

NO. A08-397

State of Minnesota  
 In Supreme Court

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

*Plaintiffs,*

vs.

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

*Defendants.*

**PLAINTIFFS' REPLY BRIEF**

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## INTRODUCTION

MERS asks this Court to depart from longstanding and fundamental principles of real estate law in order to streamline the foreclosure by advertisement process for its members. Contrary to MERS' assertions, this lawsuit does not challenge MERS' business model, its ability to serve as mortgagee as nominee, or even its authority to foreclose. This lawsuit focuses solely on MERS' failure to follow the express requirements of Minnesota's foreclosure by advertisement statute: to record the chain of assignments of a mortgage and list each assignee in the published foreclosure notice. MERS urges this Court to create a radical exception which would allow a nominee (such as MERS) to foreclose without identifying the entity on whose behalf it acts. MERS' request dramatically alters the meaning and protections of this 150-year-old law and, if granted, will permanently eviscerate the public record for mortgage foreclosures in Minnesota.

In response to Plaintiffs' challenge to its foreclosure practices, MERS inexplicably focuses on the purpose and requirements of a law that is not at issue in this case, the state recording act. MERS and its Amicii rely upon baseless predictions of catastrophic results if this Court adopts the Plaintiffs' interpretation of the law. These predictions are nonsensical and entirely without support in the record.

The Court should reject MERS' attempt to trade well-settled property law for convenience and should uphold the letter and spirit of Minnesota's foreclosure by advertisement statute by deciding the certified question in the affirmative.

**I. MERS MUST COMPLY WITH THE REQUIREMENTS OF CHAPTER 580 IN ORDER TO UTILIZE MINNESOTA'S FORECLOSURE BY ADVERTISEMENT REMEDY, AND CANNOT RELY UPON COMPLIANCE WITH CHAPTER 507, THE STATE "RECORDING ACT," AS A SUBSTITUTE.**

The answer to the certified question depends solely on the Court's interpretation of the term "assignment of mortgage" as it is used in Minnesota's foreclosure by advertisement statute, codified at Minn. Stat. ch. 580 (2006). Specifically, whether the transfer of a promissory note which includes *all* rights conveyed by the mortgage from one MERS member to another constitutes an assignment of the mortgage which must be recorded and listed in published foreclosure notices before MERS can avail itself of this purely statutory remedy. *See* Minn. Stat. §§ 580.02 and 580.04 (2006).<sup>1</sup>

Rather than explaining how its foreclosure practices comply with the statute, MERS changes the subject.<sup>2</sup> MERS claims that its foreclosure practices are valid simply because it complies with the state "recording act," codified at Minn. Stat. ch. 507 (2006). This argument is a non sequitur because the recording act is not at issue here.

MERS further claims that recording all assignments of the mortgage and listing all assignees in the published foreclosure notice would not serve the purposes of the

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<sup>1</sup> In addition to the sale of promissory notes, MERS claims that servicing rights are also sometimes traded among its members. The sole legal issue here is whether transfers of the debt itself (the promissory note) accompanied by all rights under the mortgage constitute assignments of mortgage. Transfer of servicing rights is not significant in any way to this matter.

<sup>2</sup> It is telling that MERS mentions the statute at the center of the Plaintiffs' case and of the question this Court has certified – Minnesota's foreclosure by advertisement law – on just six of the forty-one pages in its Brief.

recording act. This argument likewise does not follow because such recordings and listings are not part of, and could not have been intended to further the goals of, the recording act. They are part of the foreclosure by advertisement statute. Astoundingly, MERS fails to address the purposes or goals of the foreclosure by advertisement statute anywhere in its Brief.

This Court should reject MERS' position. First, as common sense dictates, the foreclosure by advertisement statute and the recording act are not interchangeable. The application and underlying policy goals of these two laws differ substantially. Second, while MERS successfully lobbied for changes to the recording act that would allow it to serve as mortgagee of record in a nominal capacity for a series of lenders, such changes *did not* alter the requirements of Minnesota's foreclosure by advertisement statute. *See* Minn. Stat. § 507.413 (2006). Furthermore, a determination that this amendment to the recording act implicitly repealed provisions of the foreclosure by advertisement statute, in place for more than 150 years, would violate the most basic principles of statutory construction.

**A. The Foreclosure By Advertisement Statute Serves A Different Purpose Than The Recording Act And Each Statute Mandates Its Own Actions And Results.**

**1. Under the recording act, assignments of mortgage need only be recorded to protect the assignee's interests.**

The purpose of the recording act is to protect those who rely on the public recording system to purchase real estate. *Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester*, 251 N.W.2d 120, 123 (Minn. 1977). To accomplish this goal,

the recording act provides that unrecorded interests are “void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded....” Minn. Stat. § 507.34 (2006).

