

NO. A12-0045

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State of Minnesota  
**In Court of Appeals**

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JPMorgan Chase Bank, N.A.,

*Respondent,*

vs.

Trevor Erlandson, Melissa Erlandson, 94 Roselawn,  
MERS as nominee for Homecomings Financial, LLC,  
John Doe, and Mary Roe,

*Appellants.*

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**BRIEF OF RESPONDENT**

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## STATEMENT OF THE ISSUES

1. Whether the appeal lodged January 5, 2012, from the July 14, 2011, amended foreclosure judgment is untimely, thereby depriving this Court of jurisdiction to review?

Description of How the Issue was Raised Below, Trial Court Holding And Description of How the Issue Was Preserved For Appeal:

This issue was not raised below because it is a matter of appellate practice.

Apposite Authority:

Minn. R. Civ. App. P. 104.01  
*Flakne v. Metro. Life Ins. Co.*, 270 N.W. 566 (Minn. 1936)  
*Fiman v. Hagedorn*, 242 N.W. 292 (Minn. 1932)  
*Dodge v. Davidson*, 7 N.W. 732 (Minn. 1880)

2. Whether the District Court erred by confirming the October 5, 2011, sheriff's sale, where Respondent produced the original promissory note with blank endorsement establishing its right to foreclose?

Description of How the Issue was Raised Below, Trial Court Holding And Description of How the Issue Was Preserved For Appeal:

The issue was raised below by Respondent's motion to confirm the sheriff's sale. The District Court confirmed the October 5, 2011, sheriff's sale of the property in all respects. (APP 20.) On January 5, 2012, Appellants filed a Notice of Appeal, appealing the judgment entered on December 20, 2011. (Notice of Appeal.)

Apposite Authority:

Minn. Stat. §§ 581.08 and 582.30  
Minn. Stat. § 336.3-201(a)  
Minn. Stat. § 336.3-205(b)

## STATEMENT OF THE CASE

Respondent commenced this action to foreclose a mortgage on real property located in St. Paul, Minnesota. (Complaint). The District Court granted Respondent summary judgment on May 10, 2011. The order awarded Respondent a judgment in the amount of \$159,610.23 against Appellants and a decree of foreclosure, directing the Sheriff of Ramsey County to sell the mortgaged property to satisfy some or all of the judgment. (APP 1.)

Appellants subsequently moved to vacate the judgment, asserting that they had a reasonable defense on the merits related to Respondent's claim for a potential deficiency judgment. (Appellants' Mot. Vacate). Addressing Appellants' motion, the District Court held that there was no dispute about the existence and validity of the note or mortgage. (APP 13.) Likewise, there was no dispute that Appellants failed to make the payments due under the note and mortgage and were therefore in default under those agreements. (*Id.*) As a result of that default, the principal amount owing under the note had been accelerated and the power of sale under the mortgage was operative. (*Id.*)

Because evidence of an endorsement or transfer of the promissory note to Respondent had not yet been introduced into evidence, the District Court granted Appellants' motion to vacate in part, holding that Respondent had not established its right to obtain a deficiency judgment. (APP 16.) The District Court, by order entered June 12, 2011, amended its previous decree of foreclosure. (APP 8-9.)

Appellants failed to timely appeal from the amended judgment. (Notice of Appeal.) The property was sold at a sheriff's sale on October 5, 2011. (APP 20.)

The District Court confirmed the sheriff's sale of the property on Respondent's motion. (APP 20.) Recognizing that it was unlikely to collect on any personal judgment against Appellants, Respondent waived its claim for a deficiency judgment, but produced affirmative evidence that the note had been transferred to Respondent and that it was therefore entitled to enforce the personal liability of Appellants under the promissory note. (*Id.* at 24; Transcript, 2-3.) Accordingly, the order confirming the sheriff's sale declared the foreclosure judgment satisfied in full. (APP 24.)

### **STATEMENT OF FACTS**

Respondent adopts Appellants' statement of facts, with the following exceptions:

1. Respondents object to Appellants' characterization of the District Court's orders, which speak for themselves.

2. Appellants state the allonge to the promissory note produced by Respondents "was not attached to the note." (Appellants' Brief, 8.) In fact, as represented by counsel for Respondent, the allonge was "affixed with a paper clip" to the original promissory note. (Transcript, 5.)

