

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.

MERS' BRIEF AND ADDENDUM

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LEGAL ISSUE PRESENTED

On February 27, 2008, the United States District Court for the District of Minnesota certified a question to this Court, which was accepted on March 14, 2008.

This Court reformulated the question certified as follows:

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

Although the federal court's certified question differed slightly from the reformulated one, the federal court's opinion did address and answer the reformulated certified question. The federal court correctly concluded that because there was no evidence that MERS assigned its legal interest in the mortgage itself, "it does not appear likely to this Court that the Minnesota Supreme Court would interpret Minnesota's foreclosure-by-advertisement statutes to require MERS to record the interests [in the underlying indebtedness that is] tracked within the MERS System before MERS invokes the state's foreclosure-by-advertisement statutes."¹

Most Apposite Cases:

Bottineau v. Aetna Life Insurance Co., 31 Minn. 125, 16 N.W. 849 (1883)
Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N.W. 919 (1901)

Most Apposite Statutory Provisions:

Minn. Stat. § 507.34
Minn. Stat. § 507.413
Minn. Stat. § 580.02

¹ A-339.

STATEMENT OF FACTS

I. THE PARTIES.

A. Plaintiffs Are Mortgage Loan Borrowers In Default.

The named Plaintiffs are residents of Hennepin County who collectively borrowed approximately \$1 million from various lenders and whose loans were secured by real estate mortgages on their homes. They have not complied with their obligations to repay the money they borrowed, and as a consequence, all the loans are in default, foreclosure, or have already been foreclosed upon.² The reason the named Plaintiffs are in this situation is because, as they all admit, they “f[e]ll behind on [their] mortgage” loan payments.³ Ms. Jackson has not made a mortgage payment since October 2006.⁴ The Browns never made any payments on their mortgage loan.⁵ At the time of Ms. Doane’s foreclosure sale, she had been delinquent for at least six months, as was Mr. Williams at the time of his foreclosure.⁶

The named Plaintiffs seek to represent a class of “borrowers who own and occupy, as their residence, a one- to three-family home in Hennepin County which is being, has been or may be foreclosed upon by Defendant MERS through non-judicial foreclosure proceedings....”⁷ Within this class, the named Plaintiffs seek to represent three distinct

² See A-13 ¶ 56; A-14 ¶ 61; A-15 ¶ 66; A-16 ¶ 83; A-19 ¶ 102.

³ A-63 ¶ 4; A-93 ¶ 5; A-126 ¶ 10; A-154 ¶ 6.

⁴ A-275 ¶ 7.

⁵ A-276 ¶ 9.

⁶ A-271–A-272 ¶¶ 3-4; A-279 ¶¶ 3-4.

⁷ A-20 ¶ 110.

subclasses of borrowers—those whose homes:

- have been or may be the subject of a published notice of mortgage foreclosure sale although such sale has not yet occurred;
- have been sold at a mortgage foreclosure sale but who, as of the date of the filed complaint, still occupy their homes and retain the right of redemption; and
- have been sold at a mortgage foreclosure sale and whose right of redemption expired one year preceding the filing of the complaint.⁸

Although the class Plaintiffs seek to represent is a relatively small percentage of homes in Hennepin County—only those foreclosure-affected homeowners in Hennepin County—the effect of Plaintiffs’ suit is far reaching. This case involves all residential property in Minnesota in which MERS has been designated mortgagee. This would include any property in which a mortgagee’s interest was modified, subordinated, or released in whole or in part, or property in which MERS recorded satisfactions of mortgage liens, as well as foreclosed property sold to bona fide purchasers.

B. Defendant MERS Is An Electronic Registration System.

In 1993, in the aftermath of the savings and loan crisis, several leading participants in the real estate finance industry decided it was time to develop an electronic registration system for tracking interests in mortgage loans, much like the book-entry system successfully used by the Depository Trust Company for the securities industry since the 1970s.⁹ The Federal National Mortgage Association (“Fannie Mae”), the Federal Home

⁸ A-20-A-21 ¶ 110.

⁹ R.K. Arnold, *Yes, There Is Life On MERS*, 11 Prob. & Prop. 32, 33-35 (Aug. 1997).

Loan Mortgage Corporation (“Freddie Mac”), the Government National Mortgage Association (“Ginnie Mae”), and the Mortgage Bankers Association of America¹⁰ joined forces to create an electronic registration system and clearinghouse—the MERS® System. The System, which became fully operational in 1997,¹¹ tracks transfers of mortgage servicing rights and beneficial ownership interests in mortgage loans in the secondary mortgage market on behalf of MERS members.

Today, MERS operates the MERS® System in all fifty states, as well as the District of Columbia.¹² MERS documentation and foreclosure proceedings are accepted by over 3,000 counties throughout the U.S., including all Minnesota county recorders and registrars of title.¹³ This is significant because “about two-thirds of all newly originated residential loans in the United States are registered on the MERS® System.”¹⁴

II. THE FUNCTION OF MERS IN THE MORTGAGE INDUSTRY.

A. MERS Has Simplified And Streamlined The Way In Which Lenders Originate And Sell Mortgage Loans In The Secondary Market.

To better understand the negative consequences of what Plaintiffs ask the Court to do here, it is necessary to understand the function of MERS in the mortgage industry and its relationship to loan servicers and investors in the secondary mortgage market.

The real estate finance industry includes primary and secondary mortgage markets

¹⁰ *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 83 n.2 (N.Y. Ct. App. 2006).

¹¹ MERSCORP, Inc. is the operating company that owns the MERS® System.

¹² A-270 ¶ 32.

¹³ *Id.*

¹⁴ A-181.

for residential, multifamily, and commercial properties. In the primary residential mortgage market, mortgage lenders make loans to consumers so they can buy or refinance homes and other real estate.¹⁵ In the secondary market, mortgage loans (and various interests therein) are sold—often multiple times to investors like Freddie Mac—providing new funds to mortgage lenders, which facilitates the making of new loans.¹⁶ When secondary market purchasers buy the mortgage loans, they often bundle them into mortgage-backed securities that are sold to third-party investors. The mortgage servicer and the secondary market purchaser have beneficial interests in the mortgage debt.¹⁷

Under the pre-MERS system, when there was a transfer of an interest in the mortgage loan—as described above—the parties, in many instances, would also change the mortgagee by assigning the mortgage. Those assignments were then recorded in the land records. For example, if a mortgage company acquired interests in a mortgage loan portfolio from another servicer who acquired them from brokers, an assignment of mortgage form was recorded for each transfer so that the purchaser would appear in the applicable land records,¹⁸ ensuring receipt of service of process. The pre-MERS system also involved unrecorded transfers when investors acquired undivided interests in a mortgage loan portfolio.¹⁹ Under the pre-MERS system, the assignment process could

¹⁵ *Hashop v. Fed. Home Loan Mtg. Corp.*, 171 F.R.D. 208, 210 (N.D. Ill. 1997).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 809 (1995).

¹⁹ *Id.* at 810.

take a long time to complete—up to six months for a modest loan portfolio. In addition, error rates as high as 33% were common, with assignments recorded in the wrong sequence—clouding title to the property.²⁰ One need only look at the severe title problems created by the savings and loan crisis to appreciate the imperfections and limitations of the pre-MERS system.

MERS was created to improve the efficiency of the primary and secondary mortgage market by providing an electronic registry to track transfers of mortgage interests for mortgage loan sellers, warehouse lenders, mortgage investors, document custodians, and mortgage servicers and by serving as a mortgagee for the lender and its assigns.²¹ To accomplish this, MERS is named the mortgagee of record (in a nominee capacity for the lender and lender's successors) on any loan registered on the MERS® System.²² MERS becomes the mortgagee of record in one of two ways—by being named by the borrower and the lender as mortgagee on the security instrument (mortgage deed) at the time the mortgage loan is originated, or, if this is not done, then by a recorded assignment of the mortgage deed that designates MERS as the mortgagee.²³ In either case, the security instrument constitutes a “MERS Mortgage”²⁴ that is then recorded in the county land records where the secured property is located. MERS continues as

²⁰ Arnold, *supra* note 9, at 34.

