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Brief Of Amicus Curiae The Legal Services Center of Harvard Law School And Law Professors in Support of The Appellee

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4315

MONTGOMERY COUNTY, PENNSYLVANIA, RECORDER OF DEEDS, by and through NANCY J. BECKER, in her official capacity as the Recorder of Deeds of Montgomery County, Pennsylvania,

Plaintiff-Appellee,

v.

MERSCORP, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Defendants-Appellants.

Appeal from the July 11, 2014 decision of the United States District Court for the Eastern District of Pennsylvania Civil Action No. 11-CV-06968 (Honorable Curtis Joyner) certified for interlocutory appeal on September 8, 2014

BRIEF OF AMICUS CURIAE THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL AND LAW PROFESSORS IN SUPPORT OF THE APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Legal Services Center is a program of Harvard Law School at Harvard University, a 501(c)(3) non-profit organization. No party, party's counsel, nor any person other than the amicus curiae authored any part of the brief, nor contributed money intended to fund preparing or submitting the brief.

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STATEMENT OF INTEREST

All parties have consented to the filing of this brief.

The Legal Services Center (LSC), part of Harvard Law School's clinical program, is a legal services office staffed by Harvard Law School faculty. LSC's clinical faculty offer courses on a range of consumer law topics, including mortgage law, consumer bankruptcy, and student loan law. Instructors also supervise students as part of a client services clinic, and many of LSC's cases involve representation of homeowners facing foreclosure on the basis of MERS loans. LSC's academic role and direct experience with MERS informs its views on MERS practices.

Rebecca Tushnet is a Professor of Law at Georgetown Law. She teaches property law and she has written extensively about consumer protection issues.

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The above parties submit this brief supporting the Appellee and respectfully request that the District Court's Declaratory Judgment be upheld.

ISSUE TO BE ADDRESSED

Is MERS an appropriate and reliable substitute for county-based recording systems, such as exists in Montgomery County through Appellee's Office of the Recorder of Deeds, which have traditionally served as a public basis for ascertaining, enforcing and ensuring the orderly transfer of rights in real property?

SUMMARY OF ARGUMENT

MERS represents a major departure from and grave disruption of recording practices in counties such as Montgomery County, Pennsylvania, that have traditionally ensured the orderly transfer of real property across the country. Prior to MERS, records of real property interests were public, transparent, and provided a secure foundation upon which the American economy could grow. MERS is a privately run recording system created to reduce costs for large investment banks, the "sell-side" of the mortgage industry, which is largely inaccessible to the public. MERS is recorded as the mortgage holder in traditional county records, as a "nominee" for the holder of the mortgage note. Meanwhile, the promissory note

secured by the mortgage is pooled, securitized, and transferred multiple times, but MERS does not require that its members enter these transfers into its database. MERS is a system that is “grafted” onto the traditional recording system and could not exist without it, but it usurps the function of county recorders and eviscerates the system recorders are charged with maintaining.

The MERS system was modeled after the Depository Trust Company (DTC), an institution created to hold corporate and municipal securities, but, unlike the DTC, MERS has no statutory basis, nor is it regulated by the SEC. MERS’s lack of statutory grounding and oversight means that it has neither legal authority nor public accountability. By allowing its members to transfer mortgages from MERS to themselves without any evidence of ownership, MERS dispensed with the traditional requirement that purported assignees prove their relationship to the mortgagee of record with a complete chain of mortgage assignments, in order to foreclose. MERS thereby eliminated the rules that protected the rights of mortgage holders and homeowners. Surveys, government audits, reporting by public media, and court cases from across the country have revealed that MERS’s records are inaccurate, incomplete, and unreliable. Moreover, because MERS does not allow public access to its records, the full extent of its system’s destruction of chains of title and the clarity of entitlements to real property is not yet known.

Electronic and paper recording systems alike can contain errors and inconsistencies. Electronic systems have the potential to increase the accessibility and accuracy of public records, but MERS has not done this. Rather, by making recording of mortgage assignments voluntary, and cloaking its system in secrecy, it has introduced unprecedented and perhaps irreparable levels of opacity, inaccuracy, and incompleteness, wreaking havoc on the local title recording systems that have existed in America since colonial times.

ARGUMENT

I. MERS is a departure from and disruption of the traditional recording practices upon which it relies.

A. Prior to MERS, records of real property interests were public, transparent, and provided a secure foundation upon which the American economy could grow.

