title that indicates a beneficial interest in property and gives the holder the right to acquire formal legal title.'" *Id.* citing BLACK'S LAW DICTIONARY 1076, 1523 (8th ed. 2004).

The Vermont court, in *Johnston,* held that "[t]he mortgage deed consistently referred to MERS 'solely as a nominee' and that it holds 'only legal title', but purported to expand the authority of MERS as a 'nominee' to act as in essence an

agent or as a power-of-attorney to carry out the rights of the lender, including foreclosure and sale of the property." *Id.* The Vermont court rejected this effort to expand MERS' authority and limited the nominee's powers to those "necessary to comply with law or custom", and held, importantly, that MERS and the lender purposely chose to use the specific legal term "nominee" and *not* "agent" or "power of attorney", and that MERS chose to define the term "nominee". *Id.* at 15. The court further noted that the mortgage deed consistently referred to the *Lender's* rights to the property, and not MERS', which was consistent with MERS' limited authority to act "solely as nominee". *Id.* Against this backdrop of established decisional law and admissions of MERS, the Vermont court held that MERS could not enforce the underlying obligation, and may not enforce the mortgage deed it holds in its name with only "bare legal title". *Id.* at 19.

The Vermont court examined a Nebraska case, *Mortgage Elec. Registration Sys., Inc. v. Neb. Dept. of Banking and Fin.*, 704 N.W. 2d 784 (Neb. 2005), where affirmative representations were made by counsel for MERS that:

(a) MERS "does not acquire mortgage loans... because it only holds legal title to members' mortgages in a nominee capacity", *Johnston,* Docket No. 420-6-09-Rdcv, slip op. at 10;

(b) MERS is "contractually prohibited from exercising any rights with respect to the mortgages (i.e. foreclosure) without the authorization of its members", *Id.*;

(c) "MERS does not own the promissory notes secured by the mortgages and has no rights to payments on the notes", *Id.*;

(d) "MERS 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 whatsoever. MERS merely tracks the ownership of the lien* and is paid for its services through membership fees charged to its members", *Id.*; and

(e) MERS does not acquire "any loan or extension of credit secured by a lien on real property", and that MERS "does not itself extend credit or acquire rights to receive payments on mortgage loans; that the *lenders retain the promissory notes* and servicing rights to the mortgage, while *MERS acquires legal title to the mortgage for recordation purposes." Id.*

The Vermont court also examined a Kansas case, *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), where counsel for MERS "explicitly declined to demonstrate to the trial court a tangible interest in the mortgage", *Johnston,* Docket No. 420-6-09-Rdcv, slip op. at 11 (Vt. Oct. 28, 2009) citing *Landmark Nat'l Bank v. Kessler,* 216 P.3d 158, at 167. The *Landmark* Court found that MERS had no

stake in the outcome of an independent action for foreclosure, as it did not lend money, nor was anyone involved in the case required to pay MERS any money. *Landmark,* 216 P.3d at 167. The *Landmark* court concluded by holding that "[i]f MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right", adding that while the note is essential, the mortgage itself is only "an incident" to the note. *Id.*

In expounding further on the holding of the *Landmark* decision, the *Johnston* court found that MERS was not authorized to engage in practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. *Johnston*, Docket No. 420-6-09-Rdcv, slip op. at 13-14. The *Johnston* court also noted that MERS and the lender intentionally divided the obligation and the mortgage deed, and held that MERS lacked standing to bring a foreclosure action in its own name, or as "nominee" on behalf of the lender. *Id.* at 16.

The Court of Common Pleas for the State of South Carolina in the matter of *Mortgage Elec. Registration Sys., Inc. v. Girdvainis, et. al.*, Civil Action No. 2005-CP-43-0278 (Jan. 20, 2006), also held MERS to its representations previously made to the Supreme Court of Nebraska as to its non-ownership of the promissory notes; not extending any credit; not having any independent right to collect on any debt because MERS did not extend any credit and that the mortgage debtor does not owe MERS any money; and held that since MERS prevailed in the Nebraska

litigation, MERS was "judicially estopped to disavow the positions it advanced during the litigation process in Nebraska or avoid the findings and conclusions articulated by the Nebraska court." *Id.* at 2.

The G*irdvainis* Court cited the caveat on MERS' authority by MERS' own contract, holding that the representation as to the assignment of the "note and mortgage to MERS 'for valuable consideration' is '*diametrically opposed to the way MERS operates.*'" *Id.*(emphasis added). The MERS contract with its lenders and servicers specifically limits MERS' authority as to mortgage loans and properties the subject thereof. The Terms and Conditions state:

> MERS shall have no rights whatsoever as to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or any mortgaged properties securing such mortgage loans. ***MERS agrees not to assert any rights with respect to such mortgage loans or mortgaged properties.***

(A180 at ¶2 (emphasis added).) The holding in G*irdvainis* incorporates the prohibitions of MERS' own self-imposed Terms and Conditions which preclude the use of the MERS system to either create or transfer beneficial interests in mortgage loans. *MERS. v. Girdvainis,* Civil Action No. 2005-CP-43-0278 (Jan. 20, 2006).

The United States Bankruptcy Court for the District of Nevada in the matter of *In Re Joshua and Stephanie Mitchell,* Case No. BK-S-07-16226-LBR (Aug. 19, 2008), in analyzing what MERS stated on its own website; the testimony of the

Secretary of MERS; and the definition of "beneficiary" from Black's Law Dictionary, held that "MERS is not a beneficiary as it had no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans." *Id.* (emphasis supplied) citing BLACK'S LAW DICTIONARY 165 (8th ed. 2004). The court cited the same MERS "Terms and Conditions" set forth above in the *Girdvainis* decision from 2006.

In view of the weight of this established decisional law, BB&T's assertion that MERS has some alleged authority to institute foreclosure through an assignment has no merit, violates the caveats of MERS' own contract, and conflicts with the decisions of the Courts of Nebraska (Supreme Court), Kansas (Supreme Court), New York (Court of Appeals), Vermont, South Carolina, and Nevada (Federal). MERS has no legal right to foreclose or execute any "assignments" in connection with advancing a foreclosure.

In addition to holding that MERS has no rights to the mortgage instrument, numerous courts of the United States have also held that MERS has no rights to the promissory notes and thus no authority to transfer them. MERS' legal inability to transfer the Note further precludes it from affecting a foreclosure by purported endorsements of the Note.

"A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and

mortgage by the nominee", and that as MERS never held the promissory note, its assignment of the deed of trust to a third party separate from the note had no force. *Landmark*, 216 P.3d 158, 166, citing *LaSalle Bank Nat. Ass'n v. Lamy*, 2006 WL 2251721, at *2 (N.Y. Sup.2006).

The *Landmark* court also relied on *In Re Wilhelm*, 407 B.R. 392 (Bankr. D. ID 2009), for its holding that the "standard note language does not expressly or implicitly authorize MERS to transfer the note", and the decision in *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008), as holding "for there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned . . . MERS purportedly assigned both the deed of trust and the promissory note . . . however, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority...to assign the note." *Id.*

The Supreme Court of Arkansas in the matter of *Mortgage Elec. Registration Sys., Inc. v. Southwest Homes of Ark., Inc.*, 301 S.W.3d 1 (Ark. 2009), found that the deed of trust provided that all payments were to be made to the lender; that the lender made all decisions on late payments; no payments on the underlying debt were made to MERS; and MERS did not service the loan in any way as it did not oversee payments or administration of the loan in any way.

MERS asserted to be a corporation providing electronic tracking of ownership interests in residential real property security instruments. *Id.* at 5.

As BB&T did below, MERS argued in the Arkansas case that it held a property interest through holding legal title with respect to the rights conveyed to the borrower by the lender. The Arkansas Court's response: "We disagree." *Id.* at 4. The Arkansas Court found that title was conveyed to the trustee; that the deed of trust did not convey title to MERS; and that as such, MERS was not the "beneficiary" even though it is so designated in the deed of trust. The Arkansas Court held that the lender on the deed of trust was the beneficiary as it received payments on the debt secured by the property. Similarly here, MERS is not the "mortgagee"; MERS did not receive any payments; and thus MERS has no authority to assign anything.

In *Bellistri v. Ocwen Loan Servicing, Inc.*, 284 S.W. 3d 619 (Mo. Ct. App. 2009), cited by the *Landmark* case, the Missouri Court held that the record reflected no evidence that MERS held the promissory note or that the original lender gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer the promissory note was ineffective." *Bellistri* at 623-624, citing *Black v. Adrian*, 80 S.W.3d 909, 914-915 (Mo. Ct. App. 2002).

The Federal Bankruptcy Court in the matter of *In Re Wilhelm,* 407 B.R. 392 (Bankr. D. ID 2009), similarly held, finding that although the deeds of trust named MERS as the "nominal beneficiary", this language did not, either expressly or by implication, authorize MERS to transfer the promissory notes. Without any transfer of the Notes, there was no interest in the Note by the party seeking to pursue a foreclosure through a MERS assignment. *Id.*

The Oregon Court of Appeals held, in a 27-page opinion, that MERS is not the beneficiary under the Oregon Trust Deed Act. *Niday v. GMAC Mortgage, LLC*, 284 P.3d 1157 (Or. Ct. App. 2012), *affirmed*, *Niday v. GMAC Mortgage, LLC, et al.,* 302 P.3d 444(Or. 2013) (holding that MERS is not the beneficiary despite claiming to be so in the deed of trust). Similarly, the Supreme Court of Washington followed with its decision in *Bain v. Metro. Mortgage Group, Inc.*, 285 P.3d 34 (Wash. 2012) where, on certified questions from the United States District Court for the Western District of Washington, the Supreme Court of Washington held that MERS is not an eligible beneficiary under the Washington Deed of Trust Act. The Supreme Court of Washington further held that, for purposes of a homeowner seeking to institute an action against MERS for violations of Washington's Consumer Protection Act, ". . .we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively the first element

[of the Consumer Protection Act] is met", and that if MERS claims to be a beneficiary when it is not, the action meets the deception element of a claim under the Consumer Protection Act. *Bain*, 285 P.3d at 51.

Although MERS is mentioned in the Mortgage that is the subject of this action, it is not the beneficiary and is not mentioned in the Note. There is no evidence that the original lender gave MERS either rights to the Note or rights to transfer the Note to anyone. BB&T thus failed to demonstrate that it was entitled to judgment as a matter of law, when the law itself precludes the purported assignment relied upon by BB&T.

In Delaware, a plea of avoidance is proper in defense of a mortgage foreclosure action, which pleas include, among others, a proviso of a statute, illegality of transaction, and non-performance of a condition precedent. *Gordy v. Preform Building Components, Inc.*, 310 A.2d 893, 895-96 (Del. Super. 1973). The Eids' defenses were not limited to those claimed by BB&T in paragraph 14 of its Motion for Summary Judgment. The Eids had available to them several pleas in avoidance, including Section 5061(c) which precludes BB&T from having instituted this action as it is not a party permitted to bring this action under the Statute; the illegality of MERS' attempt to assign where it was not legally the mortgagee and is precluded by its own Terms and Conditions from transferring any interests in the mortgage loan; and the non-performance of a condition precedent,

that being that MERS never acquired any legal interest in either the mortgage or the note to (allegedly) transfer to BB&T. Construing these facts in the light most favorable to the Eids (as the trial court was bound to do), BB&T's Motion for Summary Judgment should have been denied, and the grant thereof constitutes reversible error.

