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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

In re: LISA MARIE CHONG, Debtor.	Bankruptcy Case No. BK-S-07-16645-LBR Appellate Ref. No.: 09-00010
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. LISA MARIE CHONG, Appellee.	Case No. 2:09-cv-0661-KJD-LRL

In re: JOSHUA SCOTT MITCHELL and STEPHANIE JIDITH MITCHELL a/k/a STEPHANIE JUDITH CABRAL, Debtors.	Bankruptcy Case No. BK-S-07-16226-LBR Appellate Ref. No.: 09-00018
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. JOSHUA SCOTT MITCHELL and STEPHANIE JIDITH MITCHELL a/k/a STEPHANIE JUDITH CABRAL, Appellees.	Case No. 2:09-cv-0668-JCM-RJJ
In re: BARRY ALLEN TRAYNOR and LARALEE M. TRAYNOR, Debtors.	Bankruptcy Case No. BK-S-07-18851-LBR Appellate Ref. No.: 09-00016
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. BARRY ALLEN TRAYNOR and LARALEE M. TRAYNOR, Appellees.	Case No. 2:09-cv-0669-LDG-PAL

In re: SHEILA MEDINA a/k/a SHEILA GOGGIN, Debtor.	Bankruptcy Case No. BK-S-08-12206-BAM Appellate Ref. No.: 09-00017
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. SHEILA MEDINA a/k/a SHEILA GOGGIN, Appellee	Case No. 2:09-cv-0670-KJD-GWF
In re: ROBERT THOMAS ATKERSON and DAWN NICOLE ATKERSON, Debtor.	Bankruptcy Case No. BK-S-08-11608-BAM Appellate Ref. No.: 09-00011
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. ROBERT THOMAS ATKERSON and DAWN NICOLE ATKERSON, Appellee.	Case No. 2:09-cv-0673-RCJ-GWF

In re: WILLIAM JAY ZEIGLER and DAWN M. ZEIGLER, Debtor.	Bankruptcy Case No. BK-S-08-10718-MKN Appellate Ref. No.: 09-00012
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. WILLIAM JAY ZEIGLER and DAWN M. ZEIGLER, Appellee.	Case No. 2:09-cv-0676-RLH-PAL
In re: PETER C. ALTMANN, JR., Debtor.	Bankruptcy Case No. BK-S-08-10108-LBR Appellate Ref. No.: 09-00013
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. PETER C. ALTMANN, JR., Appellee.	Case No. 2:09-cv-0677-JCM-LRL

In re: SURJIT SAMBRA, Debtor.	Bankruptcy Case No. BK-S-08-17506-MKN Appellate Ref. No.: 09-00019
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. SURJIT SAMBRA, Appellee.	Case No. 2:09-cv-0683-RLH-RJJ
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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. JOSE ANG AND DIVINA ANG, Appellee.	Case No. 2:09-cv-0684-LDG-GWF

In re: GUILLERMINA CORTES, Debtor.	Bankruptcy Case No. BK-S-08-17344-MKN Appellate Ref. No.: 09-00022
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. GUILLERMINA CORTES, Appellee.	Case No. 2:09-cv-0685-KJD-RJJ
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In re: MICHELE DART, Debtor.	Bankruptcy Case No. BK-S-08-017344-MKN Appellate Ref. No.: 09-0006
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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. ADAM J. BREEDEN, Appellee.	Case No. 2:09-cv-00874-LDG-LRL

In re: JEFFREY PILATICH, Debtor.	Bankruptcy Case No. BK-S-07-17182-MKN Appellate Ref. No.: 09-00023
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. JEFFREY PILATICH, Appellee.	Case No. 2:09-cv-00888-KJD-GWF
In re: KATHLEEN O'DELL, Debtor.	Bankruptcy Case No. BK-S-08-16913-MKN Appellate Ref. No.: 09-0020
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. KATHLEEN O'DELL, Appellee.	Case No. 2:09-cv-00889-KJD-PAL

In re: ROBERT A. BEALER and CASSANDRA N. BEALER, Debtor.	Bankruptcy Case No. BK-S-08-10052-MKN Appellate Ref. No.: 09-00015
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. ROBERT A. BEALER and CASSANDRA N. BEALER, Appellee.	Case No. 2:09-cv-0890-PMP-PAL
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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. DEAN MAURER, Appellee.	Case No. 2:09-cv-00891-JCM-GWF