The recording act does not require assignments of mortgage or any other documents to be recorded; it simply resolves disputes by giving priority to interests that are recorded. An assignment of mortgage need not be recorded to be valid as between the parties to the transaction. *Wellendorf v. Wellendorf*, 139 N.W. 812, 813 (Minn. 1913). Indeed, the recording act expressly recognizes that assignments of mortgage are not always recorded, and it accommodates this practice by providing that “a certificate of satisfaction of mortgage” is entitled to be recorded and is sufficient to discharge the mortgage “*even if one or more assignments of the mortgage have not been recorded*” as long as the discharging party certifies that he or she has acquired the interests of the mortgagee of record. *See* Minn. Stat. § 507.403 (2006) (emphasis added). However, an assignee who does not record his interest cannot enforce his rights against a third party who, without knowledge of the assignment, obtains a satisfaction from the mortgagee of record. *See Huitink v. Thompson*, 104 N.W. 237, 239 (Minn. 1905). Thus, an assignment of mortgage is recorded solely to protect the assignee from wrongful conduct of the original mortgagee.

2. **Under the foreclosure by advertisement statute, all assignments must be recorded without exception.**

In contrast, the foreclosure by advertisement statute is entirely inflexible in its mandate that assignments of mortgage be recorded. The foreclosure by advertisement

remedy is unavailable unless its requirements, including recording all assignments and listing each assignee in the published foreclosure notice, are strictly followed. Pls.' Br. 13-15.

Unlike the recording act, this Court has repeatedly held that the foreclosure by advertisement statute should be construed in favor of borrowers or junior lien holders rather than the foreclosing lender. *See Moore v. Carlson*, 128 N.W. 578, 579 (Minn. 1910) (“It is elementary that the construction must be favorable to persons seeking to redeem.”); *Clifford v. Tomlinson*, 64 N.W. 381, 382 (Minn. 1895) (“[W]hile 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 foreclosure statutes are to be construed liberally in favor of redemptioners). Indeed, this Court has consistently ruled in favor of mortgagors to invalidate foreclosures that have been conducted in violation of the statutory requirements. *See* Pls.' Br. 13-15.

**3. The foreclosure by advertisement statute serves a purpose different than, and complementary to, the recording act.**

The purpose of the recording act to disclose the existence of a lien to prospective purchasers and the purpose of the foreclosure by advertisement statute to provide notice to those with a right of redemption are different, but compatible.

The interplay between the recording act and the foreclosure by advertisement remedy is illustrated in *Huitink v. Thompson*, 104 N.W. 237. Thompson borrowed money from Ernst and provided Ernst with a mortgage to secure his repayment of the

promissory note. *Id.* at 238. The mortgage was recorded. *Id.* Ernst subsequently transferred the promissory note to Huitink with an endorsement on the back of the note which, by its terms, included an assignment of the note and mortgage. However, no formal, written assignment of mortgage to Huitink was prepared or recorded. *Id.* Ernst later foreclosed the mortgage by advertisement in his own name as record mortgagee, purchased the property at the sheriff's sale, and conveyed the property to Brigham, who executed and delivered a mortgage to Ernst. *Id.* This mortgage was recorded. *Id.* Ernst then assigned the mortgage to Gores, and a formal written assignment of mortgage was recorded. *Id.*

Huitink subsequently brought an action to set aside the foreclosure conducted by Ernst and to invalidate the conveyances from Ernst to Brigham and Gores. *Id.* Significantly, this Court recognized that the transfer of the promissory note by Ernst to Huitink also assigned the mortgage and the right to foreclose to Huitink even though no formal, written assignment was recorded, and opined that the subsequent foreclosure by Ernst was unlawful. *Id.* at 239. Nevertheless, because Brigham and Gores had relied upon the records and the state of the title as disclosed, the Court held that they were entitled to the protection of the recording act and upheld their interests. *Id.*

This case highlights two critical points: (1) Even though Ernst was the mortgagee of record, he did not have the right to foreclose by advertisement because the mortgage had been legally assigned to Huitink through a transfer of the promissory note; and (2) the recording act can be used to “trump” claims that would otherwise invalidate a

foreclosure if necessary to protect innocent third parties who have relied upon the record.

*Id.*<sup>3</sup>

MERS cannot defend its foreclosure practices simply by claiming that it complies with the recording act. MERS' focus on the requirements and purpose of a statute that is not at issue in this case, and its corresponding dismissive treatment of the foreclosure by advertisement statute, reflects a troublesome view that taking a family's home without judicial process is nothing more than a routine administrative task carrying no consequence to the mortgagor or the public at large.

