

---

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,*

vs.

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

*Defendants.*

---

**PLAINTIFFS' BRIEF**

---

Robert J. Pratte, Esq.  
Sonia Braunschweig, Esq.  
DLA PIPER US LLP  
90 South Seventh Street, Suite 5100  
Minneapolis, MN 55402-4166

*Attorneys for Defendant MERS*

Charles Salter  
Assistant Hennepin County Attorney  
C-2000 Government Center  
300 South Sixth Street  
Minneapolis, MN 55487

*Attorney for Defendant Richard Stanek*

Amber M. Hawkins (#0285961)  
Galen Robinson (#165980)  
Colleen Daly (#0386510)  
LEGAL AID SOCIETY OF  
MINNEAPOLIS  
430 First Avenue North, Suite 300  
Minneapolis, MN 55401  
(612) 746-3791

William H. Crowder (#20102)  
Vildan A. Teske (#241404)  
Kathleen Finnegan Lamey (#0388038)  
CROWDER TESKE, PLLP  
555 West Seventh Street, #210  
St. Paul, MN 55102  
(651) 225-8330

*Attorneys for Plaintiffs*

*(Additional Counsel Listed on the following page)*

Melissa Briggs (DC #480862)

Eric Halperin (CA #198178 and DC #491199)

Daniel Mosteller (NC #36958)

THE CENTER FOR RESPONSIBLE LENDING

910 – 17<sup>th</sup> Street, N.W., Suite 500

Washington, D.C. 20006

(202) 349-1878

*Of Counsel*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
LEGAL ISSUE.....	vi
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	2
A. MERS Serves As Mortgagee, But Only As Nominee For A Lender Who Retains All Rights Conveyed By The Mortgage. ....	2
B. MERS Exists As A Private System To Facilitate Mortgage Loan Transfers And Foreclosures And Avoid Government Recording Fees.....	3
C. MERS Internally Tracks Transfers Of Mortgage Loans Between Its Members. ....	4
D. When MERS Is The Foreclosing Mortgagee and No Assignments Are Recorded, The Borrower Does Not Know On Whose Behalf The Foreclosure Is Being Conducted .....	8
ARGUMENT .....	9
Introduction .....	9
A. Minnesota Law Requires All Assignments To Be Recorded Prior To Foreclosure By Advertisement, Even When The Foreclosing Mortgagee Has The Current Authority To Foreclose. ....	11
B. Assignments Of The Promissory Note And All Rights Under The Mortgage Constitute Assignments Of The Mortgage Under Chapter 580. ....	16
1. The statutory term “assignment of mortgage” means and has always meant an assignment of the debt and the mortgage. ....	17

2.	The general rule in Minnesota is that an assignment of the debt <i>operates as</i> an assignment of the mortgage, and the general rule applies in this case. ....	20
i.	Although there are unusual factual situations where this Court has recognized separate ownership of a mortgage and a promissory note it secures, the circumstances here do not merit such a recognition because transfer of promissory notes between MERS members expressly includes all rights, interests, and control of the mortgages. ....	23
ii.	The Legislature could not have intended to provide fewer protections to borrowers in a self-help foreclosure than the courts routinely provide in a foreclosure by action. ....	25
C.	MERS’ Role As Nominee Obviates Any Argument That An Assignment Has Not Occurred Within The Meaning Of Section 580.02.....	26
1.	A nominee derives its power and authority from its principal.....	29
2.	MERS is no more than a corporate shell.....	30
D.	The Enactment Of Section 507.413 Did Not Exempt MERS Or Any Other Nominee From Its Duty To Record Assignments Of The Mortgage Prior to Commencement of a Foreclosure by Advertisement Under Chapter 580. ....	32
E.	By Hiding The Ownership Of Mortgage Loans In Foreclosure, MERS Harms Borrowers And The Public, And Defies The Spirit And Purpose Of The Statutory Requirement To Record All Assignments.....	37
1.	In order to defend against foreclosure, borrowers need to know who owns their mortgage loan. ....	37
2.	Public policy strongly favors disclosure of all entities who have purchased and who currently own mortgage loans in foreclosure. ....	39
	CONCLUSION.....	41

## TABLE OF AUTHORITIES

Page

### Federal Cases

<i>Hays v. Bankers Trust Co. of Calif.</i> , 46 F. Supp. 2d 490 (S.D.W. Va. 1999) .....	38
<i>In re Schwartz</i> , 366 B.R. 265 (Bankr. D. Mass. 2007) .....	37
<i>Meyer v. Argent Mtg. Co.</i> , 379 BR 529 (Bankr. E.D. Pa. 2007) .....	39
<i>Miguel v. Country Funding Corp.</i> , 309 F.3d 1161 (9th Cir. 2002) .....	38
<i>Mtg. Elec. Reg. Sys., Inc. v. Estrella</i> , 390 F.3d 522 (7th Cir. 2004) .....	29
<i>Roberts v. WMC Mortgage Corp.</i> , 173 Fed. App'x. 575 (9th Cir. 2006) .....	38
<i>U.S. v. Ringwood Iron Mines Inc.</i> , 151 F. Supp. 421 (D.N.J. 1957) .....	20
<i>Young v. U.S.</i> , 535 U.S. 43 (2002) .....	18

### State Cases

<i>Backus v. Burke</i> , 51 N.W. 284 (Minn. 1892) .....	12
<i>Bloomer v. Burke</i> , 101 N.W. 974 (Minn. 1904) .....	18
<i>Bottineau v. Aetna Life Ins. Co.</i> , 16 N.W. 849 (Minn. 1883) .....	24
<i>Brown v. Delaney</i> , 22 Minn. 349 (Minn. 1876) .....	23, 24
<i>Burchard v. Hull</i> , 74 N.W. 163 (Minn. 1898) .....	25, 29
<i>Cattle Co. v. Munro</i> , 85 N.W. 919 (Minn. 1901) .....	23, 24
<i>Clifford v. Tomlinson</i> , 198, 64 N.W. 381 (Minn. 1895) .....	15
<i>Correll v. Distinctive Dental Services, P.A.</i> , 607 N.W.2d 440 (Minn. 2000) .....	34
<i>Crawford State Bank v. Danks</i> , 243 N.W. 735, 737 (S.D. 1932) .....	21
<i>Cullman v. Bottcher</i> , 59 N.W. 971 (Minn. 1894) .....	25
<i>Deutsche Bank Nat'l Trust Co. v. Maraj</i> , 2008 NY slip. op. at 50176(U); 2008 WL 253926, at *1 (N.Y. Sup. Ct. 2008) .....	31
<i>First Nat'l Bank v. Gallagher</i> , 138 N.W. 681 (Minn. 1912) .....	19
<i>First Nat'l Bank v. Pope</i> , 89 N.W. 318 (Minn. 1902) .....	18
<i>Foster v. Trowbridge</i> , 40 N.W. 255 (Minn. 1888) .....	25
<i>Fredin v. Cascade Realty Co.</i> , 285 N.W. 615 (Minn. 1939) .....	25
<i>Graybow-Daniels Co. v. Pinotti</i> , 255 N.W.2d 405 (Minn. 1977) .....	14
<i>Green Giant Co. v. Comm'r of Rev.</i> , 534 N.W.2d 710 (Minn. 1995) .....	34
<i>Hathorn v. Butler</i> , 75 N.W. 743 (Minn. 1898) .....	vi, 14
<i>Hatlestad v. Mutual Trust Life Ins. Co.</i> , 268 N.W. 665 (Minn. 1936) .....	16, 17, 18
<i>Hayes v. Midland Credit Co.</i> , 218 N.W. 106 (Minn. 1928) .....	17, 18
<i>Heath v. Hall</i> , 7 Minn. 315, 1862 WL 1270, *6 (Minn. 1862) .....	15
<i>Heine v. Simon</i> , 702 N.W.2d 752 (Minn. 2005) .....	34
<i>Hudson v. Upper Michigan Land Co.</i> , 206 N.W. 44 (Minn. 1925) .....	14
<i>Humphrey v. Buisson</i> , 1872 WL 8677, *2, 19 Minn. 221 (Minn. 1872) .....	19
<i>Johnson v. Lewis</i> , 13 Minn. 364 (Minn. 1868) .....	19, 20
<i>Kinney v. Duluth Ore Co.</i> , 60 N.W. 23 (Minn. 1894) .....	18

<i>Lasalle Bank Nat'l Assoc. v. Lamy</i> , 824 N.Y.S.2d 769; 2006 WL 2251721, at *1 (N.Y. Sup. Ct. 2006).....	30
<i>Lowry v. Mayo</i> , 43 N.W. 78 (Minn. 1889).....	14
<i>Martindale v. Burch</i> , 10 N.W. 670 (Iowa 1881).....	19
<i>McManaman v. Hinchley</i> , 84 N.W. 1018 (Minn. 1901).....	17
<i>Meeker County Bank v. Young</i> , 53 N.W. 630 (Minn. 1892).....	18
<i>Moore v. Carlson</i> , 128 N.W. 578 (Minn. 1910).....	vi, 14, 15
<i>Mtg. Elec. Reg. Sys., Inc. v. Neb. Dep't of Banking and Finance</i> , 704 N.W.2d 784 (Neb. 2005).....	27, 28, 29, 38
<i>Mtg. Elec. Reg. Sys., Inc. v. Rees</i> , 2003 WL 22133834 at *1 (Conn. Super., 2003) (unpublished).....	30
<i>Mut. Trust Life Ins. Co. v. Ecklund Bldg. Co.</i> , 231 N.W. 207 (Minn. 1930).....	23
<i>N. Cattle Co. v. Munro</i> , 85 N.W. 919 (Minn. 1901).....	23, 24
<i>Page v. Pierce</i> , 26 N.H. 317, 1853 WL 2428, at *4 (N.H. 1853).....	19
<i>Peaslee v. Ridgway</i> , 84 N.W. 1024 (Minn. 1901).....	14, 15
<i>Pipestone County Bank v. Ward</i> , 83 N.W. 991 (Minn. 1900).....	25
<i>Pususta v. State Farm Ins. Companies</i> , 632 N.W.2d 549 (Minn. 2001).....	34
<i>Robinson Female Seminary v. Campbell</i> , 55 P. 276 (Kan. 1898).....	19
<i>Sheasgreen Holding Co. v. Dworsky</i> , 231 N.W. 395 (Minn. 1930).....	12, 14
<i>Solberg v. Wright</i> , 22 N.W. 381 (Minn. 1885).....	23, 24
<i>Soufal v. Griffith</i> , 198 N.W. 807 (Minn. 1924).....	12
<i>Spencer v. Annon</i> , 4 Minn. 542 (Minn. 1860).....	14
<i>State by Beaulieu v. Indep. Sch. Dist. No. 624</i> , 533 N.W.2d 393 (Minn.1995).....	34
<i>State v. City of Duluth</i> , 56 N.W.2d 416 (Minn. 1952).....	34
<i>Tomasko v. Cotton</i> , 273 N.W. 628 (Minn. 1937).....	15
<i>Vieths v. Ripley</i> , 295 N.W.2d 659 (Minn. 1980).....	29
<i>W. Md. R.R., Land &amp; Improvement Co. of Baltimore City v. Goodwin</i> , 26 A. 319 (Md. 1893).....	19
<i>Williamson v. Falkenhagen</i> , 227 N.W. 429 (Minn. 1929).....	18
<i>Woodmen of World Life Ins. Soc. v. Sears, Roebuck &amp; Co.</i> , 200 N.W.2d 181 (Minn. 1972).....	18