2. The Legally Deficient "Affidavit of Rick Miller"

BB&T filed, in support of its Motion for Summary Judgment, the Affidavit of Rick Miller (the "Miller Affidavit"). (A109.) Pursuant to the Miller Affidavit, Mr. Miller is not and was not an employee, officer, or agent of either the original lender (U.S. Mortgage Finance Corporation), or MERS, or Southwest Securities FSB (the alleged custodian of the Note before the alleged transfers). Although Mr. Miller claimed to have "reviewed the loan that is the subject of this lawsuit, including the transfer history of the operative instruments . . ." (A109 at ¶3) the Miller Affidavit did not state that Mr. Miller either created the loan or the loan history or any of the alleged transfer documents, and thus he did not and could not have personal knowledge of any of the contents thereof.

Rule 56(e) of the Superior Court Civil Rules mandates that affidavits in support of a motion for summary judgment be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify as to the matters in the affidavit. Super. Ct.

Civ. R. 56(e). Mr. Miller did not and could not have any personal knowledge of the alleged MERS assignment as he was not a party to and did not create that assignment. Although there are allegations of transfer of the Note from BB&T to the Federal Home Loan Mortgage Corporation and back, there is nothing in the Miller Affidavit upon which the trial court could have found that he was employed by BB&T when these alleged transfers occurred. Mr. Miller's statements as to those matters of which he has no personal knowledge are thus inadmissible hearsay pursuant to Delaware Rule of Evidence 803(1).

There is nothing in the Miller Affidavit which states, under oath and on personal knowledge, that the records allegedly reviewed were made at or near the time of the act or event by or from information transmitted by a person with knowledge, and that the records are prepared and maintained in the course of a regularly conducted business activity, and further that it was the regular practice of anyone to make a record of the acts or events, all of which are necessary in order for the alleged records reviewed to be admissible as business records pursuant to Delaware Rule of Evidence 803(6).

Even if the statements in the Miller Affidavit satisfy these requirements, the Superior Court should have excluded the statements where the method of preparation of the record or the source of the information indicate a lack of trustworthiness. *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238-239 (Del.

2001). The illegality of the MERS assignment and Mr. Miller's status as a non-employee of MERS or the original lender indicate a lack of trustworthiness as to the Miller Affidavit. The Miller Affidavit should have been stricken and disregarded, and the Motion for Summary Judgment should have been properly denied on this procedural ground. The trial court's failure to deny the Motion for Summary Judgment constitutes reversible error.

The trial court also erred in considering BB&T's untimely UCC argument, to resolve deficiencies in the Miller Affidavit. (A165.) First, as the matter was not raised in the Motion for Summary Judgment and was not of record, it could not legally be considered on a Rule 56 motion for summary judgment, which confines the disposition of such a motion to the pleadings, depositions, affidavits, and other evidence of record. *McBride v. Whiting-Turner Contracting Co.*, 625 A.2d 279 (Del. 1993) (TABLE), citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. Super. 1992). Notwithstanding this procedural infirmity, the UCC argument is just that: an argument. Appellee cited no decisional law which stands for the proposition that a UCC-based theory of transfer of a mortgage loan trumps, for purposes of summary judgment, all issues and defenses raised, including those raised by a questionable assignment of the mortgage produced by BB&T.

BB&T's counsel attempted to avoid the Superior Court's concern about Mr. Miller's ability to confirm whether he was employed by BB&T when the alleged

transfers of the loan to and from Federal Home Loan Mortgage Corporation occurred by reference to 6 *Del. C.* § 3-308. Specifically, BB&T's counsel argued that contemporaneous employment was "not necessary, because it is a [sic] barer instrument." (A162.) It is without dispute that BB&T's "endorsement" theory relies upon the validity of the alleged MERS assignment, which the Eids properly contested.

Title six, section 3-308(a) of the Delaware Code expressly provides that in an action with respect to an instrument, the authenticity and authority to make each signature on an instrument is admitted unless specifically denied in the pleadings, and the presumption as to the validity upon a challenge is only a presumption: the statute does not provide that it is not conclusive of validity. The Eids denied the authority of the MERS assignment, which BB&T characterized as an "endorsement." (A163 ("THE COURT: So, they raise it as an accusation and you raise it as an endorsement. MR. MONTECALVO: Correct.").)

Paragraph 6 of the actual MERS Terms and Conditions expressly precludes the use of the MERS system to either create or transfer beneficial interests in mortgage loans. (A180.) The alleged MERS Assignment is an attempt to transfer a beneficial interest in a mortgage loan. There is thus a challenge to the alleged "endorsement" by way of the Assignment which, pursuant to Section 3-308(a), places a burden of establishing validity on BB&T. As the trial court recognized,

there was a claimed defect in the Miller Affidavit which the trial court assumed without analyzing "could be cured rather deftly with a second affidavit by a different witness who did meet – or even Miller going back and jumping through the 8036 hoops . . ." (A164.) This issue creates a genuine issue as to BB&T's satisfaction of its burden under 6 *Del. C.* § 3-308(a) which precluded the entry of summary judgment. The grant of summary judgment was thus erroneous.

3. BB&T Failed to Prove That There Are No Genuine Issues of Material Fact

In Delaware foreclosure actions, summary judgment is only appropriate where, in viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super.). It is only if the moving party meets its threshold burden that the burden shifts to the non-moving party to establish the existence of material issues of fact, with part of this burden being the production of an affidavit sufficient under Superior Court Civil Rule 56. *Id.*

In analyzing whether the moving party has established its burden on summary judgment, the court must accept the non-movant's version of any disputed facts. *Reserves Mgmt. Corp. v. 30 Lots, LLC*, 2012 WL 2367469, at *3

(Del. Super.). Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances. *BAC Home Loans Servicing, LP v. Bas*, 2011 WL 4346512, at *1 (Del. Super. Sept. 14, 2011). BB&T failed to meet its initial burden, and the Miller Affidavit, which is *per se* deficient and fails to comply with Rule 56(e), raises significant issues of material fact which mandated a more thorough inquiry into the facts through discovery. Under the circumstances and in view of the matters raised by BB&T itself, the deposition of the MERS representative who prepared and signed the alleged assignment and the deposition of Mr. Miller were necessary in order to afford the Eids due process and their day in court. The failure of the Superior Court to compel these depositions as a prerequisite to entertaining summary judgment constitutes reversible error.

4. The Superior Court Demonstrated Why Summary Judgment Was Improper

This Court has, in reversing a summary judgment, held that summary judgment is a harsh remedy that affects a party's substantive rights and thus must be cautiously invoked; is not a mechanism for resolving contested issues of fact; and further that a court cannot try issues of fact on a Rule 56 motion but is only empowered to determine whether there are issues to be tried. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (Del. 2012). This Court has also held that a judge who decides a summary judgment

motion may not weigh qualitatively or quantitatively the evidenced adduced on the summary judgment record, and if the matter depends to any material extent upon a determination of credibility that summary judgment is inappropriate. *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (*en banc*). Citing to the opinion of the United States Supreme Court in *Anderson v. Liberty Lobby*, this Court held in *Cerberus* that "trial courts should act . . . with caution in granting summary judgment, .. [and] the trial court may . . . deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." 794 A.2d at 1150.

During the course of the colloquy between the Superior Court and counsel at the March 7, 2013 hearing on the Motion for Summary Judgment, the court stated on the record as to the matters in the Miller Affidavit, "if he gave personal knowledge as to the assignment to BB&T, 1 suppose that—1've got to find it. . .", (A161), and also as to the alleged status of BB&T as a statutory mortgagee, stated "It doesn't fall into a statute – it doesn't fall into a statutory category although it claims to be the assignee of MERS . . . You love the fact, they hate it . . . But it's still a fact." (A163.) Counsel for BB&T conceded "we directly contrast on that; we say it is an assignee of MERS", to which the trial court replied "So, they raise it as an accusation and you raise it as an endorsement?" *Id.* The trial court thus recognized, on the record, that BB&T was not a statutorily permitted party to

institute a foreclosure while simultaneously acknowledging that there was a dispute as to this fact. This finding alone precluded summary judgment as a matter of law.

The Court also stated that, as to the standing issue, "I question whether or not that's an issue that would require empanelment of a jury and question whether or not – rather, that's like a hearing that the Court would take testimony, if necessary, and make findings as necessary to establish standing." (A167.) The trial court thus recognized that a more thorough inquiry into the facts was needed under the circumstances, thus demonstrating, once again, that summary judgment was improper. *BAC Home Loans Servicing, LP v. Bas*, 2011 WL 4346512 (Del. Super. Sept. 14, 2011).

The trial court, on three separate occasions and as to three separate issues during the hearing on the Motion for Summary Judgment, demonstrated the legal impropriety of summary judgment: specifically the trial court recognized the deficiencies regarding the Miller Affidavit; identified disputed issues of material fact including that that BB&T does not fall into the statutory category of a mortgagee; and expressed concern as to whether the standing issues required the taking of testimony and making of findings to establish standing. The Superior Court's grant of summary judgment, in view of these multiple record admissions, constitutes reversible error.

Finally, the trial court stated that he would listen to an argument that Appellee does not have standing. (A167.) Incident thereto and as set forth above, the trial court acknowledged that the standing issue required the resolution of disputed facts. As the trial court stated, "whether or not that's an issue that would require empanelment of a jury" and the taking of testimony and making of findings as necessary to establish standing. *Id.* In light of this acknowledgement, the Superior Court admitted that standing was in question, and as such the proper course was to have denied the Motion for Summary Judgment and permitted the matter to proceed to trial pursuant to the established precedent of this Court. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (*en banc*).

In Delaware, in order to have standing, the plaintiff must have suffered an injury in fact of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical, and it must be likely, as opposed to merely speculative; that the injury will be redressed by a favorable decision; if the facts alleged to support an assertion of standing are controverted, those facts must then be supported adequately by the evidenced adduced at trial, with the requirement of Superior Court Civil Rule 17 that every action be prosecuted in the name of the real party in interest who has the burden of

demonstrating that he has standing. *Vichi v. Koninklijke Philips Electronics N.V.*, 62 A.3d 26, 38 (Del. Ch. 2012).

As set forth above, the MERS Assignment is defective by virtue of MERS' own judicial admissions (in *e.g.* the *MERS v. Neb. Dept. of Banking and Fin.* case cited above) and its self-imposed Terms and Conditions and there was never any effective assignment of either the Note or the Mortgage by MERS to BB&T. Absent such an assignment, BB&T had no standing. For purposes of summary judgment, the genuine material facts as to what MERS is, and can and cannot do, by virtue of its own Terms and Conditions were disputed, precluding summary judgment as a matter of law.

In view of the dubious MERS Assignment and the infirmities in the Miller Affidavit, the alleged injury to BB&T, a downline alleged holder of an obligation which it did not originate, was questionable at best, as is the alleged legally protected interest of BB&T. At the time of the hearing on the Motion for Summary Judgment, the alleged injury and interests were conjectural in the absence of the required proof by evidence at trial, and it was thus speculative that a favorable decision would redress the alleged injury. In view thereof, the Motion for Summary Judgment should have been properly denied.