3. Appellants state "counsel for Respondent conceded that the note had not been in the possession of Respondent at the time the foreclosure action was commenced" and that "[c]ounsel admitted that the note was not located until

approximately a month prior to the December 1 hearing.” (Appellants’ Brief, 8.) Appellants erroneously equate possession by counsel for Respondent with possession by Respondent. Counsel’s statement that “[her] office only got possession of this original [note] I believe a little over a month ago” explains why counsel did not present it to the court previously. (Transcript, 5.) Similarly, the statement that “we did not have the original note when we commenced the foreclosure proceedings.” (*Id.*) The term “we” refers to Respondent’s counsel’s law firm, not Respondent, as the District Court understood. (*Id.*)

### ARGUMENT

#### **I. APPELLANTS’ ARGUMENTS THAT ARE PREMISED ON THEIR UNTIMELY CHALLENGE TO THE DISTRICT COURT’S FORECLOSURE JUDGMENT SHOULD NOT BE CONSIDERED.**

There were two issues before the District Court on December 1, 2011. The first issue was whether the District Court should confirm the October 5, 2011, sheriff’s sale pursuant to Minn. Stat. § 581.08. (APP 20.) The second issue was whether Respondent was entitled to a deficiency judgment against Appellants. (*Id.*) Respondent elected to waive its claim to a deficiency judgment. (*Id.*) Therefore, the only issue for the District Court to decide was whether the October 5, 2011, sheriff’s sale should be confirmed. (*Id.* at 24.)

Although cast as an appeal of the District Court’s December 20, 2011, judgment confirming the foreclosure sale, nearly all of Appellants’ arguments challenge the propriety of the District Court’s earlier foreclosure judgment entered on May 13, 2011, and July 14, 2011. *See*, Appellants’ Brief, 10 (“Contrary to

Respondent's argument, it was not entitled to foreclose on the property"); *Id.* at 14 ("There is a genuine issue of material fact as to whether the parties to the foreclosure action are all of the parties in interest"); *Id.* at 16 ("The court erred when it concluded that Respondent could foreclose"); *Id.* at 17 ("Respondent had no right to foreclosure on the Appellants' property"); *Id.* at 20 ("Respondent cannot show that it was authorized to foreclose").

For the reasons discussed below, these arguments are untimely and thus should not be considered by this Court. *See D.Y.N. Kiev, LLC v. Jackson*, 802 N.W.2d 821, 824 (Minn. Ct. App. 2011) (dismissing part of appeal seeking review of judgment under which right to appeal expired prior to filing of notice of appeal).

**A. Appellants' Did Not Timely Appeal From The District Court's Foreclosure Judgment.**

On May 10, 2011, the District Court entered an order for judgment granting Respondent a decree of foreclosure and ordering the sale of the property. (APP 1.) Pursuant to the District Court's Order, the Court Administrator entered a judgment on May 13, 2011. (APP 4.) The District Court's May 10, 2011, order was vacated in part on July 12, 2011, but the portion of the order granting a decree of foreclosure was reaffirmed. (APP 7, 9-10.) The Court Administrator once again entered a foreclosure judgment July 14, 2011. (Respondent's App. 1.) Therefore, at the latest, Appellants' appeal from the foreclosure judgment should have been

made no later than September 12, 2011. Appellants did not file their appeal until January 5, 2012. (Notice of Appeal).

Under Minn. R. Civ. App. P. 104.01, an appeal must be taken from a final judgment within 60 days after its entry. Minn. R. Civ. App. 104.01, subd. 1. The “general rule in Minnesota is that after amendment or modification of an order, the time within which an appeal must be taken begins to run from the date of amendment.” *Krug v. Indep. Sch. Dist. No. 16*, 293 N.W.2d 26, 29 (Minn. 1980). This rule only applies, however, “when the issue was for some reason not appealable before the modification.” *Servin v. Servin*, 345 N.W.2d 754, 757 (Minn. 1984) (quoting *E.C.J. Corp. v. G.G.C. Co.*, 237 N.W.2d 627, 629 (Minn. 1976)).