In re: LONNIE EARL HAWKINS AND LISA WILLETT HAWKINS, Debtors.	Bankruptcy Case No. BK-S-07-13593-LBR Appellate Ref. No.: 09-0009
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. LONNIE EARL HAWKINS AND LISA WILLETT HAWKINS, Appellees.	Case No. 2:09-cv-00892-KJD-GWF

PROPOSED BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEES AND ARGUING FOR AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*

Center for Responsible Lending - *Amicus Curiae* the Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices in the mortgage market. In 2006, CRL researchers warned of the coming subprime foreclosure crisis, and in subsequent years it has published numerous reports detailing the cost of the foreclosure crisis to communities. CRL has frequently testified before Congress on the devastating financial impact of predatory subprime lending and advised state policymakers on how to respond to the crisis such lending has created. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in responsible financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

CRL has been actively promoting loan modifications as one way to address the foreclosure crisis currently impacting hundreds of thousands of American homeowners, and it is participating in this case because of the difficulties borrowers can have in obtaining such modifications when they do not know the owner of their loan. MERS's practice of filing motions to lift the bankruptcy stay in its own name is one of the reasons homeowners do not know this information. Additionally, CRL is concerned about the difficulties the MERS system creates for borrowers seeking to obtain legal relief for a predatory loan.

National Association of Consumer Bankruptcy Attorneys – *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4000 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own their homes. Across the country homeowners face motions for relief from stay by MERS even though they have never heard of MERS and MERS has no interest in their loan. Additionally, MERS generally refuses to identify the owner of the loan to the debtor. As a result, debtors are limited in their ability to assert claims against the owner of the loan in bankruptcy.

SUMMARY OF ARGUMENT

Mortgage Electronic Registration Systems, Inc. ("MERS") seeks relief from the automatic stay of foreclosure proceedings against bankrupt homeowners who do not owe MERS anything. MERS, however, lacks the standing and real-party-in-interest status necessary to do so because it has no financial interest in the foreclosures. MERS is a recent invention of the mortgage industry unrecognized by traditional mortgage law that, as its own documents prove, has no role in the lending process. Instead, it acts as a privatized county recorder's office that neither the borrower, the public, nor the bankruptcy court can access. MERS's efforts to use forms and legal sleight of hand to manufacture an interest in the bankrupt homeowners' loans do not cure its lack of standing and real-party-in-interest status.

Indeed, it is critically important to bankrupt homeowners that a party with a financial interest in the loans brings any motion to lift the foreclosure stay. As Congress has just explicitly recognized, homeowners facing foreclosure need to know who owns their loan in order to negotiate modifications and defend themselves against any abuses that occurred when the loan was originated. By using its name to prosecute lift stay motions, MERS deprives borrowers of such information and instead gives them the name of an entity that has no control over the loan or the foreclosure.

Moreover, even if MERS was the proper party to bring these motions to lift the stay, it could not deprive homeowners of bankruptcy's fundamental protection—the automatic stay—based on the flimsy documentation it submitted.

Accordingly, the bankruptcy court properly denied relief to MERS in all of the cases on appeal to this Court. Its opinions should be affirmed.

ARGUMENT

I. MERS LACKS STANDING AND REAL-PARTY-IN-INTEREST STATUS AS AN ENTITY UNKNOWN TO TRADITIONAL MORTGAGE LAW THAT SERVES NO ROLE IN THE LENDING PROCESS.

Nevada mortgage law, like mortgage law across the country, has developed settled predictability through well over one hundred years of common law jurisprudence and statutory enactments. The roles and rights of various players in a lending transaction—such as the borrower, the lender, and the trustee of the deed of trust—have been well settled. One of these settled principles is that the beneficiary of the deed of trust is the party to whom the debt is owed. *See Hellman v. Capurro*, 549 P.2d 750, 751 (Nev. 1976) ("A mortgagee or a beneficiary to a deed to trust is entitled to only one satisfaction of *his debt*." (emphasis added)); *see also*

Monterey S.P. P'ship v. W.L. Bangham, Inc., 777 P.2d 623, 627 (Cal. 1989) ("[A] deed of trust typically secures a debt owed the beneficiary . . . .").

MERS disrupts this well settled system by claiming it is a "beneficiary" of the deed of trust while holding no "beneficial ownership interests" in the loan. *See* MERS Br. 6 (acknowledging that MERS's purpose is to track the "beneficial ownership interests" of third parties); August 5 Declaration of William Hultman ("Hultman Decl. (8/5/08)") at ¶4 (Appx. 425) (claiming MERS remains the "beneficiary" when "beneficial ownership interest in the promissory note are transferred"). Such Alice-in-Wonderland-like contradictory assertions are wholly insufficient to give MERS standing and real-party-in-interest status in a federal court to seek relief from the Bankruptcy Code's automatic stay.[1]

A. MERS Allows the Mortgage Industry To Avoid Public Recordation of the Assignments Necessary To Create Mortgage Securities.