## **Federal Statutes**

12 U.S.C. § 2605(e).....	6
15 U.S.C. § 1641(a).....	37
15 U.S.C. § 1641(c).....	37
15 U.S.C. § 1641(d).....	37
15 U.S.C. § 1641(f)(1).....	38

## **State Statutes**

Minn. Laws 2004 ch. 234 § 3.....	13
----------------------------------	----

Minn. Stat. § 507.413 .....	11, 32, 33, 35, 36
Minn. Stat. § 507.413(2) .....	35
Minn. Stat. § 507.413(a) .....	35
Minn. Stat. § 580.01 .....	12
Minn. Stat. § 580.02 .....	passim
Minn. Stat. § 580.03 .....	13
Minn. Stat. § 580.04 .....	passim
Minn. Stat. § 580.23 .....	15
Minn. Stat. § 580.24 .....	15
Minn. Stat. § 508.57 .....	13
Minn. Stat. ch. 507 .....	32
Minn. Stat. ch. 580 .....	passim

### **Other Authorities**

Christopher L. Peterson, Predatory Structured Finance, 28 <i>Cardozo L. Rev.</i> 2185 (2007) .....	4, 5, 38, 39
George E. Osborne, <i>Handbook on the Law of Mortgages</i> , § 223 (West 1970)(1951) 17, 20 1 Garrard Glenn, <i>Mortgages, Deeds of Trust, and Other Security Devices as to Land</i> , § 249 (Baker, Voorhis & Co. 1943).....	17, 18
Kathleen C. Engel & Patricia A. McCoy, <i>Turning a Blind Eye: Wall Street Finance of Predatory Lending</i> , 75 <i>Fordham L. Rev.</i> 2039 (2007).....	5
Phyllis K. Slesinger & Daniel Mclaughlin, <i>Mortgage Electronic Registration System</i> , 31 <i>Idaho L. Rev.</i> 805 (1995).....	4, 5
R.K. Arnold, <i>Yes, There is Life on MERS</i> , <i>Prob. &amp; Prop.</i> , Aug. 1997, at 33(1995) .....	3, 4, 5
William F. Walsh, <i>A Treatise on Mortgages</i> §§ 3, 65, 67(Callaghan and Co. 1934)..	11, 20

## LEGAL ISSUE

**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 answer to the certified question before this Court is “yes” because even though MERS fails to execute a formal “assignment of mortgage,” the transfer or assignment of the indebtedness which carries all rights under the mortgage – including the right to invoke the power of sale through foreclosure – is an assignment of mortgage within the meaning of Minn. Stat. ch. 580 and, because when an entity such as MERS serves as mortgagee solely as a “nominee,” transfers of these rights and interests between its principals constitute assignments within the meaning of ch. 580.

### Most Apposite Cases

*Moore v. Carlson*, 128 N.W. 578 (Minn. 1910)

*Hathorn v. Butler*, 75 N.W. 743 (Minn. 1898)

*Bloomer v. Burke*, 101 N.W. 974 (Minn. 1904)

*Humphrey v. Buisson*, 1872 WL 8677, 19 Minn. 221 (Minn. 1872)

### Most Apposite Statutory Provisions

Minn. Stat. § 580.02 (2006)

Minn. Stat. § 580.04 (2006)

## STATEMENT OF THE CASE

Plaintiffs filed this action in Hennepin County District Court on January 25, 2008, alleging that Mortgage Electronic Registration Systems, Inc. (MERS) violates Minn. Stat. §§ 580.02 and 580.04 when it conducts non-judicial foreclosures without recording all assignments of the mortgage and listing such assignments in the published notice of foreclosure sale. A-1-31. MERS removed the case to federal court. On February 8, Plaintiffs moved the federal district court for a temporary restraining order prohibiting MERS from commencing further non-judicial foreclosures without recording all assignments of the underlying mortgage and prohibiting MERS from evicting any homeowner who had been subject to a previous foreclosure which violated the provisions of ch. 580. A-32-61. The Honorable Joan Ericksen denied Plaintiffs' motion, A-334-43, but subsequently certified the following question of state law to this Court:

When MERS serves as mortgagee of record as nominee for a lender and that lender's successors and assigns, and the original lender subsequently sells, assigns, or transfers its rights under the mortgage, has there been an assignment of the mortgage that must be recorded pursuant to Minn. Stat. § 580.02 (2006) before MERS can commence a foreclosure by advertisement?

A-376-80. In its discretion, this Court reformulated the question as:

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?

## STATEMENT OF THE FACTS

### A. MERS Serves As Mortgagee, But Only As Nominee For A Lender Who Retains All Rights Conveyed By The Mortgage.

Defendant MERS is the mortgagee of record in approximately 40 percent of foreclosures in the seven-county Twin Cities metropolitan area. A-209. However, MERS is not a mortgage originator, lender, servicer or investor. A-5, A-347. Instead, MERS is simply an electronic registry that tracks ownership interests in mortgage loans for its members, which *are* mortgage originators, lenders, servicers, and investors. *Id.*; A-180-85, A-262-64.

MERS is the foreclosing mortgagee for each of the named Plaintiffs in this action. Each of the Plaintiffs' mortgages contains virtually identical language limiting MERS' role to that of a mere nominee for the lender:

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. . . .

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. . . .

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this security instrument, but, if necessary to comply with law, or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to: the right to foreclose and sell the property; and to take any action required of Lender including, but not limited to, releasing or canceling this Security Instrument.

A-65-67, A-70, A-95-98, A-128, A-130, A-156 -59. Serving "solely as nominee" for the lender, MERS has no independent power nor exercises any discretion with respect to the

mortgage loan; its role is solely that of an “agent for the MERS Member Lender and the lender’s successors and assigns.” A-262-64. While MERS serves as nominal mortgagee, the Plaintiffs’ mortgages explicitly require the borrower to name the lender, rather than MERS, as mortgagee on property insurance policies. A-70, A-100, A-161. The mortgages further provide that the lender retains the rights conveyed therein, including the right to invoke the power of sale by foreclosing:

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. . . .

Upon payment of all sums secured by this Security Instrument, Lender shall discharge this Security Instrument. . . .

If Lender invokes the power of sale, Lender shall cause a copy of a notice of sale to be served upon any person in possession of the Property.

A-72, A-77, A-102, A-107, A-134, A-139, A-163, A-168. Language in the mortgages also informs the borrower that any sale of the promissory note will include a sale of the mortgage: “The Note or a partial interest in the Note (together with the Security Instrument) can be sold one or more times. . . .” A-76, A-106, A-138, A-167.

**B. MERS Exists As A Private System To Facilitate Mortgage Loan Transfers And Foreclosures And Avoid Government Recording Fees.**

MERS was incorporated in October 1995, with the Mortgage Bankers Association as a charter member. R.K. Arnold, *Yes, There Is Life on MERS*, Prob. & Prop., Aug. 1997, at 33.<sup>1</sup> MERS was created for the express purpose of facilitating the trading of

---

<sup>1</sup> The author of this article was general counsel of MERS.

mortgage rights “electronically among its members without the need to record a mortgage assignment in the public land records each time.” *Id.* See also Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 806 (1995) (mortgage industry sought to create its own private “central, electronic registry for tracking mortgage rights” that allows “participants in the lending industry . . . to obtain, transfer, and identify interests in mortgages essentially on a real time basis.”)<sup>2</sup> MERS provides at least three benefits for the mortgage industry: allowing the industry to internally and privately track the ownership of mortgage loans; providing a “tax avoidance tool” to eliminate the need to pay recording taxes or fees; and facilitating home foreclosures. Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2212 (2007). See also A-182.

**C. MERS Internally Tracks Transfers Of Mortgage Loans Between Its Members.**

In effect, MERS acts as a privatized county recorder’s office for the purpose of facilitating the sale of mortgage loans on the secondary market.<sup>3</sup> Under the MERS system, mortgage originators, lenders, servicers, and investors “register” their mortgage loans with MERS. See A-180-85. Mortgage loans registered with MERS receive a Mortgage Identification Number (“MIN”) which allows MERS to electronically track

---

<sup>2</sup> The authors of this article were two officials with the Mortgage Banker’s Association of America, the mortgage industry trade group that was instrumental in MERS’ creation.

