

NO. A08-397

State of Minnesota  
In Supreme Court

Jewelean Jackson, Ethylon Brown, William Brown, Brenda Doane,  
and David Williams, on behalf of themselves and  
all others similarly situated,

*Plaintiffs,*

v.

Mortgage Electronic Registration Systems, Inc., and  
Richard W. Stanek, in his official capacity  
as Sheriff of Hennepin County,

*Defendants.*

JOINT BRIEF OF AMICI CURIAE  
AMERICAN LAND TITLE ASSOCIATION  
AND MINNESOTA LAND TITLE ASSOCIATION  
ON CERTIFIED QUESTION

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## **INTEREST OF *AMICI CURIAE***

The American Land Title Association (“ALTA”) was founded in 1907 and serves as the national trade association and voice of the abstract and title insurance industry. Members of ALTA conduct business in most counties across the country, including Hennepin County, Minnesota. Nearly 3,000 title agents, abstracters, and title insurance companies are active members of ALTA and nearly all title insurance companies hold ALTA membership.

The Minnesota Land Title Association (“MLTA”), an ALTA affiliate founded in 1908, is a trade association comprised of more than 100 abstract and title insurance companies doing business in Minnesota, including Hennepin County. Its goal is to help secure the integrity of land titles throughout the state of Minnesota. MLTA, along with other educational and professional activities, periodically submits *amicus curiae* briefs in appellate cases when its members believe that the case, if wrongly decided, will disrupt the orderly process of title examination and real estate conveyances, or needlessly increase the cost, time, and effort involved to convey or insure title to real estate in Minnesota.<sup>1</sup>

ALTA and MLTA members search, review, and insure land titles to protect home buyers and mortgage lenders who invest in real estate. As such, one primary function of both ALTA and MLTA is to improve land title records. To help achieve that goal, ALTA

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<sup>1</sup> In accordance with Minn. R. Civ. App. P. 129.03, ALTA and MLTA state that (1) no counsel for any party in this action authored this brief in whole or in part and (2) Defendant MERS contributed to the fees and costs for preparation of this brief.

and MLTA have been active supporters of Mortgage Electronic Registration Systems, Inc. ("MERS") since its inception.

### **LEGAL ISSUE PRESENTED**

On February 27, 2008, the United States District Court for the District of Minnesota certified a question of law, which, on March 14, 2008, this Court accepted and reformulated as follows:

Where an entity, such as defendant MERS, serves as mortgagee of record as nominee for a lender and that lender's successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn. Stat. ch. 580?

The United States District Court, in its February 12, 2008 Order denying Plaintiffs' motion for a temporary restraining order, held that the answer to this question is likely in the negative.

#### **Key Legal Authority:**

1. Minn. Stat. § 580.02
2. Minn. Stat. § 580.04
3. Minn. Stat. § 507.413

### **STATEMENT OF FACTS**

ALTA and MLTA adopt the Statement of Facts in MERS' brief.

## ARGUMENT

ALTA and MLTA agree with the legal arguments set forth in MERS' brief. Nothing in Minn. Stat. § 580.02, § 580.04, or any other Minnesota statute provides that assignments of the underlying indebtedness (the note)—as opposed to the security interest itself (the mortgage document)—must or should be recorded.<sup>2</sup> This alone is dispositive of the question presented.

Equally dispositive is what Plaintiffs and the U.S. District Court aptly call the “MERS Statute,” Minn. Stat. § 507.413, which reflects the Minnesota legislature's endorsement of the MERS system. Plaintiffs' narrow construction of this statute, *see* Pl. Br. at 32-36, denudes it of all significance, reflecting that Plaintiffs have no explanation of why the legislature undertook the effort to pass this statute if not to allow MERS to function in Minnesota just as it has in this case.

Because *Amici* agree that MERS' interpretation of these statutes is correct, they will not repeat that discussion here. Instead, *Amici* will address why MERS is crucial to ALTA, MLTA, its members—and the many thousands of purchasers and sellers of real estate in Minnesota.

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<sup>2</sup> Plaintiffs attempt to avoid this clear statement of the issue by arguing they “do not assert that MERS must record transfers of the promissory notes” but only that transfer of the note constitutes an assignment of the mortgage, which must be recorded. *See* Pls. Br. at 21. This is a distinction without a difference. Plaintiffs are still arguing that the transfer of the underlying indebtedness is a recordable event, even where, as is true with MERS, the mortgagee of record remains the same. The rule Plaintiffs advocate, in short, will require recordation every time the note is transferred and, if that does not occur, the remedy of foreclosure by advertisement will be unavailable.