The rigid requirements of the foreclosure by advertisement statute and this Court's longstanding mandate for strict adherence thereto, as well as expressions of public policy, demand a different approach. The foreclosing mortgagee must satisfy the prerequisites of the statute that actually provides the foreclosure remedy, something MERS routinely and deliberately fails to do.

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<sup>3</sup> Other differences in the laws illustrate their separate and distinct purposes. Under the recording act, as MERS notes, recordation is intended to provide notice to the world that there is a lien affecting title to the property, and after that "interested parties must undertake further investigation as to the status of the lien." Def.'s Br. 16. In contrast, for a foreclosure by advertisement, the Legislature explicitly provided a much broader and more detailed notice of the history of interests in the mortgage than that which would be accomplished through recordation alone. The statute provides that the foreclosure notice, which must be published and served upon the occupant of the mortgaged property, "shall specify: the name of ... the mortgagee, [and] each assignee of the mortgage." Minn. Stat. § 580.04 (emphasis added).

**B. Though The Legislature Changed The Recording Act To Allow MERS To Serve As Mortgagee As A Nominee, It Did Not Amend The Foreclosure By Advertisement Statute Nor Exempt MERS From Complying With Its Requirements.**

MERS argues that the Minnesota Legislature sanctioned its foreclosure practices when the “MERS statute” amended the recording act in 2004. Def.’s Br. 13; *See also* Minn. Stat. § 507.413 (2006).<sup>4</sup> However, section 507.413 merely allows a nominee to serve as mortgagee of record on behalf of a series of principals and to record mortgage related documents on behalf of its principals. Pls.’ Br. 32-36. If anything, the MERS statute solidifies MERS’ ability to record mortgage-related documents, and, therefore, to comply with the foreclosure by advertisement statute. Regardless, this amendment to the recording act did not resolve the question before this Court.

Nothing in section 507.413 even hints that transfers between the principals of a nominal mortgagee do not constitute assignments of the mortgage. And nothing in that statute amends or repeals the requirements of the foreclosure by advertisement statute or exempts MERS and its members from compliance. To the contrary, section 507.413 specifically recognizes that mortgages are actually transferred to and owned by the entities who appoint MERS as nominee: it expressly provides that when a mortgage is

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<sup>4</sup> MERS’ counsel in this matter drafted the provision, and MERS was referenced by name during committee deliberations. Def.’s Br. at ADD 30, 53; Pls.’ Br. 14. No corresponding amendment to the foreclosure statute was proposed. In fact, in the course of these proceedings, MERS’ counsel stated that at the time the MERS statute was proposed, “the emphasis was on the releases and satisfactions [of mortgages], not on the foreclosures[.]” Def.’s Br. at ADD 31.

held by a mortgagee as nominee for a third party lender or its successors and assigns, an assignment of the mortgage can be executed *either* by the nominee (like MERS) or by the third party lender itself (or its successors or assigns). *See* Minn. Stat. § 507.413. In other words, the statute recognizes that when a mortgagee serves as nominee for a third party, the third party is always entitled – at its discretion – to record mortgage-related documents on its own behalf. This is because it is the third party lender who is the true mortgagee and not its nominee.

Moreover, MERS' interpretation of section 507.413 as an implicit repeal or amendment of the provisions of chapter 580 violates the most basic canons of statutory construction. Pls.' Br. 34-35.

MERS readily obtained an amendment to the recording act allowing it to be recognized as a mortgagee in a nominal capacity for a lender and the lender's assignees, and to execute mortgage-related documents on behalf of its principals. This amendment serves the recording act's purpose of informing the public of the existence of a lien against the property. MERS is now attempting to persuade this Court to usurp the Legislature's authority by determining that this amendment to the recording act gives MERS a sweeping exception to the requirements of the foreclosure by advertisement statute – a law with an entirely different purpose and application. The Legislature alone should determine whether the convenience and cost savings for MERS and its members justifies such a fundamental change.

**II. MERS' CLAIM THAT THE SALES OF MORTGAGE LOANS BETWEEN ITS MEMBERS DO NOT CONSTITUTE "ASSIGNMENTS OF MORTGAGE" IS UNTENABLE IN LIGHT OF THE NATURE OF THE TRANSACTIONS AND THE WELL-ESTABLISHED PRINCIPLES OF MORTGAGE AND FORECLOSURE LAW.**

To distract this Court from the legal issue in dispute, MERS relies on three different tactics. First, it attempts to convince this Court that this case is about its failure to record promissory notes. Second, it continually cites to cases which represent the exception to the general rule regarding the relationship between the note and mortgage even though the one critical fact common to cases warranting such an exception is not present here. Third, it fails to address cases from this Court interpreting the statutory requirements that are actually at issue in this case.