The land title records system has ensured the orderly transfer of American property entitlements and provided a secure platform for private commerce since colonial times. Since the earliest period of British settlement in America, land secured the loans upon which the American economy flourished. Joseph Story, Commentaries on the Constitution of the United States § 182, 164 (1833). The objective of recording laws was then, as it is now, to prevent disputes over property rights, to facilitate the enforcement of property rights and the resolution of disputes that nonetheless arise. Christopher L. Peterson, Foreclosure, Subprime

Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1364-65 (2010) [hereinafter Foreclosure].

For over three hundred years, mortgage records were held as part of the public land title records in the county where mortgaged land was located. M. Mark Heekin, Modernizing Mortgage Foreclosure Law: A Call for Transparency and an End to the Payment Rule, 33 Quinnipiac L. Rev. 165, 193 (2014). As early as 1639, the Connecticut General Court insisted that "all bargaines or mortgages of land whatsoever shall be accounted of no value until they be recorded." 14 Powell on Real Property § 82.01[1][b] (Michael Allen Wolf ed., 2007) (sic). By the time of the Revolution, mortgagees that failed to record their mortgages or assignments risked losing the ability to enforce the terms of their loans. Herbert T. Tiffany and Basil Jones, Tiffany on Real Property § 1457 (1939); Caryl A. Yzenbaard, Residential Real Estate Transactions § 5:7 (1991); Grant S. Nelson and Dale A. Whitman, Real Estate Finance Law § 5.34 (5th ed. 2007). A transparent public record of entitlements in real property has provided certainty in private bargains and a collective reference point that protects communities from commercial chaos after disasters like floods, earthquakes, fire, and hurricanes. Peterson, Foreclosure, supra 4 at 1365. The establishment of a public recording act in each state has thereby long protected all parties holding or dealing in interests in land, and

constituted "[t]he cornerstone of America's legal tradition of transparency of landholding interests." Id.

Accordingly, since 1717, Pennsylvania law has mandated that "[a]ll deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intention of the parties executing the same to grant, bargain, sell, and convey any lands, tenements, or hereditaments situate in this Commonwealth … shall be recorded in the office for the recording of deeds in the county where such lands, tenements, and hereditaments are situate." 21 Pa. Cons. Stat. § 351 (West). 1 Joyce D. Patton and Carroll G. Palomar, Patton and Palomar on Land Titles § 4, n. 7 (3d ed. 2003). Prior to MERS, the public recording system, maintained by County Recorders such as Appellee Nancy Becker, provided a public forum in which parties recorded legally operative documents pertaining to transfers of interests in real property. Through the simple but essential service of recording the name of a person or entity that originated a mortgage loan, any party that subsequently sought to purchase a mortgage note could ascertain that a seller possessed the interest he claimed by verifying that his chain of title was complete and derived from the original lender. Heekin, supra 5 at 190. The burden lay upon a party seeking to foreclose to confirm the interest it claimed to hold by showing that same unbroken chain of title.

B. MERS was created to reduce costs for sellers of mortgage-backed securities (MBS).

From its planning stages, MERS was conceived as a way of reducing costs for sellers of mortgage-backed securities (MBS). In 1970, the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae), radically changed mortgage lending relationships by originating the creation and sale of mortgage backed securities (MBS)—pools of mortgages, or bonds secured by such pools, for which they sold fractional interests. Ann M. Burkhart, Lenders and Land, 64 Mo. L. Rev. 249 (1999). By the mid-1990s, more than three-quarters of new single-family residential mortgages were being securitized, and Fannie Mae had become the largest corporation in the United States, with assets exceeding $351 billion. Id.

As trade in MBS burgeoned and the costs of securitization increased, the industry sought a means of escaping the "terribly cumbersome" and "costly" process of executing and recording mortgage assignments. Phyllis K. Slesinger and Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho L. Rev. 805, 808 (1995). The MERS concept originated in October, 1993, when an industry group comprised of representatives from Fannie Mae, Freddie Mac, Ginnie Mae, and the Mortgage Bankers' Association of America (MBA), published a "white paper" proposing the MERS concept to solicit comments from

the real estate finance industry. Id. at 810-11. In June 1994, these parties formed a Steering Committee and commissioned a study by Ernst & Young, LLP. Mortgage banking companies made initial capital contributions to incorporate MERS, Inc. Peterson, Foreclosure, supra 4 at n.61.