**I. The MERS System Has Greatly Benefited *Amici*, Their Members, And Real Estate Purchasers And Sellers In Minnesota—Benefits That Will Be Lost If MERS Is Dismantled.**

Plaintiffs significantly understate MERS' benefits. *See* Pls. Br. at 3-4. Nowhere do they acknowledge what title companies, closing attorneys, mortgage lenders, and various government-sponsored organizations and agencies have learned: the MERS system improves the accuracy of land title records, allows for more efficient searching of those records, and reduces transaction costs and filing fees in real estate closings and foreclosures.<sup>3</sup>

Indeed, without such benefits, it is unlikely that consumer-oriented government corporations and agencies—Fannie Mae, Freddie Mac, Ginnie Mae, the Federal Housing Administration, and the Department of Veterans Affairs—would have participated in the creation of MERS and served on the MERS Steering Committee.<sup>4</sup>

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<sup>3</sup> *See, e.g.*, October 9, 2003 Memorandum from Ginnie Mae Executive Vice President (“Registration of multifamily loans with MERS is voluntary and offers many benefits, including increased security of the Ginnie Mae collateral position and lower costs of origination and servicing, which results in a reduction in fraud risk and lower financing costs.”) ([http://www.ginniemae.gov/apm/apm\\_pdf/03-21.pdf](http://www.ginniemae.gov/apm/apm_pdf/03-21.pdf)); Office of Thrift Supervision, Examination Handbook on Mortgage Banking at 750.18-19 (July 31, 2007) (“The chain of title is simplified because it begins and ends with MERS.”) (<http://www.ots.treas.gov/docs/7/74836.pdf>); December 10, 1997 Mortgagee Letter from Assistant Secretary for Housing-Federal Housing Commissioner (“The Department recognizes the benefit to mortgagees by saving the cost of assigning the mortgage to MERS after the initial recording and does not object to the change.”) (<http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/97-48ml.txt>).

<sup>4</sup> The role of these government-sponsored corporations and agencies in creating and supporting MERS is well known, and discussed in law review articles cited by Plaintiffs. *See* Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 807 (1995); R.K. Arnold, *Yes, There is Life on MERS*, 11 Prob. & Prop. 32, 33 (August 1997).

Only by inaccurately portraying MERS as primarily a tool for mortgage lenders to save taxes and fees can Plaintiffs suggest that this Court need not be concerned over the consequences of dismantling it.

**A. The State of Land Title Records Before MERS.**

Before MERS, the process of drafting and recording multiple assignments of mortgages was costly and burdensome—creating needless expense in terms of transaction costs, lawyers’ fees, and filing fees, as new assignment papers had to be prepared and recorded every time a loan was sold. Most significant for *Amici*, whose members examine county land records and provide title insurance for real estate purchasers and mortgagees, the need to create and record multiple assignments led to errors and uncertainty in the chain of title whenever an assignment was missing, incorrectly prepared, incomplete, inaccurate, or misfiled.

These concerns were well-documented at the time MERS was created by authors associated with the mortgage banking industry and MERS itself. *See, e.g.*, Steve Cocheo, *Moving from Paper to Blips (the proposed Mortgage Electronic Registration System)*, 88 *American Bankers Ass’n Bankers J.* 48 (January 1996) (noting that, in the pre-MERS environment, the process of recording multiple assignments “adds up to a massive paperwork challenge” and that “[b]y one industry estimate, it can cost as much as \$250,000 to clean up assignment problems relating to a single block of 2,500 loans”); Arnold, *supra*, at 34-35; Slesinger & McLaughlin, *supra*, at 808 (“The establishment of MERS will greatly simplify a terribly cumbersome, paper-intensive, error-prone, and therefore costly process for transferring and tracking mortgage rights. This process is

derived from seventeenth century real property law and is not at all suited to late twentieth century mortgage finance transactions.”).

Real estate law commentators have also noted the burdens associated with transferring and recording mortgage interests before MERS. As stated in one of the leading treatises on real estate finance:

During the past several decades it has become increasingly common for a mortgage loan to be transferred on the secondary mortgage market, not just once, but perhaps several times during its lifetime. For secondary market investors who take seriously the implicit obligation to record their assignments, as discussed above, the increased number of transfers has produced an administrative and record-keeping burden of large proportions. Recordings are often completed slowly and are prone to error. They are also, in the aggregate, fairly costly.