MERS is a recent creation of the mortgage industry. It was incorporated in October 1995, with the Mortgage Bankers Association as a charter member. R.K. Arnold, *Yes, There Is Life on MERS*, Prob. & Prop., Aug. 1997, at 33.[2] Although Nevada law provides for the public recordation of assignments of beneficial interests in deeds of trust, *see* Nev. Rev. Stat. § 107.070, MERS was created for the express purpose of facilitating the trading of mortgage rights "electronically among its members without the need to record a mortgage assignment in the public land records each time," Arnold, *supra*, at 33; s*ee also* Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 806 (1995) (noting the mortgage industry sought to create its own private "central, electronic registry for tracking

[1] The appellees' brief provides a thorough review of the principles of standing and real-party-in-interest status, and *amici* incorporate that discussion.
[2] The author of this article was general counsel of MERS.

mortgage rights" that allows "participants in the lending industry . . . to obtain, transfer, and identify interests in mortgages essentially on a real time basis").[3] MERS serves at least three functions for the mortgage industry: it allows the industry to privately track the ownership of loans; it provides a "tax avoidance tool" eliminating the need to pay recording taxes or fees for assignments; and it facilitates home foreclosures. Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2212 (2007).

In effect, MERS acts as a privatized county recorder's office for the purpose of facilitating the sale of home loans on the secondary market. Under the MERS system, mortgage originators, lenders, servicers, and investors "register" their loans with MERS. Hultman Decl. (8/5/08) at ¶3 (Appx. 425). Because the deed of trust designates MERS as the nominal beneficiary, MERS is listed as the beneficiary in county land records. *See id*. ¶4. Subsequent transfers of the mortgage loans between MERS members are tracked only through the MERS system and not memorialized in public property records. *See id*. However, when those same transfers are made from a MERS member to a non-MERS member, an assignment of the deed of trust from MERS to the non-MERS member is supposed to be recorded in the county where the secured property is located. *See id*. (Appx. 426).

The creation of MERS was meant to facilitate the burgeoning volume of mortgage loan transfers that were occurring "[a]s investors bought more and more loans in the secondary market." Arnold, *supra*, at 34; *see also* Slesinger & Mclaughlin, *supra*, at 812. Before the burst of the housing bubble, Wall Street firms had met this investor demand by creating "mortgage-backed securities" that gave investors rights to receive payments from thousands of mortgage

[3] The authors of this article were two officials with the Mortgage Bankers Association, the mortgage industry trade group that was instrumental in MERS's creation.

loans that had been pooled together. In assembling the thousands of mortgage loans, each and every individual loan was subject to a series of transfers. At a minimum, lenders had to assign ownership of each loan in the pool to a trust that held the loans on the investors' behalf. *See* Peterson, *supra*, at 2206-09; Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039, 2045-46 (2007). While ownership of the loans was transferred to these trusts, the trusts typically contracted with "servicers" to collect payments from and handle communications with borrowers. *See* 12 U.S.C. § 2605(e), (i)(2)-(3) (defining "servicer" for purposes of the Real Estate Settlement Procedures Act and setting forth duties of the servicer).

B. MERS Has No Financial Interest in the Loans.

At no point during the process of pooling loans and selling security interests in those loan pools did MERS become entitled to receive payments from borrowers. Instead, its only function is to serve as a placeholder in the county land records for whomever owns the loan at any given moment. Indeed, MERS has carefully avoided asserting any interest in the loan payments (or proceeds of a foreclosure) in the cases presently before this Court. Nothing in the record, including the declarations of MERS Secretary William Hultman, claims that MERS is entitled to any repayments or foreclosure proceeds. To the contrary, Hultman declares that MERS acts on behalf of other parties with "beneficial ownership interests in the promissory note." Hultman Decl. (8/5/08) at ¶4 (Appx. 425). Similarly, the MERS membership rules clearly state that members are never permitted to claim MERS is a "note-owner" as part of foreclosure proceedings. Rules of Membership, Rule 8, Section 2(a)(i), 2(c) (Appx. 469-70). And for good reason, because, as noted by the bankruptcy court, MERS's Terms and Conditions specify that

"MERS shall have no rights *whatsoever* to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans." MERS Terms and Condition at ¶ 2 (Appx. 490) (emphasis added).