In 1995, MBA executives who led the establishment of MERS wrote that MERS would apply "information technology to reduce processing costs." Slesinger and McLaughlin, supra 7 at 807. At the time, standard investor guidelines required that the industry record assignments from the originating lender to a wholesaler, from the wholesaler to the Seller, and from the Seller to the Buyer. Meanwhile, an average lender/buyer was "acquiring a $550 million portfolio of servicing through a bulk purchase of mortgages with an average loan balance [of] $125,000." Id. at 809. Estimating the recordation costs for portfolios this size, MBA executives calculate at the time that "[a]ssuming that the portfolio has 4,400 loans and that recordation is $10 for each loan… the cost of the three recordations alone would be $132,000." Id. at 810. Furthermore, because investors would have to pay to prepare documents, track the return of recorded assignments and possibly rerecord, to correct errors, they concluded that "[o]ver the life of a loan, the current environment is very costly to the industry." Id. In 1997, then-CEO of MERS, Inc. R.K. Arnold wrote, "[e]stimates are that MERS will save the mortgage industry $200 million a year by eliminating the need for many

assignments." R.K. Arnold, Yes, There is Life on MERS, 11 Prob. & Prop. 33, 35 (1997).

C. The MERS structure substitutes the MERS name for the mortgage lender in the county registry.

After originating a mortgage loan, a lender registers the mortgage under the MERS name in the county recorder's office. Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic System's Land Title Theory, 53 Wm. & Mary L. Rev. 111, 116 (2011) [hereinafter Two Faces]. MERS, who is named "solely as nominee," remains the mortgagee even after subsequent transfers of the mortgage note. Id. These subsequent transfers are not recorded in the public registry. Rather, MERS operates a private database and mortgage servicers may voluntarily report changes in "beneficial interests" and servicing rights for individual mortgages. See MERS Procedures Manual (v. 27) at 88-91.[1] Consequently, MERS removes the incentives for its members to retain and aggregate the legal documentation pertaining to such transfers for any given piece of property, astronomically increasing both the likelihood of broken chains of title and the difficulty of detecting fraudulent claims in the absence of documentation showing the legitimacy of prior transfers.

[1] Available at <http://www.mersinc.org/join-mers-docman/978-mers-system-procedures-final/file>.

When a subsequent holder of the note wishes to foreclose, MERS ostensibly transfers the mortgage to that party. However, in actuality, that party assumes the MERS identity to transfer the mortgage to itself. MERS operates by allowing employees of mortgage servicers, originators, debt collectors, and foreclosure law firms to enter their own names on a webpage that certifies them as assistant secretaries or vice-presidents of MERS for a low fee. Peterson, Two Faces, supra p. 9, at 120; Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcommittee on Housing and Comty. Opportunity of the H. Comm. On Fin. Servs., 111th Cong. 103-04 (2010) (prepared statement of R.K. Arnold, MERSCORP Inc. President and Chief Executive Officer). MERS itself has under fifty employees, but over 20,000 such secretaries and vice presidents, who are not employees of MERS, and do not know simple facts about the company, such as where it is located or who its president is. Id.

D. MERS privatized and made the documentation of transfers of mortgage notes optional, discouraging the mortgage industry from maintaining complete records of actual holders of interests in real property.

The planners of MERS heralded MERS as an electronic system that would more accurately and efficiently record information about successive interests in property. See Slesinger and McLaughlin, supra p. 9, at 806 (“Advanced technology has come to the residential mortgage industry… mortgage lending is being reengineered to reduce costs and deliver a better product”); Arnold, Life on MERS,

supra p. 8, at 33 ("MERS is the result of an industry effort to reduce the need for mortgage assignments in the residential mortgage market and thus increase efficiency and reduce costs"). They also emphasized the need for careful recording while they sought to garner support for the project: before MERS was launched, the Senior Director and Director of Technology Initiatives of the MBA wrote that "[c]learinghouse rules will have to be carefully developed to assure the protection of the mortgage rights of participants." Slesinger and McLaughlin, supra 7 at 808.

However, MERS did not develop reliable clearinghouse rules to provide such protection. Rather, it has introduced unprecedented opacity and incompleteness to the record of interests in real estate. First, MERS makes it possible to keep transfers of a mortgage note private once a mortgage is recorded under its name in a county registry, because access to MERS is restricted to its members. The public has no way of identifying the actual owner of a lien on a property and therefore, of holding lenders and investors accountable for errors or fraud.