**A. MERS Mischaracterizes The Legal Issue Before This Court And Relies On Inapposite, Nonbinding Case Law For The Irrelevant Proposition That Promissory Notes Are Not Recordable.**

In an effort to obscure the legal issue at hand, MERS turns to the irrelevant mantra that it has not violated the requirements of the foreclosure by advertisement statute because promissory notes are not recordable instruments under the recording act. Def.'s Br. 7, 15, 22, 24-27. Plaintiffs do not allege that MERS must record promissory notes or assignments of promissory notes in order to comply with the foreclosure by advertisement statute. Rather, Plaintiffs argue that when promissory notes are sold from one MERS member to another along with all rights under the mortgage, that transaction operates as an assignment of mortgage within the meaning of chapter 580 even though MERS opts not to prepare or record a formal, written assignment of mortgage.

MERS cites to state court decisions from South Carolina, Arkansas and Indiana to support the proposition (unchallenged in this case) that only mortgage instruments, and not promissory notes, are recordable under state recording acts. Def.'s Br. 23-26.<sup>5</sup> As set forth above, Minnesota's foreclosure by advertisement statute serves a different purpose and includes different requirements than the recording act. None of the cases MERS cites involve a statutory requirement to record the chain of ownership of a mortgage as a prerequisite to conducting a non-judicial foreclosure and, thus, are not instructive as to whether the transactions that occur in this case constitute assignments of mortgage under chapter 580.

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<sup>5</sup> For example, in *Neal v. Bradley*, 384 S.W.2d 238 (Ark. 1964), the court was called upon to determine which of two assignees of a single promissory note was entitled to the proceeds of the debt. The mortgagee had assigned the same promissory note to two different parties, the earlier assignee not having recorded and the later assignee having recorded. *Id.* at 238-40. The court concluded that the recording act did not apply to assignments of notes and, therefore, the first assignee did not lose her interest by failing to record. The court did not even consider whether an assignment of mortgage had occurred with the assignments of the promissory note. In fact, unlike the situation here, the original mortgagee only transferred a portion of his interest in the promissory note each time it was assigned. *Id.* at 241 n.3.

In *Perry v. Fisher*, 65 N.E. 935, 936 (Ind. App. 1903), the state law at issue (not a foreclosure statute) imposed a penalty for failure to record assignments of mortgage within forty-five days. The statute expressly defined the manner in which a mortgage could be assigned: "either by an assignment entered on the margin of such record, signed by the person making the assignment and attested by the recorder, or by a separate instrument executed and acknowledged." The court held that because neither of the specific types of assignments explicitly set forth in the statute had occurred when the note was sold, a penalty should not be imposed for failure to timely record. *Id.*

**B. Where MERS Does Directly Address Plaintiffs' Argument, It Continues To Rely On Cases Involving A Critical Factual And Legal Distinction Which Results In An Exception To The General Rule That An Assignment Of The Note Operates As An Assignment Of The Mortgage.**

When MERS attempts to rebut Plaintiffs' argument that the transfer of promissory notes between MERS members constitute assignments of the underlying mortgages, it relies upon cases where the Court has recognized that the record mortgagee is the only entity with the right to foreclose regardless of whether others have unrecorded interests in the mortgage. Def.'s Br. 32-34. In each case cited by MERS, the record mortgagee holds its own distinct legal interest in the mortgage that is unchallenged. *See* Pls.' Br. 23-25. For example, in *Northern Cattle Co. v. Munro*, 85 N.W. 919, 920 (Minn. 1901), the mortgage secured several promissory notes, and the mortgagee retained at least one of them. In *Bottineau v. Aetna Life Ins. Co.*, 16 N.W. 849, 849-50 (Minn. 1883) the Court recognized that, while other parties may have equitable rights in the mortgage because of prior dealings with the mortgagee, such equitable rights did not divest the mortgagee of legal title to the mortgage. These cases are inapplicable here, where MERS is the mortgagee solely because it is appointed as nominee by each successive owner of the promissory note and where MERS has no interests distinct or separate from its principal.<sup>6</sup>

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<sup>6</sup> Furthermore, Plaintiffs do not contend that MERS, as mortgagee of record, cannot foreclose. Plaintiffs simply allege that MERS must record the assignments of mortgage that have occurred between its principals before it does so.

