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INTERESTS OF AMICI CURIAE

Amici are non-profit legal services and public interest organizations who have special expertise in defending foreclosures and in documenting how the mortgage market works. *Amici* South Brooklyn Legal Services, Jacksonville Area Legal Aid, Inc., Empire Justice Center, Legal Services for the Elderly, Queens Legal Aid, Legal Aid Bureau of Buffalo, Legal Services of New York City--Staten Island, Fair Housing Justice Center of HELP USA, and AARP's Foundation Litigation and Legal Counsel for the Elderly provide free legal representation to low-income individuals and families who are victims of abusive mortgage lending and servicing practices, and who are at risk of foreclosure. *Amici* Center for Responsible Lending, National Consumer Law Center, National Association of Consumer Advocates, and Neighborhood Economic Development Advocacy Project are non-profit research and policy organizations dedicated to exposing and eliminating abusive practices in the mortgage market. AARP advocates on behalf of consumers in the mortgage marketplace and through its Public Policy Institute conducts research on a wide variety of issues affecting older persons, including subprime mortgage lending and mortgage broker practices.

Collectively, *amici* represent or counsel thousands of low to moderate income homeowners each year. *Amici* prevent foreclosures through defense of foreclosure actions in court; negotiating with foreclosing lenders to address

servicing abuses that inflate mortgage balances and to modify mortgages to give homeowners a fresh start; filing administrative claims with city, state, and federal agencies; conducting community outreach and education to address predatory lending and abusive servicing; and working on various policy issues to protect consumers and prevent abusive mortgage lending and servicing practices.

The Mortgage Electronic Registration Systems, Inc. (“MERS”) has a substantial and detrimental impact on *amici* as it curtails their ability to conduct research and advocacy and impairs the rights of their homeowner clients. In particular, MERS’ failure to conform to New York law significantly undermines the public interest in preserving the free public database created by land and court records and imposes substantial harms on *amici’s* homeowner clients. Therefore *amici* urge this court to reverse the decision below and to find in favor of Respondents-Appellants.

PRELIMINARY STATEMENT

Through their extensive experience representing individual homeowners and closely studying both the national and local mortgage markets, *amici* have learned first-hand the detrimental effect of MERS’ electronic registration system on homeowners, and its destructive impact on the public land records that serve the public interest in a variety of critical ways. Although this case turns on a question of New York law, *amici* and the homeowners they represent nationwide have

experienced the same obstacles, confusion, and frustration that are created by the MERS system in New York State.

The MERS system harms homeowners and undermines the public interest by concealing information that is essential both to the maintenance of accurate public land and court records, and to individual homeowners, particularly those who seek redress for predatory mortgages or face foreclosure. Three issues highlight the importance of these concerns to homeowners and to the public interest. First, because MERS obfuscates the true owner of the note, MERS creates significant and detrimental confusion among borrowers and homeowners, their advocates, and the courts. Second, MERS frustrates established public policy, which dictates that title information must be publicly available, thus causing harm to state and local governments, advocacy groups, and academic researchers who routinely rely on public database information to inform legislative decision-making, to support law enforcement, and to advance policy solutions to a wide variety of housing and mortgage issues. Third, MERS' routine practice of improperly commencing foreclosure actions solely in its name, even though it is not the true owner of the note, flaunts courts rules and raises significant standing concerns. Accordingly, *amici* urge this Court to reverse the decision of the court below and find in favor of Respondents-Appellants Edward P. Romaine and the County of Suffolk, and against Petitioners-Respondents MERS.

ARGUMENT

I. **The MERS System Was Designed Without Regard to Consumers' Rights**

MERS is the brainchild of the mortgage industry, designed to facilitate the transfer of mortgages on the secondary mortgage market and save lenders the cost of filing assignments. *See, e.g.,* Br. for Petitioners-Respondents MERS (hereinafter “MERS Br.”) at 6-7 (listing the founding members of MERS as, *inter alia*, Mortgage Bankers Association of America, the Federal National Mortgage Association...and others within the real estate finance industry); *Record on Appeal* (hereinafter “R. ___”) at 604-6. (MERS is in an “administrative capacity to serve the sole purpose of appearing in the county land records”). MERS is not a mortgage lender; nor does it ever own or have any beneficial interest in the note or mortgage. *See, e.g., Merscorp, Inc. v. Romaine*, No. 9688/01, slip op. at 2 n.3 (N.Y. Sup. Ct., Suffolk Co. May 12, 2004); Informal Op. New York State Att’y Gen 2001-2 (April 5, 2001), 2001 N.Y. AG LEXIS 2; R. at 727-28. Nevertheless, MERS substitutes its name on the public records for the name of the actual owners of mortgage loans. In so doing, MERS is rapidly undermining the accuracy of the *public* land and court records databases, establishing in their place a *proprietary* national electronic registry system that “tracks” beneficial ownership and servicing rights and whose information is inaccessible to the public. Yet the design of MERS’ registration system and foreclosure procedures considered neither the public’s interest, nor the

rights and interests of consumers. *See, e.g.*, Phyllis K. Slesinger and Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 811, 814-15 (1995) (MERS initially sought input from industry representatives; no input sought from consumers).

Not surprisingly, MERS operates in derogation of the rights and interests of consumers and the public interest. MERS claims that the MERS system is beneficial to consumers because the “cost savings are substantial,” the flow of funds are sped up, and the consumer can determine which company services her mortgage by calling a toll-free number. MERS Br. at 9-11, 37-38. However, these arguments are unsupported and disregard the significant obstacles and confusion that MERS creates. As described below, the detrimental effects of MERS—the hiding of the true note and mortgage holder and the insulation of the holder from potential liability in situations involving predatory loans—substantially outweigh any purported benefit to consumers of the MERS system. Indeed, MERS is fundamentally unfair to homeowners who are trapped in the system because it transmutes public mortgage loan ownership information, required to be recorded in the public databases, into secret and proprietary information, inaccessible to both the borrower and the public.

II. MERS' Claims That the MERS System Is Beneficial to Consumers Are Unsupported.

MERS has not ushered in a beneficent new regime in the mortgage lending industry, nor does it impart cost savings or greater access to information to homeowners. *See* MERS Br. at 11, 37, 39. In fact, the opposite is true. The only beneficiaries of the MERS system are MERS and its member lenders and servicers. The losers are millions of homeowners who are unwittingly drawn into MERS' virtual black hole of information, and the public at large. Far from filling an information void, the MERS system creates an information drain, removing the true note holder's identity from the public records and substituting MERS in its stead. Significantly, while systematically eliminating any public record of mortgage loan ownership and assignments, MERS has not even bothered to maintain a private database of intermediate assignments—tracking only the identity of the loan servicer. R. at 635-637. As a result, the judges and court staff who are forced to deal with the confusion spawned by the increasing number of land records and foreclosures filed in the name of MERS can also be counted among the casualties of the MERS system.