Moreover, MERS enables incomplete record-keeping by making it voluntary for its members to update information on the MERS database. It does not compel financial institutions to record changes in ownership rights of mortgages, or penalize them for failures to do so. Arnold Deposition 176-80 (September 25,

2009).[2] MERS does not keep digital or hard copies of documents embodying agreements through which the beneficial ownership interest in a loan changes hands. Id.; Peterson, Two Faces, supra 8 at 126. Nothing binds MERS members to keep accurate records concerning the beneficial ownership interests of loans, on the MERS database or independently. Moreover, MERS makes no representations or warranties regarding the accuracy or reliability of its database. *See generally* MERS Procedures Manual, supra p. 12. Simply put, "MERS is the Wikipedia of land registration systems." Culhane v. Aurora Loan Services. 826 F. Supp. 2d 352 (D. Mass. 2011) aff'd, 708 F.3d 282 (1st Cir. 2013).

E. MERS interferes with Pennsylvania's requirement that purported assignees prove their relationship to the original lender in order to foreclose.

MERS has also obstructed foreclosing plaintiffs' ability to comply with the requirements for initiating a foreclosure action under Pennsylvania law. The Pennsylvania Rules of Civil Procedure require a foreclosure plaintiff to set forth in its complaint "the parties to and the date of the mortgage, and of any assignments, and a statement of the place of record of the mortgage and assignments." Pa. R. C. P. 1147 (a)(1) (emphasis added). However, in direct contravention of these requirements, MERS never requests or possesses proof that one of its members in fact holds the mortgage note or is the agent of the note holder when that member

[2] Available at https://www.dropbox.com/s/hzrzapyxa7bogw5/MERS-DEPO-OF-CEO-RK-Arnold-2009.pdf?dl=0.

seeks to foreclose. Rather, it allows its member's certifying officer to assign the mortgage at will, without reviewing the records to confirm that the party receiving the transfer is entitled to enforce the mortgage. MERS Rules of Membership 29-34;[4] MERS Procedures 124-25.[5] MERS possesses no legal authority to create special rules that absolve its members of the Pennsylvania state requirement, which non-MERS institutions continue to observe, that entities seeking to foreclose must plead and prove a recorded full chain of title.

F. MERS lacks legal authority and public accountability.

The creators of MERS did not lobby Congress for a uniform, electronic mortgage system that could have retained the public recording system's transparency and reduced costs. Rather, without judicially or statutorily recognized legal authority, they independently launched MERS as a private system, and created legal theories to legitimate the system post facto. In Professor Joseph Singer's words, MERS allowed banks "to be prolific about securitizing those mortgages but complacent about formalizing mortgage assignments. The result was that the banks made many, many mistakes in keeping track of these transactions. Formal records of mortgage transfers are often incomplete or incorrect; the chain of title for many properties appears to be irretrievably broken."

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[4] Available at <http://www.mersinc.org/join-mers-docman/37-mers-commercial-rules-of-membership/file>.
[5] Available at <http://www.mersinc.org/join-mers-docman/978-mers-system-procedures-final/file>.

Joseph Singer, Foreclosure and the Failures of Formality, 46 Conn. L. Rev. 497, 503-04 (2013).

MERS stands on agency-law principles, which, as Professor Adam Levitin of Georgetown Law notes, raise numerous questions in the context of mortgage loans. No provisions specifying the bounds of agency law exist in state mortgage recordation statutes, as for security interests in personalty.[6] Adam J. Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title, 63 Duke L.J. 637, 680 (2013).

From its earliest stages, the creators of MERS were aware that differences in states' real-property law would affect MERS's validity. Daniel McLaughlin, director of technology for MBA, acknowledged in 1994 that the mortgage industry "faced unique problems that the securities industry did not have," namely that "[w]e have fifty states with their own systems and laws that we have to comply with." Property Deed Ready for Book Entry, 19.3 Nat'l Mortgage News 20 (Oct. 17, 1994). Nevertheless, MERS conducted no fifty-state analysis of the potential impact of its operations. Memorandum from Covington & Burling to R.K. Arnold, President and CEO, MERSCORP, Inc. (Sept. 1, 1997) (on file with the Duke Law Journal). MERS's attempt to establish "facts on the ground supporting its existence

[6] The U.C.C. expressly permits the recording of financing statements for security interests in personalty in the name of a "representative of the secured party"; failure to indicate this representative capacity does not affect the U.C.C. financing statement's validity. *U.C.C. §§ 9-502, 9-503*.

therefore does not deserve deference, and in practice has not worked. State laws have unsurprisingly taken disparate positions with respect to numerous aspects of MERS, and borrowers are now impacted in vastly different ways based on their jurisdiction. Laura A. Steven, MERS and the Mortgage Crisis: Obfuscating Loan Ownership and the Need for Clarity," 7 Brook. J. Corp. Fin. & Com. L. 251, 256-57 (2012).