Here it is immaterial whether the entry of judgment May 13, 2011, or the entry of judgment on July 14, 2011, caused Appellants’ right of appeal to begin to run. Appellants did not file their Notice of Appeal until more than five months after entry of the July 14, 2011, judgment. (Notice of Appeal.)

**B. The July 14, 2011, Foreclosure Judgment Triggered The Time For Appeal.**

A judgment of foreclosure is a final judgment for purposes of appeal. *See Flakne v. Metro. Life Ins. Co.*, 270 N.W. 566, 569 (Minn. 1936) (holding that a judgment granting foreclosure of mortgage and directing sale is an appealable judgment). A line of cases stretching well over one-hundred years settle any question when the right to appeal ripens – and it is at the time of a foreclosure

judgment, rather than an order confirming sale pursuant to that judgment. As early as 1880, the Minnesota Supreme Court held:

The judgment directing the sale [...] adjudges the amount due, with costs and disbursements, and the sale of the mortgaged premises or some part thereof to satisfy said amount, and directing the sheriff to proceed and sell the same, etc. This judgment determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered, all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage, and the right to enforce it, is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes.

*Dodge v. Davidson*, 7 N.W. 732, 732 (Minn. 1880) (internal citations omitted) (emphasis added).

At the time the opinion in *Dodge* was written, the applicable foreclosure statute required a “final decree in an action to foreclose a mortgage.” *Id.* The “final decree” – somewhat like a modern-day certificate of sale – was intended “to afford to the purchaser record evidence in the way of a decree or judgment [...] that the title is in the purchaser free from any right to redeem.” *Id.* at 733; *c.f.* Minn. Stat. § 580.12 (providing that “upon expiration of the time for redemption, [a certificate of sale] shall operate as a conveyance to the purchaser or the purchaser’s assignee of all the right, title, and interest of the mortgagor”).

In a foreclosure action under current Minnesota law, a certificate of sale, much like a “final decree,” does not issue until after entry of the foreclosure judgment (and confirmation of the foreclosure sale). *See* Minn. Stat. § 581.08 (providing that “if the sale is confirmed, the sheriff sale forthwith execute the

proper certificate of sale”). But this does not mean the foreclosure judgment is not a final judgment for purposes of appeal.

Indeed, the Court in *Dodge* held that on “an appeal from the ‘final decree’ no error can be alleged against the judgment for a [foreclosure] sale. To review that judgment an appeal must be taken from it.” *Dodge*, 7 N.W. at 733. In order to challenge the judgment directing the foreclosure sale, then, *Dodge* teaches that an appeal must be taken directly from the foreclosure judgment and cannot be preserved until after entry of the “final decree.”

Citing *Dodge*, the Minnesota Supreme Court held 52 years later that there is “only one judgment in a foreclosure action [...] It is a final judgment and determines all the issues.” *Fiman v. Hagedorn*, 242 N.W. 292, 294 (Minn. 1932) (emphasis added). Much like the Court in *Dodge*, the Court in *Fiman* took note of the statutory requirement of “an order confirming the sale,” which replaced the statutory requirement of a “final decree.” *Id.*

While acknowledging the requirement of an order confirming the sale, the *Fiman* Court held that the foreclosure statute “provides that upon confirmation of the sale the clerk shall enter satisfaction of the judgment [...] [t]he judgment here referred to is the judgment of foreclosure.” *Id.* (emphasis added). This language mirrors the current statutory language. See Minn. Stat. § 581.09 (“Upon confirmation of the report of sale, the court administrator shall enter satisfaction of the judgment”) (emphasis added). The fact that the foreclosure sale is subject to

confirmation thus does not detract from the finality of the foreclosure judgment or somehow extend the time for a challenge to that judgment.

**C. This Court Should Not Consider Appellants' Arguments Regarding the Foreclosure Judgment.**

The District Court decided one issue in its December 19, 2011, Order from which Appellants have appealed – whether the October 5, 2011, sheriff's sale should be confirmed. (APP 24.) If Appellants wished to appeal the District Court's foreclosure judgment, they were required to file a notice of appeal within 60-days of entry that judgment. Minn. R. Civ. App. P. 104.01, subd 1.