Any cost savings resulting from the MERS system benefit its member lenders, who are freed from the costs of filing mortgage assignments, not homeowners or the public. These cost savings are touted as MERS' core purpose: "This [MERS process] eliminates the need to record an assignment to your

MERS® Ready buyer, saving on average \$22 per loan.” (“What is MERS?” promotional materials) and “Save at least \$22 on each loan by eliminating assignments.” (MERS benefit materials). *See also* http://www.mersinc.com/why_mers (last visited September 20, 2006).

Moreover, MERS’ assertion that homeowners are the beneficiaries of the MERS system simply cannot be reconciled with the practices espoused by MERS or those of its members. MERS Br. at 11, 38. While MERS claims that its member lenders pass on savings to their borrowers, MERS Br. at 11, there is no indication this is actually happening; nor is it any part of the MERS sales pitch to lenders. To the contrary, thanks to MERS, an *additional* fee frequently appears on the HUD-1 Settlement Statement: a MERS fee of \$3.95. *See* R. at 48. MERS encourages its members to charge this additional fee:

- Q. Can I pass the MERS registration fee on to the borrower?
- A. YES. On conventional loans you may be able to pass this fee on to the borrower, but you should check with your legal advisors to ensure that you are in compliance with federal and state laws. On government loans, please check with your local field office for availability and approval.

(MERS promotional FAQ).

There is no record evidence that any costs savings are passed on to borrowers. The opposite is true. The \$3.95 MERS assignment fee is built into the standard fees charged by lenders at closing and variously denominated as

“origination fee,” “underwriting fee,” “processing fee,” “administration fee,” “funding fee,” etc. on the HUD-1 settlement sheet. Under the MERS system, it is MERS and its members who are gaining financially, clerk’s offices which are deprived of valuable operating funds, and consumers who are losing ground.

MERS erroneously touts its system as providing greater access to information through the availability of a toll-free number to identify the homeowner’s loan servicer. *See R.* at 48; *MERS Br.* at 37, 39. MERS’ repeated emphasis, *MERS Br.* at 9-10, 39, on this issue is a red herring. The identity of the servicer is well known to the homeowner, who receives the servicer’s monthly bills and makes mortgage payments to the servicer. In fact, the identity of the servicer is perhaps the only information homeowners know about their loan once MERS is involved. MERS does not offer homeowners a toll-free number to learn who actually owns their note and mortgage; indeed MERS does not track that information itself. Yet this is the key piece of information that homeowners no longer possess and are unable to access because MERS has eliminated it from the public records.

III. Homeowners Have a Right to Know Who Owns Their Loans.

MERS’ existence is justified by a slender reed of an opinion letter of its counsel, a letter which cavalierly asserts that “there is no reason why, under a mortgage, the entity holding or owning the note may not keep the fact of its

ownership confidential. . . The public has no significant interest in learning the true identity of the holder of the note.” R. at 731. This self-serving opinion is utterly incorrect, and dangerously ignores consumer rights and the strong public interest in maintaining an accurate and complete public recordation system.

The 2001 Opinion of the Attorney General of the State of New York is a clear refutation of MERS’ foundational principle that MERS’ elimination of public records does not violate public policy:

Designating MERS as the mortgagee in the mortgagor-mortgagee indices would not satisfy the intent of Real Property Law’s recording provisions to inform the public about the existence of encumbrances, and to establish a public record containing identifying information as to those encumbrances. If MERS ever went out of business, for example, it would be virtually impossible for someone relying on the public record to ascertain the identity of the actual mortgagee if only MERS had been designated as the mortgagee of record.

2001 N.Y. Op. Attorney General 1010; 2001 N.Y. AG LEXIS 2.

Moreover, the importance of maintaining public records that accurately identify the mortgage holder has assumed greater importance in recent years, as mortgages are increasingly transferred into the secondary market and are only rarely retained by the originating mortgage lender. A booming secondary mortgage market has emerged with the issuance of mortgage-backed securities which are sold to Wall Street firms in pools and securitized. These securitized mortgages have skyrocketed from \$11 billion in 1994 to more than \$500 billion in 2005. Inside B&C Lending at 2 (February 3, 2006).

What this securitization boom means for consumers is that the entity that owns the note and mortgage is likely to change several times over the life of the loan. Before MERS, the easiest way to determine the current owner was to check the public records for the last assignment of the mortgage.¹ In the MERS system, however, assignments are never filed except when the mortgage is initially assigned to MERS or assigned to a non-MERS member mortgagee. As a result, when MERS is the nominee for a mortgage, the homeowner cannot determine who owns her note by checking the public records, nor can she obtain this information from MERS. The MERS system thus actively subverts the public policy of maintaining a transparent, public title history of real property.

It is essential for consumers to be able to identify the owner of their loan, since the owner alone retains the power to make certain decisions about the loan, particularly when borrowers fall behind. Knowing the identity of the servicer is rarely sufficient for consumers who are having problems with their loans, as servicers often lack the necessary authority to enter into loan modifications with borrowers or restructure overdue payments. Borrowers may also benefit from direct contact with owners when servicers' interests in collecting late fees and collection fees run counter to borrowers' interests in bringing their loans current.

¹ The recording of an assignment is beneficial to the borrower, and the public, by openly stating the current owner of the mortgage.

Thus, the homeowner's ability to locate the owner of the note and mortgage is important both to informal resolution of payment delinquencies and when more serious problems arise.

The homeowner's inability to determine quickly who owns the note and mortgage also prevents the exercise of important rights under federal and state law and makes it difficult to adequately defend foreclosure proceedings. Federal law creates a right of rescission whenever a homeowner refinances a home, or otherwise enters into a nonpurchase money mortgage. If the lender fails to comply fully with the dictates of the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, the borrower is entitled to exercise the right of rescission for an extended three year period. 15 U.S.C. § 1635(f). When exercised, this right is extremely powerful: it cancels the lender's security interest or mortgage, credits all payments entirely to principal, relieves the homeowner of the obligation to repay any closing costs or fees financed, and provides the possibility of recovering statutory and compensatory damages. 12 C.F.R. § 226.23. Of critical importance in the context of this proceeding, the right to rescind may be asserted against assignees of the obligation, i.e. the note holder itself; in fact, rescission is one of the few tools available to homeowners to stop a foreclosure. 15 U.S.C. § 1641(c).

Unlike note holders, servicers are not liable for rescission, 15 U.S.C. §1641(f)(1), and some courts have refused to honor a homeowner's rescission even

where the servicer's identity is the only information available to the homeowner. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161 (9th Cir. 2002). While the Federal Reserve Board subsequently amended its Official Staff Commentary to clarify that service upon an agent of the holder, as defined by state law, is sufficient, where the creditor does not designate a person to receive the notice of rescission, 69 Fed. Reg. 16,769 (Mar. 31, 2004), many ambiguities remain and courts have continued to question the adequacy of notice unless given to the holder of the loan. *See, e.g., Roberts v. WMC Mortg. Corp.*, 173 Fed. Appx. 575 (9th Cir. 2006). Prudent practice makes it essential for a rescinding homeowner to identify and notify the holder.