MERS's complete lack of interest in the proceeds of the loans is corroborated by the decisions of other courts that have examined the function of MERS. For instance, the United States Court of Appeals for the Seventh Circuit has described MERS's complete lack of substantive involvement in the lending transaction:

> MERS is not the lender. It is a membership organization that records, trades, and forecloses loans on behalf of many lenders, acting for their accounts rather than its own. . . . It is a nominee only, holding title to the mortgage but not the note. Each lender appears to be entitled not only to payment as the note's equitable (and legal) owner but also to control any litigation and settlement.

Mortgage Elec. Registration Sys., Inc. v. Estrella, 390 F.3d 522, 524-25 (7th Cir. 2004).

Similarly, the Nebraska Supreme Court has "conclude[d] that MERS does not acquire mortgage loans" because "simply stated, MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." *Mortgage Elec. Registration Sys., Inc. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784, 788 (Neb. 2005). This conclusion relied upon MERS's arguments to that court that

> it only holds legal title to members' mortgages in a nominee capacity and is *contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members*. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to the payments made on the notes.

Id. at 787 (emphasis added).

Most recently, the Arkansas Supreme Court earlier this year "specifically reject[ed] the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act." *Mortgage Elec. Registration Sys., Inc. v. S.W. Homes of Ark.*, __ S.W.3d __, 2009 WL 723182 (Ark. Mar. 19, 2009) (slip op. at 4-5). Based on that fact, Arkansas' highest court went on to hold that

> MERS is not the beneficiary, even though it is so designated in the deed of trust. Pulaski Mortgage, as the lender on the deed of trust, was the beneficiary. It receives the payments on the debt.

Id. (slip op. at 6).

The holding of the Arkansas Supreme Court, which MERS ignores in its brief to this Court, directly contradicts MERS's argument on appeal that the bankruptcy court holding that MERS was not the beneficiary of the deed of trust conflicted with "courts across the country." *See* MERS Br. 16-20. Moreover, the Kansas Court of Appeals, in reviewing MERS's role in home loan transactions, has rejected the claim in MERS's brief that this Court is obligated to treat it as the beneficiary of the deed of trust simply because it is designated as such on the face of the document:

> We must pay close attention not only to the terms given to the parties in carefully crafted documents but also to the roles each party actually performed. No matter the nomenclature, the true role of a party shapes the application of legal principles in this case.

Landmark Nat'l Bank v. Kesler, 192 P.3d 177, 179 (Kan. App. 2008), *review granted* (Kan. Feb. 11, 2009); *cf. Pahl v. Comm'r*, 150 F.3d 1124, 1129 (9th Cir. 1998) ("Determining who is a

beneficial shareholder requires analysis of the actual role the shareholder has played in corporate governance.").[4]

C. MERS Lacks Standing or Real-Party-in-Interest Status on Its Own Behalf.

Instead of asserting it is owed anything on its own behalf, MERS claims to serve as the "nominee" of the entities that are actually entitled to repayment. *See* Hultman Decl. 8/5/08 at ¶¶3, 4 (Appx. 425). This does not give MERS standing: "A well-founded prudential-standing limitation is that litigants cannot sue in federal court to enforce the rights of others." *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, __ F.3d ___, 2009 WL 2436669, at *2 (10th Cir. Aug. 11, 2009); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) ("The doctrine of standing . . . requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (internal quotation marks omitted)); *Morrisson-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214 (9th Cir. 1987) ("An indirect financial stake in another party's claims is insufficient to create standing on appeal."). Instead, an entity that has no financial stake in the outcome of a motion must proceed using the name of its principal. *See* Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest"); *Old Ben Coal Co. v. Office of Workers' Comp. Programs*, 476 F.3d

[4] Contrary to the assertion in MERS's brief, *see* MERS Br. 24, the bankruptcy court's opinion does not warrant reversal even if it erred in holding that MERS was not the beneficiary under the deed of trust. The bankruptcy court alternatively held that "in any event, the mere fact that an entity is a named beneficiary of a deed of trust is insufficient to enforce the obligation." Opinion and Order, *In re Mitchell*, Bankr. No. 07-16226 ("Opinion and Order"), at 6 (Appx. 745).