²¹ Slesinger & McLaughlin, *supra* note 18, at 806.

²² *Id.* at 807; Arnold, *supra* note 9, at 33.

²³ A-263 ¶ 5.

²⁴ *Id.* In addition to mortgages, MERS prepares and records other instruments affecting title to real property, such as assignments, modifications, releases, satisfactions, and discharges of mortgages.

mortgagee in the land records throughout the life of the loan. In other words, MERS remains the mortgagee of record when beneficial interests in the mortgage loan or servicing rights are sold from one MERS member to another MERS member.

Beneficial ownership interests in the mortgage loan are sold by endorsement and delivery of the promissory note.²⁵ The promissory note is the negotiable, intangible asset, which has value to financial institutions and investors.²⁶ Like other promissory notes, the right to receive payments under a mortgage loan is legally transferred when one holder negotiates the note to another by endorsement and delivery.²⁷ This is a nonrecordable event because it is the interest in the promissory note, not the mortgage itself, which is being transferred. Transfers of servicing rights, which may or may not accompany the transfer of other interests in the mortgage loan, are typically done through various contracts that are also not recordable.

By tracking these transfers of interest, the MERS® System has streamlined and made more efficient the process of packaging and selling mortgage loans on the secondary market. Even those who question MERS acknowledge that “lenders with modest capital can quickly assign their loans into a securitization conduit, and use the proceeds of the sale to make a new round of loans.”²⁸ In other words, the MERS®

²⁵ See, e.g., Minn. Stat. §§ 336.3-203–336.3-206.

²⁶ See Minn. Stat. ch. 336.3 intro. cmt. (1966); Minn. Stat. § 336.3-104.

²⁷ See Minn. Stat. § 336.3-203.

²⁸ Christopher L. Peterson, *Predatory Structured Finance*, 28 *Cardozo L. Rev.* 2185, 2213 (2007). See Pls.’ Br. at 38 (relying upon Peterson’s article to essentially contend that there is no value to the MERS® System).

System provides positive advantages—it increases the efficiency and reduces the costs of mortgage origination and servicing process. Freeing up more funding provides greater access to consumers “to purchase money mortgages, home equity lines of credit, and cash-out refinancing.”²⁹ Additionally, for the majority of consumers who honor their obligations, the MERS® System ensures that release of liens and mortgage satisfactions are timely recorded so that these consumers can sell, refinance, or otherwise deal with their home finance needs.

The MERS® System has also reduced costs for consumers—recording costs are less and therefore less is passed on to consumers. In addition, the MERS® System reduces the possibility of missed or incorrect assignments resulting in an unclear chain of title because when MERS serves as mortgagee on a mortgage, the recorded chain of title starts with MERS at origination and ends with MERS when the lien is discharged or assigned to a non-MERS member. MERS also streamlines the lien release process, reducing research time and re-recording fees. MERS thus allows the mortgage industry to better and more economically serve a greater number of people by increasing efficiencies and accuracy in the residential mortgage industry.

B. MERS Fills A Void By Tracking Transfers Of Servicing Rights And Providing That Information To Those Who Request It.

MERS also tracks changes in mortgage servicing rights among its members. The servicer services the loan for the ultimate investors, the beneficial owners. Servicing rights are sold by a purchase and sale agreement, which is a nonrecordable contractual

²⁹ *Id.*

right.³⁰ Servicers are paid to handle loan payment processing, deal with tax and insurance escrows, receive and process loan payoffs, handle delinquencies and defaults, and interact with borrowers.³¹ Knowing the identity of the servicer—not the investors who typically do not interact with borrowers—is what is most essential to a borrower.

MERS thus fills an information void that the county recorders and registrars of title cannot provide—the identity of the servicer of the mortgage loan, which is not required to be recorded in Minnesota. It is this current and easily accessible information that assists title insurers, lenders, borrowers, and consumers to arrange for such things as consolidations, loan modifications, payoff statements, deeds in lieu of foreclosure, short sales, and releases or discharges of mortgages in a timely and reliable manner.³²

Although MERS tracks transfers of servicing rights between MERS members, servicers are still required to notify homeowners in writing when loan servicing is transferred.³³

III. IN THEIR MORTGAGES, PLAINTIFFS EXPRESSLY ACKNOWLEDGED THAT MERS COULD ACT AS MORTGAGEE AND NOMINEE WITH THE POWER OF SALE.

To better understand the way in which MERS works, one need only look at the terms Plaintiffs agreed to when they executed their mortgages and promissory notes.

In the mortgage deed or security instrument executed by each Plaintiff in this case, Plaintiffs acknowledged it was a three-party agreement between the borrower, lender, and

³⁰ See Minn. Stat. § 336.9-106.

³¹ See, e.g., *Deerman v. Fed. Home Loan Mtg. Corp.*, 955 F. Supp. 1393, 1396 (N.D. Ala. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

³² A-266–A-267 ¶¶ 12-13.

³³ See Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*

MERS. The mortgages specifically identify the name and address of the borrower, the lender, and MERS. They provide a description of the real property securing the loan, with the loan evidenced by the note executed contemporaneously with the mortgage. The Plaintiffs (as mortgagors) also conveyed an interest in real estate to MERS (as nominee for the lender) to secure performance of their obligations under the loan. Finally, the mortgages were signed by each Plaintiff and acknowledged by a notary. Each mortgage was then recorded in the public land records, in compliance with applicable recording requirements under Minnesota law. It is the recorded mortgage that serves as notice to all other persons of the mortgagee's interest in the affected real estate.

Each Plaintiff specifically named MERS as mortgagee of record and acknowledged that MERS acts as nominee for the lender, its successors, and assigns:

MERS is the Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.³⁴

Plaintiffs explicitly granted and conveyed an interest in their property "to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with the power of sale...."³⁵ Finally, Plaintiffs expressly authorized MERS to act on behalf of the lender in connection with foreclosures, discharges, releases, and other documents with respect to the mortgaged property. In this regard, Plaintiffs

³⁴ See A-66; A-96; A-128; A-157.

³⁵ See A-70; A-97; A-130; A-158.

explicitly acknowledged and covenanted:

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 and canceling this Security Instrument.³⁶

Since naming MERS as mortgagee of record on Plaintiffs' mortgages, there has been no change in the mortgagee of record—MERS was and continues to be the mortgagee of record.³⁷ There have been no assignments of the Plaintiffs' mortgages and, indeed, Plaintiffs offer no proof of any such assignments. The outcome is no different even if the beneficial ownership interests or servicing rights in Plaintiffs' mortgage loans have been transferred in the secondary market by one MERS member to another, and such transfers have been tracked electronically on the MERS® System. At all times, the Plaintiffs' mortgages—with MERS as mortgagee—have remained in the public land records providing notice of the encumbrance to the real property to the outside world.

Nor does the use of MERS preclude Plaintiffs, or any other borrower, from identifying the proper entity to contact regarding problems with the loan, possible work-out arrangements, loan modifications, or the like. Anyone, including the public at large, with or without an interest in the mortgaged property, may obtain the name and telephone number of the current servicer by calling the MERS toll-free number appearing on every

³⁶ See A-67; A-98; A-130; A-159.

³⁷ See A-272 ¶ 7; A-277 ¶¶ 13-14; A-280 ¶ 8.

recorded document naming MERS as the mortgagee. Plaintiffs' mortgages also specifically disclose the sale of interests in the debt, transfers of servicing rights and the notice that will be provided about who the loan servicer is:

The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") *If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing.* If the Note is sold ... the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.³⁸

It is apparent from the record that Plaintiffs had no issue identifying their mortgage servicer—there are no claims for violations of RESPA, and at least two of the four Plaintiffs admit they worked with their servicer to renegotiate their mortgage loans.³⁹

The security instrument also references the mortgage loan or promissory note entered into by each named Plaintiff, defined as "the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest."⁴⁰ Under the promissory notes entered into by the named Plaintiffs, each reaffirmed that they understood the lender could transfer the note to another.⁴¹

³⁸ See A-76; A-106; A-138; A-167 (emphasis added).