Identifying the holder of the note is dependent upon accurate land records, as servicers incur no liability for withholding this information. While the Truth-in-Lending Act requires servicers to tell borrowers, upon request, who the holder is, 15 U.S.C. §1641(f)(2), there is no requirement that the response be timely and there is no remedy for its violation. The experience of *amici* is that servicers rarely, if ever, provide this information.

Service upon MERS is likewise ineffective, as MERS is neither the holder nor the servicer. *See Mortg. Elec. Registration Sys. v. Estrella*, 390 F.3d 522 (7th Cir. 2004) (MERS is a nominee on the mortgage only); *Mortg. Elec. Registration Sys. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784 (Neb. 2005) (MERS argues

that it is only nominee of mortgages). As “nominee,” MERS is not an agent of the holder for purposes of receipt of rescission notices. *Cf., e.g., Black’s Law Dictionary* 727 (6th ed. abr.) (defining nominee as “one designated to act for another as his representative in a rather limited sense”); *Mortg. Elec. Registration Sys. v. Neb. Dep’t of Banking & Fin.*, 704 N.W.2d 784 (Neb. 2005) (MERS argues that it is only nominee of mortgages and is contractually prohibited from exercising any rights to the mortgages). Moreover, the history of litigation involving MERS confirms that it would be foolish to rely on notice to MERS as notice to the holder of the mortgage. *See, e.g., Freedom Mortg. Corp. v. Burnham Mortg., Inc.*, 2006 WL 695467 (N.D. Ill., Mar. 13, 2006) (lender arguing that it is not bound by foreclosure bids of MERS as its nominee); *Countrywide Home Loans v. Hannaford*, 2004 WL 1836744 (Ohio Ct. App. Aug. 18, 2004).

This leaves a homeowner in a trick box. In order to exercise an important right, the homeowner must provide notice to the holder of the note or its agent. MERS does not serve as the holder, nor does it serve as the holder’s agent for this purpose; it does not believe it is required to comply with the Truth-in-Lending Act at all, according to a memo prepared by MERS’ counsel (R. at 745-6); and it refuses or is incapable of providing the homeowner with the name or address of the holder of the note. Surely this is not an unexpected consequence of the MERS system. As architect of a system that, by design, withholds information from

homeowners that is key to their exercising a critical federal right, MERS has and continues to infringe on homeowners' rights of rescission.

MERS' obfuscation of the true holder of the note further infringes on homeowners' rights to rescind abusive, high-cost home loans pursuant to New York State's Banking Law 6-1, which was enacted in October 2002 to counter predatory lending abuses in the mortgage market. Many other state and common law rights of borrowers are also imperiled by the MERS system. In foreclosure proceedings, assignee note holders often claim that they are a holder in due course when a consumer raises certain defenses such as common law fraud or deceptive acts and practices (codified in New York State as General Business Law § 349). Before MERS, consumers could easily access the complete chain of title through the public records by identifying each assignment of the loan. Under the MERS system, all of this information is lost to the homeowner, putting homeowners at a significant and unwarranted disadvantage in defending foreclosures.

IV. The MERS System Causes Significant Confusion Among Borrowers, and Has a Particularly Detrimental Impact on the Elderly and Other Vulnerable Borrowers Frequently Victimized by Predatory Lenders.

In the last decade scholars and government regulatory agencies examining mortgage lending practices, including predatory lending, have spotlighted the importance of creating transparency in the mortgage marketplace through improved disclosures to borrowers and enhanced consumer literacy. *See Curbing*

Predatory Home Mortgage Lending, U.S. Dept. of Housing and Urban Development and U.S. Dept. of the Treasury, 47 (2000), available at <http://www.huduser.org/publications/hsgfin/curbing.html> (“HUD-Treasury Report”). The MERS system flies in the face of this goal—obfuscating the mortgage process and violating consumers’ right to know. The confusion engendered by MERS has a particularly detrimental impact on the most vulnerable homeowners.

According to the 2000 Census, 12.9 percent of New York State’s population is comprised of people who are 65 years and older. Of these elderly state residents, over 66% are homeowners, while 42.8% of seniors residing in New York City own their homes.² These numbers suggest that a large number of the consumers affected by the MERS system are older New Yorkers.

Declining vision, hearing, mobility and cognitive skills make it more difficult for older borrowers to extract the critical information they need from federally mandated disclosure documents. See Alan M. White and Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L & POL’Y REV 233. Like many consumers, older adults often can not understand mortgage documents, as they are written in extremely complex and technical language. MERS amplifies this

² See Housing Characteristics: 2000 (US Census Bureau 10/01).

problem by intentionally layering new legal terms, and inserting a new and foreign legal entity, into already complicated consumer contracts and transactions.

As a result, many of *amici's* clients are unaware of MERS' involvement and are thoroughly confused when MERS begins to act on behalf of their servicer or mortgagee. The confusion and obstacles that are created by this MERS system are significant, particularly for homeowners whose predatory loans put them at an increased risk of default and foreclosure. For example, one of SBL's elderly clients, in default on her mortgage, was receiving a tremendous number of solicitations from "foreclosure rescue" companies and mortgage brokers and lenders which promised to save her from foreclosure. When she received the foreclosure summons and complaint naming MERS as the plaintiff, she disregarded it because she thought that MERS was simply another company trying to scare her. As a result of her confusion over MERS, the client nearly lost her home.

Government agencies and consumer organizations consistently report that older citizens are disproportionately victimized by predatory mortgage brokers and lenders. *See Consumer Protection: Federal and State Agencies in Combating Predatory Lending*, United States General Accounting Office, Report to the Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate (January 2004), pp. 99-102. Older homeowners are more likely to have

substantial equity in their homes, making them attractive targets. Their fixed incomes (over 20% of elderly city residents live below the poverty level) and age-related mental and physical impairments, affecting nearly half of city residents, make them more vulnerable to mortgage abuse.³ In addition, many older New Yorkers living in inner-city homes lack access to traditional lending institutions, placing them at greater risk of becoming victims of high cost, predatory, subprime lenders. *See Associates Home Equity v. Troup*, 343 N.J. Super. 254 (App. Div. 2001).⁴

Subprime lending has proven to offer opportunities for unscrupulous – or predatory-lenders to take advantage of borrowers by charging excessive interest rates and fees and using mortgage proceeds to pay inflated costs for home repairs or insurance products. The most common victims of these predatory lending practices have been found to include the elderly, minorities, and low income households.

Kimberly Burnett, Chris Herbert, et al., *Subprime Originations and Foreclosures in New York State: A Case Study of Nassau, Suffolk, and Westchester Counties* (2002) at ii.

By creating an additional, confusing overlay to the predatory loan transaction, MERS' involvement serves to compound the very significant problems

³ See U.S. Census 2000; *see also* American Community Survey, U.S. Census Bureau (2005).

⁴ After finding that the lender had targeted a 74 year old African American home owner in Newark, the Court in *Troup* held that the lender “participated in the targeting of inner-city borrowers who lack access to traditional lending institutions, charged them a discriminatory interest rate, and imposed unreasonable terms.” *Associates Home Equity*, 343 N.J. Super.254 (App. Div. 2001).

that already exist for homeowners with predatory loans. MERS shields these unscrupulous lenders, hiding the identities of assignees and muddying records which are vital to victims seeking immediate redress.