Grant S. Nelson & Dale A. Whitman, 1 Real Estate Finance Law § 5.34 (5th ed. 2007 update). *See also, e.g.*, Baxter Dunaway, 2 L. Distressed Real Est. § 24:20 (December 2007 update) (noting that MERS was designed to partially address the “major problem” of “keeping track of the legal ownership of the mortgage” and the “[p]articularly burdensome” task of “recording in the state recording systems of the assignment of the mortgage, when large groups of mortgages are transferred”); R. Wilson Freyermuth, *Why Mortgagors Can't Get No Satisfaction*, 72 Mo. L. Rev. 1159, 1191-1192 (2007) (“MERS does make one significant contribution by reducing the problems caused by unrecorded assignments.”).

The multiple sponsors of MERS realized that, much like the paper-laden method for buying and selling securities existing before the modern book-entry system, using a nominee to effectuate and record the sale of loans could resolve these problems, thereby

improving the accuracy of land records and reducing the costs of searching them. *See, e.g., Slesinger & McLaughlin, supra*, at 807; *Arnold, supra*, at 35; *Cocheo, supra*. Thus MERS was created.

**B. The Importance of MERS Today.**

MERS has, in fact, helped remedy the problems that led to its creation and, in so doing, yielded important benefits.

Perhaps most important from *Amici's* perspective, MERS has allowed title companies (and anyone else who needs to search land records) to easily and accurately determine whether a given property (if registered with MERS) is subject to a mortgage. There is no longer any need to scour the land records in search of multiple assignments—which, in any event, were often prepared incorrectly and/or misfiled, if filed at all. This has improved the process of preparing lien releases and title opinions, to the benefit of real estate purchasers. It has also reduced closing costs, to the benefit of both sellers and purchasers (depending on who is responsible for what percentage of the costs). And it has reduced the cost of title insurance policies—both owners and lenders policies—as the chain of title with respect to mortgages registered with MERS is now clear.

MERS also enables all interested parties to do what land records could not do: ensure quick and accurate identification of the mortgage servicer. This is crucial because servicers are usually the only parties with access to the payoff statement—information that, for example, helps homeowners avoid foreclosure, exercise their right of redemption, and close on the sale of their home. The title company members of ALTA

and MLTA also benefit because they can quickly identify the servicer and determine the exact payoff amount—a necessary step in the real estate closing and foreclosure process.

The ability to quickly and accurately identify the current mortgage servicer also helps consumers, as the National Consumers League (“NCL”) has recognized.<sup>5</sup> Indeed, NCL created a new website for consumers, to assist them with the mortgage loan process and avoiding foreclosure, which describes and provides an internet link to MERS. *See* <http://www.mortgagetown.org/step7.html>. NCL has done so because, contrary to Plaintiffs’ suggestion, *see* Pls. Br. at 37, it recognizes the central role that servicers play in helping homeowners avoid foreclosure. In the words of NCL’s Executive Director:

The most pressing question for homeowners going through foreclosure is who to go to for help in working out their payments in order to keep their home. There is only one entity who can work out a plan for them and that is the mortgage company handling their loan. Homeowners may be able to prevent foreclosure by contacting their mortgage company early and working out a plan. This site provides a quick and free way to find out the identity of their mortgage company through MERS® ServicerID.<sup>6</sup>

Plaintiffs do not address how dismantling MERS—thereby removing the most efficient way to accurately identify the only entity that, as a practical matter, can help consumers avoid foreclosure—will benefit consumers overall.

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<sup>5</sup> *See* April 2, 2008 NCL Press Release entitled “*New Web Site Helps Prospective Homeowners Avoid Predatory Lenders, Fraud, and Foreclosure.*” ([http://www.nclnet.org/news/2008/mortgage\\_town\\_04022008.htm](http://www.nclnet.org/news/2008/mortgage_town_04022008.htm)). National Consumers League was “founded in 1899” and states that its “mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad.” *Id.*

<sup>6</sup> *Id.* *See also, e.g.*, 1 Real Estate Finance Law, *supra*, at § 5.34 (“A further advantage is that, since its records are entirely electronic, MERS can provide instantaneous on-line access to information about who holds a particular mortgage loan and who is servicing it.”).