Because Appellants failed to timely appeal from the entry of the foreclosure judgment, this Court should not consider Appellants' extensive arguments regarding the alleged invalidity of that judgment. *See*, Appellants' Brief at 10, 14, 16, 17, 20. In fact, with the exception of Section I.B.3 of Appellants' Brief, which challenges Respondent's bid, but nonetheless rests on alleged failure of proof of the right to foreclose, Appellant does not advance a single argument that relates to the District Court's confirmation of the October 5, 2011, sheriff's sale. (*See* Appellants' Brief.)

Accordingly, this Court should not consider any of Appellants' arguments, save those found in Section I.B.3 of Appellant's Brief. *See* Minn. R. Civ. App. P. 126.02 (prohibiting court of appeals from extending time to file notice of appeal); *Honner*, 518 N.W.2d at 641 (holding that court of appeals lacks jurisdiction to

consider untimely appeal); 2002 WL 1970597 at \*2-4 (holding appeal of foreclosure judgment untimely and affirming district court).

**II. THE DISTRICT COURT DID NOT ERR BY CONFIRMING THE OCTOBER 5, 2011, SHERIFF'S SALE.**

**A. Standard of Review.**

An order confirming a foreclosure sale is reviewed for an abuse of discretion. *US Fed. Credit Union v. Avidigm Capital Group*, 2008 WL 2796742, \*7 (Minn. Ct. App. July 22, 2008) (citing *Zetah v. Isaacs*, 428 N.W.2d 96, 103 (Minn. Ct. App. 1988)).

**B. Appellants' Claim That Respondent Improperly Submitted A Credit Bid at the October 5, 2011, Sheriff's Sale Is Wholly Unsupported By The Applicable Law and Undisputed Facts.**

Appellants advance only one argument in support of their claim that the District Court erred in confirming the foreclosure sale and it, like the others, rests on alleged lack of standing to foreclose; namely, Appellants maintain that only the lender or note holder is entitled to make a credit bid, up to the amount of the entire indebtedness, at a foreclosure sale. Appellants' Brief, 20. Appellants then argue that, because "there is no evidence that Respondent paid cash or its equivalent for the Appellants' property" and (resuming their refrain on standing to foreclose) because "Respondent cannot show that it is the note holder" the sale is void. *Id.* at 21. In support of this argument, Appellants claim, "[n]o one, other than the entity that is owed the debt, can bid in the debt. *Id.* Appellants' argument fails for three reasons.

As a threshold matter, Appellants' failure to cite any legal authority in support of this claim results in a waiver of the argument. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (stating that assignments of error based on mere assertion and unsupported by argument or authority are waived unless prejudicial error is obvious); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n. 1 (Minn. Ct. App. 1994) (declining to address allegations unsupported by legal analysis or citation).

Second, the District Court's July 12, 2011, order provides that "[Respondent] is entitled to foreclose on and conduct a sheriff's sale of the [property] in order to recover the principal amount in default of \$159,610.23." (APP 9.) The order therefore clearly contemplates that Respondent is entitled to sell the property and credit bid up to \$159,610.23 at the foreclosure sale. Respondent submitted a credit bid \$98,540.00 at the foreclosure sale and thus did not exceed the amount specified in the District Court's decree of foreclosure. (APP 22.)

Third, the District Court correctly found that Respondent "presented an affidavit documenting beyond dispute its possession of the original Note and a transfer to it by Allonge." (APP 24); (APP 25-26); (Transcript 5-6.)<sup>1</sup> As

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<sup>1</sup> The fact that the allonge to the note was initially attached with a paper clip does not make the allonge ineffective. *See* 6 *Hawklund* UCC Series § 3-204:3 [Rev] ("a paper clipped or stapled [allonge] to an instrument is sufficient as an allonge"); 6B *Anderson* UCC § 3-204:12 [Rev] (3d. ed.) ("Any manner of attaching the [allonge] to the instrument would seem to be sufficient [...] Even paper clipping the allonge to the instrument should be sufficient); *c.f. Nab Asset Venture II, L.P.*

Appellants concede that the note holder is entitled to submit a credit bid at a foreclosure sale, there is simply no basis for Appellants' argument.