V. The Public Has a Significant and Enduring Interest in Preserving and Protecting the Free Public Databases Created by the Land and Court Records of This Nation.

MERS . . . represents the future of foreclosure: a brave new world of anonymity and unaccountability . . . The ostensible purpose is to save companies the county filing fees they often must pay when they buy mortgages or transfer servicing. An added benefit: if a foreclosure filing becomes necessary that filing, too, can be in MERS' name. That makes it harder for journalists, community groups and researchers to determine whose mortgages are actually ending in foreclosure. If MERS has its way, it will become increasingly difficult to tell whose mortgages are failing.

Richard Lord, AMERICAN NIGHTMARE: PREDATORY LENDING AND THE FORECLOSURE OF THE AMERICAN DREAM 157 (Common Courage Press 2005).

A. Public land and court data records facilitate research investigating the root causes of a variety of mortgage and other land related problems.

The public land and court records have served as a vitally important, free and accessible source of data that have been relied upon by broad constituencies, including government, academics, non-profit advocacy organizations, businesses and private individuals throughout the past century. These records have assisted the legislative branches of government in formulating policy and providing a legislative response to crises, including redressing abusive mortgage lending

practices.⁵ See Zach Schiller, *Foreclosure Growth in Ohio* (2006), available at http://www.policymattersohio.org/pdf/foreclosure_growth_ohio_2006 (supporting recently enacted Amended Substitute Senate Bill No. 185, 126th Cong., which expanded the Ohio Consumer Sales Practices Act to cover mortgage lending);⁶ TRF, *Mortgage Foreclosure Filings in Pennsylvania* (2005), available at <http://www.trfund.com/resource/downloads/policypubs/Mortgage-Foreclosure-Filings.pdf> (Study resulting from Pennsylvania state legislative request to gather information and analyze foreclosures);⁷ Burnett et.al, *Subprime*

⁵ The studies listed represent only a small sampling of the numerous studies and reports reliant on public land and court records data that have influenced legislative decision-making. See e.g., The Reinvestment Fund (“TRF”), *Mortgage Foreclosure Filings in Delaware* (2006), http://www.trfund.com/resource/downloads/policypubs/Delaware_Foreclosure.pdf (Study commissioned by the Office of the State Bank Commissioner to analyze foreclosure activity in Delaware); TRF, *A Study of Mortgage Foreclosures in Monroe County and The Commonwealth’s Response* (2004), <http://www.banking.state.pa.us/banking/cwp/view.asp?a=1354&q=547305> (Study commissioned by the Pennsylvania Department of Banking and the Housing Finance Agency to investigate foreclosure trends in Monroe County); Lynne Dearborn, *Mortgage Foreclosures and Predatory Lending in St. Clair County, Illinois 1996-2000* (2003) (U.S. Department of Housing and Urban Development (“HUD”) funded study of loan terms and foreclosure trends commissioned by St. Clair County); Lorain County Reinvestment Fund, *The Expanding Role of Subprime Lending in Ohio’s Burgeoning Foreclosure Problem: A Three County Study of a Statewide Problem*, (2002), <http://cohhio.org/projects/ocrp/SubprimeLendingReport.pdf> (Study of foreclosure trends in three Ohio counties).

⁶ See also Zach Schiller and Jeremy Iskin, *Foreclosure Growth in Ohio: A Brief Update* (2005), http://www.policymattersohio.org/pdf/Foreclosure_Growth_Ohio_2005.pdf; Zach Schiller, Whitney Meredith, & Pam Rosado, *Home Insecurity 2004: Foreclosure Growth in Ohio*, available at http://www.policymattersohio.org/pdf/Home_Insecurity_2004.pdf.

⁷ See also Pennsylvania Department of Banking, *Losing the American Dream: A Report on Residential Mortgage Foreclosures and Abusive Lending Practices in Pennsylvania* (2005), available at http://www.banking.state.pa.us/banking/lib/banking/about_dob/special%20initiatives/mortgage%20forecloser/statewide%20foreclosure%20report.pdf. This report was presented to the Pennsylvania House of Representatives by the Secretary of the Pennsylvania

Originations and Foreclosures in New York State (Study supported passage of New York predatory lending law, N.Y. Banking Law § 6-1).⁸

The land and court records data have been utilized by the executive branches of government to inform their regulatory activities related to land ownership, *see e.g.* Ramon Garcia, *Residential Foreclosures in the City of Buffalo, 1990-2000* (2003)⁹ (New York Federal Reserve Bank investigation),¹⁰ and are a source of information for law enforcement agencies seeking to prosecute offenders for mortgage fraud, property flipping and other criminal mortgage-related offenses.¹¹ *See e.g. People v. Larman*, No. 06253-2005 (Kings County Supreme Ct. Sept. 20, 2006) (Indictment for fraudulent mortgage transactions); *People v. Sandella*, No. 02899-2006 (Kings County Supreme. Ct. Sept. 27, 2006) (indictments for multi-

Department of Banking and includes information from several sources, including TRF, Mortgage Foreclosures in Pennsylvania.

⁸ Executive Summary available at: http://www.abtassociates.com/reports/ES-Suburban_NY_Foreclosures_study_final.pdf (Public records and HMDA data demonstrated that subprime foreclosures impacted both urban and suburban communities)

⁹ This report is available at: http://www.newyorkfed.org/aboutthefed/buffalo/foreclosure_study.pdf (10 year study of foreclosure trends in Buffalo)

¹⁰ The following are a small sampling of executive branch studies relying on data in the public domain. *See e.g.*, Bunce, Harold, Gruenstein, Debbie et al., *Subprime Lending: The Smoking Gun of Predatory Lending?* (HUD 2001), <http://www.huduser.org/Publications/pdf/brd/12Bunce.pdf>; Dearborn, *Mortgage Foreclosures in St. Clair*.

¹¹ For a sampling of New York criminal indictments relying on land records data, *see People v. Albertina*, 09141-2005 (Kings County Supreme Ct. Sept. 28, 2006) (Attorney General indictment for a multi-million dollar scheme to sell houses with fake deeds); *People v. Constant*, No. 01843A-2006 (Suffolk Supreme Ct. Oct. 12, 2006)(Suffolk County grand jury indictment of six for roles in real estate scam); *Altegra Credit Co. v. Tin Chu, et al.*, No. 04326-2004 (Kings County Supreme Ct. March 25, 2004)

million dollar residential property flipping scheme).¹² These data also inform local governments about the cost and impact of abusive lending practices on both their constituents and the public purse. See T. Nagazumi & D. Rose, *Preying on Neighborhoods: Subprime mortgage lending and Chicagoland foreclosures, 1993-1998* (Sept. 21, 1999)¹³ (NTIC study investigated the effects of subprime mortgage lending on foreclosures in Chicago); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 Conn. L. Rev. 355 (2006).