418, 420 (7th Cir. 2007) (holding a party with "no possible stake in this litigation" is "not a real party in interest").[5]

MERS attempts to avoid this requirement by engaging in legal trickery that inflates form over substance. Through its system of creating "certifying officers," who sign affidavits as "assistant secretaries" of MERS, MERS purports to turn the loan owner's employees into its own employees and the contents of the owner's loan files into its own property. This legal sleight of hand proceeds in two steps: First, MERS creates a corporate resolution naming the owner's employees as MERS Certifying Officers. *See* Hultman Decl. (8/5/08) at ¶ 6 (Appx. 426) ("MERS provides Members a corporate resolution designating one or more employees *of the Member* a MERS Certifying Officer." (emphasis added)); Rules of Membership, Rule 3, Section 3(a) (Appx. 458-59) (detailing this process). Second, MERS then treats anything in the possession of its Certifying Officers—the owner's employees—as MERS's property. *See* Hultman Decl. (8/5/08) at ¶ 5 (Appx. 426) (detailing that MERS will plead it is the noteholder when a note is endorsed in blank and "in the possession of a MERS Certifying Officer"); Rules of Membership, Rule 8, Section 2(a) (Appx. 469) ("If a Member chooses to conduct foreclosures in the name of Mortgage Electronic Registration Systems, Inc., the note must be endorsed in blank and in *possession of one of the Member's* MERS certifying officers." (emphasis added)). Through this contrivance, MERS asserts in court filings (as it does in its brief to this Court

[5] Because MERS has *no* financial interest in the loan, the situation before this Court is unlike the question of whether a mortgage servicer, which collects payments on the loan and keeps a portion of those payments as its fee, has standing or is a real party in interest. *See In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) ("The general rule is that a mortgage servicer has standing by virtue of *its pecuniary interest* in collecting payments under the terms of the note and mortgage." (emphasis added)); *see also In re Hwang*, 396 B.R. 757, 768-69 (Bankr. C.D. Cal. 2008) (distinguishing whether a servicer is a "party in interest" or has standing from the question whether it is the "real party in interest").

concerning *Dart* and *Zeigler*) that it is the note holder based on the fact that the note is in the owner's file. *See* August 18 Affidavit of Stacey Kranz ("Kranz Aff. (8/18/08)") at ¶4 (Appx. 647) ("Bank of America, who is listed as the current servicer on the Ziegler . . . loan registered on the MERS® System, had (and has) physical possession of the original Zeigler note in its files. MERS in turn has possession of the original Zeigler Note through a MERS Certifying Officer who is an employee of the member listed as servicer on the MERS® System."); August 15 Affidavit of Cynthia Mech ("Mech Aff. (8/15/08)") at ¶4 (Appx. 642) (same).

Such machinations do not make MERS the note holder when the note remains in the file of the loan owner and all the parties understand that all the rights under the note belong with the loan owner. Courts in numerous contexts have treated purported transfers as "shams" when control or other legal rights do not change hands. *See, e.g.*, *Neely v. United States*, 775 F.2d 1092, 1094 (9th Cir. 1985) ("[T]ransfer of the title of assets to a trust while retaining the use and enjoyment is a sham transaction that will not be recognized for tax purposes."); *Shaprio v. Matouck* (*In re Hayes*), 322 B.R. 644, 647-48 (Bankr. E.D. Mich 2005) (allowing the purported transferor "to keep possession and control . . . is strong evidence that the parties had no actual intent to transfer ownership" (citing cases)). Moreover, MERS's Terms and Conditions and Rules of Membership demonstrate the farce of court filings claiming MERS is the note holder, as both of those set of documents make clear that MERS is always acting on behalf of third-party note holders who have the real financial interest in the borrowers' payment, rather than on its own behalf. *See* MERS Terms and Conditions at ¶ 3 (Appx. 490) ("MERS shall at all times comply with the instructions of the *holder* of mortgage loan promissory notes." (emphasis added)); Rules of Membership, Rule 2, Section 6 (Appx. 456) (same). It is nonsensical for

MERS to agree to "*at all times* comply with the instructions of the holder" if it views itself as the true holder at any time.

D. MERS Cannot Proceed on Behalf of the Loan Owners Because It Has Presented No Evidence It Is the Current Loan Owners' Agent.

But even if MERS could properly prosecute lift stay motions in its own name on behalf of a third party, that right would not entitle MERS to relief in the cases before this Court because MERS has merely shown it was appointed as the original lenders' agent. This showing, however, does not prove it has been appointed an agent by the loans' current owners. *See In re Vargas,* 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("If [the original lender] has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal.") Nothing in the record even indicates the identities of these current loan owners, let alone whether they have appointed MERS as their nominee. Moreover, in *Dart* and *Zeigler*—the only cases in which MERS on appeal claims to have presented sufficient evidence—the record conclusively proves that the original lender does *not* own the loan.