CONCLUSION

BB&T conceded the authority of the Superior Court to vacate the judgment pursuant to Rule 60(b), and waived and abandoned any counter-arguments thereto.

BB&T has no standing to institute the action below. Its affidavit in support of its Motion for Summary Judgment is legally infirm. BB&T failed to satisfy its legal burden on summary judgment under Delaware law, and the trial court Judge's multiple admissions on the record demonstrated the impropriety of summary judgment. The Judgment appealed from must thus be reversed.

Dated: October 31, 2014

BAYARD, P.A.

/s/ Stephen B. Brauerman
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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRANCH BANKING AND TRUST COMPANY, a bank organized under the laws of the state of North Carolina, Assignee of Mortgage Electronic Registration Systems, Inc., as nominee, a corporation organized and existing under the laws of the State of Delaware, Plaintiff, v. HATEM G. EID A/K/A HATEM EID; YVETTE EID, Defendants.	PARCEL NO. 09-022.20-012 C.A. No. N11L-12-270 CEB NON-ARBITRATION CASE SCIRE FACIAS SUR MORTGAGE Mortgage Record 20080314-0017357 Assignment Record 20090707-0044169 IN REM IN PERSONAM

FINAL JUDGMENT ORDER

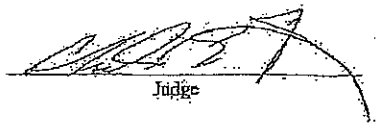
AND NOW, TO WIT, the Motion for Summary Judgment Under Rule 56 of Branch Banking and Trust Company (BB&T) having been heard and considered;

IT IS ORDERED that Judgment be entered *in rem* in favor of Branch Banking and Trust Company (BB&T) and against Hatem G. Eid *a/k/a* Hatem Eid and Yvette Eid and *in personam* against Hatem G. Eid a/k/a Hatem Eid for the amounts set forth below.

Principal Amount Due	$180,049.39
Interest from 12/1/08 to 7/15/14 At $35.04 per diem	$71,853.38
TOTAL PRINCIPAL & INTEREST DUE	$257,902.77
Escrow Advance	$8,828.27

Late Charges	$289.98
Property Inspections	$201.40
Foreclosure Costs	$333.40
TOTAL DEBT DUE	$267,555.82

ALSO include in the judgment interest to date of confirmation, late charges to date of confirmation and five percent (5%) counsel fees of the total amount decreed for principal and interest.



Judge

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BRANCH BANKING AND TRUST COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N11L-12-270 CEB
HATEM G. EID A/K/A HATEM EID; YVETTE EID,	)	
Defendants.	)	

Date Submitted: March 28, 2013
Date Decided: June 13, 2013

MEMORANDUM OPINION.

Upon Consideration of
Plaintiff's Motion For Summary Judgment.
GRANTED.

Robert T. Aulgur, Jr., Esquire and Monica L. Townsend, Esquire, WHITTINGTON & AULGUR, Middletown, Delaware. Michael Montecalvo, Esquire, WOMBLE CARLYLE SANDRIDGE & RICE, LLP, Winston-Salem, North Carolina. Attorneys for Plaintiff Branch Banking and Trust Company.

Stephen B. Brauerman, Esquire and Colin R. Robinson, Esquire, BAYARD, P.A., Wilmington, Delaware. William J. Barnes, Esquire, W.J. BARNES, P.A., Beverly Hills, California. Attorneys for Defendants Hatem Eid and Yvette Eid.

BUTLER, J.

INTRODUCTION

The present controversy began with a standard execution of a note secured by a mortgage. It ends with plaintiff Branch Banking and Trust Co. ("BB&T" or "plaintiff") seeking summary judgment. Before ruling, a review of the facts is in order.

FACTUAL BACKGROUND

In February of 2008, Hatem Eid ("Mr. Eid") executed a promissory note ("the Note")[1] in favor of US Mortgage Finance Corporation ("US Mortgage") for $187,500 plus interest at a rate of 6.875%. Around that same time Mr. Eid and his sister, Yvette Eid ("Ms. Eid") executed a mortgage (the "Mortgage")[2] that secured the Note in favor of "MERS" as "nominee" for the lender, US Mortgage, on property located in Newark, Delaware.[3] The Mortgage was duly filed and recorded in the real property records of New Castle County, Delaware as well as with the Mortgage Electronic Registration System ("MERS"). Through a series of transfers, the Note and the Mortgage ultimately landed in the hands of BB&T. The Eids took possession of the Newark property and, since approximately December, 2008 to today – approximately 4 ½ years – have not made a mortgage payment.

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[1] Ex. A. to Plaintiff's Complaint (hereinafter "Ex. __ to Complaint").

[2] Ex. B to Complaint.

[3] Parcel No. 09-022.20-012.

On February 29, 2008 Mr. Eid received and signed a notice informing him that US mortgage was transferring its interest in the mortgage to BB&T effective April 1, 2008. The notice advised him that the Mortgage would thereafter be serviced by BB&T.[4] The mortgage transfer was duly recorded in MERS. The Note was physically transferred to BB&T by Southwest Securities, FSB which held the Note as custodian and bailee on behalf of US Mortgage pursuant to a special power of attorney.

On April 14, 2008 BB&T transferred its interest in the Note to Federal Home Loan Mortgage Corporation ("Freddie Mac"), but pursuant to a contractual agreement with Freddie Mac, BB&T remained the servicer of the Mortgage and held the Note as a custodian for Freddie Mac. On July 7, 2009 Freddie Mac transferred its interest in the Note back to BB&T. On or around that same day MERS assigned the Mortgage to BB&T and the assignment was recorded in the real property records of New Castle County, Delaware.[5] As a result of these transfers and assignments, BB&T maintains it is the mortgagee under the Mortgage, the loan servicer and the current owner and holder of the Note.

As noted above, Defendants have failed to make payments under the Note since December, 2008. BB&T filed a complaint with this Court on December 29,

[4] Ex. C to Complaint.

[5] Ex. B to Complaint.

2011 alleging breach of contract and seeking a writ of scire facias on the Mortgage, a Sheriff's sale of the property and repayment of the outstanding balance under the Note.

For much of the subsequent year after filing the complaint, defendants represented themselves pro se. Plaintiff's discovery to the defendants went unanswered and plaintiff moved for summary judgment. Finally, defendants secured counsel and formally opposed summary judgment. Argument was held on March 7, 2013 with the relatively recently retained counsel for defendants. The Court expressed some skepticism that defendants had presented bona fide issues for trial, but gave both parties the opportunity to further expand their arguments before the Court would rule. The parties duly filed supplemental briefs on summary judgment.

It is worth noting that the defendants did not, and still have not, sought to take discovery of plaintiff. Rather, it appears that defendants are content to rely upon what they perceive to be fatal weaknesses in plaintiff's moving papers to avoid summary judgment.

CONTENTIONS OF THE PARTIES

The premise of BB&T's first brief in support of its motion for summary judgment is that defendants have admitted to the material allegations of the complaint through their answer and failure to respond to plaintiff's request for

admissions. BB&T contends it has established that 1) defendants failed to make the payments required under the Note, 2) said failure constitutes a default under the Note and Mortgage, and 3) BB&T is the current holder of the Note and Mortgage. BB&T reasons that since no genuine issues of material fact remain, summary judgment is appropriate. BB&T concludes it is entitled to accelerate the debt and foreclose on the property.

The defendants respond with two arguments: 1) Mr. Rick Miller, upon whose affidavit BB&T relies in support of its motion, lacked firsthand knowledge of the relevant transfers and 2) BB&T has not shown that it is the real party in interest to prosecute this foreclosure action, asserting that MERS is nothing more than an entity that tracks the transfer and servicing rights in mortgage loans. Scire facias sur mortgage foreclosures are governed by 10 *Del.C.* § 5061(a) which provides that the only parties entitled to institute a foreclosure action are the mortgagee and the heirs, executors, administrators, successors, and assigns thereof. Defendants maintain that BB&T is not the proper party in interest and may not foreclose on the property.

ANALYSIS

In reviewing the record and questioning defense counsel on the issue directly during a March 2013 hearing, the Court finds that no genuine issues of material fact remain to be litigated. BB&T has set forth clearly in its motion the necessary

elements for relief in this case. In their Answer, defendants admit that Mr. Eid executed the Note and further that defendants collectively executed the Mortgage on the Newark property. Defendants admitted through their Answer that beginning in December of 2008 and continuing to the present they have failed to make the required payments under the Note. They acknowledge that failure to make these required monthly payments constitutes an event of default under the Note and Mortgage.

Defendants took the funds, but have failed to make the agreed upon payments constituting a default under the Note and Mortgage. Pursuant to the agreed upon terms of the relevant documents, BB&T is entitled to foreclose on the property.[6] Defendants have not attacked the authenticity of either document nor have they argued any defenses to excuse their default. Simply stated, the defendants entered into a contract, subsequently breached that contract and do not effectively deny it, all of which entitles plaintiff to relief under the contract.

All of this is abundantly evident from the record before the Court and indeed, is not seriously contested by defendants. But two issues raised by defendants merit further consideration: whether BB&T's affiant must have "personal knowledge" of the transactions to which he refers and whether BB&T is the "real party in interest."

[6] Ex. B to Complaint at p. 13, ¶22.

With respect to the bank's affiant, Mr. Miller, we think defendants attach more importance to the affidavit than it deserves. Mr. Miller is Assistant Vice President in the Non-Performing assets division of BB&T.[7] His affidavit references the Note, the assignment and the Mortgage, all of which are attached as exhibits and the authenticity of which is not disputed by the defendants. Those documents speak for themselves and Mr. Miller's affidavit is little more than a leisurely walk through the documents, stopping to point out relevant paragraphs along the way. Defendants' problem is not the Miller affidavit, it is the documents appended thereto. The authenticity and correctness of these documents are not challenged, we presume because they cannot be.[8]

Defendants complain that the Miller Affidavit is deficient because he did not swear to personal knowledge of the passing of the Mortgage from US Mortgage to MERS. Defendants' closely related claim is that even if Mr. Miller could swear to personal knowledge about this transfer, plaintiff's case would be wanting because

[7] Miller Affidavit, ¶2.

[8] Documents affecting an interest in property are an exception to the hearsay rule. See D.R.E. 803 (15): "A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document."

plaintiff has not shown it has standing to sue or, alternatively, that it is not the "real party in interest" to bring a foreclosure action.[9]

There are at least two responses to defendants' argument. First, it happens that in this particular case, the "Mortgagee" under the Mortgage was (and always was) MERS. MERS did not acquire its interest in the Mortgage by way of assignment from US Mortgage, so there was no need to have a witness with "personal knowledge" of that transfer because no transfer ever happened. There was indeed an assignment from MERS to BB&T; the corporate assignment from MERS to BB&T was indeed signed by Mr. Miller and notarized on June 10, 2009 and is in the record. We may fairly infer that he had personal knowledge of the document he signed. Moreover, BB&T filed its assignment with the New Castle County Recorder of Deeds, an assignment of which the Court may take judicial notice even if Mr. Miller did not have personal knowledge.[10] More fundamentally, the issue whether Mr. Miller must swear to personal knowledge of the assignment of the mortgage presumes that defendants have some rights to object to the chain of assignment resulting in plaintiff's acquisition of its cause of action against defendants. This presumption is further expanded when defendants argue that

[9] *See*, D.R.C.P. Rule 17

[10] *See generally, Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at n. 58 (Del. Ch. Jan. 27, 2010) aff'd, 7 A.3d 485 (Del. 2010)(taking judicial notice that a loan and mortgage had been satisfied through a Mortgage Satisfaction Piece filed with the Recorder of Deeds of Sussex County, Delaware).

plaintiff has not shown it is the "real party in interest" to press the foreclosure claim.