¹² Criminal property flipping is rampant throughout the country. For a sampling of this problem see e.g. Press Release, Office of Attorney General, N.J. Div. of Criminal Justice Targets financial crime (Nov. 14, 2004), <http://nj.gov/lps/newsreleases04/pr20041117b.html> (Indictment of North Jersey businessman for mortgage fraud scheme that netted more than \$677,000 in fraudulent loans); *Lessons learned from the laboratory* (Community Law Center (CLC) 2002)(A report by the CLC – Baltimore City flipping and Predatory Lending Task Force (47 individuals were indicted, pled guilty, or were convicted in federal court for property flipping and mortgage fraud)), <http://www.communitylaw.org/Executive%20Summary.htm>; see also Press Release, Sen. Mikulski Formed Task Force and Secured Federal Assistance to Address Flipping Problem (Oct. 9, 2003), <http://mikulski.senate.gov/record.cfm?id=213248> (70 people convicted of property flipping in Baltimore); Press Release, FBI, U.S. Attorney's Office, Ohio, (May 9, 2006); Press Release, U.S. Attorney's Office, S.D. Mississippi (Feb.16, 2006); Press Release, Office of the Attorney General, Florida (June 25, 2004)

¹³ This report is available at: <http://www.ntic-us.org/preying/preying.pdf> ; For a sampling of other relevant studies, see D. Rose, *Chicago Foreclosure Update 2006* (July), <http://www.ntic-us.org/documents/ChicagoForeclosureUpdate2006.pdf> (NTIC study analyzes foreclosure trends in Chicago); D. Rose, *Chicago Foreclosure Update 2005*, http://www.ntic-us.org/currentevents/press/pdf/chicagoforeclosure_update.pdf; William C. Apgar & Mark Duda, *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom 1996-2000* (May 11, 2005), <http://www.nw.org/Network/neighborworksprogs/foreclosuresolutions/documents/Apgar-DudaStudyFinal.pdf> (Documents the financial costs of foreclosure to municipalities); Apgar, *The Municipal Cost of Foreclosures: A Chicago Case Study* (Feb. 27, 2005), http://www.hpfonline.org/PDF/Apgar-Duda_Study_Full_Version.pdf (Also documents indirect costs that result from the domino effect that foreclosures have on communities).

Non-profit groups and academics rely upon data in the public domain to illustrate trends, spotlight the impact of various mortgage practices on minority and low income communities and uncover abusive practices that injure their constituencies. They use this information to advocate for policy initiatives that benefit the public interest. See e.g. Nagazumi, *Chicago Update 2006*; Apgar and Duda, *Collateral Damage*; Apgar, *Municipal Cost of Foreclosures*; Lindley Higgins, *Effective Community-Based Strategies for Preventing Foreclosures, 1993-2004* (2005),¹⁴ (A 2005 analysis of the factors that led to foreclosure generated proposals for foreclosure prevention programs)¹⁵; Neighborhood Housing Services (NHS) of Chicago, *Preserving Homeownership: Community-Development Implications of the New Mortgage Market* (2004) (Study of foreclosures from 1998-2003 proposes foreclosure prevention initiatives for community based organizations working cooperatively with private industry and federal, state, and local governments).¹⁶

¹⁴ This report is available at: <http://www.nw.org/network/pubs/studies/documents/foreclosureReport092905.pdf>.

¹⁵ See also Nagazumi, *Preying on Neighborhoods*; Richard Stock, Center for Business and Economic Research (CBER), *Predation in the Sub-Prime Lending Market: Montgomery County Vol. I., 1994-2001* (2001), <http://www.mvfairhousing.com/cber/pdf/Executive%20summary.PDF> (Study examines predatory lending in Montgomery County, Ohio).

¹⁶ This report is available at: http://www.nw.org/network/pubs/studies/documents/preservingHomeownershipRpt2004_000.pdf. See also Nagazumi, *Preying on Neighborhoods* at 36-37 (urging legislature to pass Illinois legislation to end predatory subprime lending and to disclose predatory pricing and practices to Illinois regulators and the public); Higgins, *Community-Based Strategies* at i. (Objective is to increase capacity of local community based

Businesses utilize the public land and court records data as the providers of research services that convert public information into customized databases. *See e.g.* NYForeclosures.com; Atlanta Foreclosure Report;¹⁷ Boston Foreclosure Report and Foreclosure Report of Chicago¹⁸). These data collection businesses serve a wide variety of business customers, including mortgage brokers seeking leads, bankruptcy attorneys, and real estate agents, as well as government and non-profit research entities. *See id.*¹⁹

B. The public databases have played an important role in facilitating understanding and government response to the recent “foreclosure boom.”

Land and court records data have become a particularly important public resource over the past decade, as the nation has experienced what some have characterized as a “foreclosure boom.” *See generally* Apgar and Duda, *Collateral*

organizations to revitalize communities); Apgar & Duda, *Collateral Damage* at 16 (Report identifies foreclosure avoidance strategies for municipalities).

¹⁷ *See* <http://www.equitydepot.net>.

¹⁸ *See* <http://www.chicagoforeclosurereport.com>.

¹⁹ Non-profit and government researchers that have relied on these data collection businesses to do the primary research legwork that provides them with land and court records data to support their analyses include, the Federal Reserve Bank of New York’s Buffalo Branch, *see* Ramon Garcia, *Residential Foreclosures in the City of Buffalo, 1990-2000* (2003); *see* Bunce, *Subprime Lending*; Kimberly Burnett, Bulbul Kaul, & Chris Herbert, *Analysis of Property Turnover Patterns in Atlanta, Baltimore, Cleveland and Philadelphia* (2004), http://www.abtassociates.com/reports/analysis_property_turnover_patterns.pdf; Debbie Gruenstein & Christopher Herbert, *Analyzing Trends in Subprime Originations and Foreclosures: A Case Study of the Boston Metro Area, 1995-1999* (2000), <http://www.abtassociates.com/reports/20006470781991.pdf>; Nagazumi, *Preying on Neighborhoods*; Rose, *Chicago Foreclosure Update 2006*.

Damage; see also Daniel Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Housing Pol’y Debate, Issue 1 (2006).²⁰ As subprime mortgage lending escalated from \$35 billion in 1994 to \$140 billion in 2000²¹ to more than \$600 billion in 2005, foreclosure rates jumped by an alarming 335.6%. See Robert Avery, Kenneth Brevoort, Glenn Canner, *Higher-Priced Home Lending and the 2005 HMDA Data* at A125 (Sept. 8, 2006).²² These skyrocketing subprime foreclosures disproportionately impacted low-income and minority communities. *Id.* at 63.