³⁹ A-154 ¶ 8; A-93 ¶¶ 6-9.

⁴⁰ Pls.' Br. at 4.

⁴¹ A-84; A-118; A-146; A-171.

IV. THE MINNESOTA LEGISLATURE, COUNTY REGISTRARS AND RECORDERS, BAR ASSOCIATIONS, AND COURTS ALL RECOGNIZE THE VALIDITY OF MERS.

Plaintiffs assert that “MERS essentially acts as a privatized, but secret, county recorder’s office.”⁴² But the Minnesota legislature, county registrars and recorders, the State and various County Bar Associations, and the courts recognize the legitimacy of MERS, with the right to serve as mortgagee, file lien releases, and to foreclose.

Like many developments in the modern age that are not fully anticipated or provided for by existing laws, customs, or practices, issues arose during the evolution of MERS and the services it provides. As the Court is aware, the Torrens system of land registration in Minnesota requires precision in its documentation because the registrar’s offices, in effect, pass on the legal efficacy of documents which are registered. The use of the disclosed nominee or disclosed agent concept in a mortgage to be recorded with the registrar of titles raised chain of title issues that needed to be addressed.

Working with the real property section of the Minnesota State and County Bar Associations, the Registrars of Title for Hennepin and Ramsey Counties, and other Minnesota county recorders’ offices, the Minnesota legislature passed legislation specifically confirming the authority of mortgagees designated as nominees or agents.⁴³

⁴² Pls.’ Br. at 4. Notably, since 1998, MERS has been a member of the Property Records Industry Association (PRIA), which represents a unique partnership of business and government members of the property records industry, with the end goal of facilitating recordation and access to public property records. *See* <http://www.pria.us>.

⁴³ *See Mortgage satisfaction certificate provided: Hearing on H.F. No. 1805 Before the H. Civ. Law. Comm., 2003-2004 Leg., 83rd Sess. (Minn. Feb. 3, 2004)*, audio available at http://www.house.leg.state.mn.us/audio/archivescomm.asp?=4&1_year=83.

MERS was specifically referenced in connection with that legislation:

The act [Minn. Stat. § 507.413] also allows county title registrars to rely on mortgage assignments and satisfactions where the Mortgage Electronic Registration System (MERS) is shown as nominee of the lender. MERS exists to track changes in beneficial interests over the life of a mortgage as it is re-sold.⁴⁴

Minn. Stat. § 507.413 thus makes it clear that 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 foreclosure of a mortgage. Further, it applies to all instruments executed, recorded, or filed before, on, or after August 1, 2004.

In 2006, the Minnesota Court of Appeals in *In re Sina*,⁴⁵ held that MERS had standing to bring foreclosure proceedings. While the debt was sold to Aurora Loan Services, Maribella Mortgage assigned the mortgage to MERS, as mortgagee, in its capacity as nominee for the lender. When the Sinas defaulted on their mortgage loan, MERS proceeded to foreclose by advertisement. The Sinas argued that the foreclosure was void because Aurora Loan Services never recorded a valid assignment of the mortgage. Because “MERS legally recorded its assignment of the mortgage and [] it had the authority to foreclose the mortgage in its name,”⁴⁶ the appellate court held that the foreclosure-by-advertisement requirements had been met by MERS.

⁴⁴ H. Research Act Summ., *Certificate of Mortgage Satisfaction by Assignee; MERS*, 2004 Leg., 83rd Sess. (Minn. July 2, 2004), <http://www.house.leg.state.mn.us/hrd/as/83/as153.html>.

⁴⁵ No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006), ADD-60.

⁴⁶ *Id.* at *2.

ARGUMENT

I. THE MERS® SYSTEM HAS NOT FUNDAMENTALLY CHANGED MINNESOTA'S PROPERTY SYSTEM, BUT RATHER, SUPPORTS IT.

A. MERS Complies With The Minnesota Recording Act, Providing Notice To Purchasers And Creditors Of Any Liens.

The strictly legal issue before this Court revolves around the recording of mortgage instruments, which have been referred to as “mortgage deeds” or “security instruments.” Plaintiffs attempt to complicate an otherwise straightforward analysis by refusing to distinguish between documents conveying an interest in real property, which are and must be recorded, and those transfers of interests in the debt obligation, which are neither recorded nor susceptible of recordation. To better understand this, we must first turn to the Minnesota Recording Act itself, which requires, in relevant part, that:

Every conveyance of real estate shall be recorded ... and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof⁴⁷

The purpose of the Recording Act is to protect third parties—subsequent bona fide purchasers and judgment creditors⁴⁸—by informing them there is an encumbrance on the property. Thus, the primary objective of the recording statutes is to memorialize for the benefit of outside third parties the interests that affect title to real property.⁴⁹

⁴⁷ Minn. Stat. § 507.34. *See also* Minn. Stat. § 507.01 (defining a conveyance as “every instrument in writing whereby any interest in real estate is created, aliened, mortgaged, or assigned or by which the title thereto may be affected in law or in equity”).

⁴⁸ *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989).

⁴⁹ There may be some standing issues as to whether the borrower Plaintiffs are proper parties to challenge a statutory provision enacted to provide record notice to parties outside the subject transaction.

This is done by recording one simple document—a conveyance of an interest in real property that is in the form of a mortgage deed—with the county recorder or registrar.⁵⁰ This recordation provides notice to subsequent purchasers of the outstanding rights of others in the property.⁵¹ And once the world is placed on notice, interested parties must undertake further investigation as to the status of the lien. Since the mortgagor (the borrower) already knows there is a lien and has in fact expressly granted this interest to the mortgagee, the notice provided under the Recording Act is *not* for the mortgagor’s benefit. Nor is the Recording Act, as Plaintiffs see it, a consumer disclosure statute. Indeed, the party least considered by the recording statutes is the debtor; recording the mortgage is for the benefit of the lender—not the borrower.

The MERS® System fully complies with the Minnesota Recording Act, providing information in the county records as to title to property. For example, Plaintiffs’ mortgages were recorded in the Hennepin County land records. They provide notice of the existence of an encumbrance that may affect real property interests and uses and place potential purchasers, title examiners, or others on notice that MERS is authorized to discharge, release, cancel, or otherwise affect the lien.⁵² It is not for Plaintiffs’ benefit that the mortgage deeds are recorded—they already know there is a lien on the property. As between mortgagor and mortgagee, recordation is to protect the mortgagee’s interest.

⁵⁰ For ease of reference, we refer to recordation as applying to both Torrens and abstract property.

⁵¹ See *Telford v. Henrickson*, 120 Minn. 427, 431-32, 139 N.W. 941, 943 (1913).

⁵² See, e.g., A-98 (agreeing that MERS has the right “to foreclose and sell ... and to take any action required of Lender including ... releasing and canceling” the mortgage).

B. The Use Of A Nominee In Real Estate Transactions—Like MERS Here—Has Long Been Sanctioned As A Legitimate Practice.

MERS Mortgages clearly disclose that MERS serves as the mortgagee for record purposes and as nominee for the lender, its successors, and assigns. In this role, MERS represents the interests of MERS member lenders. Here, the lenders and homeowners accepted MERS' nominee role or agency in the mortgage transaction when the Plaintiffs entered into their mortgage and the lender accepted it. Plaintiffs misapprehend the concept of nominee—it does not limit either the powers granted to MERS or its ability to exercise those powers. Rather, it makes clear that MERS is acting for the benefit of the MERS members who are the lenders, successors, or assigns. And it simply means:

one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, or as the grantee of another....⁵³

MERS status as “nominee” is a common occurrence in public land records and “has long been sanctioned as a legitimate practice.”⁵⁴ Individuals frequently confer rights on a “nominee,” “agent,” or “trustee” for a variety of purposes, including to execute or hold mortgage instruments.⁵⁵ The use of a nominee is also authorized under the UCC:

⁵³ *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 411 (7th Cir. 1938). This definition has become accepted as the common meaning of “nominee.” See, e.g., *Black's Law Dictionary* 1076 (8th ed. 2007).

⁵⁴ *In re Cushman Bakery*, 526 F.2d 23, 30 (1st Cir. 1975), cert. denied, 425 U.S. 937 (U.S. 1976) (citing cases).