<sup>3</sup> Throughout this brief, Plaintiffs will use the term “mortgage loan” to refer to the combination of the promissory note (evidencing the underlying indebtedness) and the mortgage (the security interest that secures repayment of the indebtedness).

ownership interests in the mortgage loans. A-5, A-347. Because the mortgage itself designates MERS as the nominal mortgagee, MERS becomes the mortgagee in county land records. *Id.* See also A-66, A-96, A-128, A-157. Subsequent transfers of the mortgage loans between MERS' members are tracked only through the MERS system and not memorialized in public property records. A-181-82. However, when those same transfers are made from a MERS member to a non-MERS member, "an assignment [of mortgage] from MERS to the non-MERS member is recorded in the county where the secured property is located." A-264, A-185.

The creation of MERS was meant to facilitate the burgeoning volume of mortgage loan transfers that were occurring "[a]s investors bought more and more loans in the secondary market." Arnold, *supra*, at 34; see also Slesinger & Mclaughlin, *supra*, at 812; A-180-85. The transfer of mortgages is an essential part of the process of selling mortgage loans on the secondary market. For example, during the securitization of residential mortgage loans, there are a series of transfers which almost invariably occur. First, a mortgage loan is sold by the originating lender to a loan aggregator, wholesale lender or an affiliated trust of the originating lender (often referred to as the "seller"). Christopher L. Peterson, *Predatory Structured Finance*, 28 *Cardozo L. Rev.* 2185, 2206-2209 (2007); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *Fordham L. Rev.* 2039, 2045-46 (2007). The mortgage loan is pooled with other mortgage loans collected by the seller, and then the entire pool of mortgage loans is sold to a Wall Street investment firm or an affiliate (often referred to as an "issuer/depositor"). *Id.*; A-223; A-237-38. The issuer/depositor then

assigns the mortgage and the rest of the mortgage pool to a trust. Each of these assignments is absolute, and the assignor retains no control or any power of revocation.

*Id.* A servicer is typically employed by the trust to collect payments from and handle communications with a borrower. A servicer of a mortgage loan is the company employed by the owner of a loan to collect payments from a borrower and to handle communications with a borrower. *See* 12 U.S.C. § 2605(e), (i)(2)-(3) (defining “servicer” for purposes of the Real Estate Settlement Procedures Act and setting forth duties of the servicer); *see also* A-245.

The legal documents that govern securitization transactions readily demonstrate that securitization involves multiple ownership transfers of all components of a mortgage loan, including the mortgage and the promissory note. The representative securitization documents contained in the record, each of which has been filed with the Securities and Exchange Commission, are replete with references to the sale and transfer of mortgage loans. For example, one such document declares that:

[i]t is the express intent of the parties hereto that the conveyance of the Mortgage Notes, Mortgages, assignments of Mortgages, title insurance policies and any modifications . . . relating to the Mortgage Loans by the Seller to the Depositor, and by the Depositor to the Trustee be, and is construed as, an absolute sale thereof to the Depositor or Trustee, as applicable.

A-223. Moreover, those agreements require the physical mortgage documents, including those that list MERS as mortgagee, to be transferred from the original lender to the new owner. A-227 (requiring that the original lender “has delivered or caused to be delivered to the Custodian for the benefit of the Certificateholders, the documents and instruments

with respect to each Mortgage Loan as assigned: . . . in the case of each MERS Mortgage Loan, the original Mortgage”). *See also* A-237-38 (requiring that “[i]n connection with the transfer and assignment of each Mortgage Loan, the Depositor has delivered or caused to be delivered to the Trustee for the benefit of the Certificateholders the following documents or instruments with respect to each Mortgage Loan so assigned: . . . the original Mortgage with evidence of recording thereon or a certified true copy of such Mortgage submitted for recording”).

Accordingly, these sample SEC filings illustrate that a transfer of all components of the mortgage loan – expressly called an “assignment” by the securitization industry – occurs at the time the original lender sells the mortgage loan to the investment bank coordinating the securitization deal, and again each time the mortgage loan is subsequently transferred. For example, one agreement in the record requires that when a MERS-registered mortgage loan becomes part of the mortgage pool, “the Seller agrees that it will cause, at the Seller’s expense, the MERS System to indicate that such Mortgage Loans *have been assigned* by the Seller to the Trustee in accordance with this Agreement.” A-228 (emphasis added). Likewise, another agreement specifies that “[f]or any mortgage held through the MERS System, the mortgage is recorded in the name of Mortgage Electronic Registration System[s], Inc., or MERS, as nominee for the owner of the mortgage loans and *subsequent assignments of the mortgage* were, or in the future may be, at the discretion of a servicer, registered electronically through the MERS System.” A-230 (emphasis added).

**D. When MERS Is The Foreclosing Mortgagee and No Assignments Are Recorded, The Borrower Does Not Know On Whose Behalf The Foreclosure Is Being Conducted.**

MERS is the foreclosing “mortgagee” for each of the named Plaintiffs. In its published foreclosure notices for each of the Plaintiffs, MERS listed itself as the mortgagee and did not list any assignments of the mortgage. A-90, A-123, A-152, A-170. Indeed, no assignments have been recorded for any of the Plaintiffs’ mortgages. *See* A-14, A-16, A-19, A-353, A-356, A-359. Thus, MERS is the only entity disclosed to the public and the borrower as being responsible for the mortgage and the foreclosure proceeding.

At the time the foreclosures were commenced, at least two of the original lenders no longer owned the Plaintiffs’ mortgage loans. A-15-16, A-18, A-20, A-355-56, A-358-59. Even where MERS admits that the original mortgage lender has transferred its ownership interests, assignments of mortgage were not recorded or registered and were not listed in the published foreclosure notices. *Id.*; A-19.

Moreover, while MERS serves as the public face of the mortgage lender when a foreclosure by advertisement is instituted, behind the curtain MERS has no face at all. MERS is precisely what its name suggests: an electronic registry. Foreclosures conducted by MERS are not conducted by MERS’ employees or staff. Rather, they are conducted by the true owner of the mortgage loan or the servicer administering the loan under contract with the owner. MERS publishes “foreclosure instructions” on a state-by-

state basis to instruct its members how to foreclose a MERS mortgage. The instructions for Minnesota provide that:

Employees of the servicer will be certifying officers of MERS. This means they are authorized to sign any necessary documents, such as the power of attorney to foreclose the mortgage, as an officer of MERS. The certifying officer is granted this power by a corporate resolution of MERS. In other words, the same individual [sic] that currently sign the documents for the servicer will continue to sign the documents, but now as an officer of MERS.

*MERS Recommended Foreclosure Procedures for Minnesota, Version 1.1, November 11, 1999, available at [www.mersinc.org/Foreclosures/details.aspx?state=MN](http://www.mersinc.org/Foreclosures/details.aspx?state=MN). See also A-185 (“A member of your staff is appointed as a MERS certifying officer who will have the authority to sign as a MERS officer.”)*

## **ARGUMENT**

### **Introduction**

MERS regularly conducts foreclosures by advertisement in violation of Minn. Stat. §§ 580.02 and 580.04 (2006) when it fails to record all assignments of the mortgage and fails to include such assignments in the published notice of foreclosure sale. MERS defies both the letter and the spirit of Minnesota law when it refuses to record transfers of ownership in mortgage loans – transfers which, under Minnesota law, constitute assignments of the mortgage – prior to utilizing Minnesota’s streamlined, cost-effective foreclosure by advertisement remedy.

In an effort to legitimize its foreclosure practices, MERS asks this Court to interpret a critical provision of Minnesota’s foreclosure by advertisement statute in a

manner that is wholly inconsistent with the text, purpose, and intent of the law, and which would render the statutory requirements virtually meaningless. MERS' interpretation of the foreclosure by advertisement statute is nothing more than a fabrication intended to evade the requirements of more than a century of law.

Under well-settled law during the period when the statute was enacted, the "assignment of mortgage" meant an assignment of the mortgage *or* the indebtedness secured thereby. As a result, MERS must record assignments when the promissory note and all rights under the mortgage are sold, assigned and transferred between its members. Furthermore, because MERS serves as mortgagee solely as a nominee for the lender and the lender's successors and assigns, a transfer of interests between MERS' principals necessarily includes a transfer of the mortgage.

The answer to the Certified Question hinges on this Court's interpretation of the meaning and purpose of the statutory requirement, under Minn. Stat. §§ 580.02 and 580.04, to record "all assignments" of a mortgage prior to commencement of a foreclosure by advertisement and to list "each assignee" of the mortgage in the published notice of foreclosure sale.<sup>4</sup>

To provide context for the Court's analysis, Plaintiffs first provide a brief history of the nature and purpose of Minnesota's foreclosure by advertisement statute, including

---

<sup>4</sup> Both claims rely upon a determination that there has been an "assignment" that should be recorded pursuant to Minn. Stat. § 580.02, as well as listed in the published Notice of Mortgage Foreclosure Sale ("foreclosure notice") pursuant to Minn. Stat. § 580.04. For simplicity sake, the Plaintiffs focus their argument on the requirement to record all assignments under Minn. Stat. § 580.02 because the Court's answer to the certified question is equally applicable to both sections.

this Court’s longstanding mandate of strict adherence thereto. Plaintiffs then discuss Minnesota’s common law, which establishes that the transfer of a promissory note constitutes an assignment of the mortgage. Next, Plaintiffs explain why a mortgagee who serves solely as “nominee” for another only holds the interests of its principal and, accordingly, a transfer by the principal of all its rights under the mortgage loan – including the right to be the mortgagee itself or name a nominal mortgagee such as MERS – constitutes an assignment of the mortgage. The Plaintiffs then explain that the recently enacted “MERS statute,” codified at Minn. Stat. § 507.413, simply facilitates MERS’ duty to record instruments on behalf of its principals and does not allow MERS to avoid the requirements of Minn. Stat. §§ 580.02 and 580.04. Finally, we explain why both the borrower and the public are harmed by MERS’ failure to record transfers of mortgage loans prior to foreclosure by advertisement.