Struggling to understand the origins of this foreclosure crisis, government and researchers have turned to the public data. See *supra* Schiller; TRF, *Delaware*; TRF, *Pennsylvania*; Dearborn, *Mortgage Foreclosures in St. Clair*; Paul Bellamy, *The Expanding Role of Subprime Lending in Ohio’s Burgeoning Foreclosure*

²⁰ This report is available at: http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1701_immergluck.pdf#search=%22%22Immergluck%22%20and%20%22Geoff%22%22

²¹ See Neal Walters & Sharon Hermanson, *Subprime Mortgage Lending and Older Borrowers* (AARP Public Policy Institute), Data Digest Number 74 (2001). Data Digest available at: http://assets.aarp.org/rgcenter/consume/dd74_finance.pdf

²² This report is available at: <http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf>; “HMDA” refers to the Home Mortgage Disclosure Act, 12 USC § 2801 et. seq.; see also Margot Saunders and Alys Cohen, *Federal Regulation of Consumer Credit: The Cause or the Cure for Predatory Lending?* at 11 (Joint Center for Housing Studies 2004), http://www.jchs.harvard.edu/publications/finance/babc/babc_04-21.pdf

Problem: A Three County Study of a Statewide Problem, 1994-2001 (2002).²³ This effort to learn the root causes of the “foreclosure boom,” to understand whether particular regions or demographic groups are most affected by rising foreclosures, to evaluate the impact of these foreclosures on the surrounding community, and to address and seek to remedy any abuses that enabled this crisis to develop, has spawned a virtual explosion of research studies. *See e.g.* TRF, *Delaware*; Rose, *Chicago* (2006); Engel, *Do Cities Have Standing?*; Rose, *Chicago Foreclosure Update 2006*; Rose, *Chicago Foreclosure Update 2005* (Updating foreclosure activity in Chicago); Apgar & Duda, *Collateral Damage*; Apgar, *Municipal Cost of Foreclosures*; TRF, *Pennsylvania*; TRF, *Monroe County*; Nagazumi, *Preying on Neighborhoods*; NHS of Chicago, *Preserving Homeownership*; Dearborn, *Mortgage Foreclosures in St. Clair*; Paul Bellamy, *The Expanding Role*; Burnett, *Subprime Originations*; Garcia, *Buffalo supra* note 10; Bunce, *Subprime Lending*; Nagazumi, *Preying on Neighborhoods*.

Standing alone, land and court records data serve as a valuable resource to confirm the existence of the foreclosure boom, identify any key participants in the foreclosure process, and identify those geographic areas hardest hit. *See supra*, Dearborn, *Mortgage Foreclosures in St. Clair*; Stock, *Predation* at 8; Apgar,

²³ This report is available at: <http://www.cohhio.org/projects/ocrp/SubprimeLendingReport.pdf>

Chicago at 5.²⁴ In fact, research derived from courthouse and public land records motivated the North Carolina legislature to become one of the first states to crack down on predatory mortgage lending. *See Habitat for Humanity Refinances*, Coalition for Responsible Lending (updated July 25, 2000) (This ground breaking study examined refinances of affordable Habitat for Humanity mortgages into unaffordable predatory loans); David Rice, *Predatory Lending Bill Caught in Debate*, Winston-Salem Journal, April 27, 1999.

Land and court records data are even more valuable and informative when analyzed in conjunction with several other “puzzle pieces” of publicly available data. *See e.g.* Duda & Apgar, *Mortgage Foreclosures in Atlanta: Patterns and Policy Issues, 2000-2005* (2005)²⁵; *see* Apgar, *Collateral Damage*; Rose, *Chicago Foreclosure Update 2006*; Burnett, *Subprime Originations*. When combined with other sources of data, such as census tract and HMDA data, land and court records data enable researchers to layer information to develop a comprehensive picture that identifies the leading foreclosure filers, the geographic location and racial composition of foreclosure hotspots and the loan characteristics associated with concentrated and quick foreclosures. *See e.g.* Duda, *Atlanta* at 15; *see also*

²⁴Similarly, Mountain State Justice, a West Virginia legal services organization that represents victims of predatory lending, has conducted an annual review of foreclosure filings in the state since July 2001. *See* Report of West Virginia Foreclosures, available from Mount State Justice.

²⁵This report is available at: <http://www.nw.org/network/neighborworksprogs/foreclosuresolutions/documents/foreclosure1205.pdf>

Burnett, *Atlanta, Baltimore, Cleveland and Philadelphia* at iii; Nagazumi, *Preying on Neighborhoods* at 9; Stock, *Predation* at 1.

In the past, the availability of detailed public information has enabled researchers to pinpoint some of the root causes of increased foreclosures and, for example, informed the New York State legislature in crafting a legislative response to abusive practices associated with high cost loans. There, a New York study which combined public records data with HMDA data to identify subprime lenders and the distribution of subprime foreclosures demonstrated that subprime foreclosures were prevalent in suburban as well as urban areas.²⁶ *See* Burnett, *Subprime Originations*. Comprehensive research similarly enabled the State of Illinois and the City of Chicago to redress abusive lending practices and thereby put the brakes on the foreclosure boom in Chicago. *See e.g.* Nagazumi, *Preying on Neighborhoods* (study demonstrated that subprime foreclosures were both an urban and suburban problem; that most non-performing loans were subprime, and identified the top foreclosers of high interest loans); *see also*, subsequently enacted Illinois predatory lending law, 815 ILCS § 137. Data from land and court records

²⁶ The New York predatory lending law enacted April 1, 2003 can be found at N.Y. Banking Law § 6-1, N.Y. Gen. Bus. Law § 771-a, and N.Y. Real Prop. Acts. Law § 1302.

has played an important role in analyzing other trends in the mortgage market, such as identifying unfair or discriminatory lending patterns and practices.²⁷

Unfortunately, in recent years MERS' increasing emergence as a placeholder for the true note and mortgage holders in land and court records databases has corrupted these sources of data and undermined their utility as a research source.

C. Through its penetration of the public databases MERS has caused a dramatic deterioration in the quality and quantity of publicly available information.

In New York city alone, MERS has rapidly replaced true owners in the city maintained public database—ACRIS—increasing its filings from a nominal fewer than 100 in 2000, to approximately 90,000 in 2005 and an expected 120,000 filings in 2006.²⁸ Since the MERS label on the public records shields the identity of the

²⁷ Bunce, *Subprime Lending*; In 2001, a joint HUD and U.S. Dept. of the Treasury report found that “[i]n predominantly black neighborhoods, subprime lending accounted for 51 percent of refinance loans in 1998 – compared with only 9 percent in predominantly white neighborhoods.” *Curbing Predatory Home Mortgage Lending*, U.S. Dept. of Housing and Urban Development and U.S. Dept. of the Treasury, 47 (2000), <http://www.huduser.org/publications/hsgfin/curbing.html>.

²⁸ AARP accessed the New York City Department of Finance's Automated City Register Information System (ACRIS) website on September 12, 2006 to research the number of MERS, MERS as nominee and Mortgage Electronic Registration System filings in all boroughs for each of two months—March and August during the years 2000 through 2006. The results of this search are included below.

March 2000 7; August 2000 8; March 2001 610; August 2001 126;
March 2002 414; August 2002 663; March 2003 1,277; August 2003 2,785;
March 2004 4,384; August 2004 4,697; March 2005 7,064; August 2005 8,009;
March 2006 10,619; August 2006 10,411.

actual participants in the mortgage and foreclosure processes—the true note-holders and mortgagees, the MERS filings have created a significant hole in this important public database.