Importantly, MERS does not cite a single Minnesota case to support the proposition that a mortgage is not assigned when the promissory note along with *all rights conveyed by the mortgage* are transferred.<sup>7</sup> MERS attempts to bootstrap holdings based on vastly distinct facts and legal relationships, not present here, to the day-to-day business of selling mortgage loans on the secondary market. Such a broad application would constitute an abrupt departure from the well-established principles governing the relationship between a promissory note and a mortgage.

**C. The Relevant Minnesota Case Law Clarifies That The Foreclosure By Advertisement Statute Requires Recordation Of The True Owner Of The Rights In A Mortgage, Not A Mere Agent.**

While MERS relies upon nonbinding cases from other jurisdictions pertaining to instruments that can be recorded under other states' recording acts, and cases from Minnesota involving different facts and legal relationships than those present here, it gives only cursory attention to cases that have been decided by *this* Court interpreting the nature and scope of the law at issue in *this* case, Minnesota's foreclosure by advertisement statute. *See* Pls.' Br. 13-20.

*Hathorn v. Butler*, 75 N.W. 743, 744 (Minn. 1898) presents a situation strikingly similar to the case at hand. The foreclosing party, Butler, was the mortgagee of record;

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<sup>7</sup> MERS cites *In the Matter of the Petition of David R. Sina and Candice M. Sina* for the proposition that the Minnesota Court of Appeals ruled that MERS met the requirements to foreclosure by advertisement. *In re Sina* is distinguishable from this case in several respects, including that the two pro se mortgagors' foreclosure claims were barred by res judicata and collateral estoppel. No. A06-200, 2006 WL 2729544, at \*3 (Minn. App. Sept. 26, 2006), *rev. denied* (Dec. 12, 2006). Def.'s Br. at ADD 60-62. The *Sina* court did not determine that there were one or more unrecorded assignments of the Sinas' mortgage. *Id.*

however, Butler had assigned the mortgage to Mann with an agreement between them that the assignment would not be recorded so that Butler, as the mortgagee of record and Mann's agent, could foreclose if necessary. Because the assignment to Mann was not recorded, the Court invalidated the foreclosure, explaining that the true owner of the mortgage must be disclosed and not just the identity of an agent. *Id.* "For the purposes of foreclosure under the power the notice of sale must be, and it must show that it is, the act of the person in whom the power to foreclose is vested." *Id.* See also *Moore v. Carlson*, 128 N.W. 578, 579 (Minn. 1910) (mortgagor has a right to know "the various assignments which affect the title of the person seeking to foreclose by advertisement").

As the foregoing cases show, the foreclosure record must include more than a simple agent or nominee; it must name the party in whom the actual power to foreclose is vested. In the case of MERS mortgages, such power lies with the owner of the promissory note.

**D. Adopting MERS' Narrow And Superficial Interpretation Of The Term "Assignment Of Mortgage" Would Defy The Very Purpose Of Chapter 580's Recording And Notice Requirements.**

MERS is masterful at using semantics to its advantage. MERS claims to be the "mortgagee" even though MERS itself admits that it is only a nominee with no independent rights or power under the mortgage. It claims there has been no "assignment of the mortgage," even though the debt and all interests conveyed by the mortgage are transferred among MERS members and even though the investment firms that purchase mortgages on the secondary market require that the original mortgage document be delivered to the purchaser of the promissory note. A-227. MERS claims its members

have only “beneficial interests” in the mortgages even though they possess all legal rights and powers under the mortgage, including the authority to appoint MERS to serve as their nominal mortgagee. MERS claims to track only the transfer of “promissory notes,” “beneficial interests” and “servicing rights” in mortgages but standardized mortgage industry agreements define the “MERS® system” as “[t]he system of recording transfers of Mortgages electronically maintained by MERS ®.” A-220, A-226.

MERS seems to believe that by simply attaching or refusing to attach legal terms to its business practices, those practices either take on or escape the corresponding legal significance. This approach may be the way MERS functions, but it is not the way Minnesota real estate law has functioned for over 150 years.

In keeping with its Alice in Wonderland definitions, MERS takes the view that the term “mortgage” means only the “mortgage instrument,” and not the interest in real property embodied therein. MERS must so define the term “mortgage” as “mortgage instrument” because it is the only way that the transfers that always occur between MERS members can possibly be conceived as something other than assignments of the mortgage. In an early case, this Court defined the term “assignment” as “a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.” *Brown v. Crookston Agric. Ass’n.*, 26 N.W. 907, 908 (Minn. 1886) (internal citations omitted). Under the MERS system, the owner or transferee of the promissory note also possesses a property right: the right to foreclose on the home that serves as security for the debt – the ultimate right conveyed by the

mortgage. It is the transfer of this property right that constitutes an assignment of mortgage which must be recorded in order to achieve compliance with chapter 580.