In design, MERS was meant to mimic the structure of the Depository Trading Company (DTC), and similarly replaces the lender as the mortgagee in local land records to immobilize legal title to mortgages. The DTC is a common agency structure for securities trades that was created to resolve the "Wall Street Paperwork Crisis" of the 1960s, when the volume of daily trades made the then requisite delivery of physical stock certificates and bonds from sellers to buyers impractical.[7] However, the DTC does not legitimize the MERS structure as precedent, because no equivalent statutory or regulatory framework exists for MERS as for the DTC; MERS's lack of legal foundation and oversight is radically new.

The DTC operates within a statutory framework as a "securities intermediary" under U.C.C. Article 8. The law makes clear that the DTC holds but

[7] Instead of listing individual investors as registered securities' owners with various firms, corporate-securities registrations now list the DTC as a common nominee, and the DTC tracks ownership of the securities in its books and holds physical securities in its vaults. The DTC immobilizes between 85-90% of all equities, corporate, and municipal bonds issued in paper form in the United States. Levitin, supra p. 14 at 680-81.

does not own physical securities, which remain the property of investors. U.C.C. §§ 8-102, 8-502. Further, the statute sets out investors' rights vis-à-vis third parties, and the DTC has legal duties to comply with investors' instructions. U.C.C. §§ 8-502, 8-506, 8-507, 8-510, 8-511. Finally, the SEC regulates the DTC as a registered clearing agency, and must approve DTC rules. 15 U.S.C. §§ 78s, 78q(1).

Again, MERS lacks any comparable statutory authority and regulation. Its lack of legal foundation means that it has been able pursue arguments most favorable to its growth in any given situation, even when those arguments contradict each other in different jurisdictions. For example, when MERS has brought foreclosure actions, it has argued that it was an actual mortgagee or assignee. See, e.g., Landmark National Bank v. Kesler, 40 Kan. App. 2d 325, 327 (2008) ("MERS claims that it holds the title to the second mortgage… MERS objects to its characterization as an agent."). However, when faced with suits alleging fraud, deceptive practices, or when it wished to avoid license and registration requirements, it argued that it was merely an agent without exposure to liability, and did not have the same power as a mortgage owner. See, e.g., Escher v. Decision One Mortgage Co., 369 B.R. 862 n.8 (Bankr. E.D. Pa. 2007) ("MERS's role as nominee leads the Court to conclude that it cannot be liable on any of the Plaintiff's [Truth in Lending or Pennsylvania consumer protection]

claims. A nominee is understood to be an agent for another."). See also Peterson, Foreclosure, supra p. 4, at 1376. MERS's adoption of inconsistent positions across jurisdictions to obtain favorable outcomes in litigation underscores its fundamental lack of legal authority. See also Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 216 P.3d 158, 165–66 (2009) (stating that MERS defines its role "in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time").

MERS's contradictory claims to be both agent of a mortgagee and also the actual mortgagee are especially alarming since MERS professes that its strongest claim to legal authority lies in the principles of agency law. Without legal foundation, MERS has exploited its lack of legal oversight to usurp the function of the state's County Recorders, and trample on the long-tended records of interests in land, to reduce recording costs for mortgage bankers.

G. MERS acts as a placeholder in the traditional recording system, and cannot function without that system.

MERS inserts a placeholder in the public record. It thereby grafts itself onto systems for recording interests in land, while rendering that recording meaningless. By resting its system on the placeholder record of its name, it allows all subsequent activity related to the mortgage loan to ensue without internal or external regulation. MERS therefore consists of private contractual arrangements that derive what questionable legality they possess by "grafting" the MERS system

onto local land-recording offices, a preexisting public legal structure. As R.K. Arnold, CEO of MERS until 2011, noted, "because MERS is premised on an assignment recorded in the public land records, MERS cannot work without county recorders." Arnold, Life on MERS, supra p. 8, at 703.