In *Dart*, Cynthia Mech's affidavit indicates that Centralbanc Mortgage Company, the original lender, sold its ownership interest. *See* June 2 Affidavit of Cynthia Mech at ¶6 (Appx. 263). There is nothing in the record indicating who currently owns the loan. Although her supplemental affidavit discloses that Bank of America now services the loan, *see* Mech Aff. (8/15/08) at ¶4 (Appx. 642), that addition provides no information about ownership, s*ee* 15 U.S.C. § 1641(f) (distinguishing servicers from owners of the obligation). Accordingly, the record contains no indication that MERS has been authorized by the current owner to serve as its nominee. Likewise, Stacey Kranz' affidavit in *Zeigler* indicates that Meridias Capital, Inc. has

transferred its ownership interest and that Bank of America now services the loan. *See* June 2 Affidavit of Stacey Kranz at ¶6 (Appx. 263); Kranz Aff. 8/18/08 at ¶4 (Appx. 647). Again, the record contains no indication of the current owner or that MERS has been appointed nominee by that actual owner. Under such circumstances, MERS is not entitled to prosecute relief stay motions. *See Vargas*, 396 B.R. at 517 ("MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner. In consequence, because these purported movants are not identified, the motion must be denied on these grounds alone."); *see also In re Parrish*, 326 B.R. 708, 719 (Bankr. N.D. Ohio 2005) ("To have an allowed proof of claim, the claimant must prove an initial fact: that it is the creditor to whom the debt is owed or, alternatively, that it is the authorized agent of the creditor.").

MERS, which has neither a financial interest in the loans at issue nor a role recognized by traditional mortgage law, lacked standing and real-party-in-interest status to file the motions to lift the bankruptcy stay. Its creation of forms and legal fictions cannot avoid this conclusion. Moreover, its claim to be acting as a nominee of the loan owners is wholly unsubstantiated because it has provided no evidence of who currently owns the loans.

II. BORROWERS FACING FORECLOSURE NEED TO KNOW WHO OWNS THEIR LOAN.

The fact that MERS hides the name of the current loan owner by filing motions to lift the bankruptcy stay in its name and not providing any evidence of who currently owns the loan has real and troubling consequences for bankrupt homeowners. Borrowers typically have no idea that their loans have been securitized and sold to new owners. However, this fact can be critically important for borrowers who run into problems paying their loans, as their servicers' flexibility in offering loan modifications may be constrained by the contract between the servicer

and the loan owner. *See* U.S. Treasury, Making Home Affordable Program, Borrower: Frequently Asked Questions 12 (July 19, 2009), *available at* http://www.makinghomeaffordable.gov/docs/borrower_qa.pdf ("If the organization that services your loan does not own it, your servicer may need to get permission from the owner or investor before they can change any of the terms of your loan."). Moreover, borrowers need to know the owner's identity because they cannot rely on their servicers to relay the owner's policy on modifications. *See* Karen Weise, *Bundled Loans Stall Modification Plans* (Marketplace radio broadcast Aug. 6, 2009), *available at* http://marketplace.publicradio.org/display/web/2009/08/06/pm-loan-mods/ ("I've talked with lots of homeowners who'd . . . been told an investor won't allow their modification. But experts say that doesn't make sense.").

Borrowers who have been the victims of illegal lending practices also need to know the identity of the loan owner in order to vindicate their rights. For instance, the Truth in Lending Act provides under certain circumstances that the current owner of the loan is liable for damages related to the original lender's illegal conduct. *See* 15 U.S.C. § 1641(d), (e). It also requires the current loan owner to honor requests by homeowners who want to rescind their loans upon discovering that they did not receive accurate disclosures. *See id*. § 1641(c). But neither a damage nor a rescission claim can be raised against the servicer. *See id*. § 1641(f). Courts regularly dismiss Truth in Lending cases in which borrowers fail to name the current loan owner. *See*, *e.g.*, *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002) (dismissing a TILA rescission claim because the assignee was not named as a party although loan originator and servicer were named). Accordingly, the Minnesota Supreme Court has expressed "concern"

that MERS merely identifying itself as the party in filings related to foreclosure actions "may foreclose federal remedies that are otherwise available to homeowners." *Jackson v. Mortgage Elec. Registration Sys.*, __ N.W.2d ___, 2009 WL 2461257, at *13 (Minn. Aug. 13, 2009). Likewise, the common law provides a homeowner whose lender committed fraud with a claim against the current owner who had knowledge of the fraud when it bought the promissory note or was otherwise complicit. *See Hays v. Bankers Trust Co. of Calif.*, 46 F. Supp. 2d 490, 495-97 (S.D. W. Va. 1999).