**A. Minnesota Law Requires All Assignments To Be Recorded Prior To Foreclosure By Advertisement, Even When The Foreclosing Mortgagee Has The Current Authority To Foreclose.**

Minnesota’s foreclosure statutes were originally enacted more than 150 years ago, when Minnesota became a United States territory. The Revised Statutes of the Territory of Minnesota (“Rev. Stat.”) ch. 85 (1851). The foreclosure statutes enacted in Minnesota and other states grew out of and were a reaction to the equitable rights developed in English common law. William F. Walsh, *A Treatise on Mortgages* §§ 3, 65, 67 (Callaghan and Co. 1934). Where the common law was ambiguous and imprecise, the foreclosure statutes set forth specific prerequisites, requirements, rights, and deadlines.

*Id.*

Non-judicial foreclosure, called “foreclosure by advertisement” in Minnesota, is a more convenient, expedient, and significantly less expensive remedy for mortgage lenders than its judicial counterpart. *See Soufal v. Griffith*, 198 N.W. 807, 809 (Minn. 1924) (noting that foreclosure by advertisement was “devised to avoid the delays and expense of judicial proceedings”).<sup>5</sup> However, it deprives homeowners of a judicial forum and the opportunity to raise defenses or to challenge the process through which their home is being foreclosed.<sup>6</sup> In recognition of this inequity, the statute imposes prerequisites that must be satisfied in order to effectuate a valid foreclosure by advertisement. *See Sheasgreen Holding Co. v. Dworsky*, 231 N.W. 395, 396 (Minn. 1930) (“The proceeding is inherently of such character that a strict compliance with the statute is necessary”).

Under the statute, before a lender can commence a foreclosure by advertisement, it is required:

- (1) that some default in a condition of such mortgage has occurred, by which the power to sell has become operative;
- (2) that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof, or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part;

---

<sup>5</sup> A mortgage can be foreclosed upon this way only when it contains a “power of sale” provision. *See* Minn. Stat. § 580.01; *Backus v. Burke*, 51 N.W. 284, 285 (Minn. 1892).

<sup>6</sup> The courts in virtually every state can authorize a foreclosure, and in fact twenty-two states require mortgage lenders to obtain a court order before foreclosing on a borrower’s home. Minnesota is among the twenty-eight states which allow mortgage lenders to foreclose through a statutory non-judicial process.

- (3) that the mortgage has been recorded and, if it has been assigned, *that all assignments thereof have been recorded*; provided, that, if the mortgage is upon registered land, it shall be sufficient if the mortgage and all assignments thereof have been duly registered.

Minn. Stat. § 580.02. (emphasis added).<sup>7</sup> The statute further provides that each assignee “shall” be listed in the foreclosure notice, which must be published in the newspaper for at least six consecutive weeks prior to the sheriff’s sale and served upon the occupant of the mortgaged premises. Minn. Stat. §§ 580.03, 580.04 (2006). These requirements - to record all assignments and list all assignees in the published foreclosure notice - have existed in substantially the same form since their original enactment in 1851. *See* Rev. St. ch. 85, §§ 2, 5 (1851).<sup>8</sup>

This Court has always mandated strict compliance with Minnesota’s statutory requirements. Nearly 150 years ago, it explained its rationale:

When the holder of a mortgage, instead of proceeding to foreclosure by judicial proceedings, . . . resorts to the power contained in the mortgage,

---

<sup>7</sup> Foreclosure requirements are substantially the same for both abstract and registered property, however, while documents pertaining to abstract property are “recorded,” documents pertaining to registered property are “registered.” *See* Minn. Stat. §§ 508.57 and 580.02. *See also* A-336, n. 2 (“Court assumes the distinction between recordation and registration of assignments is not material and refers to recordation of assignments in considering Plaintiffs’ motion.”)

<sup>8</sup> The relevant portion of § 580.02, which requires recordation of all assignments, has remained virtually unchanged. The relevant portion of § 580.04, which requires assignments to be listed in the notice of foreclosure sale, was amended just once, in 2004. In its original version, it read: “Every notice shall specify: 1. The names of the mortgagor and the mortgagee, and the assignee, if any[.]” As a result of the 2004 change, it currently reads: “Each notice shall specify: (1) The name of the mortgagor, the mortgagee, each assignee of the mortgage, if any[.]” *Compare* Minn. Laws 2004 ch. 234 § 3 and Rev. St. Ch. 85 § 5.

thus taking the remedy in his own hands, by an *ex parte* proceeding, it is but reasonable that he should be kept strictly within the terms of the power, and held to a rigid observance of all the requirements of the Statutes which regulate its exercise. . . .

*Spencer v. Annon*, 4 Minn. 542, 543 (Minn. 1860). Failure to adhere to the statutory requirements renders a foreclosure void. *Moore v. Carlson*, 128 N.W. 578, 579 (Minn. 1910). See also *Hathorn v. Butler*, 75 N.W. 743, 744 (Minn. 1898); *Lowry v. Mayo*, 43 N.W. 78 (Minn. 1889).<sup>9</sup>

The requirement to record and list all assignments of the mortgage applies even when the foreclosing mortgagee has both record and legal title. In *Moore v. Carlson*, this Court reversed a judgment in favor of the foreclosing party – the original mortgagee – because the foreclosing party had assigned and then reacquired the mortgage prior to foreclosure but had failed to list the intervening assignment in the foreclosure notice. 128 N.W. at 578-79. This Court explicitly rejected the mortgagee’s claim that “[i]t would serve no useful purpose” to have provided notice of an assignment to a party who had reassigned the mortgage back to the original mortgagee prior to foreclosure:

---

<sup>9</sup> See also *Graybow-Daniels Co. v. Pinotti*, 255 N.W.2d 405, 407 (Minn. 1977) (recognizing that foreclosure statutes and their strict requirements have been virtually unchanged since the late 1800s, and that early cases are still good law); *Hudson v. Upper Michigan Land Co.*, 206 N.W. 44, 45 (Minn. 1925) (holding that “when the mortgagee elects to foreclose by advertisement, all the essential requisites of the statute must be complied with, and that a clear departure therefrom vitiates the proceeding”); *Peaslee v. Ridgway*, 84 N.W. 1024, 1025-26 (Minn. 1901) (voiding a foreclosure by advertisement because the mortgagee stated the wrong page of the record book wherein the mortgage was recorded); *Sheasgreen*, 231 N.W. at 396 (holding that the foreclosing mortgagee’s failure to record a power of attorney voided a foreclosure by advertisement); *Spencer*, 4 Minn. at 543 (“the published notice that the property will be sold, is all the notice that parties interested have of this proceeding, and this notice the Statute declares, must contain certain specifications, any one of which it would be fatal to omit”).

This view of the construction of the statute we are not able to accept. . . . To name the various assignees is not without value to the mortgagor. He is entitled to know the history of the transaction, and to consider in connection with his action the various assignments which affect the title of the person seeking to foreclose by advertisement.

*Id.* at 579.<sup>10</sup>

This Court has also held that the foreclosure by advertisement statutes should be construed in favor of borrowers (mortgagors). *See Moore*, 128 N.W. at 579. (“It is elementary that the construction must be favorable to persons seeking to redeem.”); *Clifford v. Tomlinson*, 198, 64 N.W. 381, 382 (Minn. 1895) (“while the statute may have been intended for the benefit of both parties, its various provisions tend to enlarge the rights of the mortgagor”); *Tomasko v. Cotton*, 273 N.W. 628, 630 (Minn. 1937) (holding that foreclosure statutes are to be construed liberally in favor of redemptioners).<sup>11</sup>

In Minnesota, foreclosure by advertisement is a *privilege*, not a right. It is a remedy that is only available to those who strictly adhere to the statutory requirements. MERS violates both the letter and the spirit of those statutory requirements when it forecloses without recording the chain of ownership of the underlying mortgage loan.

---

<sup>10</sup> Courts have also repeatedly held that failure to strictly adhere to the statute’s requirements voids a foreclosure, regardless of whether the mortgagor was prejudiced. *Peaslee*, 84 N.W. at 1025 (“The question whether such defects [in the foreclosure by advertisement process] are of a prejudicial character is not considered important.”); *Heath v. Hall*, 7 Minn. 315, 1862 WL 1270, \*6 (Minn. 1862) (rejecting the argument that in order to void a foreclosure by advertisement for noncompliance with statute, plaintiff must show that he was prejudiced).

<sup>11</sup> Redemptioners include the borrower and any junior creditors attempting to preserve their interests. *See, e.g.*, Minn. Stat. §§ 580.23 and 580.24 (2006).

**B. Assignments Of The Promissory Note And All Rights Under The Mortgage Constitute Assignments Of The Mortgage Under Chapter 580.**

The parties agree that “mortgage loans” in the MERS system are frequently sold and traded on the secondary market.<sup>12</sup> A-6, A-180-85, A-265. MERS does not record assignments when mortgage loans are transferred between its members because the avoidance of formal written assignments and their attendant recordation fees are the very reason that MERS was created. *See* A-181, A-264.

MERS claims that no “assignments” occur when a mortgage loan is transferred between its members because MERS remains the mortgagee as a nominee for the original lender and each of its successors and assigns. According to MERS, only the promissory note and the “beneficial interests” in the mortgage are transferred when these transactions occur. A-244-46. MERS’ argument – that an assignment of the promissory note which carries all interest and control over the mortgage securing it is somehow not an “assignment” of the mortgage – is contradicted by longstanding Minnesota case law.

As a matter of well-settled law, “[o]wnership of a promissory note and the mortgage securing it cannot be separated. A mortgage is unenforceable if it is not owned by the note holder.” A-289.<sup>13</sup> Simply put, the general rule provides that an assignment of the debt operates as an assignment of the mortgage. *See Hatlestad v. Mutual Trust Life*

---

<sup>12</sup> Plaintiffs use the term “secondary market” broadly, to refer to any acquisition of the “mortgage loan” by an entity other than the original lender, including government-sponsored entities such as Fannie Mae or Freddie Mac, or entities that participate in the securitization of residential mortgage loans.