We think defendants have it wrong here. The supposition underlying defendants' claim is that they may challenge the assignment (or proof of the assignment) of their debt. Defendants attack the assignment of the Mortgage from MERS to BB&T. As a matter of Delaware law, for an assignment to be valid and to convey all the interest of the assignor it must be attested by one credible witness.[11] The assignment at issue was notarized by Tamie Scott and therefore meets the requirements set forth in the Delaware Code. Plaintiff cites no authority suggesting that MERS assignments are treated differently than any other assignment in Delaware. On the contrary, Delaware Courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by MERS.[12]

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[11] 25 *Del.C.* § 2109(a); An assignment of a mortgage or any sealed instrument attested by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor. (b) All assignments of mortgages or any sealed instruments heretofore made in the presence of 1 witness and all satisfactions made by assignees in such assignments are made good and valid.

[12] *See, e.g., Savage v. U.S. Nat. Bank Ass'n*, 19 A.3d 302 (Del. 2011)(upholding plaintiff's interest in defendant's mortgage acquired through an assignment from MERS.); *Citimortgage, Inc. v. Trader*, 2011 WL 3568180 (Del. Super. May 13, 2011)(finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff).

In *CitiMortgage, Inc. v. Bishop*,[13] Judge Scott of this Court addressed a similar case with a similar defense. Judge Scott noted that a debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment. Indeed, this appears to be the weight of authority in federal court as well.[14]

BB&T is the current holder of the Note and the Mortgage. The Note is a negotiable instrument.[15] The transfer of an instrument, "vests in the transferee any right of the transferor to enforce the instrument."[16] "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to

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[13] 2013 WL 1143670 (Del. Super. Mar. 4, 2013).

[14] *See, In re Perreira*, 2011 WL 6305552 (Bankr.D. R.I. Dec. 16, 2011)(finding that the debtors were not a party to any of the assignments, nor third party beneficiaries of the assignments, and therefore lacked standing to challenge these assignments); *In re Walker*, 466 B.R. 271, 285 (Bankr.E.D.Pa.2012) (acknowledging the development of a judicial consensus that a borrower lacks standing to challenge an assignment when he is neither a party to nor a third party beneficiary of the securitization agreement); *In re Edwards*, 2011 WL 6754073, at *4 (Bankr.E.D. Wisconsin Dec. 23, 2011)(Finding a debtors standing to be lacking where he was neither a party to the pooling or servicing agreements nor a potential third party beneficiary of those agreements).

[15] 6 *Del.C.* § 3-104(a): Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.

[16] *Id.*

the person receiving delivery the right to enforce the instrument."[17] By endorsing the instrument, the Note became payable to any bearer and, BB&T is the current holder and it is therefore entitled to payment thereon.[18]

CONCLUSION

In considering the record as a whole, the Court finds no issues of material fact remain. Further, the Court has determined that BB&T is the proper party in interest to bring suit. Plaintiff's Motion for Summary Judgment is therefore **GRANTED.**

IT IS SO ORDERED.

Judge Charles E. Butler

[17] 6 *Del.C.* § 3-203.

[18] *See*, 6 *Del.C.* § 3-204; 6 *Del.C.* § 1-201(b)(5); 6 *Del.C.* § 1-201(b)(21)(A).

Unreported Decisions

STATE OF SOUTH CAROLINA COUNTY OF SUMTER RECORDED 2006 JAN 20 AM 10: 36 JANES S. CAMPBELL CLERK OF COURT SUMTER COUNTY, S.C.	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT CIVIL ACTION #: 2005-CP-43-0278
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. PLAINTIFF VERSUS: LEONARD F. GIRDVAINIS, JR., ET. AL., DEFENDANTS	SUPPLEMENTAL ORDER DENYING RULE 59(e) MOTIONS

On October 20, 2005, I issued an order dismissing this action with prejudice. The order was filed on October 21, 2005. On November 7, 2005, the Plaintiff filed a Rule 59(e) motion "to alter or amend [the] Final Order Dismissing Action." I denied the motion in an Order which was filed with the Clerk of this Court on January 11, 2006.

In the meantime counsel for the defendant submitted an Affidavit (copy attached) which he asked that I consider in support of the motion. I have reviewed the affidavit, but I have concluded that the contents are irrelevant and/or of no substantive value, because:

1. Although the assignment to MERS [recorded in volume 852 at page 9] purports to convey the mortgage "together with the note thereby secured," MERS contractual relationship with lenders is such that the lender retains the note, the debt thereby represented, and the right to collect the debt.

   > The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, *in an administrative capacity*, for the beneficial owner or owners thereof from time to time. **MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.**[1]

2. In the Nebraska case, which MERS initiated to avoid having to pay fees levied in that State against mortgage bankers, MERS represented to the Court and/or the Court found:

   > MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights

[1] *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784, 787

in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

***

MERS ... does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. **MERS explains that it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur."**

***

To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee, however, **the lender retains the note and servicing right.** The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower. *** MERS 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 whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members

***

MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the *lenders retain the promissory notes* and servicing rights to the mortgage, while **MERS acquires legal title to the mortgage *for recordation purposes*. 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. But, simply stated, ***MERS HAS NO INDEPENDENT RIGHT TO COLLECT ON ANY DEBT BECAUSE MERS ITSELF HAS NOT EXTENDED CREDIT, AND NONE OF THE MORTGAGE DEBTORS OWE MERS ANY MONEY.***

3. Since MERS initiated the Nebraska litigation and prevailed in it, it is judicially estopped to disavow the positions it advanced during the litigation process there or to avoid the findings and conclusions articulated by the Nebraska Court.[2]

4. The affiant's representation that Guaranty assigned the note and mortgage to MERS "**for valuable consideration**" is diametrically opposed to the way MERS operates, as described in the Nebraska case. As evidenced by the text of the Nebraska decision, MERS does not acquire the notes or the debts thereby represented for or without consideration. It has neither the right nor the obligation to service the debts represented by the notes and/or secured by the mortgages. As its sole source of revenue "MERS is compensated for its services through fees charged to participating MERS members."[3]

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[2] *State v. McCall*, 364 S.C. 205, 612 S.E.2d 453, (S.C.App.,2005); *Hawkins v. Bruno Yacht Sales, Inc.* 353 S.C. 31, 577 S.E.2d 202 (S.C.,2003).

[3] *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784, 786.

5. Furthermore, the principal/agent (nominee) relationship between its members and MERS is such that the "close-connectedness doctrine" would prevent MERS from qualifying as a holder in a due course without notice, even if it did acquire some ownership interest in the debt.[4]

6. Although there is implicit in the affidavit a suggestion that the process through which MERS "acquires" a mortgage qualifies it as a holder in due course and protects it from defects in transactions which preceded the acquisition, the affiant does not state whether MERS even sees (much less examines for impropriety) the mortgage, the note, or any of the loan documents. However, the MERS method of operation, as reported in its contracts with its "members" and as found by the Nebraska Court, would indicate that it doesn't. Certainly, there is no reason for it to do so, since it has nothing invested in the transaction and will receive payment from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the affidavit would be disingenuous, if not an outright misrepresentation.

AND IT IS SO ORDERED: JANUARY 19, 2006

Lawrence S. Evans, Jr.
MASTER IN EQUITY

[4] *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.* 893 F.Supp. 1304 (1994), *1318 -1319 (D.S.C.,1994: "A transferee does not take an instrument in good faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction."

Mortgage Elec. Registration Sys., Inc. (MERS) v. Johnston, No. 420-6-09 Rdcv (Cohen, J., Oct. 28, 2009)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

STATE OF VERMONT
RUTLAND COUNTY

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), as Nominee for WMC MORTGAGE CORP.,	)	**Rutland Superior Court Docket No. 420-6-09 Rdcv**
Plaintiff,	)	
v.	)	
FRANK S. JOHNSTON and ELLEN L. JOHNSTON, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, and ANY OTHER OCCUPANTS OF [Redacted] (n/k/a [Redacted]) WALLINGFORD, VERMONT,	)	
Defendants	)	

ORDER RE PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT, FILED SEPTEMBER 1, 2009

This matter comes on before the Court on a Motion for Default Judgment against the United States of America Department of Treasury, Internal Revenue Service, filed on September 1, 2009, by plaintiff Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for WMC Mortgage Corp. Plaintiff had previously filed a Motion for Default Judgment on July 8, 2009, as to defendants Frank and Ellen Johnston. The Court granted that Motion on August 27, 2009.

Plaintiff MERS is represented by Grant C. Rees, Esq. Defendant United States of

America Department of Treasury, Internal Revenue Service ("IRS") has entered an appearance through Assistant United States Attorney Melissa A.D. Ranaldo. However, defendant IRS has not filed a Verified Answer. Defendants Frank and Ellen Johnston are not represented by counsel.

Background

On September 18, 1989, Frank and Ellen Johnston (the "Johnstons") purchased property located at [redacted] in the town of Wallingford, Vermont. On April 27, 2005, the Johnstons executed a promissory note (the "Note") in favor of WMC Mortgage Corp, in the original principal amount of $117,000.00 dollars. Said Note was secured by a Mortgage Deed dated April 27, 2005, from the Johnstons to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for WMC Mortgage Corp. ("WMC"). The Mortgage Deed also listed MERS as the mortgagee. The Mortgage Deed was recorded in the Town of Wallingford Land Records.

On June 10, 2009, plaintiff MERS, as nominee for WMC, brought a Complaint for Foreclosure against defendants Frank and Ellen Johnston, as well as the United States of America Department of Treasury, Internal Revenue Service. The Complaint alleges that the Johnstons failed to make payments on the Note.

On July 8, 2009, plaintiff MERS, as nominee for WMC, filed a Motion for Default Judgment against the Johnstons. Said Motion was granted by the Court on August 27, 2009.[1]

On September 1, 2009, plaintiff MERS, as nominee for WMC, filed a Motion for Default Judgment against defendant IRS. The Court now raises, *sua sponte*, the issue of

[1] The Court granted plaintiff's Motion for Default Judgment against the Johnstons before the issue of standing was brought to the Court's attention by the case of *Landmark Nat. Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), issued August 28, 2009.

MERS's standing to bring the instant foreclosure action, either independently or in its role as "nominee" for the lender WMC.

Discussion

A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. Restatement (Third) of Property, Mortgages § 5.4(c).

The relationship of MERS to the mortgage transaction is not subject to any easy description. *Landmark Nat. Bank v. Kesler*, 216 P.3d 158, 164 (Kan. 2009). The Supreme Court of Kansas and the Supreme Court of Nebraska have described MERS as follows:

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Id. (quoting *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 785 (Neb. 2005)).