⁵⁵ *Id.*; 2 Milton R. Friedman, *Friedman on Contracts & Conveyances of Real Property*, § 6:1.3 (James Charles Smith ed., 7th ed. 2007); *In re Childs Co.*, 163 F.2d 379, 382 (2d Cir. 1947); *Barkhausen v. Continental Ill. Nat'l Bank Trust Co. of Chicago*, 120 N.E.2d 649, 655 (Ill. 1954), cert. denied, 348 U.S. 897.

The Uniform Commercial Code does not require that the secured party as listed in such statement be a principal creditor and not an agent The purpose of filing this financing statement is to give notice to potential future creditors of the debtor or purchasers of the collateral. *It makes no difference as far as such notice is concerned whether the secured party listed in the filing statement is a principal or an agent*, and no provision in the Uniform Commercial Code draws such a distinction.⁵⁶

So there is no reason why, under a mortgage arrangement, the entity holding or owning the note must disclose its ownership—the promissory note governs the terms and obligations of the *loan*. The security instrument (mortgage deed), when recorded, simply provides notice to the world that a lien has been placed on the debtor’s property as security for a note. Contrary to Plaintiffs’ assertion, the public has no significant need or interest in learning the true identity of the holder of the note or any interests therein. As the Second Circuit Court of Appeals noted, the rationale for upholding the validity of mortgages, where the mortgagee is acting as nominee or agent, lies at the heart of the purpose of the recording system.⁵⁷ That is, the recording system is to provide notice of security interests to all persons, *not necessarily notice of the identity of secured parties*.

In addition, the Minnesota Legislature has itself recognized the status of nominees in real estate transactions. By enacting Minn. Stat. § 507.413, the legislature acknowledged the legitimacy of mortgagees acting as nominees—and in particular, MERS—and provided them with the authority to record assignments, satisfactions,

⁵⁶ *In re Cushman Bakery*, 526 F.2d at 30 (emphasis added). See also *First Nat’l Bank of Breckenridge v. Thorpe Bros.*, 179 Minn. 574, 576, 229 N.W. 871, 872 (1930) (noting it was apparent from the parties’ contract that by agreeing to the use of a nominee, the bank “might not get defendant’s personal obligation” to pay the loan).

⁵⁷ *Id.*

releases, or powers of attorney to foreclose on behalf of their principals. Plaintiffs even characterized this statute as the “MERS Statute” and have conceded on countless occasions that this section authorizes MERS, as designated nominee, to foreclose.⁵⁸

If, however, as Plaintiffs suggest, the general public has some undefined interest in the identity of the ultimate owner of a debt, surely that logic should also extend to the 98% of mortgagors who honor their debt obligations. Yet Plaintiffs’ analysis of Minn. Stat. §§ 507.413 and 580.02 makes that information available only to those consumers who do not honor their obligations—an incongruous and inappropriate result.

II. MERS IS IN FULL COMPLIANCE WITH THE FORECLOSURE-BY-ADVERTISEMENT STATUTE.

A. Minnesota’s Foreclosure Statute Requires That Assignments Of The “Mortgage”—Not The Mortgage Loan—Must Be Recorded.

1. Transfers Of Interests In A Mortgage Loan Are Not Recordable Under Minnesota Law.

Plaintiffs contend that the foreclosure proceedings instituted by MERS are void because MERS failed to comply with statutory requirements for nonjudicial foreclosure. Plaintiffs’ claims are grounded in the contention that their “mortgages” were “assigned” at least once and that the “assignments” were not recorded. They also assert that the assignments were not listed in the published foreclosure notices.⁵⁹ Plaintiffs’ claims raise the strictly legal question as to what a “mortgage” is under Minnesota law and whether the Plaintiffs’ “mortgages” in this case have been “assigned.”

Plaintiffs’ argument is premised on a tortuous reading of the pronoun “it” in

⁵⁸ See, e.g., Pls.’ Br. at 24; A-338; ADD-16; ADD-19; ADD-49.

⁵⁹ A-36.

Minnesota's foreclosure-by-advertisement statute, Minn. Stat. § 580.02(3). This section simply states that if a mortgage is to be foreclosed by advertisement, "that the mortgage has been recorded and, if *it* has been assigned, that all assignments thereof have been recorded...."⁶⁰ Quite simply, the use of the term "mortgage" references the only document in a mortgage loan transaction that conveys an interest in real property and is susceptible of recordation—the mortgage deed, also known as a security instrument or mortgage. The most basic rules of grammar and sentence construction make it clear that the pronoun "it" means the "mortgage," which is even further described as the document recorded in the county land records. One need only juxtapose Plaintiffs' position with the approach taken by the Minnesota legislature in enacting laws affecting the land title records system to see this is the case.

Minnesota Statutes define a "mortgage" as "any instrument...creating or evidencing a lien of any kind on real property, given by an owner of real property as security for a debt...."⁶¹ Minnesota case law has defined a "mortgage" consistently with the statutory definition—"a real estate mortgage is to pledge property as security for the payment of a debt."⁶² Minnesota's definition is not unique: A mortgage is "[a]

⁶⁰ Minn. Stat. § 580.02(3) (emphasis added).

⁶¹ Minn. Stat. § 287.01.

⁶² *City of St. Paul v. St. Anthony Flats Ltd. P'ship*, 517 N.W.2d 58, 61 (Minn. Ct. App. 1994) (citing *Sprague v. Martin*, 29 Minn. 226, 229, 13 N.W. 34, 36 (1882)). See also *Mortgage One, Inc. v. Newton*, Nos. A04-2384, A05-312, 2005 WL 2979257, *7 (Minn. Ct. App. Nov. 8, 2005) ("a mortgage only acts as security for the debt evidenced in a promissory note") (citing *First Nat'l Bank of Shakopee v. Halo Invs.*, 394 N.W.2d 158, 160-61 (Minn. Ct. App. 1986)), ADD-63.

conveyance of title to property that is given as security for the payment of a debt....”⁶³

So a “mortgage” is a security arrangement (a lien) evidenced by a written instrument.

The “instrument” evidencing the lien on the real property is sometimes referred to as a “mortgage deed” and, in more current mortgage forms, it is often also called a “security instrument.”⁶⁴ Here, Plaintiffs attached as Exhibit A to their affidavits their “security instruments,” which were filed with the Hennepin County Recorder’s Office as evidence of the “mortgage.” By contrast, a promissory note is sold by negotiation, which requires an endorsement of the note and delivery of the endorsed promissory note.⁶⁵

In Minnesota’s statutory framework a “residential mortgage loan,” such as those at issue here, is defined as a “loan made primarily for personal, family, or household use” that is secured by a “mortgage on residential real property.”⁶⁶ Thus, a mortgage loan is the *indebtedness*. The mortgage loan is usually evidenced by a promissory note that creates the obligation of the borrower (the obligor or payor on the note and the “mortgagor” on the security instrument) to pay the lender (the obligee or payee on the note and the “mortgagee” on the security instrument) a sum of money. Plaintiffs have attached some of their mortgage loan documents as Exhibit B to their affidavits.

Under Minn. Stat. § 580.02, a foreclosure by advertisement requires “that the *mortgage* has been recorded and, if it has been assigned, that all assignments thereof have

⁶³ *Black’s Law Dictionary* 1031, supra note 53.

⁶⁴ *Engenmoen v. Lutroe*, 153 Minn. 409, 713-44, 190 N.W. 894, 896 (1922) (a deed given as security is a mortgage).

⁶⁵ *See, e.g.*, Minn. Stat. §§ 336.3-203–336.3-206.

⁶⁶ Minn. Stat. § 58.02, subd. 18.

been recorded.” Minn. Stat. § 580.04 also requires the foreclosure notice contain “the name of the mortgagor, the mortgagee, each assignee of the mortgage, if any, and the original or maximum principal amount secured by the mortgage.” So the mortgage (the security instrument) must be recorded, and if there were any assignments of the mortgage (the security instrument) securing the property, those assignments must too be recorded. But under Minnesota’s statutory framework, there is no requirement that the mortgage loan documents—that is, evidence of the indebtedness, such as the note—be recorded. Nor is such evidence of the debt susceptible of recordation. Further, there are no requirements to file assignments of the documents evidencing the debt.