**C. The Problems Leading To MERS' Creation Will Reemerge If MERS Is Dismantled.**

Plaintiffs hypothesize alleged ills contributed to by MERS, *see* Pls. Br. at 39-41, which MERS refutes in its brief, *see* MERS Br. at 40-41, but do not address why it is acceptable to regress to the inaccurate, inefficient, and costly system that caused the mortgage industry, Fannie Mae, Freddie Mac, Ginnie Mae, the Federal Housing Administration, and the Department of Veterans Affairs to create and support MERS in the first place. Those problems were real and commonly-recognized by a disparate group of stakeholders in the real estate market. Plaintiffs have no answer as to why it makes good public policy sense for this Court to dismantle an effective solution for which there is currently no available alternative.<sup>7</sup>

Moreover, the secondary market has grown dramatically since MERS was created. Notwithstanding excess in the creation and sale of mortgage-backed securities leading to the subprime mortgage meltdown, this secondary market will continue to exist—because it serves an important market need of freeing up capital for new and existing homebuyers. A law review article cited by Plaintiffs recognizes this undeniable fact. *See* Christopher

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<sup>7</sup> *Cf.* 1 Real Estate Finance Law, *supra*, at § 5.34 (“A substantial share of all residential mortgages currently being originated in the United States is already being placed with MERS, and it is likely that within a few years virtually all residential loans originated by financial institutions will be within the MERS system. It has already proven to be a remarkable success.”); 2 L. Distressed Real Est., *supra*, at § 24:20 (“The [MERS Mortgage Identification Number] is unique and will not change during the life of the loan. That innovation alone is a tremendous improvement for the mortgage industry ... As a result of these advantages, many lenders may eventually abandon their own proprietary loan numbering systems in favor of the MIN.”).

L. Peterson, *Predatory Structured Finance*, 28 *Cardozo L. Rev.* 2185, 2188 (2007). *See also, e.g.,* Freyermuth, *supra*, at 1164.

Dismantling MERS and returning to the pre-existing practices for transferring and recording assignments will likely result in greater uncertainty in land records than existed when MERS first came into operation. This is precisely contrary to the principle recognized by the United States District Court that “Minnesota has long prized certainty in real estate law.” A-342 (citing *Title Ins. Co. of Minn. v. Agora Leases, Inc.*, 320 N.W.2d 884, 885 (Minn. 1982); *Gille v. Hunt*, 29 N.W. 2, 3 (Minn. 1886)).

## **II. A Ruling In Plaintiffs’ Favor May Extinguish The Foreclosure By Advertisement Remedy For Many Mortgages.**

Plaintiffs characterize their argument as narrow and modest, affecting only the prerequisites for recording in the context of foreclosure by advertisement. *See* Pls. Br. at 24. In fact, Plaintiffs’ argument, if successful, may prevent many mortgage owners from using Minnesota’s foreclosure by advertisement remedy, which, as Plaintiffs acknowledge, “is a more convenient, expedient, and significantly less expensive remedy for mortgage lenders than its judicial counterpart.” *Id.* at 12. *See also, e.g.,* 1 *Real Estate Finance Law, supra*, at § 7.19 (“The underlying theory of power of sale foreclosure is simple. It is that by complying with the above type statutory requirements, the mortgagee accomplishes the same purposes achieved by judicial foreclosure without the substantial additional burdens that the latter type of foreclosure entails ... Moreover, where it is in common use, power of sale foreclosure has provided an effective foreclosure remedy with a cost in time and money substantially lower than that of its judicial foreclosure

counterpart.”); Kareen R. Ecklund, *Advantages and disadvantages of foreclosure by advertisement*, 6A Minn. Prac., Methods of Practice § 49.2 (3d ed. 2007 update) (“Foreclosure by advertisement generally is an effective foreclosure remedy which is faster, more efficient and less costly than foreclosure by action.”).

If the certified question is answered in the affirmative, every mortgagee who owns a loan in or nearing default will be forced to record all prior assignments before initiating foreclosure by advertisement. In many cases this will be difficult, in many other cases impossible, principally for two reasons:

*First*, all previous owners of the promissory note will need to be identified. For properties that have been registered on the MERS system from the beginning, this will not pose a problem. But MERS has only been in existence for approximately 10 years. Many homes, of course, may be encumbered by mortgages originated and assigned (perhaps multiple times) well over 10 years ago. Even within the past 10 years, many mortgages were originated and assigned outside of the MERS system and only entered MERS later. In short, simply identifying all previous owners of indebtedness may be difficult and, in some cases, impossible.