MERS has therefore privatized the majority of mortgage records in the country while undermining the value of county public records. Peterson, Two Faces, supra p. 9, at 132 (2011). MERS purports to simplify the process of trading mortgage-backed securities, because it has taken the liberty of eliminating requirements for documenting changes to the beneficial ownership interests in real property. MERS, in effect, creates a lacuna in the record, and makes meaningless the record onto which it is grafted. As Professor Christopher Peterson writes, "Recording mortgages in MERS's name and subsequent refusal to record assignments is not a technological innovation. On the contrary, it is an example of atrophy of the mortgage market's information infrastructure and the rule of law." Peterson, Foreclosure, supra p. 4, at 1404.

II. MERS helped precipitate the foreclosure crisis and left homeowners without recourse to protect their property rights.

A. MERS facilitated the securitization of subprime loans.

MERS's impact on homeownership and the mortgage industry has had broad national consequences, including but not limited to the foreclosure crisis of 2008. These consequences have caused significant and continuing distress for

Pennsylvania's cities and homeowners, which Pennsylvania's recording statute was meant to protect.

Since MERS increased the speed and the volume at which mortgage-backed securities could be traded while reducing recording costs, the mortgage finance industry quickly embraced recording and foreclosing its mortgage loans in MERS's name, rather than the actual parties in interest. Industry players did not embrace MERS based on the passage of legislation or a landmark court ruling, since none legitimized the creation of MERS. Rather, mortgage industry insiders reported that the key development that led them to use MERS was its endorsement by credit rating agencies such as Moody's, Standard and Poor's, and Fitch Investment. Peterson, Foreclosure, supra p. 4, at 1373; Carson Mullen, MERS: Tracking Loans Electronically, 60:8 Mortgage Banking 62, 65 (May 31, 2000). In particular, Moody's published an opinion approving of MERS despite its acknowledgment that the system's legality in every state was uncertain. Moody's Investors Service, Mortgage Electronic Registration Systems, Inc. (MERS): Its Impact on the Credit Quality of First-Mortgage Jumbo MBS Transactions at 3, Structured Finance Special (April 30, 1999) ("Although in many states the assignment of mortgage does not have to be recorded when the note is transferred, there are some states that require the assignment of mortgage to be recorded so that the buyer of the loan is protected against subsequent transferees and creditors of

the seller of the mortgage. There are also some states where the law is uncertain as to the protection afforded loan buyers against subsequent transferees and creditors of the loan seller.”).

Although they were on notice that MERS would legally conflict with the laws in some states, mortgage industry insiders, including Moody’s, pursued or encouraged the pursuit of the immediate financial opportunities the system presented, rather than seek structural adjustments that would respect the rights that conflicting state laws protected. By 1999, private label subprime mortgage securitizers had begun using MERS. Peterson, Foreclosure, supra p. 4 at 1370; Mullen, supra p. 19, at 64. In the early 2000s, the use of MERS exploded, and by late 2002 MERS had recorded its name in place of actual assignees and mortgagees in ten million residential home mortgages. MERS Registers 10 Million Loans, Inside MERS 1 (Nov./Dec. 2002). As the subprime mortgage refinancing industry boomed, MERS registered 21,000 loans on its system each day on average. A year later, the number of loans recorded in MERS’s name doubled to twenty million. MERS Registers 20 Million Loans, Inside MERS 1 (Jan./Feb. 2004). MERS’s then CEO R.K. Arnold proclaimed that MERS’s mission was to “capture every mortgage in the country.” R.K. Arnold, Viewpoint, Inside MERS 1 (Jan. Feb. 2004). By May of 2007, it had tripled again to sixty million mortgage loans. Kate Berry, Foreclosures Turn Up Heat on MERS, Am. Banker 1 (July 10, 2007).

Subsequently, MERS, as Christopher Peterson has written, "was an important cog in the machine that churned out the millions of unsuitable, poorly underwritten, and incompletely documented mortgages that were destined for foreclosure" in the recent mortgage crisis. Peterson, Foreclosure, supra 4 at 1407. As Wake Forest Law School Professor Tanya Marsh observed in 2011, many scholars and policymakers found that MERS's lack of transparency, along with the increasing complexity of transactions, contributed to the recent financial crisis. Foreclosures and the Failure of the American Land Title Recording System, 111 Colum. R. Rev. 19 (2011) (Sidebar). The New York Times reported in 2009 that MERS had "played an integral, if unsung, role in the proliferation of mortgage-backed securities that fueled the housing boom." Mike McIntire, Tracking Loans Through a Firm that Holds Millions, April 23, 2009, at B1.