In addition, the record in this case, including the affidavits of the foreclosing counsel, together with the affidavit of MERS, irrefutably demonstrate that the “mortgages,” which are the security instruments that convey interests in real property and establish the liens on Plaintiffs’ properties, have *not* been assigned.⁶⁷ Plaintiffs have not identified any assignments of the security instrument or other transfer of the mortgage lien that would require recording. It is simply indisputable that no such transfer or assignment has taken place. MERS was and remains the sole mortgagee of record with respect to Plaintiffs’ properties.

What Plaintiffs have done is point to Securities and Exchange Commission (“SEC”) filings of questionable relevance from unrelated entities such as Bear Stearns,

⁶⁷ See A-272 ¶ 7; A-277 ¶¶ 13-14; A-280 ¶ 8; A-268–A-269 ¶¶ 18-29.

Credit Suisse, and Morgan Stanley⁶⁸ discussing the pooling and servicing arrangements entered into for certain *mortgage loans* and mistakenly argue that Minnesota Statutes require the transfer of any interest in the *mortgage loan* to be “memorialized in local property records.”⁶⁹ But this too is simply not the case. The mortgage loan documents to which Plaintiffs refer need not be recorded in local property records for purposes of § 580.02 or listed on foreclosure notices for purposes of § 580.04. Moreover, Plaintiffs fail to show how these SEC filings in any way relate to their mortgage loans.

The merits of Plaintiffs’ claims are based upon two entirely erroneous contentions. First, that a “mortgage” within the meaning of §§ 580.02 and 580.04 means a transfer or assignment of an interest (in whole or in part) of the indebtedness. It does not. Second, there is no evidence in the record before this Court or in the Hennepin County recording system that demonstrates there has been any assignment of the security instrument—(a recordable conveyance)—on Plaintiffs’ properties. MERS is thus in complete compliance with Minn. Stat. §§ 580.02 and 580.04, and the foreclosures upon Plaintiffs’ properties are entirely appropriate.

2. Other Courts Have Also Concluded That Transfers Of Interests In A Mortgage Loan Are Not Recordable.

Our interpretation of Minnesota Statutes is consistent with other courts that have determined that a transfer of an interest in a mortgage loan is not a written conveyance that is recordable. Notably, these courts reached their decision long before MERS.

⁶⁸ A-216; A-224; A-229; A-232.

⁶⁹ A-37.

For example, in *Citizens' National Bank of Connellsville v. Harrison Doddridge Coal & Coke Company*,⁷⁰ the West Virginia Supreme Court drew a distinction between the assignment of the note or bond secured by a mortgage or deed of trust and an assignment of the lien itself. "In the former case the note or bond is the immediate and direct subject of the contract and the assignment carries the security, only in equity, not at law. The assignee obtains no legal interest in the land."⁷¹ Instead, the assignee has an equitable interest in the mortgage that is enforceable only in the name of mortgage holder. And although in equity an assignment of the debt is an assignment of the security, there is still a distinction between the two:

It follows that an assignment of a mortgage carries the legal title, while an assignment of the note or bond secured by it does not. Likewise the assignment of a deed of trust may carry an equitable interest in the land, by direct contract, while an assignment of the note or bond secured by it merely vests right in the assignee to invoke the jurisdiction of a court of equity to give him the benefit of the security. However that may be, he certainly does not obtain the benefit of the security by direct contract. It comes to him by mere implication, and it may well be said the recording statute embraces only direct conveyances, those made by express contract, and not those effected by implication. *Here is found a very substantial ground for the view that an express assignment of the lien, the mortgage, or deed of trust is recordable, while an assignment of the note or bond it secures is not.*⁷²

The Arkansas Supreme Court reached the same conclusion but under a slightly different line of analysis. In *Neal v. Bradley*,⁷³ the court looked to the recording statutes

⁷⁰ 109 S.E. 892 (W. Va. 1921).

⁷¹ *Id.* at 894-95.

⁷² *Id.* (emphasis added).

⁷³ 384 S.W.2d 238 (Ark. 1964).

to determine whether an assignment of a promissory note must be recorded. There, two promissory notes had been assigned to different parties at two different times, with one party recording the assignment while the other did not. The court had to decide which assignment was superior—the unrecorded initial assignment or the recorded latter one. In reviewing the recording statutes, the court concluded that they did “not apply to notes or proceeds of notes, but only to liens on land”—that is, “only to instruments touching and affecting real estate.”⁷⁴ Because recording acts generally do not apply to assignments of choses in action⁷⁵—a right to recover a debt or money—“[n]otes secured by a mortgage may be effectively transferred as to all persons without recording if there is no requirement in the recording act that the transfer be recorded.”⁷⁶

In another case, where the recording statutes required assignees to record any assignments or be penalized, the Indiana Court of Appeals similarly concluded that holders of interests in a series of bonds did not have to record their interests. The bank duly recorded the mortgage, and the mortgage secured the bonds “regardless of the person who thereafter became the owner thereof and no assignment thereof was

⁷⁴ *Id.* at 241.

⁷⁵ *See, e.g., Carolina Nat'l Bank of Columbia v. City of Greenville*, 81 S.E. 634, 637 (S.C. 1914) (“the assignment of a chose in action, is not embraced within the provisions of the recording acts”). *See also Williamson v. Falkenhagen*, 178 Minn. 379, 380, 227 N.W. 429, 429 (1929) (“A debt evidenced by a promissory note and secured by a mortgage is a mere chose in action, at most personal chattel.”).

⁷⁶ *Id.* (citing 11 Am. Jur. 2d *Bills & Notes*, § 326 and quoting 45 Am. Jur. *Records & Recording Laws* § 43). Notably, the proposition is still good law today. *See, e.g., 55 Am. Jur. 2d Mortgages* § 311 (2d ed. Database updated Mar. 2008); 66 Am. Jur. 2d *Records & Recording Laws* § 45 (2d ed. Database updated Mar. 2008).

necessary to protect the subsequent bondholders.”⁷⁷ The mortgage alone provided adequate notice to prospective purchasers of the encumbrances against the property. The court also reached a similar conclusion in an earlier case, where it also confirmed that “the assignment of the note, while it did carry with it the mortgage, was not an assignment of the mortgage, within the meaning of this [recording] act.”⁷⁸

Likewise, the Minnesota Legislature has not established any law that requires evidence of a transfer of a right to recover a debt or money be recorded in the land title records. Minnesota law also distinguishes between a mortgage and a mortgage loan—the former represents an interest in land affecting title, while the latter does not. Under the Minnesota Recording Act, only conveyances affecting legal title are recordable, while a mortgage loan merely evidences the indebtedness and does not affect title. The distinction between a mortgage and a mortgage loan is something that cannot be ignored. Plaintiffs’ failure to mention, let alone address, these issues is telling. Indeed, their decision to define the terms “mortgage” and “mortgage loans” as synonyms in their Brief shows their misunderstanding of the purpose and operation of Minnesota’s recordation laws and further reveals the weakness of their position.

3. Plaintiffs’ Position Has Been, And Still Is, That An “Assignment” Of The Mortgage Loan Must Be Recorded.

Before the federal court, Plaintiffs asserted that their “mortgage loans ha[d] been assigned” and that “Minnesota law says that if the loans have been assigned, those

⁷⁷ *Kaufman v. Millies*, 18 N.E.2d 970, 978 (Ind. Ct. App. 1939).

⁷⁸ *Perry v. Fisher*, 65 N.E. 935, 936 (Ind. Ct. App. 1903).

assignments have to be recorded before a nonjudicial foreclosure can be commenced.”⁷⁹ Characterizing Plaintiffs’ position, the federal court also concluded “Plaintiffs assert that MERS must record [the changes tracked within the MERS® System] before foreclosing a mortgage by advertisement.”⁸⁰ Before this Court, however, Plaintiffs now contend that that is not their argument—they are not asserting that “MERS must record transfers of promissory notes.”⁸¹ Rather, they contend “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.”⁸² If that is now their argument,⁸³ one must question how such a task would be accomplished and the information that would be recorded.