MERS' position is based on its claim that only "beneficial interests" or "equitable interests" in the mortgages – rather than the mortgages themselves – are sold and assigned between its members. Def.'s Br. 30-31. As MERS states, a party who has an "equitable interest" in a mortgage would need to "invoke the jurisdiction of a court of equity to give [them] the benefit of the security." Def.'s Br. 24. MERS' suggestion that the interests at issue here are simply "equitable" is misleading. Under the MERS system, the assignee of a promissory note who appoints MERS to serve as its mortgagee as nominee does not need to invoke the jurisdiction of a court of equity because, as a result of express contract, it owns the security interest and all legal rights conveyed thereby and can revoke MERS' status as nominal mortgagee at any time. *See* Plaintiffs' mortgages at A-72, 102, 134, 163 (indicating that it is the Lender who possesses an interest in the property and rights under the mortgage); A-77, 107, 139, 168 (indicating that it is the Lender who has the right to invoke the power of sale). Likewise, MERS members do not have mere "beneficial interests" because they have actual legal ownership and control over the mortgages. *See* Pls.' Br. 21-22.

Consistent with its analysis, MERS cites an unrelated statute regarding taxation of recorded documents for its definition of the term mortgage as "an instrument." Def.'s Br. 20 (citing Minn. Stat. § 287.01). However, the UCC defines "mortgage" as an "interest in real property ... which secures payment or performance of an obligation." Minn. Stat. § 336.9-102 (72) (d). *See also Close v. Hodges*, 46 N.W. 335, 335 (Minn. 1890) (noting

that a mortgage vests an interest in property). The Comments to the UCC are especially instructive in this regard: “the defined term ‘mortgage’ means an interest in real property; it does not mean the record that evidences, or is filed or recorded with respect to, the mortgage.” Minn. Stat. § 336.9-102 cmt. 9a (2002).

This Court must determine whether the act of transferring a promissory note, and *all* rights under the mortgage that secures that note, constitutes an “assignment of mortgage” for purposes of chapter 580. The Court will need to decide whether it is more likely that the term “mortgage” in chapter 580 was meant to encompass solely the piece of paper upon which the contract is written – the mortgage document itself (a limitation not found in the statute) – or whether the Legislature intended a broader meaning.

MERS strains credulity when it suggests that the intent of chapter 580 is to capture only assignments of a piece of paper, and not the transfer of all substantive rights and interests conveyed by the document. Contrary to MERS’ argument, this Court long ago recognized that the recording and notice provisions of chapter 580 entitle the mortgagor “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.” *Moore v. Carlson*, 128 N.W. at 579. Only the current owner of the power to foreclose can delegate it to MERS, as its nominee. And it is impossible to know whether MERS actually has the power to foreclose without knowing who truly owns that power, how they acquired it, and whether they have in fact delegated that power to MERS. Because this information surely “affects the title of the person seeking to foreclose by advertisement,” the mortgagor is entitled to know it. Allowing a foreclosing

entity to evade the statute's requirements by simply eschewing a formal written assignment of the mortgage document would eliminate these protections all together. That cannot have been the intent of the Legislature.

**III. MERS CAN EASILY COMPLY WITH THE LAW, AND REQUIRING IT TO DO SO WILL NOT DESTROY ITS BUSINESS MODEL, WREAK HAVOC ON TITLE RECORDS, OR HARM THE MORTGAGE LENDING INDUSTRY.**

Despite the myriad reasons why MERS claims it should not be required to record assignments, MERS can readily comply with the law. Any questions about its ability to do so were resolved through enactment of the MERS statute.

Amicii ALTA and MLTA, in a brief funded by MERS, preview an absurd parade of horrors that will occur if MERS is required to follow Minnesota's 150-year-old foreclosure by advertisement law. *See* ALTA Br. 1. The parade begins with an assertion, completely without evidence or foundation, that the entire MERS' system will be "dismantled;" it builds steam with Amicii's allegation, again without evidence or foundation, that the foreclosure by advertisement remedy will no longer be available for many mortgages; and reaches its crescendo with the claim that if MERS is forced to comply with the law, mortgage lenders may be unwilling to lend money to Minnesotans. *Id.* at 4, 9-13. MERS engages in its own version of hysteria when it claims that Minnesota's land title records will be dramatically altered by a decision requiring MERS to comply with the recording and notice provisions of Minnesota's foreclosure by advertisement law. As shown below, a decision for the Plaintiffs will not cause any such dramatic results.