Courts have also noted that MERS's role in keeping loan owners' identity out of the public record adversely affects public policy research. *See MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 85 (N.Y. 2006) (Ciparick, J., concurring) ("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."). Similarly, keeping loan owners' name out of the bankruptcy courts' electronic dockets may thwart the usefulness of bankruptcy records in informing public policy related to lending. *See* Katherine Porter, *Misbehavior and Mistake in Mortgage Bankruptcy Claims*, 87 Tex. L. Rev. 121 (2008) (reporting on home lending research based on filings in 1,700 bankruptcy cases); *see also* 11 U.S.C. § 107 (providing public access to bankruptcy records).

Congress has recently recognized the problems created for borrowers when they do not know who owns their loan and the strong public interest in having this information disclosed. The Helping Families Save Their Homes Act of 2009 requires that loan owners notify borrowers about all future transfers in ownership. Section 404 of the act provides that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a

third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer." Pub. L. No. 111-22, 123 Stat. 1632, 1658 (codified at 15 U.S.C. § 1641(g)(1)). As Senator Boxer, the author of this provision, stated on the Senate floor:

> [I]f you are in trouble and you want to renegotiate your mortgage, you need to sit down with the company that holds your note. That is all we do in this amendment. . . . It seems like a no-brainer to me. Clearly, the law needs to be made explicit because, frankly, the people who hold the mortgages seem to go into hiding and you cannot find them when you want to find them.

155 Cong. Rec. S5173 (daily ed. May 6, 2009). MERS should not be allowed to use the bankruptcy courts to further what Congress has determined to be an unacceptable practice of hiding the identity of loan owners.[6]

MERS, however, seeks this Court's blessing to keep loan ownership information hidden from homeowners even when they face the imminent prospect of foreclosure. The disclosure of merely MERS's name in lift stay motions is an unsatisfactory substitute for knowing the loan owner (or even the servicer) because MERS lacks any authority to modify the loan. Indeed, consistent with MERS's own documents that recognize that it has no financial interest or rights in the loans, *see supra* Section I.B, MERS informs homeowners having trouble making payments that they need to contact their servicer rather than it, *see* Welcome to MERS for Homeowners, http://www.mersinc.org/homeowners/index.aspx (last visited Aug. 18, 2009) (identifying the servicer as "the company you call when you have questions about your loan"). Accordingly, as noted by the appellees' brief, this arrangement violates the bankruptcy court's local rule that requires a movant "to communicate in good faith regarding resolution of the motion before filing

[6] Because this law applies only to ownership transfers that occur after its enactment, it is unlikely to provide the identity of the loan owner to homeowners facing foreclosure (and lift stay motions) during the current economic crisis, because their loans were already transferred.

a motion for relief from stay." L.R. Bankr. P. 4001(a)(3). MERS has no such ability. Moreover, MERS is a particularly pernicious block to homeowners' attempt to assert legal defenses because "[w]hen MERS forecloses, it uniformly refuses to acknowledge or accept responsibility for consumer claims and defenses related to the origination or servicing of the loan." Peterson, *supra*, at 2280.

The Federal Rules of Civil Procedure's requirement of proceeding in the name of the real party in interest is intended to prevent just such a disconnect between the party prosecuting a motion and the decisionmaker with authority: "The purpose of the [real-party-in-interest] requirement is to protect individuals from the harassment of suits by persons who do not have the power to make final and binding decisions concerning prosecution, compromise and settlement. . . . [A] real party in interest must be in such command of the action as to be legally entitled to give a complete acquittal or discharge to the other party upon performance." *In re Tainan*, 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985), *cited with approval in Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002). Accordingly, this Court should affirm the bankruptcy court's holding that MERS lacks standing and is not a real party in interest that can file motions to lift the automatic bankruptcy stay.

III. SHODDY EVIDENCE IS INSUFFICIENT TO DENY BORROWERS THE FUNDAMENTAL PROTECTION OF THE BANKRUPTCY STAY.

Apart from the legal deficiencies the bankruptcy court held to exist in MERS's lift stay motions, it also found evidentiary deficiencies. These evidentiary findings must be reviewed for an abuse of discretion. *See Johnson v. Neilson* (*In re Slatkin*), 525 F.3d 805, 811 (9th Cir. 2008). Under that standard, this Court can reverse only if it finds the bankruptcy court made a "clearly

erroneous assessment of the evidence." *Heath v. Am. Express Travel Related Serv. Co.* (*In re Heath*), 331 B.R. 424, 429 (9th Cir. B.A.P. 2005).