The void in the mortgage database will directly and measurably harm the constituents of community groups, such as the University Neighborhood Housing Program (UNHP), who will no longer reap benefits achieved through negotiations with the largest foreclosing entities in the Bronx, entities which have been identified through UNHP's tracking of information about Bronx residential lending.²⁹ These benefits have included negotiated loss mitigation procedures and the creation of an Asset Control Area program to renovate and sell 300 FHA insured foreclosed homes to qualified first time moderate-income homebuyers. Moreover, MERS' anticipated penetration of the Bronx multi-family market will likely cripple UNHP's Building Indicator Project (BIP), whose database has enabled the identification and repair of distressed rental housing. The BIP's database of more than 7,000 Bronx multifamily apartment buildings, including ownership, building size, housing code violation, city lien, and critically, mortgage

Estimated annual filings for 2000 and 2006 were based on the two months of filings for those years.

²⁹ UNHP's research shows MERS was plaintiff in 305 (11%) of the 2,770 auctions scheduled in the Bronx over the past 4 ½ years. If the use of MERS continues to grow, it will become increasingly difficult for groups like UNHP to track who is foreclosing in their neighborhoods and to undertake remediation efforts with the foreclosers that they have successfully engaged in the past.

holder data, has enabled UNHP to engage lenders who, in turn, have pressured building owners to make numerous repairs to Bronx rental housing stock.³⁰

New York is not alone in facing the deterioration of its public mortgage databases. MERS' penetration of the City of Chicago's database starkly presents this problem. In 1999, NTIC undertook its comprehensive study of subprime lending in the Chicago area over a five year period from 1993-1998. At that time, *no lender or mortgagee's identity* was hidden by the MERS label. *See Nagazumi, Preying on Neighborhoods* at 25. (Figure 10 displays the top 34 lenders responsible for high interest rate foreclosures in 1998). By 2005 MERS itself was identified as the largest foreclosing entity in Chicagoland, with 1,100 foreclosure filings. Hidden from public view were the identities of the actual foreclosing lenders and possibly the perpetrators of the most egregious lending practices. *See Rose, Chicago Update 2006* at 11 (Table 8 shows the most active foreclosing institutions in 2005). As in Chicago, MERS topped the list of the largest foreclosure filers during the period 2000-2005 in Atlanta, named as the foreclosing agent on 41,467 or 16.1 percent of all filings, and was the largest filer in

³⁰ Similarly, St. Ambrose Housing Aid Center, a housing advocacy group in Baltimore, Maryland representing homeowners victimized by predatory mortgage lending regularly searched the land records to identify homeowner victims of suspect lenders and to identify any assignees. St. Ambrose is no longer able to identify many of these assignees and can no longer assess their complicity in promoting the origination of abusive mortgages.

foreclosure tracts with very high foreclosure rates. Duda, *Atlanta* at 15 -17 & Figure 3-1.³¹

The erroneous identification of MERS as lender of record in Jefferson County and throughout the state during 2000 to 2002 tainted research into foreclosure trends in Kentucky. *See Steve C. Bourassa, Predatory Lending In Jefferson County: A Report to the Louisville Urban League, 2* (Urban Studies Institute, University of Louisville) (December 2003).³² As one of the largest foreclosers of predatory loans, MERS' presence on the public record masked the identity of its constituent lenders, the true mortgagees, and obscured the true make up of the loan portfolio foreclosed upon.

The MERS filing spreads a cloak of invisibility over any *member* mortgage/note-holder that purchases a loan following origination. The lender whose loose underwriting guidelines or careless oversight facilitated the origination and sale of foreclosure-prone loans is carefully hidden from public view by the MERS system. *See e.g.* Duda, *Atlanta* at 19. In shielding the identity of these mortgage transaction participants, the MERS label hobbles researchers, who, because of missing data, are less able to ascertain whether escalating

³¹Over the past year, from July 1, 2005-June 30, 2006, MERS, has also become one of the four top foreclosers in West Virginia. *See* Report of West Virginia Foreclosures, available from Mountain State Justice.

³² This report is available at: <http://www.lul.org/Predatory%20Lending%20Report.pdf>

foreclosures are caused by a small number of rogue players—who may be dealt with through enforcement actions—or are part of a systemic problem that requires a targeted legislative response. Whether this cloaking of its members' transactions resulted from a conscious plan or was simply a felicitous byproduct of MERS' money saving scheme, the result is the same—a dangerous and destructive attack on the public databases.

D. The MERS Shield Creates an Irretrievable Void in the Property Records that Harms Many Constituencies.

The void in the property records harms a broad array of entities and, unless this process is reversed, these data will be irretrievably lost to the public. Law enforcement agencies may be stymied in their efforts to investigate and prosecute criminal mortgage fraud and property flipping if deprived of important data sources on which they have relied in the past. *See, e.g., People v. Albertina; People v. Larman; People v. Sandella; People v. Constant; Altegra Credit Co. v. Tin Chu, supra.* State legislatures will face obstacles to understanding the root causes of mortgage-related problems and will be unable to identify offending entities if they can no longer rely on public databases that have served to inform them about past foreclosure crises in their jurisdictions. Similarly, local governments which have turned to the land and court records data to understand the origins of escalating foreclosures in their communities will no longer have the necessary data upon which to base their analyses. Instead, those lenders and

investors who are the primary offenders will be able to hide behind the cloak of invisibility provided by MERS.

E. Restoration and enhancement of the public database is critical to enable government to function effectively.

It is essential that the land and court records of this nation remain public and contain the information required by law—namely, the true identity of the participants in the mortgage transaction. Governments and researchers must continue to have the ability to evaluate the full range of public data, including the land and court records, in investigating the root causes of foreclosures and other problems and trends in the housing markets. Without this data they will be unable to discover whether specific entities are primarily responsible for increased foreclosures, or whether there is an industry-wide problem. They will be unable to assess which secondary market lenders facilitate abusive lending, or which servicers are quick to foreclose.

State and local government have a particular interest in preserving the integrity of the public data sources in the land and court records, as these records have been a key component of research analyzing the costs imposed by foreclosures on municipalities and neighboring homeowners and businesses. Concentrations of foreclosures impose a particularly high societal cost on surrounding neighborhoods (through reduced property values) and on government for neighborhood services (for increased policing, social services, fire and trash)

and reductions in the tax base. One recent study estimated that foreclosures in high foreclosure areas imposed costs up to \$34,000 on the city and up to \$220,000 on neighboring homeowners. *See* Apgar, *Municipal Cost of Foreclosures*; Apgar, *Collateral Damage*; Duda, *Atlanta* at 15³³ These studies have also revealed the devastating impact of predatory lending on long overdue gains in inner city minority homeownership, as foreclosures have decimated equity and destroyed neighborhood vitality virtually overnight. *See* Kathe Newman & Elvin K. Wyly, *Geographies of Mortgage Market Segmentation: The Case of Essex County*, New Jersey, 19 Housing Stud. 53, 54 (Jan. 2004); Housing Council (2003), Residential Foreclosures in Rochester, New York 10 (foreclosures erode sales prices of nearby homes). Government has a right to seek to minimize these societal costs *and to transfer those costs to the mortgage participants responsible for the transactions.*