**III. IN ADDITION TO BEING UNTIMELY, APPELLANTS' REMAINING ARGUMENTS DO NOT PROVIDE ANY BASIS TO FIND THAT THE DISTRICT COURT ERRED BY GRANTING RESPONDENT A DECREE OF FORECLOSURE.**

As discussed in Section I, *supra*, Appellants' Brief is primarily an untimely challenge of the District Court's foreclosure judgment. To that end, Appellants' arguments are premised on the notion that there is a genuine issue of material fact about whether Respondent is entitled to enforce the promissory note associated with the mortgage loan. (*See* Appellants' Brief.)

Appellants' argument – that in order to foreclose Respondent must establish not only that it holds legal title under the mortgage, but also that it can enforce Appellants' personal liability under the note – misapprehends the applicable law. But even if the relevant law supported Appellants' arguments, the District Court correctly decided that Respondent is in fact entitled to enforce the note. As a result, there is simply no basis, in fact or law, for Appellants' arguments that the foreclosure judgment was improperly granted.

**A. Standard of Review.**

A district court must grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together

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*v. Lenertz, Inc.*, 1998 WL 422207, \*2 (Minn. Ct. App. July 28, 1998) (holding that stapling an allonge to an instrument is sufficient to affix it but expressing no opinion on whether paper clipping is sufficient to affix an allonge.)

with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). No genuine issue of material fact exists if the evidence “merely creat[es] a metaphysical doubt as to a factual issue.” *State Farm Fire & Cas. V. Aquila, Inc.*, 718 N.W.2d 879, 886-87 (Minn. 2006).

On appeal, the appellate court applies a *de novo* standard of review to a grant of summary judgment and views the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). The appellate court “will affirm a district court’s grant of summary judgment if it can be sustained on any grounds.” *Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. Ct. App. 2010).

**B. The District Court Correctly Determined that Respondent Was Entitled to Foreclose The Mortgage.**

Appellants’ arguments that Respondent was not entitled to foreclose on the mortgage are unpersuasive for three reasons. First, the note and mortgage are separate and independent contracts, with distinct remedies available under each. Second, the undisputed facts establish that Respondent is in fact the holder of the note and is therefore entitled to enforce it. Third, Appellants’ concerns over possible “double” or “future” liability are unfounded.

**1. The Note and Mortgage Are Separate And Independent Contracts And Respondent Was Entitled To Enforce The Terms of The Mortgage and Foreclose On The Property.**

When Appellants obtained the mortgage loan that is the subject of this action, they executed both a note and mortgage. (APP 29, 56.) Only the mortgage contains a power of sale as a remedy for default. (APP 41, ¶ 22.) A mortgagee therefore “has two distinct remedies if the mortgagor defaults. The mortgagee may either sue for a personal judgment on the note, or rely on the security of the mortgage to sell the property and apply the proceeds of the sale to payment of the debt.” *City of St. Paul Hous. & Redev. Auth. V. St. Anthony Flats Ltd. P’ship*, 517 N.W.2d 58, 61-62 (citing *Winne v. Lahart*, 193 N.W. 587, 589 (Minn. 1923).

Respondent elected to foreclose on the mortgage. When the District Court granted Respondent its decree of foreclosure, there was no dispute as to the existence of the debt under the note, Appellants’ default under the note, and Respondent’s status as the holder of legal title under the mortgage. (APP 12-13.) No further showing was required for Respondent to enforce the mortgage. (APP 41, ¶ 22) (“If the default is not cured [...] [the mortgagee] at its option may [...] invoke the power of sale.”) This is consistent with longstanding Minnesota law:

The Decisions of this court clearly establish that a mortgage and a note are separate and independent contracts, different in their nature and purpose. The note is a distinct instrument enforceable according to its terms and independently of the mortgage. On the other hand, the mortgage is an independent contract, though collateral to the instrument which it secures, and, as such, may be foreclosed even though an action on the note is barred.

*Lundberg v. Nw. Nat. Bank of Minneapolis*, 216 N.W.2d 121, 123 (Minn. 1974) (emphasis added) (citing *Johnson v. Howe*, 176 Minn. 287, 223 N.W. 148 (1929); *Welbon v. Webster*, 89 Minn. 177, 94 N.W. 550 (1903); *Conner v. Howe*, 35 Minn. 518, 29 N.W. 314 (1886)).