Chief Judge Kaye of the Court of Appeals of New York described the role of MERS as follows:

> In 1993, members of the real estate mortgage industry created MERS, an electronic registration system for mortgages. Its purpose is to streamline the mortgage process by eliminating the need to prepare and record paper

> assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the mortgage itself, may be transferred. MERS hopes to register every residential and commercial home loan nationwide on its electronic system.

Merscorp, Inc. v. Romaine, 861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting in part).

The mortgage deed designated the relationships of the Johnstons, the lender WMC, and the nominee and mortgagee MERS, and established payment and notice obligations. That document purported to define the role played by MERS in the transaction and the contractual rights of the parties.

The document began by identifying the parties:

> (A) "Security Instrument" means this document which is dated April 27, 2005 together with all Riders to this document. (B) "Borrower" is FRANK S JOHNSTON and ELLEN L JOHNSTON, HUSBAND AND WIFE, AS TENANTS BY THE ENTIRETY, THEIR HEIRS AND ASSIGNS FOREVER. Borrower is the mortgagor under this Security Instrument. (C) "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 mortgagee* under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. (D) "Lender" is WMC MORTGAGE CORP. Lender is a Corporation organized and existing under the laws of CALIFORNIA. Lender's address is P.O. BOX 54089, LOS ANGELES, CA 90054-0089. *Lender is the mortgagee under this Security Instrument.* (emphasis added).

The first full paragraph of the second page of the mortgage document conveyed a security

interest in real estate:

> 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 and in consideration of the debt, Borrower does hereby mortgage, grant and convey to MERS (*solely as nominee* for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the COUNTY of RUTLAND. (emphasis added).

The first paragraph of the third page of the mortgage document contained the following language that apparently limited and expanded MERS's rights:

> 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 Lenders' 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 cancelling this Security Instrument. (emphasis added).

Paragraph 9 of the mortgage document provided the lender with the right to protect the security:

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect *Lender's interest in the Property* and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulation), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate *to protect Lender's interest in the Property and rights under this Security Instrument*, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. (emphasis added).

Paragraph 22 of the mortgage document addressed power of sale:

> If *Lender* or Borrower invokes the power of sale, and the Property is judicially ordered to be sold pursuant to such power, Lender shall mail a copy of a notice of sale by registered mail to Borrower at the Property Address or at any other address Borrower delivers to Lender in writing for that purpose. (emphasis added).

Paragraph 23 of the mortgage document addressed release of the mortgage:

> Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. *Lender shall discharge* this Security Instrument. (emphasis added).

The Mortgage Deed further stated that all payments would be made to lender WMC, and the notice provisions of the document refer solely to the lender WMC.

The mortgage deed stated that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage deed, and the functional relationship between MERS and the lender, WMC, is likewise not defined. See *Kesler*, 216 P.3d at 165 (analyzing similar language in mortgage deed). The Vermont Supreme Court has not yet defined the term "nominee," nor has it addressed whether a "nominee" has standing to bring a foreclosure action. In the absence of a contractual definition of the term "nominee," or a definition under Vermont law, the contractual term is to be interpreted based on its plain meaning. *In re Cole*, 2008 VT 58, ¶ 9, 184 Vt. 64; see also *Kesler*, 216 P.3d at 165 (stating "[i]n the absence of a contractual definition of the term "nominee," the parties leave the definition to judicial interpretation.").

Black's Law Dictionary defines nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the

benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004).

Legal title is defined as "[a] title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." *Id.* at 1523. This is in contrast to equitable title, which is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Id.*

The mortgage deed consistently referred to MERS "solely as a nominee" and that it holds "only legal title," but it then purported to expand the authority of MERS as a "nominee" to act as in essence as an agent or as a power-of-attorney to carry out the rights of the Lender, including foreclosure and the sale of property. However, this purported expansion of authority was restricted to that "necessary to comply with law or custom." Importantly, the MERS and the lender WMC purposely chose to use the specific legal term "nominee," and *not* "agent" or "power-of-attorney." MERS also chose not to define the term "nominee." Furthermore, the mortgage deed consistently referred to the *Lender's* rights in the property, and not MERS's. This is consistent with MERS's authority to act in a very limited way "solely as nominee" - by holding bare legal title (not equitable title) for the lender.

I. MERS's Standing to Bring Independent Foreclosure

The Court will first address whether MERS has standing, independently, not in its role as "nominee," to bring the foreclosure action. Again, a mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. Restatement (Third) of Property, Mortgages § 5.4(c). In general, a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. *Id.*

cmt. e.

If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 is generally understood to make the right of enforcement of the promissory note transferrable only by delivery of the instrument itself to the transferee. Restatement (Third) of Property, Mortgages § 5.4 cmt. c. Vermont has adopted the Uniform Commercial Code in regards to negotiable instruments. Addressing the enforceability of a negotiable instrument, 9A V.S.A. § 3-301 sets forth:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

To be a "holder" of an instrument, 9A V.S.A. § 3-301(i), one must posses the note *and* the note must be payable to the person in possession of the note, or to bearer. 9A V.S.A. § 1-201(b)(21)(A) (emphasis added). Here, the "holder" option is not available to MERS because the note is not payable to MERS, nor has it been indorsed, either specifically to MERS or in blank. See *Id.*; 9A V.S.A. § 3-205(b) (blank indorsement becomes payable to bearer). Also, 9A V.S.A. § 3-301(iii) is not applicable, as it does not appear that plaintiff is entitled to enforce the instrument pursuant to either section 3-309 or 3-418(d).

A "nonholder in possession of the instrument who has the rights of a holder," 9A V.S.A. § 3-301(ii), includes persons who acquire physical possession of an unindorsed note. See 9A V.S.A. 3-203(a),(b). As the statutory comments explain, however, such

nonholders must "prove the transaction" by which they acquired the note:

> If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. *Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.*

Id. cmt. 2 (emphasis added).

In its Complaint, MERS does not assert to "hold" the Note, nor does it assert that it can otherwise enforce the Note. Therefore, MERS cannot enforce the underlying obligation, and may not enforce the mortgage deed it holds in its name. See Restatement (Third) of Property, Mortgages § 5.4(c); see also cmt. e. This is consistent with MERS's role "solely as nominee" in that it "holds only legal title to the interests granted by Borrower in this Security Instrument."

In regards to MERS's standing to bring an action for foreclosure independently, in its own name, the Court also notes that this inability to enforce the underlying obligation is consistent with the representations made by MERS to the Supreme Court of Nebraska in *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784 (Neb. 2005). There, the Nebraska Court faced the issue of whether MERS could be regulated as a "mortgage banker." *Id.* at 785. State law defined "mortgage banker" as:

> [A]ny person not exempt under section 45-703 who, for compensation or gain or in the expectation of compensation or gain, directly or indirectly makes, originates, services, negotiates, acquires, sells, arranges for, or offers to make, originate, service, negotiate, acquire, sell, or arrange for ten or more mortgage loans in a calendar year.

Id. at 786 (citing Neb. Rev. Stat. § 45-702). The Court noted the following representation made by MERS:

> MERS argues that it *does not acquire mortgage loans* and is therefore not a mortgage banker under § 45-702(6) because *it only holds legal title* to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it *does not own the promissory notes* secured by the mortgages and has no right to payments made on the notes. MERS explains that it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur."

Id. at 787 (citing brief for MERS) (emphasis added). According to the Court, counsel for MERS further explained:

> [T]hat MERS 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 whatsoever. MERS merely tracks the ownership of the lien* and is paid for its services through membership fees charged to its members.

Id. (emphasis added). In finding that MERS was not a "mortgage banker," the Court stated:

> In other words, through its services to its members as characterized by the district court, MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the *lenders retain the promissory notes* and servicing rights to the mortgage, while *MERS acquires legal title to the mortgage for recordation purposes.*

> 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. But, simply stated, *MERS has no independent right to collect on any debt* because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money.

Id. at 788. (emphasis added).

Likewise, as noted by the Supreme Court of Kansas in *Landmark Nat. Bank v. Kesler*, "[c]ounsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in the mortgage." 216 P.3d at 167. In *Kesler*, the Kansas Court found that MERS was not a contingently necessary party in a mortgage foreclosure action. *Id.* at 168. The Court found that MERS had no stake in the outcome of an independent action for foreclosure, as it did not lend money, nor was anyone involved in the case required to pay MERS money. *Id.* at 167 (citing *In re Sheridan*, No. 08-20381-TLM, 2009 WL 631355 (Bankr. D. Idaho March 12, 2009)). The Court stated, "[i]f MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right." *Id.* (citing *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) (stating "[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note." (quoting *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 275 (1872)).

As two commentators from the Mortgage Banker's Association of America noted, "it is a legal maxim that the mortgage depends on the note for enforceability." Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 808 (1995).[2] This Court finds that MERS has no standing to bring an

[2] The Court notes that co-author Phyllis K. Slesinger was Senior Director, Secondary Market & Investor Relations, Mortgage Banker's Association of America ("MBA"), Washington, D.C. 31 IDAHO L. REV. 805, 818 fn.a. Co-author Daniel Mclaughlin was Director of Technology Initiatives, Mortgage Banker's

independent foreclosure action.

II. MERS's Standing to Bring Foreclosure Action as "nominee" for Lender

MERS has brought the instant foreclosure action as "nominee" for lender WMC. As noted *supra*, the word "nominee" is defined nowhere in the mortgage deed, and the functional relationship between MERS and the lender, WMC, is likewise not defined. MERS and the lender WMC purposely chose to use the specific legal term "nominee," and not "agent" or "power-of-attorney," without defining it.

As stated above, the term "nominee" has not yet been defined by the Vermont Supreme Court. Black's Law Dictionary defines nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004). Other courts have had the occasion to analyze the role of MERS as a "nominee."

In *Kesler*, the district court found that MERS was not a real party in interest to the foreclosure action and there was no requirement to name it as a party. 216 P.3d at 162. The court of appeals affirmed that ruling and held that a non-lender was not a contingently necessary party in a mortgage foreclosure action. *Id.* at 161. MERS sought

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Association of America, Washington, D.C. *Id.* fn.aa. Their analysis of the planned structure and role of MERS relied extensively on two sources: Mortgage Banker's Association Interagency Technology Task Force, Whole Loan Book Entry Concept for the Mortgage Finance Industry (Oct. 1993) (hereinafter White Paper), and Ernst & Young, LLP, MERS Cost Benefit Analysis (Dec. 1994). *Id.* fn.6-fn.15.

The White Paper was published by a MBA task force comprised of representatives from the MBA, Fannie Mae, Freddie Mac and Ginnie Mae. *Id.* at 810. The White Paper was published at the MBA's Annual Convention and was thereafter used as the primary vehicle for soliciting comments from the real estate finance industry on the MERS concept. *Id.* at 810-11. Ernst & Young, LLP (Ernst & Young) was subsequently engaged to validate the White Paper's findings by conducting a feasibility study and performing other analyses. *Id.* at 811. The result was the MERS Cost Benefit Analysis.