**A. MERS Has The Ability To Comply With Minnesota's Foreclosure By Advertisement Statute And Forcing It To Do So Will Not "Dismantle" Its Record Keeping System.**

MERS disingenuously suggests that if it is ordered to record assignments of the mortgage from one of its principals to the next, it would merely record an assignment to itself, which would serve no purpose. Def.'s Br. 27. As enunciated by both *Hathorn* and *Moore*, the purpose of the recording and notice requirements of chapter 580 is to disclose the entity with the right and power to foreclose.

In order to comply with the foreclosure by advertisement statute, MERS must record an assignment of mortgage from MERS, as nominee for the principal who is identified in the mortgage, to MERS, as nominee for such principal's *assignee* who shall be identified in the assignment. In this manner, each entity for which MERS has served as nominal mortgagee will be identified. Enactment of section 507.413, which expressly authorizes MERS (as nominee) to record assignments of mortgage, resolved any potential obstacle to MERS' ability to complete this task on behalf of its principals.

MERS implies that Plaintiffs are making an unprecedented and inappropriate request to learn the identity of the holder of the promissory note and that there is "no reason why" the entity owning the note must disclose its ownership. Def.'s Br. 18-19. This assertion is willfully false. The statute that MERS itself wrote *only* allows a nominee to become the record mortgagee if the lender (universally identified as the owner of the promissory note in MERS mortgages) discloses its identity. *See* Minn. Stat. §507.413(a)(1) (recognizing a mortgage granted "to a mortgagee as nominee or agent for a third party identified in the mortgage, and the third party's successors and assigns"). If

the mortgage is never foreclosed upon, chapter 580 does not apply and the recording act expressly allows the mortgage to be discharged either by MERS, on behalf of its principal, by another record mortgagee, or by another party which certifies that it has acquired the interests of the record mortgagee. Minn. Stat. §§ 507.413 and 507.403. However, if the mortgage is to be foreclosed by advertisement at some later time, each subsequent principal must be disclosed in order to comply with the foreclosure by advertisement statute.

Moreover, Amicii's suggestion that somehow MERS will be unable to identify which assignments to record – a concern that MERS itself does not raise – reflects Amicii's lack of understanding of the legal issue presented in this matter. ALTA Br. 11. Amicii alleges that MERS or other foreclosing parties will be required to identify all previous owners of promissory notes before foreclosing, and that this information will be difficult to trace for loans which are *not* in the MERS system. ALTA Br. 11-12. An affirmative answer to the certified question will not produce such a result. Plaintiffs do not allege that an assignment of mortgage occurs whenever any promissory note is transferred. Rather, Plaintiffs allege that an assignment of mortgage occurs when the promissory note and all rights under the mortgage are transferred and the *mortgagee is solely a nominee for the owner of the promissory note*. Thus, the only time ownership of a promissory note would need to be examined is if the mortgagee is identified in the mortgage itself as a nominee for the lender and the lender's successors and assigns. Given that the system of appointing a nominal mortgagee for a series of lenders is the brainchild of MERS' creators, the result Amicii fear is highly unlikely.

Finally, contrary to Amicii's baseless prediction, requiring MERS to comply with Minnesota's foreclosure by advertisement statute will not "dismantle" the entire MERS' system. ALTA Br. 4. As MERS itself indicates, only a small percentage of the overall number of mortgage loans in its system result in foreclosure. Def.'s Br. 19, 37; Def.'s Br. at ADD 31. Judgment for Plaintiffs will merely mean that MERS must comply with the recording and notice provisions with which all foreclosing mortgagees in Minnesota have been required to comply for more than 140 years prior to the inception of MERS.

**B. Minnesota's Title Records System Will Not Be Fundamentally Disrupted By The Court's Determination That MERS Must Comply With The Recording And Notice Provisions of Chapter 580.**

MERS' assertion that requiring it to comply with the foreclosure by advertisement statute would "fundamentally change and have a devastating impact on Minnesota's title records system," Def.'s Br. 35-37, is likewise without basis; MERS provides no support whatsoever for this allegation and even its Amicii, who are *title examiners and agents*, do not make this claim. For example, MERS claims that for foreclosures that have already occurred, title would have to be reformed, detrimentally affecting purchasers who bought foreclosed properties, that the entire foreclosure process will need to be unwound, and that somehow every subsequent conveyance will need to be predicated on a recordation of all interests in the debt, "clouding title and invalidating *hundreds of thousands of mortgage satisfactions* and all conveyances of interests in real estate coming thereafter." Def.'s Br. 36-37. These statements are intended to be inflammatory and are patently false.