B. MERS increased the costs of enforcing property rights and left homeowners without recourse to challenge wrongful foreclosures.

MERS's up-front savings for financial institutions that securitized mortgages came at the expense of certainty and enforceability of property rights. When the mortgage backed securities market crashed, MERS frequently could not identify and locate the holders of the mortgage notes that had been bundled. Heekin, supra p. 5 at 191; Gloria J. Liddell and Pearson Liddell, Jr., Robo Signers: The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact Upon Stakeholders, 16 Chap. L. Rev. 367 (2012). The principal

issue that has caused foreclosures to be set aside has been the inability of many foreclosing lenders to produce the original mortgage note when called upon to do so. Heekin, supra 4-5 at 171.

However, such foreclosures are only ever set aside after protracted, expensive foreclosure litigation. The reduced ability to clearly ascertain property rights has thus led to tremendous costs in the enforcement of property rights. As Professor Levitin observes, the rise of foreclosures and foreclosure litigation in 2007 revealed how MERS, and its alterations to the processes of mortgage transfer, “shifted costs from deal formation to deal enforcement.” Levitin, supra at 649. When one compares these costs to the costs of record-keeping that the industry targeted for elimination, $10 per recordation, amounting to around $30 per loan, seems a small amount to pay to protect a family’s interest in the ability to discover who owns their loan, who would execute a foreclosure proceeding against them, and to challenge a party attempting to do so on the basis of mistake or fraud. The costs of recordation that the industry now “saves” constitutes only a very small fraction of each $125,000 loan, and has come at the loss of the security of someone’s *home*. Furthermore, MERS has shifted the costs of resolving the problems caused by MERS’s poor documentation practices to courts of the same cities, now suffering as a result of the foreclosure crisis, at the expense of whom large investment banks “saved” those initial costs in recording fees.

C. Surveys, audits and public media have exposed the inaccuracy of records in the MERS database.

It is practically impossible to track errors or detect fraud through the MERS system both because MERS does not require that its members record the necessary documentation and because MERS does not make its records available to the public. Because MERS records are shrouded in secrecy, it is also impossible to know just how incomplete or inaccurate MERS records are. However, surveys and reporting by public media have suggested that the MERS database is alarmingly inaccurate.

One survey of 396 foreclosure cases in six judicial foreclosure states found that "the plaintiff asserting the right to foreclose matched the identified 'investor' in MERS database only twenty percent of the time." Alan M. White, Losing the Paper-Mortgage Assignments, Note Transfers and Consumer Protection, 24 Loy. Consumer L. Rev. 468, 486 (2012). An audit in California, a non-judicial foreclosure state, found that the beneficiary on the foreclosure sale deed only matched MERS's "investor" field forty-two percent of the time. Id. at 487 (citing Aequitas Compliance Solutions, Inc., Foreclosure in California: A Crisis of Compliance 7 (2012)). This figure excluded cases where MERS did not disclose an investor. Id.

In 2011, the New York Times reported that MERS and its member banks "apparently lost or mistakenly destroyed loan documents" in thousands of cases,

and often confused and misrepresented which entities owned mortgage notes. Michael Powell and Gretchen Morgenson, MERS? It May Have Swallowed Your Loan, N.Y. Times, March 6, 2011, at BU1. Homeowners were left to try to contact mortgage servicing and origination companies, or federally insured banks, which often did not have accurate records of their own, and which collapsed during the foreclosure crisis by the hundreds. Peterson, Two Faces, supra p. 9, at 126; Worth Civils & Mark Gongloff, Subprime Shakeout: Lenders that Have Closed Shop, Been Acquired or Stopped Loans, Wall St. J. Online;[8] Failed Bank List, Federal Deposit Insurance Corporation (FDIC).[9]

D. Court proceedings and federal agency investigations have further exposed the inaccuracy of records in the MERS database.