<sup>13</sup> Citing to affidavit of University of Minnesota Law School Professor Ann Burkhart, who has been a member of the American Law Institute since 1989 and is an adviser to the Restatement of Property (Mortgages).

*Ins. Co.*, 268 N.W. 665, 668 (Minn. 1936). Moreover, based upon this firmly-established principle, the term “assignment of mortgage” has historically been understood to encompass assignments of the mortgage itself *or* the debt secured thereby.

MERS’ attempt to avoid the recordation requirement by claiming that the mortgage is not assigned when the debt and all rights under the mortgage are transferred between its members attempts to discard over a century of law by simply ignoring that law. MERS’ attempt should be rejected by this Court.

**1. The statutory term “assignment of mortgage” means and has always meant an assignment of the debt and the mortgage.**

It is a longstanding and fundamental principal of real estate law that the mortgage cannot be separated from the promissory note that it secures, and that an assignment of the promissory note automatically carries with it the mortgage. The reason is simple: the mortgage is incident to the debt it secures and “has no separate or independent existence as a contract.” *Hayes v. Midland Credit Co.*, 218 N.W. 106, 107 (Minn. 1928). *See also* *McManaman v. Hinchley*, 84 N.W. 1018, 1018 (Minn. 1901) (same). Predictably, the definition of mortgagee was commonly understood to mean the owner of the mortgage and the debt. As stated in a venerated treatise: “[t]he mortgagee of real property has two things, the personal obligation and the interest in the realty securing that obligation. This twofold character of the rights of the mortgagee must be kept in mind when transfers by the mortgagee are considered. For a transfer to be complete, both the obligation and the security interest must pass to the same person.” George E. Osborne, *Handbook on the Law of Mortgages*, § 223 (West 1970)(1951); *see also* 1 Garrard Glenn, *Mortgages*,

Deeds of Trust, and Other Security Devices as to Land, § 249 (Baker, Voorhis & Co. 1943) (“The mortgagee has two things, the debt and the lien that secures it. . . .”).<sup>14</sup>

This Court has long affirmed these hornbook principles, reiterating in myriad cases that an assignment of the debt carries the mortgage along with it, and that a “mere transfer of the note secured by a mortgage is in law an assignment of the latter.”

*Hatlestad v. Mutual Trust Life Ins. Co.*, 268 N.W. 665, 668 (Minn. 1936). *See also Bloomer v. Burke*, 101 N.W. 974, 975 (Minn. 1904) (“It is true that the transfer of a negotiable promissory note secured by a mortgage carries the security as an incident.”); *First Nat’l Bank v. Pope*, 89 N.W. 318, 319 (Minn. 1902) (although mortgagee made no “formal assignment” when he transferred the promissory note, the mortgage followed the debt as an incident thereto, the transfer of the note “carried with it the security and all remedies” the original mortgagee had or held); *Meeker County Bank v. Young*, 53 N.W. 630, 631 (Minn. 1892) (indorsement and transfer of the note equitably assigns the security); *Hayes v. Midland Credit Co.*, 218 N.W. 106, 107 (Minn. 1928) (“[w]here a note secured by a mortgage is indorsed and transferred to a purchaser without a formal assignment of the mortgage, the security follows the note as an incident thereof. Such transfer of the note operates as an equitable assignment of the mortgage.”); *Williamson v. Falkenhagen*, 227 N.W. 429 (Minn. 1929) (“mortgage is but an incident of the debt and passes with it.”); *Kinney v. Duluth Ore Co.*, 60 N.W. 23 (Minn. 1894) (“It is elementary that the assignment of a debt carries with it all the liens, securities, and remedies which

---

<sup>14</sup> Osborne has been cited by this Court. *Woodmen of World Life Ins. Soc. v. Sears, Roebuck & Co.*, 200 N.W.2d 181, 185 n.5 (Minn. 1972). Glenn has been cited by the U.S. Supreme Court. *Young v. U.S.*, 535 U.S. 43, 48 (2002).

the assignor held or might have employed to enforce its payment, in the absence of a statute to the contrary.”); *First Nat’l Bank v. Gallagher*, 138 N.W. 681, 681-82 (Minn. 1912) (“the debt secured is the principal obligation, and the mortgage a mere incident thereto. The assignment of the debt carries with it the mortgage, . . .”). Thus, this Court has specifically and repeatedly held that, “[A]n assignment of the debt draws the mortgage security after it, as a consequence, and as being appurtenant to the debt. . . . This is the general language of the courts of law, as well as of the courts of equity; and the common sense of the parties, the spirit of the mortgage contract, and the reason and policy of the thing, would seem to be with the doctrine.” *Humphrey v. Buisson*, 1872 WL 8677, \*2, 19 Minn. 221 (Minn. 1872); *Johnson v. Lewis*, 13 Minn. 364 (Minn. 1868)(same).<sup>15</sup>

Given the undeniable stability of this well-settled principle from earliest Minnesota times, there can be no doubt that in 1851, when the statutory provisions at issue were originally enacted, “assignment of mortgage” meant assignment of the promissory note *and* the mortgage or an assignment of either. “[T]he expression ‘assignment of the mortgage’ is almost universally used, not only by the general public,

---

<sup>15</sup> Contemporaneous case law from throughout the country confirms that the transfer of mortgage debt legally constituted an assignment of the mortgage. *See, e.g., Robinson Female Seminary v. Campbell*, 55 P. 276, 277 (Kan. 1898) (“The assignment of the note operated as an assignment of the mortgage made to secure the note. . . .”); *Martindale v. Burch*, 10 N.W. 670, 671 (Iowa 1881) (“That an assignment or transfer of a note, secured by a mortgage, operates as an assignment of the mortgage lien, is a settled rule of the law.”); *Page v. Pierce*, 26 N.H. 317, 1853 WL 2428, at \*4 (N.H. 1853) (“It is settled in this State, that the assignment of a debt secured by a mortgage of land, is *ipso facto* an assignment of the security also.”); *W. Md. R.R., Land & Improvement Co. of Baltimore City v. Goodwin*, 26 A. 319, 321 (Md. 1893) (“The law in this state is well settled ‘that an assignment of a debt secured by mortgage operates as an assignment of the mortgage.’”)

but also by the legislature, the courts, and the legal profession, to describe the transfer of the totality of the mortgagee's rights, that is, his right to the debt as well as the lien securing it." Osborne, *supra* § 226. Similarly, "[t]hough the debt is the principal thing and the mortgage its incident, nevertheless the security which the mortgage gives to the creditor is the element of greatest importance and value in the secured debt as property, and an assignment of the mortgage, therefore, is universally regarded, by laymen and lawyers alike, as an assignment of both debt and mortgage." Walsh, *supra*, at § 58.<sup>16</sup>

Thus, when the predecessor to ch. 580 was adopted, contemporaneous scholarship and case law confirms that the statutory term "assignment of the mortgage" referred both to an assignment of the mortgage and an assignment of the debt secured thereby. MERS' narrow interpretation of this statutory term ignores firmly-established common law and the nature and spirit of the mortgage contract.

**2. The general rule in Minnesota is that an assignment of the debt operates as an assignment of the mortgage, and the general rule applies in this case.**

Even if this Court were to determine that the statutory term "assignments of mortgage" did not, in 1851, mean assignments of the debt, the same result is obtained. This is because under the well-settled principles and case law discussed above, assignment of a promissory note generally operates as an assignment of the mortgage.

Indeed, in a case interpreting statutory language essentially identical to that of Minnesota's, the South Dakota Supreme Court found that a non-judicial foreclosure was

---

<sup>16</sup> Walsh has been cited by the federal court. *U.S. v. Ringwood Iron Mines Inc.*, 151 F. Supp. 421, 424 (D.N.J. 1957).

defective when the assignee of the note had not recorded an assignment but instead foreclosed using the name of the mortgagee of record. *Crawford State Bank v. Danks*, 243 N.W. 735, 737 (S.D. 1932).<sup>17</sup> Based on a separate statute that provided what Minnesota common law has long recognized, that “[t]he assignment of a debt secured by mortgage carries with it the security,” the court held that the foreclosure by advertisement was void for failure to comply with the requirement that all assignments of the mortgage be recorded. *Id.* at 737-38.

MERS claims that the mortgage interests traded among its members are simply “beneficial interests” that cannot be recorded, and that it cannot record transfers of promissory notes because such documents are not recordable in the first place under Minnesota’s recording act. A-245-46, A-373-74. This position mischaracterizes the Plaintiffs’ argument and is entirely without merit. First, the Plaintiffs do not assert that MERS must record transfers of the promissory notes. Rather, Plaintiffs argue that transfers of the promissory note constitute assignments of the mortgage, and, thus, MERS is required to record assignments of the mortgage which result from such transfers. Second, as shown above, transfers of the promissory notes, particularly in this situation where the transfer carries with it all the lender’s rights under the mortgage including the right to “invoke the power of sale,” do not simply convey “beneficial interests” in mortgage loans. According to Black’s Law Dictionary, a beneficial interest is “[p]rofit,

---

<sup>17</sup>The statute provided that to entitle a party to foreclose by advertisement “it shall be requisite: . . . That the mortgage containing such power of sale has been duly recorded, and, if it shall have been assigned, that all the assignments thereof have been duly recorded. . . .” *Crawford*, 743 N.W. at 737 (citing § 2877, R.C. 1919).

benefit, or advantage resulting from a contract, or the ownership of an estate *as distinct from the legal ownership or control.*” Black’s Law Dictionary 156 (6th ed. 1990) (emphasis added). MERS’ use of the term “beneficial interests” to describe the interests that are transferred among its principals is legally incorrect because MERS does not have any control over the mortgage loans, and it simply acts as nominee upon the direction of a principal which does have control.

Moreover, MERS’ arguments belie the language in standard securitization filings which repeatedly emphasize that transfers of the promissory note and the mortgage are occurring, even though formal paper assignments are not being prepared, and that MERS is tracking the assignments internally for its members: “the Seller agrees that it will cause . . . the MERS System to indicate that such Mortgage Loans have been assigned by the Seller to the Trustee[.]” A-228; “[S]ubsequent assignments of the mortgage were, or in the future may be, at the discretion of a servicer, registered electronically through the MERS System.” A-230; “MERS ® System: The system of recording transfers of Mortgages electronically maintained by MERS.” A-220.