First, the recently enacted MERS' statute expressly allows MERS to appear in the chain of title as nominee for a series of principals and to assign or discharge a mortgage on their behalf. Minn. Stat. § 507.413. Furthermore, the recording act also allows mortgages to be satisfied without a full chain of title as long as the party executing the discharge certifies that he or she has acquired the record mortgagee's interests. Minn. Stat. § 507.403 (2006). Additionally, there is a one-year statute of limitations on actions challenging a foreclosure based on a defective notice. Minn. Stat. §§ 582.25 and 582.27 (2006). Moreover, as the outcome of *Huitink v. Thompson* indicates, even foreclosures that are challenged within the applicable limitations period can be upheld if necessary to protect the title of a bona fide third-party purchaser for value. 104 N.W. at 239.<sup>8</sup>

To be sure, some of the mortgage foreclosures that have occurred will be void if the Court answers the certified question in the affirmative, and MERS will have to modify its procedures for all pending and future foreclosures. However, this outcome presents a relatively minor inconvenience compared to the permanent loss of both meaningful foreclosure records and the critical safeguards guaranteed for more than 150 years to Minnesota borrowers in foreclosure.

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<sup>8</sup> Indeed, the District Court may determine that voiding the foreclosure is not the most appropriate remedy in every case, particularly when the homeowner has already vacated the home and an innocent third party has purchased it. In recognition of this possibility, the Plaintiffs' request alternate relief in the form of damages for homeowners who have already reached the end of their redemption period and have vacated their homes following an unlawful foreclosure. A-2, 21, 23-24, 27.

**C. Requiring MERS To Record And Provide Notice Of The Assignments Occurring Between Its Principals Before Commencing A Foreclosure By Advertisement Will Not Deprive Members Of The Lending Industry Of Any Benefits.**

The scope of this action is limited to MERS' foreclosure practices. For the vast majority of loans that do not result in foreclosure, nothing will change for MERS and its members. When it does foreclose, MERS will simply need to record all necessary assignments and list them in the published foreclosure notice, just as all non-MERS members are required to do.

MERS tries to portray its practices – despite its short history and its creation by and for members of the mortgage lending industry – as universally accepted. Def.'s Br. 13-15. In a case MERS repeatedly cites for the proposition that the courts approve of its practices, *MERSCORP, Inc. v. Romaine*, both the concurrence and dissent note that the questions of whether MERS has violated the clear prohibition against separating a lien from its debt or whether MERS has standing to bring foreclosure actions have yet to be resolved. 861 N.E.2d 81, 85-86 (N.Y. 2006).<sup>9</sup> The *Romaine* court also noted the following concerns, similar to those expressed in this matter:

MERS's success will arguably detract from the amount of public data available concerning mortgage ownership that otherwise offers a wealth of statistics that are used to analyze trends in lending practices. Another concern raised is that, once an assignment of the mortgage is made, it can

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<sup>9</sup> See also Tim Huber, *Mortgage Records Privatization Eyed*, Minneapolis St. Paul Business Journal, Oct. 18, 1996 (president of the Minnesota county recorder's association expressing concerns about the reliability and accountability of MERS when privatizing public records).

be difficult, if not impossible, for a homeowner to find out the true identity of the loan holder.

*Id.* at 85-86 (Justice Ciparick, concurring).<sup>10</sup>

Indeed, MERS arrogantly dismisses the concerns of the Federal Reserve Board and Hennepin County, which have both indicated that community efforts to deal with the foreclosure crisis are hampered when MERS obscures the identity of assignees of mortgage loans. *See* Pls.' Br. 40.

While MERS undoubtedly has value as a record-keeping system to its members in the lending industry, its impact on other areas of mortgage and foreclosure law and public policy are not universally praised or even fully understood. Thus, MERS' foreclosure practices should not be rubber stamped by this Court without a full and thorough analysis of the relevant law and the far-reaching impacts of the legal positions it advocates. This is a task for the Minnesota Legislature.

## CONCLUSION

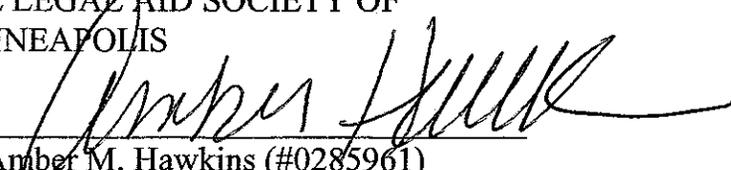
Plaintiffs respectfully request that this Court uphold the letter and spirit of Minnesota's foreclosure by advertisement statute by requiring MERS to record and provide notice of mortgage assignments between its principals.

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<sup>10</sup> *Romaine* did not involve foreclosures; the Court addressed only the question of whether mortgages, assignments of mortgage, and discharges of mortgage listing MERS as the lender's nominee could be recorded. 861 N.E.2d at 82.

Dated: June 2, 2008

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