Mortgage servicing companies, banks, courts and government agencies have all expressed astonishment at the extent to which MERS database is inaccurate. In 2009, a Florida mortgage origination and servicing company called Diversified Mortgage (Diversified) sued MERS over the uncertainty in ownership of Florida mortgages registered on MERS. Diversified complained that MERS may have allowed Diversified's trading partners to list themselves as owners of Diversified's loans without permission from Diversified. Peterson, Two Faces, supra p. 9, at

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[8] Available at <http://online.wsj.com/public/resources/documents/info-subprimeloans0706-sort.html> (last visited March 13, 2015).

[9] Available at <http://www.fdic.gov/bank/individual/failed/banklist.html> (last visited March 13, 2015).

131. Diversified claimed that when asked to produce a list of all its trading partners that may have made this claim, MERS could not or refused to do so, eventually became "confusing and hostile," and "demanded that Diversified not attempt further contact with MERS." Id. at 132. Diversified then learned that other third-party financial institutions had initiated foreclosure proceedings on mortgages that Diversified believed it owned. Id. at 132-33.

In another Florida case, Judge Jennifer Bailey, a circuit court judge in Miami stated of 60,000 foreclosures filed in 2009 in her court, "[A]lmost every single one of them… represents a situation where the bank's position is constantly shifting and changing because they don't know what the Sam Hill is going on in their files." Transcript of Hearing on Order to Show Cause at 5, HSBC Bank USA v. Eslava, No. 1-2008-CA-055313 (Fla. Cir. Ct. May 6, 2010). Janis Smith, a spokeswoman for Fannie Mae, admitted Fannie Mae kept its own records and that "We would never rely on it [MERS] to find ownership." Powell and Morgenson, supra p. 32.

In 2011, the Federal Reserve, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision conducted an on-site review of MERSCORP and MERS. They found, as they wrote in an Interagency Report on their review of foreclosure policies and practices, significant weaknesses in MERS's oversight, management supervision and corporate governance that merited bringing formal

enforcement action against MERS under the Bank Service Company Act and the Federal Deposit Insurance Act. Federal Reserve, Office of the Comptroller of the Currency, and Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices 10-11 (2011). Additionally, the Interagency Report found that servicers had failed in conducting appropriate due diligence assessments of and quality control processes pertaining to MERS, by failing to monitor, evaluate, and appropriately manage the MERS contractual relationship, assess internal control processes at MERS, ensure the accuracy of servicing transfers, and ensure that servicers' records matched MERS records. Id.

E. MERS's inaccuracy affects not only the properties for which it is named as mortgagee, but all properties adjoining those properties.

Not only is it difficult and sometimes impossible to track down who is the beneficial owner of the borrower's obligation, but MERS clouds or renders unmarketable properties of neighbors to a foreclosed property in other respects. As David Woolley, a California Licensed Land Surveyor and Certified Fraud Examiner with over two decades of experience, has noted, MERS does not comply with first in time (race) or constructive or actual notice statutes, so senior/junior property rights cannot be determined when discrepancies arise in property boundary lines. David Woolley and Lisa Herzog, MERS: The Unreported Effects of Lost Chain of Title on Real Property Owners, 8 Hastings Bus. L. J. 365, 366 (2012). Thus, MERS destroys adjoining property rights and records of

homeowners who never defaulted on mortgages and are now forced to litigate boundary disputes. Id.

CONCLUSION

MERS has largely replaced the formerly transparent public record of mortgage interests with a partial, inaccurate and inaccessible private registry that greatly increased the likelihood of fraud and litigation. For the first time in the history of the nation, there is no longer an authoritative public record of interests in land in each county. For the above reasons, to uphold Pennsylvania law, and to allow Montgomery County to begin to reconstitute the damage to the record MERS has wrought, the Order on Appeal should be affirmed.

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Dated: March 23, 2015

CERTIFICATES

I, Max Weinstein, hereby certify that:

1. I caused a true and correct copy of the foregoing Brief of Amicus Curiae to be served upon all counsel of record via the Court's ECF system, in accordance with L.A.R. Misc. 113.4, on this the 23rd day of March, 2015.
2. The Brief of Amicus Curiae was filed with the Court via the Court's ECF system, and by Fedex, postage prepaid, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.
3. I am admitted to the bar of the Third Circuit.
4. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).
5. This Brief further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Times New Roman.
6. In addition, I certify that the Brief filed electronically is identical to the Brief that is being filed in paper form. I also certify that the document

was subject to a virus check pursuant to the Center's virus check system, Microsoft Endpoint Protection, and no virus was detected.

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