Debtors have a fundamental right to avoid collection actions, including foreclosure, during the pendency of bankruptcy:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Dawson v. Wash. Mutual Bank, F.A. (*In re Dawson*), 390 F.3d 1139, 1147 (9th Cir. 2004) (quoting H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97). Although the foreclosure stay can be lifted when a homeowner is unable to make mortgage payments, it is critical that borrowers not be deprived of such a fundamental protection of bankruptcy without solid evidence that the creditor is entitled to proceed. As a New Jersey bankruptcy court held in reviewing problematic certifications filed as part of lift stay motions, "notwithstanding the volume, pace and electronic systemizing of stay relief motions and applications, this court must remain mindful of the serious stakes—most often it is the family homestead that is in jeopardy. . . . [B]oth the data supplied and the verification processes employed by those who would foreclose on residences must be above reproach." *In re Rivera*, 342 B.R. 435, 440 (Bankr. D.N.J. 2006) (emphasis omitted). This Court should apply the same standard.

The bankruptcy court found that various affidavits filed in these cases could not be considered pursuant to Federal Rule of Evidence 602 because the affiants lacked adequate personal knowledge. On appeal, MERS disputes this finding only as to the affidavits of Cynthia

Mech (submitted in *Dart*) and Stacey Kranz (submitted in *Zeigler*). Yet even these affidavits are deficient. In addition to the bankruptcy court's finding that their "bald assertion[s]" about "review[ing] the loan file" was inadequate, Opinion and Order at 14 (Appx. 753), neither affidavit provide any support for their claim that "[*a*]*t the time* MERS filed the Motion for Relief" the notes were found in Bank of America's possession, Kranz Aff. (8/18/08) at ¶4 (Appx. 647) (emphasis added); Mech Aff. (8/15/08) at ¶4 (Appx. 642) (emphasis added). Even if such a review may have uncovered that the notes were in the files at the time the affidavits were made—more than six months after MERS filed the motions to lift stay—there is no indication how Ms. Mech or Ms. Kranz, in reviewing the loan file, learned when the notes entered into the files or whether the notes were present when MERS filed its motions. MERS's brief admits that it was necessary for it to prove the "physical possession of the notes *at the time* the motions for relief from stay were filed," MERS Br. 31 (emphasis added), so this deficiency is fatal.[7]

This case is just one of a recent plethora of cases in which bankruptcy courts have found patent inadequacies or misstatements in affidavits accompanying lift stay motions seeking home foreclosures. *See, e.g.*, *In re Fitch*, No. 04-16905, 2009 WL 1514501 (Bankr. N.D. Ohio May 28, 2009) (affidavit that falsely represented that the servicer was acting on behalf of MERS); *In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007) (affidavit filed in lift stay proceeding stating personal knowledge of a borrower's default when the borrower had not defaulted); *Rivera*, 342 B.R. 435 (certifications filed with relief stay motions were presigned with details filled in later by other individuals). This is just one aspect of the systematic problems currently being

[7] Moreover, the affidavits' deficiencies are compounded by their legally erroneous position that Bank of America's loan files became MERS's property merely by declaring Bank of America employees to be Assistant Secretaries and Certifying Officers of MERS. *See supra* Section I.C. Only through that legal fiction do they claim to know what is in MERS's possession.

witnessed in bankruptcy courts across the nation with lenders' cavalier treatment of homeowners. *See, e.g.*, *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008) (observing systematic problems in bankruptcy filings by Wells Fargo concerning home loans). The bankruptcy court did not abuse its discretion in refusing to accept such problematic filings.

CONCLUSION

In creating MERS, the industry decided that settled mortgage law did not matter, and it could create its own private system of mortgage law. The mortgage industry's unilateral actions in creating MERS do not entitle them to have the judiciary alter the settled doctrines of standing and real-party-in-interest status to accommodate its machinations. But that is exactly what MERS is asking here in claiming that it can file motions to lift the bankruptcy stay without naming any party who will actually receive foreclosure proceeds. Moreover, by filing these motions in its name, MERS deprives homeowners facing foreclosure of essential, otherwise-unavailable information concerning who owns their loan. This Court should refuse to authorize MERS's subterfuge and affirm the decision of the bankruptcy court.

Respectfully Submitted,

/s/

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August 20, 2009