Because the information cited in this law review article was taken directly from the documents which formed the basis for MERS, the Court finds the article to be particularly informative as to the planned structure and role of MERS.

review before the Kansas Supreme Court as to that issue. *Id.*

In trying to attach a meaning to MERS's description as "nominee," the Court found that the parties "defined the word in much the same way that the blind men of Indian legend described an elephant – their description depended on which part they were touching at any given time." *Id.* at 165-66. One party described MERS's role as "nominee" in three different ways. First, that MERS held the mortgage in street name so that banks could transfer the mortgages. *Kesler*, 216 P.3d at 166. The description later changed to MERS as a mortgagee, holding the mortgage for somebody else. *Id.* Finally, the party described MERS as a trustee with multiple beneficiaries. *Id.* Another party stated that MERS was a representative designated to act for another in a limited sense. *Id.* That party later deemed a nominee to be like a power-of-attorney. *Id.*

The Kansas Supreme Court found the legal status of a nominee depended on the context of the relationship of the nominee to its principal. *Id.* The Court found the relationship of MERS to a subsequent purchaser of the mortgage was "akin to that of a straw man." *Id.* The mortgage document purported to give MERS the same rights as the lender, but consistently referred to only the rights of the lender, including the rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. *Id.* As in the instant foreclosure action, the document constantly limited MERS to act "solely" as the nominee of the lender. See *Id.*

Counsel for MERS insisted that it did not have to show a financial or property interest in order to be a necessary party. *Id.* at 168. In holding that MERS was not a contingently necessary party to the foreclosure action, the Kansas Supreme Court noted that MERS argued before the Nebraska Supreme Court that it was *not* authorized to

engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. *Id.* (citing *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784). The Court finds this argument made by MERS before the Nebraska Supreme Court to be particularly interesting.

In *In re Huggins*, 357 B.R. 180, 182 (Bankr. D. Mass. 2006), the debtor argued that MERS, acting as "nominee" for the lender, lacked standing to seek stay relief to foreclose on a mortgage on the debtor's residence. The court found that MERS had authority to conduct a foreclosure by power of sale under Massachusetts law. *Id.* at 183.

In so holding, the court relied upon the Black's Law Dictionary for "nominee" – "[a] nominee is generally understood as a person designated to act in place of another." *Id.* (citing Black's Law Dictionary (8th Ed. 2004)). Conspicuously missing from the *Huggins* court's opinion was the fact that the Black's Law definition limits a "nominee" to act usually in a "very limited way" and as "[a] party who holds bare legal title for the benefit of others." See, generally, *In re Huggins*, 357 B.R. 180; see also Black's Law Dictionary 1076 (8th ed. 2004).

In holding that MERS had standing to bring the foreclosure action, the court set forth four conclusions, each of which this Court finds unpersuasive or distinguishable from the instant facts.

First, the court concluded that MERS acted as nominee for lender, which held the note, and therefore there was no disconnection between note and mortgage. *Id.* at 184. However, this conclusion overlooks both the definitions of "nominee" and "legal title." In its "limited" role as nominee, MERS held "legal title." Legal title "does not

necessarily signify full and complete title or a beneficial interest." Black's Law Dictionary 1523 (8th ed. 2004). This is in contrast to equitable title, which is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Id.* In *Huggins*, there *did* appear to be a disconnection, as the lender held the Note while MERS held bare legal title. The Court fails to see how MERS's very limited role as a "nominee" can somehow connect the severed note and mortgage.

Second, MERS was the record mortgagee with powers expressly set forth in the mortgage document, including power of sale. *In re Huggins*, 357 B.R. 184. Once again, this conclusion does not take into account that MERS held only "legal title" and not the note. Therefore, MERS could not enforce the mortgage as record mortgagee.

Third, Massachusetts law expressly authorized the exercise of sale powers by a mortgagee or person authorized to sell, precisely the position held by MERS. *Id.* The opinion again ignored the fact that MERS held only "legal title" and not equitable title as the mortgagee of record. Furthermore, by cutting off the definition of "nominee," the court apparently accepted "nominee" to mean the equivalent of "agent," which this Court does not.

It is not known whether the mortgage document in *Huggins* was similar in every aspect to the instant document, but here the mortgage deed limited MERS's right to foreclose and sell the property with the preceding qualification - "if necessary to comply with law or custom." This Court does not find that it is "necessary to comply with law or custom" that MERS have the right to foreclose and sell the property. The parties intentionally chose not to use the term "agent," the mortgage document contains no definition of "nominee," the role of MERS is consistently limited to acting "solely as

nominee," holding bare legal title, and all rights as to notice, payment, and interest in the property are seemingly kept with the lender. There is no indication that MERS was an agent or power-of-attorney for the lender WMC.

Finally, the *Huggins* court stated:

> The logic of a denial of MERS's foreclosure right as mortgagee would lead to anomalous and perhaps inequitable results, to wit, if MERS cannot foreclose though named as mortgagee, then either Spectrum [lender] can foreclose though not named as mortgagee or no one can foreclose, outcomes not reasonably or demonstrably intended by the parties.

In re Huggins, 357 B.R. at 184.

The Court declines to accept this logic, as it ignores black letter mortgage law. In general, a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. Restatement (Third) of Property, Mortgages § 5.4 cmt. e. Furthermore, separation of the obligation from the mortgage results in a practical loss of efficacy of the mortgage. *Id.* cmt. a. MERS and the lender intentionally split the obligation and the mortgage deed. This split was necessary to create the MERS system and facilitate the growth of the secondary mortgage market. See Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 818 fn.2 (stating "[f]or mortgages sold into the secondary market, legal title and equitable ownership are commonly severed. Mortgage servicers retain bare legal title to facilitate mortgage servicing; equitable interests are transferred to the investor.").

However, the result need not be inequitable if the rules of mortgage law are properly followed. The two commentators from the Mortgage Bankers' Association of America noted that while a loan is current there would be no need to execute or record

assignments in the public land records to reflect sale of the mortgage to an investor; however, if a loan is to be foreclosed MERS could assign the mortgage in order to allow for a foreclosure action. Slesinger & Mclaughlin, supra, at 814.

The outcome that MERS does not have standing to foreclose is consistent with MERS's role simply as a "clearinghouse" which holds bare legal title and tracks mortgage ownership interests. See *Id.* at 811. This outcome is also consistent with the representations made by MERS before the Nebraska Supreme Court, in which it argued that it did not service, negotiate, or acquire mortgage loans, and, therefore, was not a "mortgage banker" under state law. *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d at 786-88. MERS argued that it only held legal title to member bank's mortgages in a nominee capacity and "explained that it merely immobilizes the mortgage lien while transfers of the promissory note and servicing right continue to occur." *Id.* at 787.

The commentators from the Mortgage Bankers' Association of America stated the following: "*Mortgage bankers* originate or acquire mortgages to obtain fee income for "servicing" the mortgages. *Servicing involves*: i) collecting borrowers' payments of principal, interest, taxes and insurance; ii) remitting them to the proper payee; and iii) handling mortgage defaults, *foreclosures* and payoffs." Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 818 fn.1 (1995) (emphasis added).

By bringing this foreclosure action, MERS seemingly contradicts its past representations that it is a passive entity (a type of clearinghouse) in the mortgage finance industry. While MERS argued before the Nebraska Supreme Court that in its role as

"nominee" it is not a servicer of mortgage loans, it now purports to be just that in bringing the instant foreclosure action.[3]

The Kansas Supreme Court noted the problems and complications introduced by the MERS system, in that "having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder." *Kesler*, 216 P.3d at 168. The Court further stated:

> It is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees.

Id. (quoting *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007)). Chief Judge Kaye of the Court of Appeals of New York Court noted similar concerns:

> Public records will no longer contain this information [mortgagee's identity] as, if it achieves the success it envisions, the MERS system will render the public record useless by masking beneficial ownership of mortgages and eliminating records of assignments altogether. Not only will this information deficit detract from the amount of public data accessible for research and monitoring of industry trends, but it may also function, perhaps unintentionally, to insulate a noteholder from liability, mask lender error and hide predatory lending practices.

Romaine, 861 N.E.2d at 88 (Kaye, C.J., dissenting in part). This problem would be further compounded if MERS, an entity which is neither a beneficial mortgagee nor a servicer, had standing to bring a foreclosure action as a "nominee."

If MERS were able to bring the instant foreclosure action, the result would be incongruous in two ways. First, that a clearinghouse or exchange for mortgages would

[3] The Court notes that the Fair Debt Collection Practices Act may apply to a mortgage servicer attempting to collect debts owed or due or asserted to be owed or due another, if such debt was in default at the time it was obtained by such person. 15 U.S.C. § 1692(a)(6)(F)(iii).

become an active entity in the transactions it oversees. Second, that MERS, an entity that by its own terms in the mortgage deed holds only bare legal title, and as it argued to the Nebraska Supreme Court does not acquire or service mortgage loans, would, upon foreclosing in its own name as "nominee," be able hold title to the property.

The Court finds that MERS's role as "nominee" is limited to holding bare legal title for the benefit of the lender and its successors and assigns. Thus, MERS lacks standing to bring the instant foreclosure action in its own name, as "nominee," on behalf lender WMC.

ORDER

Plaintiff Mortgage Electronic Registration Systems, Inc.'s foreclosure action is DISMISSED for lack of standing. Accordingly, the Court's Order, issued August 27, 2009, granting plaintiff's Motion for Default Judgment against the defendants Frank and Ellen Johnston is VACATED. The dismissal of the foreclosure action is without prejudice as to allow the proper plaintiff to come forward.

Furthermore, because this is a case of first impression under Vermont law and because it involves important issues concerning mortgage law and real estate title law, the Court will certify the issue of standing to the Vermont Supreme Court pursuant to V.R.C.P. 80.1(m).

Dated at Rutland, Vermont this _____ day of _____, 2009.

_____
Hon. William Cohen
Superior Court Judge

Entered on Docket
March 31, 2009

Hon. Linda B. Riegle
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re JOSHUA & STEPHANIE MITCHELL, Debtor(s).	Case No. BK-S-07-16226-LBR Chapter 7 DATE: August 19, 2008 TIME: 3:30 p.m.

MEMORANDUM OPINION

Mortgage Electronic Recording Systems, Inc. ("MERS") through various counsel has filed a number of motions to lift stay.[1] Some of the motions were filed in the name of MERS, while others have been filed in the name of MERS as the nominee for another entity. An order for joint briefing was entered because the substantially same issues were presented in the motions, and a joint hearing was held. *Mitchell (*#07-16226) has been designated as the lead case.[2] The trustee or counsel for the debtor in these cases has opposed the lift-stay motions on the

[1]Motions have been filed in the following cases: #07-16226, #07-016333, #07-16645, #07-17577, #07-18851, #08-10427, 08-11007, #08-11860, #07-13593, #08-10108, #08-10778, #08-12255, #07-17468, #08-11245, #08-11608, #08-11668, #08-11725, #08-11819, #08-12206, #08-12242, #08-12317, #08-12319, #08-10052, #08-10072, #08-10718, #08-11499, #07-16519. Each of the judges will enter their own orders in the matters that are assigned to them.

[2]The docket numbers mentioned in this opinion are to the *Mitchell* case unless otherwise noted.

grounds of standing and that MERS is not the real party in interest.