Under Plaintiffs’ theory, since MERS remains the mortgagee, presumably Plaintiffs intend for MERS to assign the mortgage to itself. Plaintiffs would be in no different position than they are today—MERS would still be the holder of the interest in the mortgage as nominee for the lender, and there would be no information regarding the promissory notes. This simple example reveals the circular nature of Plaintiffs’ argument

⁷⁹ ADD-12–ADD-13.

⁸⁰ A-339 n.4.

⁸¹ Pls.’ Br. at 21.

⁸² *Id.*

⁸³ Plaintiffs appear to take inconsistent positions in their Brief as well—at times stating it is the transfer of interest that must be recorded while at times stating it is the “assignment of the mortgage” that is at issue. *Compare id.* at 9 (“MERS defies both the letter and the spirit of Minnesota law when it refuses to record transfers of ownership in mortgage loans”) with n. 81 *supra*. Plaintiffs’ definitional construct further confuses their argument.

and exactly what they contend must be recorded—the transfers of the beneficial interests in the mortgage loans. This is exactly what they requested in federal court and lost.

The true nature of Plaintiffs' argument is further revealed by another statement made before the federal court. Plaintiffs asserted that such "assignments" of the loans only need to be recorded if MERS initiates a foreclosure-by-advertisement proceeding. If, however, the loans "never go to foreclosure, the assignments, the places these loans have traveled, the entities that bought and sold and traded them never have to be known."⁸⁴ Under Plaintiffs' theory, therefore, the only time an assignment of the "mortgage loan" would need to be recorded is when MERS utilizes the foreclosure-by-advertisement process. So even though Plaintiffs contend the transfers in the loans are assignments that must be recorded, under Plaintiffs' theory they need only be recorded *if* the properties are foreclosed upon under Minn. Stat. § 580.02.

Plaintiffs selective recording, however, runs counter to the Recording Act and its purpose, which is to protect strangers to the subject transaction, such as bona fide purchasers and judgment creditors, not mortgage loan borrowers. Under Plaintiffs' theory, if transfers of beneficial interests in mortgage loans are "assignments of the mortgage" then it follows that all such "assignments" would have to be recorded to establish a proper chain of record title, including when a release or satisfaction of the mortgage is filed. Plaintiffs' interpretation of what is recordable would effect a wholesale transformation of Minnesota's recording system and the purpose behind it.

⁸⁴ *Id.*

Instead of providing notice of security interests for the benefit of innocent purchasers and bona fide creditors, the focus would be on delinquent borrowers—the very individuals who specifically granted the encumbrance. Plaintiffs’ argument also reveals, once again, that it is not the assignment of the mortgage or security instrument that is at issue here. If Plaintiffs were truly focused on the mortgage—and not the mortgage loan—one would expect that all such “assignments” must be recorded, regardless of whether foreclosing by advertisement, releasing a mortgage, or otherwise dealing with the affected real estate.

4. Plaintiffs’ Interpretation Of Minnesota Law Does *Not* Support The Conclusion That An “Assignment” Of The Mortgage Loan Must Be Recorded.

Plaintiffs do not look to Minnesota Statutes or principles of statutory construction to answer the strictly legal question before this Court. Instead, Plaintiffs attempt to merge the critical distinctions between a security instrument (mortgage) and the promissory note by artificially equating the terms mortgage and mortgage loan⁸⁵ and using them inconsistently and inaccurately throughout their Brief. To make this leap, they rely upon case law and treatises to assert that the “statutory term ‘assignment of mortgage’ means and has always meant an assignment of the debt and mortgage” “or an assignment of either.”⁸⁶ The Minnesota cases Plaintiffs cite, however, stand for the simple proposition that “the debt secured is the principal obligation, and the mortgage a

⁸⁵ See Pls.’ Br. at 4 n.3 (“Throughout this brief, Plaintiffs will use the term ‘mortgage loan’ to refer to the combination of the promissory note...and the mortgage”).

⁸⁶ *Id.* at 17, 19.

mere incident thereto. The assignment of the debt carries with it the mortgage....”⁸⁷

At the risk of stating the obvious, real estate debt, like most other forms of debt, is evidenced by a promissory note. The purpose of the mortgage is to secure repayment of the debt with the real estate as collateral. When a promissory note is negotiated to another party by endorsement and delivery, the holder of the beneficial interest in the note is entitled to the benefit of the security instrument. It is in that context that the mortgage “follows the note.” This does not mean, however, that there has necessarily been a legal assignment of the mortgage that is recordable.

This Court in *Hayes v. Midland Credit Company*,⁸⁸ a case Plaintiffs rely upon, addressed this very issue. There, Hayes owned a promissory note secured by a mortgage, which he allegedly transferred to a bank cashier. The cashier later delivered the note and mortgage to another bank as collateral for a personal loan. Hayes claimed he had agreed to loan the mortgage but not the notes that the cashier had delivered (with an endorsement) to the bank. This Court specifically noted that “[a] legal assignment of a mortgage must be in writing.”⁸⁹ When, as was the case in *Hayes*, “a note secured by a mortgage is indorsed and transferred to a purchaser without a formal assignment of the

⁸⁷ *Id.* at 19 (quoting *First Nat’l Bank of Benson v. Gallagher*, 119 Minn. 463, 465, 138 N.W. 681, 681-82 (1912)). Plaintiffs also rely upon *Hatlestad v. Mut. Trust Life Ins. Co.*, 197 Minn. 640, 646, 268 N.W. 665, 668 (1936), for the proposition that a “mere transfer of the note secured by a mortgage is in law an assignment of the latter.” To make that statement, this Court relied upon *Kersten v. Kersten*, 114 Minn. 24, 26, 129 N.W. 1051, 1052 (1911), which simply stated that the mortgage was “but an incident” of the debt and that an assignment of the latter carried with it the security.

⁸⁸ 173 Minn. 554, 218 N.W. 106 (1928).

⁸⁹ *Id.* at 556, 218 N.W. at 107.

mortgage, the security follows the note as an incident thereof. Such transfer of the note operates as an *equitable* assignment of the mortgage.”⁹⁰ Because the endorsement was forged, the note was not transferred, and there was nothing else upon which to rest the claim of title, as there was no written, legal assignment of the mortgage. So by its very nature, a court of equity—not one at law—must determine whether there has been an equitable assignment. So it follows that such “equitable assignments” do not fall within the Minnesota’s Recording Act, as there is no legal transfer of title that is recordable.

Many of the other cases Plaintiffs rely upon also support, rather than refute, MERS’ position here. For example, in *Bloomer v. Burke*,⁹¹ this Court noted the distinction between a note and mortgage—the mortgage was recorded putting any subsequent purchaser on notice that the note was still outstanding. The subsequent purchaser “was called upon to pursue the inquiry and find out where the note was.”⁹² If, as Plaintiffs contend the “assignment of the mortgage” has always included the debt, it would therefore follow that any assignments of the debt would also have been on record to put third parties on notice. But that was not so—this Court noted that the subsequent purchaser had a duty to inquire of the mortgagee of record as to the status of the note.

Again in *Hayes v. Midland Credit Company*,⁹³ another case Plaintiffs cite, this Court found that even though the purchaser had possession of the note, it could not be

⁹⁰ *Id.* (emphasis added).

⁹¹ 94 Minn. 15, 19, 101 N.W. 974, 975 (1904).

⁹² *Id.*

⁹³ 173 Minn. 554, 218 N.W. 106 (1928).

enforced—there was no valid endorsement on the note, and there was no written assignment of the mortgage.⁹⁴ So contrary to Plaintiffs’ assertion, a recordable “assignment of mortgage” cannot mean an “assignment of the promissory note *and* the mortgage or an assignment or either.”⁹⁵ The cases Plaintiffs cite in support of their definitional construct that a mortgage and mortgage loan are one and the same again illustrates the weaknesses in their argument.