Accordingly, notwithstanding the fact that MERS does not record assignments when loans registered in its system are transferred, such transfers do constitute assignments of mortgage that must be recorded prior to MERS’ commencement of a foreclosure by advertisement as required by Minn. Stat. §§ 580.02 and 580.04.

- i. Although there are unusual factual situations where this Court has recognized separate ownership of a mortgage and a promissory note it secures, the circumstances here do not merit such a recognition because transfer of promissory notes between MERS members expressly includes all rights, interests, and control of the mortgages.**

MERS argues that legal title to the mortgage can be held by someone other than the owner of the debt and, that in such cases, the record mortgagee is the only party authorized to foreclose under the power of sale. A-374-75. MERS cites to the following cases for this proposition: *Mut. Trust Life Ins. Co. v. Ecklund Bldg. Co.*, 231 N.W. 207, 208-09 (Minn. 1930); and *N. Cattle Co. v. Munro*, 85 N.W. 919, 920 (Minn. 1901). In denying Plaintiffs' motion for a temporary restraining order, the lower Court also cited to *Solberg v. Wright*, 22 N.W. 381, 382 (Minn. 1885) and *Brown v. Delaney*, 22 Minn. 349 (Minn. 1876) for the same proposition. However, in each of these cases, the party holding title to the mortgage also possessed some of the underlying indebtedness, which means it had actual legal powers and rights of its own under the mortgage. Unlike MERS, these mortgagees were not simply nominees who were appointed by the debt owners to avoid state law recordation requirements.

*Solberg*, *Brown*, *Mutual Trust*, and *Northern Cattle* all involved situations in which multiple promissory notes were secured by one mortgage, yet the notes were assigned to multiple parties. In each case, the party wishing to foreclose held title to the mortgage and at least one of the promissory notes and, thus, had its own rights under the mortgage related at least to that portion of the debt. *See* 231 N.W. at 208-09; 85 N.W. at

920; 22 N.W. at 382; 22 Minn. at 349. Accordingly, MERS' identification of these – or other outlier cases where assignment of a promissory note was not deemed an assignment of the mortgage – are legally distinguishable from MERS' practices at issue in this case and the question of statutory interpretation presently before this Court.

Both the trial court and MERS cited *Bottineau v. Aetna Life Ins. Co.*, 16 N.W. 849 (Minn. 1883) for the proposition that the power to foreclose vests only in the record mortgagee. A-339. As an initial matter, Plaintiffs do not challenge MERS' authority to foreclose as the record, nominal mortgagee. The plaintiffs here merely allege that MERS must record the transfers of ownership between its principals before it does so. Furthermore, *Bottineau* is simply inapposite. The *Bottineau* plaintiffs challenged the foreclosure by arguing that Day, the mortgagee of record who initiated the foreclosure, was not the sole owner of the mortgage. *Id.* at 850. Plaintiffs' argument was based on a previous transaction in which Day had purported to convey the mortgaged property to certain third parties before he had acquired any interest in the property. *Id.* at 849-50. When Day subsequently acquired the mortgage and proceeded to foreclose on the property, the Plaintiffs argued that such third parties also owned the mortgage based on their prior dealings with Day. *Id.* The court recognized the third parties' *equitable interests* in the mortgage; however, those interests did not result from an assignment of either the mortgage or the indebtedness and did not constitute an assignment of the mortgage itself which would prevent Day from foreclosing. *Id.*

In contrast, here Plaintiffs argue that an assignment of mortgage has occurred as a result of the transfer of the promissory note and all interests and rights under the

mortgage between MERS' principals. Such assignments must be recorded and listed in the published foreclosure notice pursuant to Minn. Stat. §§ 580.02 and 580.04.

- (ii) **The Legislature could not have intended to provide fewer protections to borrowers in a self-help foreclosure than the courts routinely provide in a foreclosure by action.**

In keeping with its position that it can be the permanent, nominal mortgagee for a series of principals, MERS also suggests that borrowers in foreclosure “have neither the right nor the need to know” the ultimate owner of their mortgage loan. A-330. Courts routinely disagree. As previously articulated by this Court, the purpose of foreclosure is “to enforce the security, *i.e.*, to have the property applied to the satisfaction of the debt or other obligation secured thereby.” *Fredin v. Cascade Realty Co.*, 285 N.W. 615, 618 (Minn. 1939). Common sense dictates that the ownership of the indebtedness is inherently relevant to any foreclosure proceeding. Predictably, in foreclosures by *action*, Minnesota courts have consistently considered the ownership of the underlying debt to be an important factor when determining whether a foreclosing entity is entitled to foreclose. *See, e.g., Pipestone County Bank v. Ward*, 83 N.W. 991 (Minn. 1900) (discussing whether foreclosing party actually owned the note and mortgage); *Burchard v. Hull*, 74 N.W. 163, 164-165 (Minn. 1898) (holding that only the owner of the mortgage and principal note had the right to foreclose, not an agent who had been given interest coupons and directed to collect under them); *Cullman v. Bottcher*, 59 N.W. 971, 971-72 (Minn. 1894) (discussing ownership of the note and mortgage in an attempt to determine who has a right to bring an action to foreclose); *Foster v. Trowbridge*, 40 N.W. 255, 256 (Minn. 1888) (holding that in order to bring an action to foreclose a mortgage, the

plaintiff must show that it was assigned the underlying promissory note). It is axiomatic that the Legislature would not have intended to provide the mortgagor and junior creditors with *less* information in a self-help foreclosure by advertisement than they would be provided in a foreclosure conducted under the court's supervision.

Under MERS' new found interpretation of more than a century of law, the entity that owns all of the interest, power, control, and discretion over a mortgage loan foreclosed by advertisement will *never* be disclosed to either the borrower or the public. MERS claims that it can avoid the longstanding disclosure requirements so long as it simply does not call the transfer of a mortgage loan an "assignment of mortgage."

MERS' interpretation flies in the face of the statute and the common law and must be rejected. In keeping with the fundamental, well-settled principles that the mortgage and the debt are inseparable, and that an assignment of the debt constitutes an assignment of the mortgage, the assignment of the indebtedness secured by a MERS mortgage is an assignment of mortgage within the meaning of Minn. Stat. §§ 580.02 and 580.04. These assignments must be recorded before MERS or its member can utilize Minnesota's streamlined foreclosure by advertisement remedy.

**C. MERS' Role As Nominee Obviates Any Argument That An Assignment Has Not Occurred Within The Meaning Of Section 580.02.**

The preceding argument addresses whether a party can split ownership of a mortgage and promissory note, and then claim that an assignment of the promissory note which expressly includes all rights under the mortgage does not constitute an "assignment of the mortgage" within the meaning of Minnesota's foreclosure by advertisement statute.

Even if the Court were to determine that ch. 580 was not intended to reach this situation, the transfer of promissory notes among MERS' members still constitutes an assignment of mortgage because MERS serves as mortgagee "solely as nominee" for each successive owner of the promissory note.

Before a principal is able to delegate its own rights under the mortgage to a nominee, the principal must first possess those rights. Thus, in order for MERS to maintain its role as nominee when the mortgage loan is transferred among its members, MERS' principal – the new owner of the mortgage loan – must grant MERS such status. The transfer of this power to grant MERS its status as nominee is the precise transfer that must be recorded prior to foreclosure by advertisement.

MERS does not have any interest in the mortgage loans registered on its system, and it has no authority or discretion with respect to administration, collection, or foreclosure of the loans. In fact, a foreclosure commenced in the name of MERS is only done so at the direction of – and by the employees of – MERS' principal. When the Nebraska Department of Banking and Finance tried to regulate MERS as a mortgage lender in 2005, MERS made clear it does not possess any independent authority with respect to the mortgage. *Mtg. Elec. Reg. Sys., Inc. v. Neb. Dep't of Banking and Finance*, 704 N.W.2d 784, 786-87 (Neb. 2005) (MERS represented that 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.”).<sup>18</sup>

MERS argues that it has legal title to the mortgage and its appurtenant power of sale based on the language in the mortgage document that MERS “is the mortgagee,” has “power of sale,” and has “the power to foreclose and sell the property.” A-242-43. Each of these quoted phrases, however, is severely qualified by the language that MERS “is acting solely as nominee for Lender and the lender’s successors and assigns.” *Id.* Further, the mortgages themselves expressly provide that the “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.*” A-69, A100, A-133, A-161 (emphasis added). Therefore, it is plain that MERS has only an apparent authority over a mortgage.

MERS claims that it does not need to record an assignment of mortgage when interests in a mortgage loan are sold from one MERS member to another because MERS automatically serves as nominal mortgagee for the new owner of such interests. When these same interests are sold to a non-MERS member, however, MERS *does* execute and record an assignment of mortgage to such entity in local property records because the purchaser has not appointed MERS to act as its nominal mortgagee. *See* A-185. The transfer of this power to grant or deny MERS its status as nominee must be recorded prior to foreclosure by advertisement.

---

<sup>18</sup> The Court also noted that “MERS merely *tracks the ownership of the lien*” for its members. *Mtg. Elec. Reg. Sys., Inc. v. Neb. Dep’t of Banking and Finance*, 704 N.W.2d at 787 (emphasis added).

**1. A nominee derives its power and authority from its principal.**

MERS' claim to be the sole mortgagee and owner of the power of sale when the mortgage loan has been transferred between its members is a guise covering the facts. In an agency relationship, the principal controls the agent's conduct. *Vieths v. Ripley*, 295 N.W.2d 659, 664 (Minn. 1980). It is self-evident that an agent cannot create in himself an authority to do a particular act merely by its performance. *Burchard v. Hull*, 74 N.W. 163, 164-65 (Minn. 1898). Before a principal is able to delegate its rights under the mortgage to a nominee, the principal must first possess those rights. Thus, in order for MERS to maintain its role as nominee when the mortgage loan is transferred among its members, MERS' principal – the new owner of the mortgage loan – must grant MERS such status.