The initial response filed by MERS contained no evidentiary support. Rather it described the role of MERS and its members by relying on law review articles and the recitation of facts in other cases in other districts involving MERS. Prior to the initial argument, MERS attempted to withdraw the motions filed in all but four of the cases. MERS then filed a declaration at the court's direction explaining why the motions were withdrawn. The declaration of William Hultman was filed in *Dart*.[3] The declaration, in addition to explaining MERS' rationale for withdrawing the motions, also attached as exhibits copies of the MERS Membership Application, the MERSCorp. Inc. Rules of Membership, the MERS Procedural Manual, and the MERS Terms and Conditions of Membership.[4] The court also requested appropriate evidentiary support for the allegations concerning the relationship between MERS and the entities for whom the motions were brought. A supplemental declaration was filed in *Michell,* the lead case.[5]

As noted, MERS has attempted to withdraw all but four of its original motions, leaving ouly *Dart (*#08-11007), *Hawkins* (#07-13593), *Ramirez-Furiati (*#08-10427), and *Zeigler (*#08-10718). MERS admits that it failed to follow its own procedures in the motions it wants to withdraw.[6] The debtor, the chapter 13 trustee, and MERS subsequently stipulated to a lift of stay in *Ramirez-Furiati* which the court approved with the acknowledgment that the order contained no finding about MERS' standing.[7] This court will discuss the issues raised in the motions that

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[3]*Dart* (#08-11007).

[4]Docket #47 in *Dart*.

[5]Docket #74 in *Mitchell* ("Huntman Declaration"). The Declaration also incorporated the prior declaration filed by Mr. Hultman in *Dart*. References in this memorandum to the declaration filed in *Mitchell* include the incorporated declaration and the exhibits thereto.

[6]Docket #74, Declaration of William Hultman ("Hultman Declaration"), Exhibit 1, pp. 4-5. "The fact that MERS chose to not go forward on these . . . motions was not a determination by MERS that it does not have standing to move for relief from stay." Exhibit D to that Declaration sets forth the name of the motions withdrawn and the reason for withdrawal.

[7]Docket #54 in #08-10427.

MERS attempts to withdraw,[8] and by this order issues its ruling in *Dart* and *Hawkins*, which are the two cases that are now pending before it.[9]

The court has advised the parties that it would consider any information contained on the MERS website at http://www.mersinc.org/ unless an objection was made. No objection has been filed by either party. The court thus takes judicial notice of the contents of the MERS website.

WHAT IS MERS?

MERS is a national electronic registration and tracking system that tracks the beneficial ownership interests and servicing rights in mortgage loans.[10] The MERS website says this:

> MERS is an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked. Created by the real estate finance industry, MERS eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.

William Hultman, Secretary of MERS, has testified in his Declaration that loans are registered to a "MERS Member" who has entered into the MERS Membership Agreement. MERS Members enter into a contract with MERSCORP to electronically register and track beneficial ownership interests and servicing rights in MERS registered mortgage loans.[11] MERS Members agree to appoint MERS, which MERSCORP wholly owns, to act as their common agent, or nominee, and to name MERS as the lienholder of record in a nominee capacity on all

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[8]FED. R. BANKR. P. 9014 makes FED. R. BANKR. P. 7041 applicable to contested matters, which includes lift stay motions, and FED. R. BANKR. P. 7041 incorporates FED. R. CIV. P. 41. Under these rules, a party can voluntarily dismiss a lift-stay motion without a court order only if there is a stipulation to dismiss or the dismissal is filed *before* an opposition is filed, and neither is true here.

[9]Some cases were added to the argument calendar after the April 29, 2008 joint hearing order. Separate orders will be entered in each of those cases, which counsel agreed to continue pending a ruling in the "test case." *See* Transcript (Docket # 83) pp. 9 and 76.

[10]MERS Response, Docket # 49, p. 3.

[11]"MERS Members" are mortgage lenders and other entities. ("Membership in MERS Overview," filed with Hultman Declaration, Docket #74.)

recorded security instruments relating to the loans registered on the MERS System. When a promissory note is sold by the original lender to others, the various sales of the notes are tracked on the MERS System.[12]

Hultman goes on to say in his Declaration that once MERS becomes the beneficiary of record as nominee, it remains the beneficiary when the beneficial ownership interests in the promissory note or servicing rights are transferred by one MERS Member to another and that it tracks the transfers electronically on the MERS System. So long as the sale of the note involves a member of MERS, MERS remains the beneficiary of record on the deed of trust and continues to act as nominee for the new beneficial owner.[13]

STANDING

MERS must have both constitutional and prudential standing,[14] and be the real party in interest under FED. R. CIV. P. 17,[15] in order to be entitled to lift-stay relief.

Constitutional standing under Article III requires, at a minimum, that a party must have suffered some actual or threatened injury as a result of the defendant's conduct, that the injury be traced to the challenged action, and that it is likely to be redressed by a favorable decision. *Valley Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464, 472 (1982)(citations and internal quotations omitted).

Beyond the Article III requirements of injury in fact, causation, and redressibility, MERS must also have prudential standing, which is judicially-created set of principles that places limits on the class of persons who may invoke the courts' powers. *See Warth v. Seldin*, 422 U.S. 490,

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[12]Docket #74, Hultman Declaration at ¶ 3.

[13]Docket # 74, Hultman Declaration at ¶ 4.

[14]The standing doctrine "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

[15]Stay-relief requests are governed by FED. R. BANKR. P. 4001(a)(1), to which FED. R. BANKR. P. 9014 is applicable. Rule 9014, in turn, incorporates Rule 7017, which makes FED. R. CIV. P. 17 applicable ("[a]n action must be prosecuted in the name of the real party in interest.").

499 (1975). As a prudential matter, a plaintiff must assert "his own legal interests as the real party in interest," *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), as found in FED. R. CIV. P. 17, which provides "[a]n action must be prosecuted in the name of the real party in interest."

MERS' primary contention is that it has standing by virtue of the fact that it was named as the beneficiary under the deeds of trust and that the trustor (the maker of the note) recognized MERS could take actions of the beneficiary or that it is the nominee of the beneficiary. "In non-judicial foreclosure states, [MERS] must at least be the record beneficiary under the Deed of Trust, with the powers expressly set forth therein, including the power of foreclosure; in addition, as noted, it *may* become the holder on the note under some circumstances. This procedure fully establishes standing under this court's rules and Nevada law."[16] MERS argues in its supplemental brief: "It would be reasonable to hold that a motion that pleads MERS is the of-record beneficiary on the deed of trust is prima facie evidence of standing to move for relief from stay and contains an implied certification that MERS is able to discharge the responsibilities of a movant."[17] MERS states that the issue of standing focuses on who can foreclose and that MERS can foreclose on the properties as a "person authorized to make the sale under the terms of the trust deed.[18] (*See also*, Transcript, Docket # 83, pp. 14-15.)

MERS also argues that it has standing which follows principles set forth in the Uniform Commercial Code that entitle a nominee holder of an instrument to sue to enforce the instrument.[19] It is unclear whether MERS is arguing that it has standing in its own right, or as the agent of the entity entitled to enforce the note, or both. Compare the following arguments, all

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[16]MERS' Response, Docket #49, p. 9 (emphasis added).

[17]Supplemental Brief of MERS, Docket # 73, p. 10.

[18]Docket #49, p. 10. However, it is not the beneficiary that is authorized to make the sale under the trust deed, it is the trustee.

[19]Docket #49, p. 10.

made in the same supplemental brief.[20] MERS argues at page 9 of the brief that "this evidence demonstrates MERS right to enforce the note as the note's 'holder.'"[21] In the same brief, at page 8, it argues "[t]his evidence further demonstrates MERS authority ***to act for*** the current beneficial owner of the loan or its servicer."[22] And at page 1 of the brief MERS argues this: "In the motions at issue, MERS is the agent of the original lender and its successors and assigns for defined purposes (such a relationship is termed a 'nominee.')."[23]

STANDING AS THE NAMED BENEFICIARY OR THE NOMINEE OF THE BENEFICIARY OR ITS ASSIGNEE

MERS does not have standing merely because it is the alleged beneficiary under the deed of trust. It is not a beneficiary and, in any event, the mere fact that an entity is a named beneficiary of a deed of trust is insufficient to enforce the obligation.

The deed of trust attempts to name MERS as both a beneficiary and a nominee. The document first says this:

> 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.[24]

And later it says this:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lenders successors and assigns) and the successors and assigns of MERS.[25]

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[20]Docket #73.

[21]Docket #73, p. 9.

[22]Docket # 73, p. 8. (Emphasis added.)

[23]Docket #73, p. 1.

[24]*In re Mitchell*, #07-16226, Motion to Lift Stay (Docket # 30), Exhibit B, p. 2, Subpart (E).

[25]*In re Mitchell*, #07-16226, Motion to Lift Stay (Docket # 30), Exhibit B, p. 3.

MERS' "Terms and Conditions"[26] identifies MERS' interests. The Terms and Conditions say this:

> ***MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.*** MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under a deed of trust and any other form of security instrument under applicable state law.

(Emphasis added.)

A "beneficiary" is defined as "one designated to benefit from an appointment, disposition, or assignment . . . or to receive something as a result of a legal arrangement or instrument." BLACK'S LAW DICTIONARY 165 (8th ed. 2004). But it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, if it doesn't walk like a duck, talk like a duck, and quack like a duck, then it's not a duck.[27]

But more importantly, even if MERS is the nominee of the beneficiary, or the motion was brought by the beneficiary, that mere allegation is not sufficient to confer standing.

Under Nevada law a negotiable promissory note[28] is enforceable by: (1) the holder[29] of the

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[26]"MERS Terms and Conditions" filed in *Dart* (#08-11007) at ¶ 2, Docket #47-7. (Emphasis added.)

[27]The court is aware of at least one case in this district, *Elias v. Homeeq Serv.*, 2009 WL 481270 (D. Nev. 2009)(slip copy), in which MERS has been found to have standing to foreclose as a nominee beneficiary of a deed of trust. While the court in *Elias* found the deeds of trust, notices of foreclosure, and the trustee's deed upon sale established MERS' standing, there is nothing in the opinion to suggest that MERS lacked possession of the notes.

[28]The court assumes, without deciding, that the notes in question are negotiable instruments. If they aren't, then custom and practice will treat them as if they are. For example,

note, or (2) a nonholder in possession of the note who has the rights of a holder.[30] Thus if MERS is not the holder of the note, then to enforce it MERS must be a transferee in possession who is entitled to the rights of a holder or have authority under state law to act for the holder. Simply being a beneficiary or having an assignment of a deed of trust is not enough to be entitled to foreclose on a deed of trust. For there to be a valid assignment for purposes of foreclosure both the note and the deed of trust must be assigned. A mortgage loan consists of a promissory note and a security instrument, typically a mortgage or a deed of trust.[31] When the note is split from the deed of trust, "the note becomes, as a practical matter, unsecured." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. a (1997). A person holding only a note lacks the power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. e (1997). "Where the mortgagee has 'transferred' only the mortgage, the transaction is a nullity and his 'assignee,' having received no interest in the underlying debt or obligation, has a worthless piece of paper." 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 37.27[2] (2000).