Yet, Appellants contend – conspicuously without citation – that a showing of “authority” from the note holder is necessary to foreclose. (Appellants’ Brief, 20.) This is simply not true. *See, e.g., Carpenter v. Artisans’ Sav. Bank*, 47 N.W. 150, 150 (Minn. 1890) (where legal and equitable title in security instrument are split, and one forecloses, “both are bound and the foreclosure is valid. It is a matter between them alone, and does not concern the mortgagor.”); *Bottineau v. Aetna Life Ins. Co.*, 16 N.W. 849, 850 (Minn. 1893) (“The mortgagor, whose interests were not affected by the fact that others had equitable rights in the mortgage with the one whom the legal title had vested, could not on that fact alone object to his using such legal title.”); *Bassman v. Faue*, 48 N.W. 13, 16 (Minn. 1891) (holding that legal title holder of the security instrument holds the security instrument in trust for those with equitable interests, which is of no concern to the mortgagor).

The law is clear. Even if another entity holds an equitable interest in the mortgage (i.e., the note), the holder of the equitable interest is bound by Respondent’s election, as the holder of legal title to the mortgage, to foreclose. *See Carpenter*, 47 N.W. at 150. Moreover, the relationship between the Respondent, as the holder of legal title, and any other entity with an equitable

interest in the mortgage is of no concern to Appellants, and cannot form the basis of an objection to Respondent's decision to foreclose the mortgage. *See Bottineau*, 16 N.W. at 850.

These principles were recently affirmed by the Minnesota Supreme Court in *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 500 (Minn. 2009) (“[O]ur own decisions have repeatedly recognized the doctrine that the debt [...] may be in one person, while what may be termed legal title to the security instrument is in another [...] in such cases the power of sale must be exercised in the name of the party who has the legal title to the instrument. We affirm today [these] principles”) (internal quotations and citations omitted) (emphasis added). This is precisely what happened below. Respondent, as the holder of legal title to the mortgage, commenced the foreclosure action and was awarded a decree of foreclosure. (APP 1, 7, 54.) Following the sale of the property on October 5, 2011, the foreclosure judgment was completely satisfied. Minn. Stat. § 581.09; (APP 21-22). Appellants' claims to the contrary are unavailing.

## **2. The Undisputed Facts Establish That Respondent Is The Holder of The Note.**

At the December 1, 2011, hearing on Respondent's motion to confirm the sheriff's sale, Respondent produced the original promissory note executed by Appellants. (Transcript 5-6); (APP 25-26.) The note was granted in favor of Homecomings Financial, LLC, but subsequently was endorsed by Homecomings Financial, LLC, in favor of Residential Funding Company, LLC. (APP 56.); (APP

61); Minn. Stat. § 336.3-205(a). The note was then endorsed in blank via an allonge executed by Residential Funding Company, LLC. (APP 64); Minn. Stat. §§ 336.3-205(b) and 336.3-204 (“for the purposes of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument). The allonge was affixed to the note by a staple, and was previously affixed with a paper clip. (Transcript, 5.)

When an “endorsement is made by the holder of an instrument and it is not a special endorsement [i.e., payable to a specific person], it is a ‘blank endorsement.’” Minn. Stat. § 336.3-205(b). When endorsed in blank, “an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.” *Id.*; Minn. Stat. § 336.3-201(a) (“Negotiation means transfer of possession [...] of an instrument by a person other than the issuer to a person who thereby becomes its holder.”) The holder of an instrument is entitled to enforce the instrument. Minn. Stat. § 336.3-301.

The undisputed facts establish that Respondent, as the holder of an instrument endorsed in blank, is entitled to enforce the note. (APP 25-26, 64); (Transcript, 5); (Nov. 22, 2011, Affidavit of William Butler, Ex. 1, p. 13).<sup>2</sup> There is no evidence in the record that controverts this fact. (APP 24, note 1.)