B. As Nominee, MERS Holds The Legal Interests Granted By Plaintiffs In The Mortgages While Others Have Beneficial Interests In The Mortgage Loans.

There is no requirement under Minnesota law that the mortgagee of record and the beneficial owner of the mortgage loan must be the same entity. Plaintiffs have not, and cannot identify any such law. “Ordinarily, where a mortgage and the obligation secured thereby are held by different persons, the mortgage is regarded as an incident to the obligation, and, therefore, held in trust for the benefit of the owner of the obligation.”⁹⁶

Minnesota law has recognized on many different occasions that the mortgagee—with the power of sale—can be different than the beneficial owner of the mortgage loan. This Court has repeatedly held that in proceedings for foreclosure by advertisement, “the owner of the record and the legal title existing at the time of the foreclosure is the proper person to conduct and effectuate the same....”⁹⁷ For example, in *Bottineau v. Aetna Life*

⁹⁴ *Id.* at 556-57, 218 N.W. at 107.

⁹⁵ Pls.’ Br. at 19.

⁹⁶ *Boruchoff v. Ayvasian*, 79 N.E.2d 892, 897 (Mass. 1948).

⁹⁷ *Clarke v. Mitchell*, 81 Minn. 438, 441, 84 N.W. 327, 328 (Minn. 1900) (and cases cited therein).

Insurance Company,⁹⁸ Day was record owner of a mortgage, and there were several unrecorded interests. Day foreclosed by advertisement, and the mortgagor, Bottineau, attacked the proceeding on the ground that Day was not the sole owner and therefore not entitled to foreclose. This Court clearly held that the mortgagor had no right to raise the claim, as the legal title to the mortgage and the power of sale vested in Day.

Likewise, in *Northern Cattle Company v. Munro*,⁹⁹ this Court again confirmed that even though a promissory note may have been transferred to another, the mortgagee—who still held legal title to the mortgage and had the power of sale—was the only one who “had the right to foreclose the mortgage by advertisement.”¹⁰⁰

In fact, there are a number of other situations when the mortgagee and beneficial owner are not the same. For example, many commercial lending institutions structure participation loans¹⁰¹ in such a manner that a lead bank is named the mortgagee, acting individually and as agent for other lenders who may from time to time obtain interests in the loan to the borrower. The loan participation agreement among lenders—to which the borrower would not typically be a party—reflects the agreement among the participating lenders regarding funding, voting decisions, and the like. But it is the lead bank, serving

⁹⁸ 31 Minn. 125, 127, 16 N.W. 849, 850 (1883).

⁹⁹ 83 Minn. 37, 85 N.W. 919 (1901).

¹⁰⁰ *Id.* at 39, 85 N.W. at 920. For other cases in which this Court has held that holder of legal title to a mortgage can exercise the power of sale if that title appears of record, see *Mut. Trust Life Ins. Co. v. Ecklund Bldg. Co.*, 180 Minn. 544, 547-48, 231 N.W. 207, 209 (1930); *Clarke v. Mitchell*, 81 Minn. 438, 441-42, 84 N.W. 327, 328-29 (1900); *Dunning v. McDonald*, 54 Minn. 1, 1, 55 N.W. 864, 865 (1893).

¹⁰¹ See, e.g., 2 Michael T. Madison, Jeffrey R. Dwyer & Steven W. Bender, *The Law of Real Estate Financing* §§ 11.2, 11.4 (Database updated Dec. 2007).

as the mortgagee of record, which has the power to both foreclose and release the lien on behalf of all the lenders. Similarly, a trustee can be appointed to serve as mortgagee of record for a trust or pool of investors,¹⁰² or a partnership can be named mortgagee of record for individual partners.¹⁰³

C. Federal Law Provides Plaintiffs A Means To Obtain Information About Their Servicer, Lender, Or Owner Of Their Mortgage Loans.

Any contention that the MERS® System somehow conceals information about the servicer, lender, or owner of the mortgage loan is both inaccurate and likely irrelevant. Plaintiffs' submissions and references to predatory lending, the subprime crisis, and the volume of foreclosures play no part in analyzing the narrow legal issue presented here. A wide variety of state and federal laws govern the disclosures and notifications applicable to consumer credit transactions. For example, the Real Estate Settlement Procedures Act ensures that consumers are notified of any "assignment, sale or transfer" of servicing and provides remedies if it is not done.¹⁰⁴ Similarly, federal law specifies the process for making inquiries of the servicer and obligates the servicer to respond in a specified period of time.¹⁰⁵ The servicer is the party charged with interacting with borrowers and the duties of dealing with the obligation on the debt and is the party that all loan payments,

¹⁰² See, e.g., *Norwest Bank Minn., N.A. v. Ode*, 615 N.W.2d 91, 95 (Minn. Ct. App. 2000) (discussing rights and duties of trustee acting as mortgagee).

¹⁰³ See, e.g., *Nat'l Citizens' Bank of Mankato v. McKinley*, 129 Minn. 481, 484-85, 152 N.W. 879, 879-80 (1915) (discussing what may be transferred without adversely impacting the rights of a partnership mortgagee).

¹⁰⁴ See 12 U.S.C. § 2605; 24 C.F.R. § 3500.21(d).

¹⁰⁵ See 12 U.S.C. § 2605(e).

loan modifications, workouts, foreclosures, escrows, or other matters are done with.

Under the Truth in Lending Act, borrowers may inquire of a servicer not holding the mortgage loan to provide certain information regarding the owner or master servicer:

Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.¹⁰⁶

In addition, servicers are to timely respond to borrower inquiries concerning the borrower's mortgage loan account.¹⁰⁷ None of these protections or obligations is in any way modified or changed by the MERS® System. Nor are they related to the land title records system before or after the establishment of the MERS® System.

III. PLAINTIFFS' INTERPRETATION OF THE FORECLOSURE-BY-ADVERTISEMENT STATUTE WOULD FUNDAMENTALLY CHANGE AND HAVE A DEVASTATING IMPACT ON MINNESOTA'S TITLE RECORD SYSTEM.

Plaintiffs interpretation of the foreclosure-by-advertisement statute—and hence the reinterpretation of Minnesota's Recording Act—would have a devastating impact on both the residential finance system and the real estate title records in Minnesota and thus would have a significant deleterious impact on the public interest. At its core, Plaintiffs' suit constitutes nothing less than a frontal attack on Minnesota's statutory mortgage and foreclosure framework, undercutting the sanctity of contract and the requirement that parties perform their contractual obligations. If this attack were successful, it would have a devastating impact on the availability of capital that makes it possible for Minnesotans

¹⁰⁶ 15 U.S.C. § 1641(f)(2).

¹⁰⁷ 15 U.S.C. § 2605(e).

to obtain mortgage loans for their homes. More significantly, it would severely disrupt the system of recording interests in real property across the state.

Public policy clearly favors the enforcement of contracts according to their terms, and the interests of the public at large are served by that policy. It also favors the protection of legitimate business interests, as well as parties' reliance on freely-negotiated agreements. Permitting Plaintiffs to escape their responsibility for their mortgage loans would undermine these established public policy interests. It should be noted that Plaintiffs raise absolutely no defenses to the foreclosures they are seeking to stop, reverse, void, cancel, or delay.

In what appears to be an attempt to implicate some unknown public policy, Plaintiffs rely upon mortgage-backed securities offering prospectuses, city council resolutions, and other similar items. Aside from the fact that these references bear no relationship to Plaintiffs' mortgage loans or the legal issues here, the fact that the income stream from a mortgage loan may be securitized in a mortgage-backed security with a multitude of tranches, each of which are invested in by a wide and diverse international body of investors is irrelevant. Similarly, a city council's belief that if it only knew who all the investors in mortgage-backed securities were, it could avert foreclosures is at best a misguided concept.

Finally, there would be significant consequences as to what Plaintiffs seek here. For example, for those foreclosures that have already taken place and the redemption periods have expired, title would have to be reformed—detrimentally affecting those *bona fide* purchasers who bought the foreclosed properties. The entire foreclosure

process would need to be unwound—requiring the purchasers and mortgage companies to void their agreements, return any advanced funds, and revert the property to someone who lost the property initially because they failed to meet their obligations and pay their mortgage loans. In addition, every extant conveyance by a mortgagee will be called into question and subject to challenge. 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. This would detrimentally affect the 98% of mortgagors who honor their obligations and never go into foreclosure. This clearly would not be in the public’s interest and is contrary to Minnesota law.