*Second*, even if all previous owners of the note can be identified, the mortgagee, before foreclosing, must contact a representative of each owner to begin the process of drafting and signing an assignment document for recording. This may prove impossible

because many previous owners no longer exist<sup>8</sup>—in which case there is nobody who can sign the assignment contract. Even where all prior owners are still doing business, they may not have kept records dating back potentially decades and, thus, could not help prepare, and would not be willing to sign, an assignment contract whose accuracy was unverifiable. Moreover, these previous owners—who may not have had any interest in the loan for years if not decades—have no incentive to cooperate with the current owner and may simply be unwilling to sign.

These complications are likely to affect more than just loans at or near foreclosure. Indeed, mortgage owners, as a practical matter, may be forced to undertake the process of creating and recording old assignments described above for *all* loans. Simply put, the present value of any mortgage loan is diminished where the owner cannot rely on the ability to foreclose by advertisement in the future should the borrower default. Therefore, mortgage owners may be wary of *owning* a loan that, at present, could not be foreclosed by advertisement, and, in the future, could not be foreclosed unless all prior assignments could be fully and accurately recorded—the likelihood of which would be unknown and unpredictable. Mortgage owners may also be wary of *purchasing* a loan

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<sup>8</sup> Because of the subprime crisis and other factors, many mortgage lenders have recently gone out of business. See, e.g., Jim Buchta, *Market conditions, new rules see mortgage originator licenses drop*, Star Tribune (December 8, 2007) (<http://www.startribune.com/business/12267426.html>); Erich Dash & Gretchen Morgenson, *Bank Agrees to Buy Troubled Loan Giant for \$4 Billion*, New York Times (Jan. 11, 2008) ([http://www.nytimes.com/2008/01/11/business/12bank-web.html?\\_r=1&scp=1&sq=mortgage+lenders+failed&st=nyt&oref=slogin](http://www.nytimes.com/2008/01/11/business/12bank-web.html?_r=1&scp=1&sq=mortgage+lenders+failed&st=nyt&oref=slogin)). Even before the crisis, numerous lenders went out of business for any number of reasons. One cannot assume that because a mortgage lender or owner was in business 10 or 20 years ago, it still is today.

subject to prior mortgages, which may impair the secondary market for mortgage loans and, as a result, raise mortgage interest rates.

Even worse, mortgage lenders, except in the case of newly-built homes or homes with no prior mortgages, may be unwilling to *lend* in the first instance without the certainty that foreclosure by advertisement will be an available remedy if the borrower defaults. At a minimum, many mortgage lenders for homes with prior mortgages may demand increased mortgage rates on new loans to compensate for the potential loss of the most efficient and inexpensive foreclosure remedy.

These potentially-insurmountable logistical difficulties most directly affect mortgage owners and real estate purchasers. But they also affect *Amici*, whose members are called upon to research the chain of title to determine whether title is clear and, if not, to take steps to make it clear. Where this determination cannot be made with accuracy, because of uncertainty as to the validity and proper recording of one or more old assignments, title insurance companies may be unable or unwilling to insure the property—or, depending on the level of clarity in the land records, may be willing to insure but only for an increased premium.

In sum, a ruling in Plaintiffs' favor will likely extinguish the foreclosure by advertisement remedy for a great many mortgage owners and mortgage lenders. This will require the more expensive and inefficient foreclosure by action remedy, with the consequences of (a) diminishing the availability of mortgage loans or increasing their cost and (b) increasing the cost of title insurance.

## CONCLUSION

ALTA and MLTA respectfully submit that this Court should answer the certified question in the negative and reject Plaintiffs' attempt to dismantle the legislatively-approved MERS system along with its improvements to the clarity of land title records.

Dated: May 21, 2008



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## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rule of Civil Appellate Procedure 132.01, subds. 1 and 3, for a brief produced with a 13 point proportional font, Times New Roman. The brief is printed on 8 ½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The length of the brief is 3,621 words, as determined by the word counter of the word processing software, Microsoft Office Word 2003, which was used to prepare the brief.

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