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<sup>2</sup> Appellants contend that because the allonge to the note is undated and there is no evidence of when Respondent came into possession of the note, there is a disputed issue of material fact regarding when Respondent obtained the right to enforce the note. Appellants’ Brief 20. Yet there is no dispute that the mortgage was granted in favor of Mortgage Electronic Registration Systems, Inc.

**3. Appellants' Purported Concern Over Further Liability Under The Note Is a Nothing More Than A Red Herring.**

Appellants contend that the District Court's foreclosure judgment exposes them to "possible future liability for the note." Appellants' Brief 12, 14-16. This is patently untrue. Following the District Court's confirmation of the sheriff's sale, the foreclosure judgment against Appellants was fully satisfied. (APP 22); Minn. Stat. § 581.09 ("[u]pon confirmation of the report of sale, the court administrator shall enter satisfaction of the judgment to the extent of the sum bid [...] The amount entered is full satisfaction of the judgment unless a deficiency is allowed.")

Minn. Stat. § 582.30 provides "a person holding a mortgage may obtain a deficiency judgment" if a number of requirements are met. Minn. Stat. § 582.30, subd. 1. Respondent, however, waived any claim it may have had to deficiency judgment. The District Court thereafter ordered the Court Administrator to "fully satisfy the [foreclosure judgment] such that there is no surplus or deficiency." (APP 22.)

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("MERS") as nominee for the lender and assigned from MERS to Respondent. (APP 30, 54.)

Per the MERSCORP, Inc. (the parent company of MERS) Rules of Membership "MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes [and] may rely on instructions from the servicer [i.e., the note holder's agent] shown on the MERS® System." (Nov. 22, 2011, Affidavit of William Butler, Ex. 1, p. 13). Thus, when MERS executed the assignment of mortgage to Respondent, it did so at the behest of the note holder. This further undermines Appellants' claim that Respondent was somehow "unauthorized" by Appellants' concocted mystery note holder to foreclose.

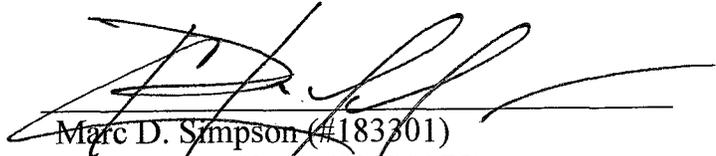
Appellants appear to be claiming that an entity other than Respondent may be entitled to enforce the note and thereby could pursue a deficiency judgment against them. Appellants' Brief 14-16. Appellants, however, do not provide any evidence of who, save Respondent, may be entitled to enforce the note. Indeed, Appellants do not even claim that anyone, save Respondent, has ever made a demand for payment under the note. (*See* Appellants' Brief).

The undisputed facts establish that Respondent is the holder of the note. To the (hypothetical) extent another entity holds an equitable interest the proceeds of the foreclosure sale or the note, that is, quite simply, of no concern to the Appellants. *See Bottineau*, 16 N.W. at 850. Accordingly, there is no need for this Court to speculate about this non-existent issue.

### **CONCLUSION**

Based on the foregoing, Respondent respectfully requests that the Court affirm the District Court's order approving the October 5, 2011, sheriff's sale, and disregard Appellants' other arguments relating to the earlier foreclosure judgment. To the extent that this Court considers Appellants' other arguments relating to the earlier foreclosure judgment, this Court should still affirm the District Court's Order confirming the sale, as those arguments are without merit.

Dated: March 22, 2012



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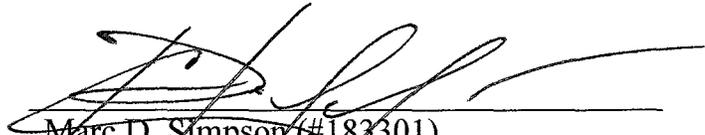
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**CERTIFICATE OF COMPLIANCE**

Respondent's Principal Brief complies with the requirements of Rule 132.01, subd. 3(a) of the Minnesota Rules of Civil Appellate Procedure as to word count. This brief contains 4,886 words, excluding the Table of Contents, Table of Authorities, Appendix, and Addendum, and the brief meets the typeface requirements of Rule 132.01. The word processing software utilized to prepare this brief is Microsoft Word 2003.

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