IV. THE CASES AND ACADEMIC PAPERS REFERENCING MERS ARE NOT RELEVANT TO THE LEGAL ISSUES HERE.

With the advent of MERS, there was a change in the way transfers of interests in the mortgage loan were tracked, not how these interests were transferred—from a paper system to an electronic one.¹⁰⁸ With any such change, it is expected there will be those who question it. Issues may also have to be addressed that have never been addressed before. In addition, parties may attempt to take advantage of the change to avoid obligations or seek relief that would otherwise not be available. This is expected. It does not mean, however, that the system change is not beneficial, lawful, or without merit.

Plaintiffs cite to several cases and academic papers referencing MERS, many of which

¹⁰⁸ See, e.g., *Mtg. Elec. Reg. Sys., Inc. v. Revoredo*, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007) (“the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law.”).

raise these issues. None, notably, touch upon the legal question before this Court and some actually support MERS' position here.

For example, in *Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*,¹⁰⁹ the Nebraska Supreme Court had to determine whether MERS should be licensed and registered as a mortgage banker under Nebraska law. The Department of Banking and Finance argued that because a loan and corresponding mortgage are inextricably intertwined and the interests acquired by MERS are interests in mortgage loans, MERS should be licensed and registered. Rejecting this argument, the court concluded that “the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes.”¹¹⁰ In other words, the Nebraska Supreme Court refused to do what Plaintiffs argue here—conclude that mortgage and mortgage loan are so intertwined that one cannot hold legal title to the mortgage while another retains the beneficial interest in the mortgage loan.

Plaintiffs also look to three trial court cases—*Mortgage Electronic Registration Systems, Inc. v. Rees*,¹¹¹ *Lasalle Bank National Association v. Lamy*,¹¹² and *Deutsche Bank National Trust Company v. Maraj*¹¹³—and one appellate decision¹¹⁴ to contend

¹⁰⁹ 704 N.W.2d 784 (Neb. 2005).

¹¹⁰ *Id.* at 787-88.

¹¹¹ No. CV03081773, 2003 WL 22133834 (Conn. Super. Ct. Sept. 4, 2003), A-381.

¹¹² No. 030049/2005, 2006 WL 2251721 (Aug. 7, 2006), A-384.

¹¹³ No. 25981/07, 2008 WL 253926 (N.Y. Sup. Ct. Jan. 31, 2008), A-387.

¹¹⁴ *Mtg. Elec. Reg. Sys., Inc. v. Estrella*, 390 F.3d 522, 524-25 (7th Cir. 2004).

MERS status as a nominee for the lender is questionable. But in *Rees*, the issue was whether MERS was the holder of the mortgage and the promissory note—there was a discrepancy between the testimony and documentary evidence on this issue. In *Lamy*, there was a defect in title related to the assignee, which then affected MERS’ ability to subsequently assign the mortgage. Neither case, however, rested on a defect in the standing of MERS as nominee.¹¹⁵ In fact, a majority of courts reviewing MERS standing as nominee—including the Minnesota Court of Appeals—have upheld its ability to act.¹¹⁶

And in *Deutsche Bank*, MERS was not a party to the suit, and therefore, did not have the ability to respond to the New York trial court’s concerns about the MERS® System and the manner in which assignments are made.¹¹⁷ The court questioned how an officer of Deutsche Bank could also be a vice president of MERS and with the power to assign MERS’ rights to Deutsche Bank. The membership rules to the MERS® System expressly provide that MERS members—pursuant to a duly authorized and adopted corporate resolution—may designate one or more employees to be “certifying officers” of MERS.¹¹⁸ These officers are then permitted to take certain actions, including assigning the lien of any mortgage loan registered on the MERS System. Corporate law

¹¹⁵ See *In re Huggins*, 357 B.R. 180, 184 (Bankr. D. Mass. Dec. 14, 2006) (discussing *Lamy*).

¹¹⁶ See, e.g., *In re Sina*, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006), ADD-60; *Mtg. Elec. Reg. Sys., Inc. v. Revoredo*, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007) (citing cases); *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81 (N.Y. Ct. App. 2006).

¹¹⁷ See, e.g., 2008 WL 253926, at *1, A-387.

¹¹⁸ See, e.g., MERS Rules of Membership, at Rule 3, § 3, http://www.mersinc.org/MERS_Products/publications.aspx?mpid=1.

has long authorized corporate entities to establish authorized signatories and officers, and countless individuals serve as officers of multiple entities.

Finally, in *Estrella*, the Seventh Circuit did not rule upon the authority of MERS to act as nominee and commence a foreclosure action on behalf of its principal. At issue was an application to confirm a sale. The court simply dismissed the appeal based upon well-settled law that court orders denying confirmation of judicial sales are not final decisions and therefore not appealable.¹¹⁹ The court also opined that the federal court may lack subject matter jurisdiction over the proceeding because it is the principals' citizenship—not MERS' citizenship—that matters.¹²⁰ Implicit in the Seventh Circuit's opinion, however, was a recognition that MERS has standing to act as nominee.

Plaintiffs also attempt to interject predatory lending into this case by citing to academic papers referencing MERS and relying upon an Amicus Brief. The legal issue at hand, however, is whether transfers of beneficial interests must be recorded in the public land records. Plaintiffs' reliance upon academia's analysis of predatory lending as it somehow relates to MERS is unfounded and irrelevant to the legal question this Court must decide. The named Plaintiffs assert no defenses to the foreclosure actions instituted by MERS, they just did not pay their mortgage loan obligations. In addition, there is no allegation that MERS engages in predatory lending (nor can there be any such allegations because MERS does not make loans), MERS is mentioned only in passing in one of the academic papers Plaintiffs cite. Finally, the focus of the Amicus Brief is on racial

¹¹⁹ 390 F.3d at 524.

¹²⁰ *Id.* at 525.

discrimination, which is not remotely at issue here. To the limited extent that they make any effort to establish some connexity with the issue before this Court, they seem to contend that the recording system is there to benefit academia and its research. But that is not, and never has been, the purpose of Minnesota's Recording Act.

In short, Plaintiffs grasping at a handful of issues that have arisen in various foreclosure proceedings and reliance upon unsubstantiated academic work related to predatory lending—notably, not at issue here—provides *no* basis to disrupt Minnesota's property records and title system. The federal court correctly determined that Minnesota law does not impose upon MERS a duty to record transfers in the beneficial interests of mortgage loans. As MERS has shown, the federal court's decision is consistent with Minnesota Statutes and case law. Any fundamental change to the system at this point—which is what Plaintiffs ask this Court to do—would be highly disruptive and have a devastating impact on Minnesota's real property system. If any such change is to be made, it should be the Minnesota Legislature—not this Court—that should be making that decision.

CONCLUSION

For the foregoing reasons, Defendant Mortgage Electronic Registration Systems respectfully requests that the Court answer the certified question in the negative, ruling that when an entity serves as mortgagee of record as nominee for a lender and the lender's successors and assigns, and there has been no assignment of the mortgage itself, an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security does not need to be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn. Stat. ch. 580.

Dated: May 14, 2008

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STATE OF MINNESOTA
IN SUPREME COURT

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

Plaintiffs,

v.

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

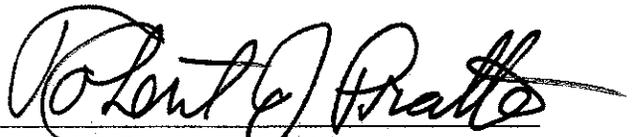
Defendants.

CERTIFICATION OF BRIEF LENGTH

I, Robert J. Pratte, certify that MERS' Brief conforms to the requirements of
Minn. R. Civ. P. 132.01, subs. 1 and 3, for a brief produced with Times New Roman
13 pt. font. The length of this brief is 11,664 words. This brief was prepared with
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