Given this, it is troubling that MERS apparently believes that in states such as Nevada

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under N.R.S. § 104.9012(tt), Nevada's Article 9, an "instrument" is defined as a negotiable instrument, "or any other writing that evidences a right to the payment of a monetary obligation . . . and is of a type that in ordinary course of business is transferred by delivery with any necessary endorsement or assignment." "Instruments" are thus defined somewhat broadly according to ordinary business practices.

[29]A "holder" is the person in possession of a negotiable instrument that is payable either to a bearer or to an identified person who has possession. N.R.S. § 104.1201(u)

[30]N.R.S. § 104.3301. A negotiable promissory is also enforceable under N.R.S. § 104.3301(c) by a nonholder of a note that has been stolen, destroyed, or paid by mistake. There has been no allegation in this case making this provision relevant here.

[31]Nevada recognizes that parties may secure the performance of an obligation or the payment of a debt by means of a deed of trust. N.R.S. § 107.020. The maker of the note is the trustor and the payee is the beneficiary.

possession of the note is not required if no deficiency is sought.[32] Hultman says this in his declaration:

> In non-judicial foreclosure states, if the Member chooses to have MERS foreclose under the power of sale provision in the security instrument and is not seeking a deficiency judgment, then the note does not need to be in the possession of the Member's MERS Certifying Officer when commencing the foreclosure action; provided, however, that under no circumstances may the Member allege that the note is in MERS possession and seek enforcement of the note unless MERS actually possesses the note.[33]

This distinction between judicial and non-judicial foreclosure states, or deficiency and non-deficiency ones, is one which MERS has designed out of whole cloth. In 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. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. c (1997). *See also, In re Vargas*, 396 B.R. 511, 516-17 (Bankr. C.D. Calif. 2008).

DOES MERS HAVE STANDING AS THE AGENT OF THE MEMBER OR IN ITS OWN RIGHT?

The mere statement that the movant is a member of MERS does nothing but lay the groundwork for agency. In order to enforce rights as the agent of the holder, MERS must establish that its principal is entitled to enforce the note. Motions brought by MERS as nominee could meet the threshold test of standing, and MERS might be the "real party in interest" under FED. R. CIV. P. 17, if MERS is the actual nominee of the present Member who is entitled to enforce the note. Under Rule 17 a party in interest is any party to whom the relevant substantive law grants a cause of action. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1038 (9th Cir. 1986). Counsel for MERS acknowledged during oral argument that MERS is the agent for its

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[32]Despite MERS' contention that the mere status as a beneficiary or nominee of a beneficiary is sufficient, MERS has tried to withdraw most of its motions because it could not ascertain that its Member had possession of the note when the motion was filed. *See* Hultman Declaration at p. 4, Docket #74; Docket #49 at p.11; and Docket #47, Exhibit D in *Dart*).

[33]Hultman Declaration, Docket #74, ¶ 4.

members only.[34] If a note has been transferred to a non-member, then MERS cannot act as the agent. One cannot assume that just because MERS was named as the initial nominee in the deed of trust that it still retains that relationship with the holder of the note. Moreover, by virtue of the fact that some of the motions were filed even after the note was transferred out of the MERS system, it is apparent that MERS has not tracked (or been appropriately advised of) the assignment of the note to a non-member. For example in *Moore*,[35] MERS brought a motion to lift-stay in February 2008 as nominee for Quick Loan Funding.[36] Later, in July 2008, an amended lift-stay motion was brought by GRP Loan in *Moore*.[37] Exhibit C to the amended motion shows that an assignment of the deed of trust was made from MERS to GRP on February 27, 2007, which pre-dates MERS' lift-stay motion.[38] Similarly, in *Mercado*,[39] a matter which was added to the argument calendar after the order for joint briefing,[40] MERS brought a motion to lift-stay as nominee for MILA.[41] However, as seen in a later stipulation to sell the property,[42] Homecomings Financial Network was the entity who was entitled to enforce the note.

In the remaining cases, MERS has attempted to establish its standing through the affidavits of "Certifying Officials." Under the Membership Agreement, MERS provides Members a corporate resolution designating one or more employees of the Member a MERS Certifying Officer. This resolution, among other things, appoints the individual as an assistant

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[34]*See also*, Docket #74, Hultman Declaration at ¶ 4.

[35]*Moore (*#07-16333).

[36]Docket #37 in *Moore*.

[37]Docket #59 in *Moore*.

[38]Docket #59, Exhibit C.

[39]#07-17690.

[40]Docket #44 in *Mercado*.

[41]Docket #28 in *Mercado*.

[42]Docket # 50, Exhibit 1 in *Mercado*.

secretary and vice president of MERS. They are given the power to "take any and all actions and execute all documents necessary to protect the interest of the Member, the beneficial owner of such mortgage loan, or MERS in any bankruptcy proceeding regarding a loan registered on the MERS System that is shown to be registered to the Member.[43] There appears to be absolutely no requirement that these Certifying Officers have any knowledge of the loan in question. From the MERS website it appears that the "Certifying Official" (the person who works for the holder of the note) is not an employee of the servicer either.[44]

In *Hawkins* the motion was brought by MERS "solely as nominee for Fremont Investment & Loan, its successors and/or assigns."[45] However, in his affidavit at ¶ 6, Victor Parisi[46] states that the beneficial ownership interest in the *Hawkins* note was sold by Fremont Investment & Loan and ownership was transferred by endorsement and delivery. While the affidavit goes on to the say that MERS was a holder at the time the motion was filed, it is obvious that MERS has no rights to bring the motion as nominee of Fremont given that Fremont no longer had any interest in the note.

Similarly, in *Ziegler*[47] the motion was brought by MERS "solely as nominee for Meridias Capital, Inc., its successors and/or assigns."[48] Yet the affidavit of Stacey Kranz at ¶ 6 states that "the beneficial ownership interest in the Zeigler Note was sold by Meridias and ownership was transferred by endorsement and delivery. The Zeigler Note was subsequently endorsed in

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[43]Form Corporate Resolution, attached to Exhibit C to the Hultman Declaration, filed in *Dart*, #08-11007.

[44]The website says that "[a]fter your mortgage loan closed, your lender more than likely outsourced the job of managing your loan to another company called a SERVICER. This is the company you call when you have questions about your loan."

[45]Docket #28 in #07-13593.

[46]Docket #49, Exhibit C, and Docket #56, Exhibit A in *Mitchell*.

[47]#08-10718.

[48]#08-10718, Docket #21.

blank."[49] An additional affidavit was filed by German Florez, the president of Meridias, who disavowed "any interest in the Note and Deed of Trust regarding the Subject Property."[50]

A slightly different defect exists *Dart*. That motion was brought by MERS "solely as nominee for Centralbanc Mortgage, its successors and/or assigns."[51] However, Ms. Mech, as Certifying Officer, testifies that the note is held by Bank of America, who is listed as the current servicer, and who "had (or has) physical possession of the note in its files."[52] In a previous affidavit, Ms. Mech testified that "the beneficial ownership interest in the Dart Note was sold by Centralbanc and ownership was transferred by endorsement and delivery. The Dart Note was subsequently endorsed in blank."[53]

So while in each of these cases MERS may really be contending that is it entitled to enforce the note in its own right through possession, or as the nominee of the transferee, the motion was brought instead as nominee of an entity that no longer has any ownership interest in the note.

Additionally, each motion has been brought in the name of the lender and "its successors and/or assigns." Under FED. R. CIV. P. 17 an action must be prosecuted in the name of the real party in interest. "As a general rule, a person who is an attorney-in-fact or an agent solely for the purpose of bringing suit is viewed as a nominal rather than a real party in interest and will be required to litigate in the name of his principal rather than in his own name." 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1553 (2d ed. 1990). An agent with ownership interest in the subject matter of the suit is a real party in interest. *Id.* There is no evidence, however, of an agency relationship here or that MERS has any ownership interest

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[49]Docket #56, Exhibit C-1 in *Mitchell*.

[50]Docket #56, Exhibit C-3 in *Mitchell*.

[51]Docket #25 in *Dart* (#08-11007).

[52]Docket #81-1 at ¶ 4 in *Mitchell*.

[53]Docket #49-1 at ¶ 6 in *Mitchell*.

making it the real party in interest under Rule 17.

OTHER EVIDENCE PROBLEMS

Even if the defects were ones of pure pleading,[54] the testimony in these cases is neither competent nor admissible. Each of the affiants in the remaining cases testify as follows:

> I have been appointed as Assistant Secretary of Mortgage Electronic Registration Systems., Inc. ("MERS") under a Corporate Resolution that was executed on [date]. I make this affidavit in support of Movant. I have reviewed the loan file relating to the above-referenced matter, and if called upon to testify as to the facts set forth in this Affidavit, I could and would testify competently based upon my review.

The affiant then purports to set forth the history of the negotiation and transfer of the note and who now has possession.[55]

First, this testimony is not admissible because there is no evidence that the affiants are competent witnesses. The Federal Rules of Evidence apply in bankruptcy[56] yet there is no evidence that these Certifying Officers have adequate personal knowledge of the facts under FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").[57]

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[54]For example, Mr. Hultman has stated that a number of motions were withdrawn because they identified MERS as the payee under the note. Hultman Declaration, Docket #74 in *Mitchell*.

[55]For example Ms. Mech testifies in her affidavit (Docket # 81-1) that at the time MERS filed the motion to lift stay in *Dart*:

> Bank or America, who is listed as the current servicer on the Dart (MIN: 100233602006080675) loan registered on the MERS System, had (and has) physical possession of the original notes in its files. MERS in turn has possession of those documents throngh a MERS Certifying Officer who is an employee of the member listed as servicer on the MERS System.

[56]FED. R. BANKR. P. 9017.

[57]Stacey Kranz, "an Assistant Secretary of [MERS] under a Corporate Resolution" testifies in *Zeigler* (#08-10718) that "MERS was in physical possession of the Zeigler Note at the time MERS filed the motion . . . ."(Docket #73 in *Zeigler* #08-10718). Mr. Victor Parsi, similarly appointed, testifies in *Hawkins* that "MERS was a holder of the Hawkins Note at the time the

Ms. Mech's bald assertion that she has "reviewed the loan file" is inadequate to show that she is personally knowledgeable of the facts. Neither are the purported notes and deeds admissible. For business records to be admissible as an exception from the hearsay rule under FED. R. EVID. 803(6) there must be a showing that the records were:

> (1) made at or near the time by, or from information transmitted by, a person with knowledge;
> (2) made pursuant to a regular practice of the business activity;
> (3) kept in the course of regularly conducted business activity; and
> (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness.

These elements must be established either by the testimony of the custodian or other qualified witness or must meet certification requirements. *See In re Vee Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005).

CONCLUSION

The lift-stay motions in *Dart* and *Hawkins* are denied. MERS may not enforce the notes as the alleged beneficiary. While MERS may have standing to prosecute the motion in the name of its Member as a nominee, there is no evidence that the named nominee is entitled to enforce the note or that MERS is the agent of the note's holder. Indeed, the evidence is to the contrary, the note has been sold, and the named nominee no longer has any interest in the note.

IT IS SO ORDERED.

Motion for Relief was filed in MERS name. . . ."(Docket #56-2 filed in *Mitchell.*)

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