Accordingly, numerous other courts have attributed legal significance to the fact that MERS is a mere nominee with no real control over the power and rights created by the mortgage and promissory note. For instance, the Seventh Circuit Court of Appeals looked behind the form and statements of MERS and determined that the citizenship of the owner of the note – not MERS as its nominee – must be considered to establish diversity jurisdiction because MERS acts as a nominee only and does not control any litigation or settlement. *Mtg. Elec. Reg. Sys., Inc. v. Estrella*, 390 F.3d 522, 524-25 (7th Cir. 2004). Similarly, looking to the true holder of the power under the note and mortgage, the Nebraska Supreme Court held that MERS is not covered by a Nebraska statute that applies to mortgage lenders. *See Neb. Dep't of Banking & Finance*, 704 N.W.2d at 788.

Indeed, in another case involving MERS, the Connecticut Superior Court noted that a “nominee” status “does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him/her.” *Mtg. Elec. Reg. Sys., Inc. v. Rees*, 2003 WL 22133834 at \*1 (Conn. Super., 2003) (unpublished) (attached) A-381-83. Courts in New York have similarly held, “...that a nominee of the owner of the note and mortgage, such as Mortgage Electronic Registration Systems, Inc. (MERS),” does not own either the note or the mortgage. *Lasalle Bank Nat’l Assoc. v. Lamy*, 824 N.Y.S.2d 769; 2006 WL 2251721, at \*1 (N.Y. Sup. Ct. 2006) (internal citations omitted) (attached). A-384-86.

As we show in section D, *infra*, Minnesota law allows MERS to serve as the nominal mortgagee of record for its principals. However the transfers of rights from one principal to the next, which carry the power to appoint MERS as nominal mortgagee and to invoke the power of sale by foreclosing in MERS’ name, are mortgage assignments which must be recorded prior to foreclosure by advertisement under ch. 580.

**2. MERS is no more than a corporate shell.**

MERS is nothing more than a corporate shell – a name that mortgage industry members use to conduct their business. When a foreclosure is commenced in the name of MERS, it is not handled by any employee or agent of MERS; rather, it is handled by the true owner of the mortgage loan. Indeed, all MERS members are authorized signatories of MERS and can conduct their business in the name of MERS. *See* A-185. Thus, when a foreclosure is being initiated in the name of “MERS,” it is really being handled by

either the owner of the mortgage loan or perhaps the servicer (the entity under contract to collect payments and otherwise service the loan).

A 2008 New York case illustrates this point. In *Deutsche Bank Nat'l Trust Co. v. Maraj*, 2008 NY slip. op. at 50176(U); 2008 WL 253926, at \*1 (N.Y. Sup. Ct. 2008) (attached) A-387-89, the Court denied the plaintiffs' motion for a default foreclosure judgment because of questions about the relationships between MERS (the nominee for original lender Indymac Bank) and the plaintiff ("Deutsche Bank"). Prior to commencement of the foreclosure, Deutsche Bank, trustee for the securitized trust that owned the mortgage loan, had acquired an assignment of the mortgage from MERS.<sup>19</sup> *Id.* The Court noted that the person who executed the assignment by MERS, on behalf of Indymac, to Deutsche Bank, was the same person who executed Deutsche Bank's application for a default judgment in the foreclosure proceedings. *Id.* In the assignment to Deutsche Bank, the assignor claimed to be Vice President of MERS and, in a later affidavit, she claimed to be an officer of Deutsche Bank. *Id.* The Court further noted that the affidavits and assignment of mortgage indicated that Indymac, MERS, and Deutsche Bank all shared the same business address. *Id.*

MERS cannot circumvent the requirements that are imposed on all other lenders who use Minnesota's expedient foreclosure by advertisement remedy. Regardless of whether two parties could theoretically split a mortgage and note sufficiently to allow transfers of the note to escape recordation before foreclosure by advertisement, the statute

---

<sup>19</sup> In the State of New York, a plaintiff in a mortgage foreclosure action (judicial) must show ownership of both the mortgage and the promissory note. A-384.

should not be interpreted to allow a single entity that acts as mortgagee “solely as a nominee” with no rights, powers, or discretion of its own to foreclose by advertisement without recording assignments of the mortgage loan between its principals. When the Legislature enacted the protections of Minn. Stat. §§ 580.02 and 580.04, it could not have intended to allow an entity with as little an interest as MERS to act as a straw man to hide the chain of assignments of a mortgage loan in foreclosure.

**D. The Enactment Of Section 507.413 Did Not Exempt MERS Or Any Other Nominee From Its Duty To Record Assignments Of The Mortgage Prior To Commencement of a Foreclosure by Advertisement Under Chapter 580.**

MERS argues that Minn. Stat. § 507.413, which was enacted by the Minnesota Legislature in 2004 at the urging of MERS (and thus has been referred to in these proceedings as the “MERS statute”), authorizes a “nominee” of a lender to serve as the mortgagee of record and to institute foreclosure proceedings on behalf of its members. A-246-47. Plaintiffs agree. However, the MERS statute does not allow MERS to disregard transfers between its members which must be recorded to satisfy the requirements of ch. 580 before it commences a foreclosure by advertisement on their behalf.

The MERS statute was codified in 2004 as part of ch. 507, which governs “Recording and Filing Conveyances.” *See* Minn. Stat. ch. 507 generally. The section provides, in pertinent part:

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

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

The county recorder and registrar of titles shall rely upon this assignment, satisfaction, release or power of attorney to foreclose to assign, satisfy, release, or foreclose the mortgage.

Minn. Stat. § 507.413 (2006).

MERS' attempt to rely upon this statute to avoid its duty to record assignments defies the plain meaning of the statute, legislative intent, and the canons of statutory construction. This statute merely made it easier for MERS to better serve its members by authorizing MERS to record mortgage-related documents on its members' behalf. That is all it did.

By its plain language, this statute recognizes that an entity, such as MERS, can serve as the mortgagee of record *as a nominee* for a lender and that lender's successors and assigns, and that in its nominal status, it can execute certain mortgage-related documents on behalf of its principals, such as satisfactions and assignments of mortgages, and granting a power of attorney to foreclosure a mortgage on behalf of its principals. Nothing in this statute, however, relieves MERS of the duty to abide by the requirements of ch. 580, including the requirement to record all assignments of the mortgage (as that term is intended by ch. 580) prior to commencement of a foreclosure by advertisement.

In interpreting statutory language, the court's "primary objective . . . is to give effect to the legislature's intent as expressed in the language of the statute." *Pususta v. State Farm Ins. Companies*, 632 N.W.2d 549, 552 (Minn. 2001) (citing Minn. Stat. § 645.16 (2000)). Where the Legislature's intent is clearly discernable from plain and unambiguous language, the court should apply the statute's plain meaning. *See Green Giant Co. v. Comm'r of Rev.*, 534 N.W.2d 710, 712 (Minn. 1995) (citing Minn. Stat. § 645.16). However, in the face of ambiguity, courts will rely on the canons of statutory construction to aid in interpretation. *Correll v. Distinctive Dental Services, P.A.*, 607 N.W.2d 440, 445 (Minn. 2000).

First, section 507.413 is not ambiguous. As indicated by its inclusion in the "Recording and Filing Conveyances" act, it facilitates MERS' attempts to record certain mortgage-related documents on behalf of its principals. Insofar as the Court deems section 507.413 to be ambiguous when juxtaposed with the requirements of ch. 580, it should look to the canons of statutory construction as well as to the legislative history. *See Heine v. Simon*, 702 N.W.2d 752, 765 (Minn. 2005).

Section 507.413 contains no explicit repeal of any portion of ch. 580. And "there is no repeal by implication if both laws may stand and be operative without repugnance to each other." *State v. City of Duluth*, 56 N.W.2d 416, 418 (Minn. 1952). Similarly, the basic rules of statutory construction require that the conflicting provisions be construed together, if possible, to give effect to both provisions. *State by Beaulieu v. Indep. Sch. Dist. No. 624*, 533 N.W.2d 393, 396 (Minn. 1995) (citing Minn. Stat. § 645.26, subdiv. 1

(1994)). In this case, both laws can be fully operative without repeal of one or conflict between the two.

The relationship between sections 507.413 and 580.02 is complementary because the MERS statute facilitates the ease with which a nominee, such as MERS, can record mortgage-related documents on behalf of its principals. The MERS statute informs the county recorder that certain documents are “entitled to be recorded . . . or filed.” Minn. Stat. § 507.413(a) . When its member informs MERS that a mortgage has been satisfied, for example, MERS can record a satisfaction of mortgage on behalf of its principal. And when a MERS member deems it necessary to commence a non-judicial foreclosure, MERS has the tools on hand to record a complete chain of assignments between its members – on their behalf – to satisfy the statutory prerequisites of ch. 580.

Far from evincing an intent to eliminate the need to record, section 507.413 specifically directs the county recorder or registrar of titles to recognize a “subsequent assignment . . . executed by the mortgagee [MERS] or the third party, its successors or assigns. . . .” Minn. Stat. § 507.413(2) . This provision allows MERS, as the original mortgagee as nominee, to record subsequent assignments between its members to satisfy the requirements of ch. 580. Construing section 507.413 to allow MERS to foreclose by advertisement without recording assignments as required under ch. 580 would defy the canons of statutory construction by effectively repealing the mandates of Minn. Stat. §§ 580.02 and 580.04 for transfers that occur between MERS members.

Furthermore, the legislative history of section 507.413 is devoid of any evidence that would indicate the Legislature intended to create an exception for entities such as

MERS – or any “nominee” for that matter – from the requirement to record all assignments of the mortgage between its principals prior to commencement of a foreclosure by advertisement. In fact, the audio tapes from both the Senate Judiciary and House Civil Law committees are completely bereft of any mention of the statute’s impact on the prerequisites for foreclosure by advertisement. *Mortgage satisfaction certificates and assignments or releases: Hearing on S.F. No. 1621 Before the S. Comm. on Judiciary*, 2003-2004 Leg., 83<sup>rd</sup> Sess. (Minn. Feb. 10, 2004) (audio tape available at Minnesota Legislative Reference Library); *Mortgage satisfaction certificate provided: Hearing on H.F. No. 1805<sup>20</sup> Before the H. Civ. Law Comm.*, 2003-2004 Leg., 83<sup>rd</sup> Sess. (Minn. Feb. 3, 2004) (audio available online at [http://www.house.leg.state.mn.us/audio/archivescomm.asp?comm=4&ls\\_year=83](http://www.house.leg.state.mn.us/audio/archivescomm.asp?comm=4&ls_year=83)).

The fact that the Legislature enacted section 507.413 to allow MERS to record mortgage-related documents on behalf of its principals does not change the entirely separate and longstanding requirement that prior to foreclosing on a home without judicial process, all assignments must be recorded.

The plain language of the foreclosure by advertisement statute, Minnesota courts’ strict construction of the foreclosure by advertisement statute, the lack of any explicit repeal of the mandates of the foreclosure by advertisement statute in section 507.413, the fact that both statutes can be fully effective at the same time, and the legislative history of section 507.413 all support the Plaintiffs’ interpretation of this section.

---

<sup>20</sup> S.F. 1621 was later substituted for H.F. 1805, but insofar as is relevant here, H.F. 1805 was identical to S.F. 1621.

**E. By Hiding The Ownership Of Mortgage Loans In Foreclosure, MERS Harms Borrowers And The Public, And Defies The Spirit And Purpose Of The Statutory Requirement To Record All Assignments.**

- 1. In order to defend against foreclosure, borrowers need to know who owns their mortgage loan.**

MERS falsely asserts that borrowers in foreclosure “have neither the right nor the need to know” the ultimate owner of their mortgage loan and, that by providing the identity of servicers to borrowers upon request, MERS provides sufficient information to borrowers facing foreclosure. A-330. For a borrower in foreclosure, knowing the identity of the assignee of his mortgage loan can be critical. *See, e.g., In re Schwartz*, 366 B.R. 265, 268-70 (Bankr. D. Mass. 2007) (concluding the foreclosing entity had not established the propriety of the foreclosure sale and could not evict the homeowner where assignment to foreclosing entity was dated twenty days after foreclosure sale).

For example, the Truth in Lending Act (“TILA”), which includes the Home Ownership and Equity Protection Act (“HOEPA”), provides for liability – including the remedy of rescission – against assignees for certain violations of its disclosure mandates. *See* 15 U.S.C. § 1641(a), (c) (providing for assignee liability for violations, including disclosures which are “incomplete or inaccurate from the face of the disclosure statement or other documents assigned” and “disclosure[s] which do[] not use the terms required”); 15 U.S.C. § 1641(c) (“Any consumer who has the right to rescind ... may rescind the transaction as against any assignee of the obligation”); 15 U.S.C. § 1641(d) (allowing all

claims and defenses to be asserted against “any person who purchases or is otherwise assigned a [HOEPA] mortgage”).<sup>21</sup>

MERS “uniformly refuses to acknowledge or accept responsibility for consumer claims and defenses related to the origination or servicing of the loan.” Christopher L. Peterson, *Predatory Structured Finance*, 28 *Cardozo L. Rev.* 2185, 2280 (2007); *see also Mtg. Elec. Req. Sys., Inc. v. Neb. Dep’t of Banking and Finance*, 704 N.W.2d at 786-87. Moreover, TILA claims based on theories of assignee liability *cannot* be brought against servicers unless the servicer “is or was the owner of the obligation” and, even when the servicer is the assignee, it is not liable if it is named as an assignee “solely for the administrative convenience of the servicer.” 15 U.S.C. § 1641(f)(1) & (2). Thus, if a borrower cannot identify the assignee of his mortgage loan – as opposed to the originating lender or servicer of his loan or MERS as the nominal mortgagee and foreclosing entity – these powerful defenses and claims can be lost. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002) (dismissing TILA rescission claim because assignee was not named as a party although loan originator and servicer were named); *Roberts v. WMC Mortgage Corp.*, 173 Fed. App’x. 575, 576 (9th Cir. 2006) (dismissing claim because TILA rescission notice was not timely delivered to assignee of mortgage loan).

---

<sup>21</sup> Likewise, a borrower in foreclosure with common-law defenses such as fraud and civil conspiracy in the origination of her loan may have claims against the assignee of her mortgage loan if she can show the owner had knowledge or complicity of wrongdoing when it bought the promissory note. *Hays v. Bankers Trust Co. of Calif.*, 46 F. Supp. 2d 490, 495-97 (S.D.W. Va. 1999).

If transfers of ownership of the mortgage loan are not recorded at the time of foreclosure, it can be difficult, if not impossible, for a borrower to ascertain the assignee of his mortgage loan. *See Peterson, supra* at 2265-2268; cf. *Meyer v. Argent Mtg. Co.*, 379 BR 529, 552-53 (Bankr. E.D. Pa. 2007) (denying motion to amend to add assignee despite fact that borrower had made a written request to the servicer for the identity of the assignee prior to litigation, and the servicer failed to provide it); *Peterson, supra*, at 2265 (“[p]hone calls to the loan’s servicer are frequently ignored, subject to excruciating delays, and typically can only reach unknowledgeable staff who themselves lack information on the larger business relationships”). Accordingly, preserving the borrower’s ability to obtain this information through public records is the only way to ensure that homeowners will not lose the opportunity to raise vital claims and defenses before their homes are foreclosed upon through an expedient, non-judicial foreclosure.

**2. Public policy strongly favors disclosure of all entities who have purchased and who currently own mortgage loans in foreclosure.**

Minnesota’s requirement that all assignments be recorded prior to the commencement of a foreclosure by advertisement also provides crucial ownership information to communities seeking to manage the current foreclosure crisis. As a result of MERS’ failure to follow the requirements of Minnesota law, the public will never know the chain of ownership to thousands of failing mortgage loans in Minnesota communities. Policymakers seeking to respond and ameliorate the impact of these foreclosures cannot ascertain the identity of responsible parties or even parties who should be invited to be part of efforts to craft a solution.

A resolution recently adopted by the Hennepin County Board of Commissioners illustrates this point, providing in pertinent part:

Whereas, foreclosures pose a substantial negative consequence to the citizens of Hennepin County including community destabilization, diminished economic development, and homelessness with attendant pressures on the safety net Hennepin County provides; and

Whereas the citizens of Hennepin County and the Broader public have a stake in knowing all entities who have or had an interest in real property subject to non-judicial foreclosure; and

Whereas, the Hennepin County Board finds that the real estate records system which is maintained by Hennepin County should be as accurate and complete as possible:

Be it resolved, that the Hennepin County Board Finds that public disclosure of all entities who have or had an interest in real property subject to non-judicial foreclosure is in the best interest of Hennepin County residents and the broader public.

Hennepin County Bd. of Comm'rs. Resolution No. 07-11592 (Nov. 13, 2007) A-194.

Further, a Federal Reserve study expressly recognized that the inability to identify the owners and investors of mortgage loans in foreclosure undermines efforts to assist borrowers and solve the community problems associated with foreclosures. Michael Grover, *Fed-led research reveals need for better Twin Cities foreclosure data*, *CommunityDividend*, 2006 Issue No. 4, available at <http://minneapolisfed.org/pubs/cd/06-4/foreclosure.cfm>. A198-99. The study specifically noted that MERS contributes to this by concealing the identity of those who own mortgage loans in foreclosure. A-199. Thus, an interpretation of Minn. Stat. § 580.02 that allows foreclosures to occur without a recordation of transfers between

MERS members creates a potentially insurmountable obstacle to communities seeking to find solutions to the current foreclosure epidemic. *See generally* A-196-99.

In sum, allowing MERS to avoid disclosing the chain of ownership of mortgage loans in foreclosure harms both borrowers facing foreclosure as well policymakers and communities seeking solutions to the current foreclosure crisis.

### CONCLUSION

In an effort to legitimize its foreclosure practices, Defendant MERS asks this Court to interpret Minnesota's foreclosure by advertisement statute in a manner that is wholly inconsistent with the purpose and intent of the statute, and which would render two of its key provisions virtually meaningless.

MERS was created based on the desires and convenience of the mortgage industry, not law or public policy. Plaintiffs seek to preserve a critical safeguard that Minnesota law has provided to homeowners in foreclosure for more than 150 years: the right to know who owns their mortgage loan. Accordingly, Plaintiffs respectfully request that this Court preserve the letter and spirit of Minn. Stat. §§ 580.02 and 580.04 by answering the Certified Question in the affirmative.

Dated: \_\_\_\_\_

4/14/08

**THE LEGAL AID SOCIETY OF  
MINNEAPOLIS**

By: \_\_\_\_\_

*Amber Hawkins*  
Amber M. Hawkins (#0285961)  
Galen Robinson (#165980)  
Colleen Daly (#0386510)  
Home Ownership Protection Project  
Legal Aid Society of Minneapolis  
430 First Avenue North, Suite 300  
Minneapolis, MN 55401-1780  
(612) 746-3791

**CROWDER TESKE, PLLP**

William H. Crowder (#20102)  
Vildan A. Teske (#241404)  
Kathleen Finnegan Lamey (#0388038)  
555 West Seventh Street, Suite 210  
Saint Paul, MN 55102  
(651) 225-8330

**ATTORNEYS FOR THE PLAINTIFFS**

**THE CENTER FOR RESPONSIBLE  
LENDING**

Melissa Briggs (DC #480862)  
Eric Halperin (CA #198178 and  
DC #491199)  
Daniel Mosteller (NC 36958)  
910 - 17<sup>th</sup> Street, NW, Suite 500  
Washington, DC 20006  
(202) 349-1872

**OF COUNSEL**