However, since foreclosure avoidance strategies, targeted legislation and regulation depend on the availability of data to inform decision-making, where MERS has caused a critical source of heretofore public data to disappear, states, cities and advocates no longer have sufficient information to respond in a carefully

³³ *See also* Immergluck, *External Costs of Foreclosure*; Daniel Immergluck & Geoff Smith, *There Goes the Neighborhood: The Effect of Single-Family Mortgage and Foreclosures on Property Values* at 9. (2005). This report is available at: http://www.woodstockinst.org/publications/task_doc_download/gid,52/Itemid,%2041/

(Homes in low and moderate income neighborhoods in Chicago experience between 1.44 and 1.8 percent decline in value for every home foreclosed within one-eighth of a mile).

targeted and not overly inclusive way. *See* Duda, *Atlanta* at viii. Thus, “in Fulton County [GA] and other places with foreclosure problems, the fact that entities without the legal ability to make servicing decisions [MERS] are registered with the county has been identified as a *major obstacle to municipal foreclosure-avoidance efforts*. . . .” Duda, *Atlanta* at 15. Similarly, the University Neighborhood Housing Program in the Bronx and many other community groups are losing an important tool that has enabled them to improve the communities of their constituents.

F. More, not less public data is needed to enable a carefully targeted and rapid governmental response to problems in the housing market.

Foreclosure remains³⁴ a key problem in today’s housing markets.

Particularly in low-income neighborhoods, foreclosures can lead to vacant or abandoned properties that, in turn, contribute to physical disorder in a community. *See* Immergluck, *External Costs of Foreclosure, supra*. This disorder can create a haven for criminal activity, discourage the formation of social capital, and lead to disinvestment in communities.

³⁴ Foreclosure rates continue their meteoric rise, presenting significant problems and hardships for affected homeowners, their surrounding communities and local governments. In August 2006, 115,292 properties throughout the nation entered foreclosure, a 24 percent increase over the foreclosure level in July and 53 percent increase over foreclosures in 2005. *See* Les Christie, “Foreclosures Spiked in August,” (Sept. 13, 2006), available at: http://money.cnn.com/2006/09/13/real_estate/foreclosures_spiking/index.htm?postversion=2006091305.

The costs flowing from problems in the housing market impact not only lenders and borrowers directly involved in the sale or purchase of homes. The costs can have a significant effect on entire communities. *See id.* For instance, concentrated foreclosures can affect the property values of homes in the same or adjoining neighborhoods. If policymakers are to truly understand the context in which foreclosures take place and subsequently create legislation to obviate the problems created by foreclosures (and thereby alleviate related social and economic difficulties faced by individuals and communities), more data is necessary and its accessibility to the public is imperative.

Researchers agree and have suggested that the solution to understanding complex mortgage related problems is to require *more* not less information and to further impose *more* not fewer costs on mortgage participants. *See* NHS of Chicago, *Preserving Homeownership, supra.* Contrary to the attack on the public databases and public revenues undertaken by MERS, the authors recommend creating loan performance and foreclosure databases that contain sufficient information to enable the tracking and assessment of key causes of delinquency and default.³⁵ These databases would be used to shape more effective legislation, mitigate public costs and abusive practices and target foreclosure hotspots “without

³⁵ Apgar and Duda recommend tracking all loans, all parties to the loans, loan terms, and would at a minimum require the disclosure of the note holder and servicer whenever foreclosure is threatened.

stemming the flow of credit to low-income, low-wealth and credit-impaired borrowers. *Id.* at 84.

States such as Illinois have already demonstrated a strong interest in gathering more information about high cost mortgage loans. Illinois's newly created data collection program requires all licensed mortgage brokers and loan originators to enter detailed information into a database for residential mortgage loans in designated areas in Chicago. *See* Public Act 094-0280 (HB 4050). This database project is designed to address predatory practices and high foreclosure rates. The federal government has also moved to increase data collection for high cost loans.³⁶

Another key recommendation that has emerged from municipal studies is to increase public awareness of the significant foreclosure costs imposed on communities by mortgage participants and reallocate those costs that are “rightfully the responsibility of borrowers, lenders and others that are direct parties to the mortgage transaction” to the transactions that created them through increased filing fees and creation of an industry fund. Duda, *Atlanta* at 26-27; *see also*

³⁶ Reacting to a 2001 joint HUD-U.S. Department of the Treasury report that found a disproportionately high level of high cost, subprime refinance lending in predominantly black neighborhoods, as compared to predominantly white neighborhoods, the Federal Reserve Board ramped up its HMDA data reporting requirements in 2004. *See HUD-Treasury Report 2000, supra.* Lenders who make high cost, subprime loans must now provide pricing information for these loans. *See* Federal Financial Institutions Examination Council, *A Guide to HMDA: Getting it Right!* (Dec. 2003).

Apgar, *Municipal Cost of Foreclosures* at 35. Such fees would reduce the municipal expenditures and loss of neighboring equity that currently function as effective subsidies to the most abusive transactions.

Land and court records serve as vitally important research tools for government, community organizations and academic researchers. A private entity, such as MERS, must not be allowed to deplete the public databases of land and court records or to undermine the public's significant and enduring interest in preserving the integrity of these public databases of land and court records.

VI. MERS' Subversion of the Public Policy Behind Public Recordings Costs County and City Clerks Over a Billion Dollars.

MERS' erosion of the public databases has, as its designers intended, created a drain on the public treasuries. This transfer of significant revenues from county and city clerks throughout the country to MERS and its members, is an unwarranted interference with the clerks' public recordation function.

In April 2006, MERS announced that 40 million mortgages were registered with MERS. *40 Millionth Loan Registered on MERS* (Inside MERS, May/ June 2006), available at <http://www.mersinc.com/newsroom/currentnews.aspx>. MERS admits that a loan is transferred many times during its life. MERS Br. at 51. With an average recordation cost of \$22 for each mortgage assignment, multiplied by 40 million loans and then multiplied again to account for the many transfers that occur during the life of a loan, the appropriation of public funds effected by the MERS

system is staggering. See http://www.mersinc.com/why_mers/index.aspx (last visited October 4, 2006). Based on a conservative estimate that each of the 40 million loans on the MERS system is assigned three times each during the life of the loan, the cost to county and city clerks nationwide from the inception of the MERS system through April 2006, has been an astounding \$2.64 billion. This figure is continuing to grow as new mortgages are registered daily on the MERS system.

Through its charge of \$3.95 per loan, MERS has instead diverted gross revenues of \$158 million to itself. The MERS artifice has enabled the redirection of far greater revenues away from the public treasuries and back to lenders through improper avoidance of recordation costs. In so doing, MERS has subverted the important public function of the county clerks and interfered with the rightful collection of funds owing to the public treasuries.

VII. MERS Lacks Standing to Bring Foreclosure Actions in Its Name.

MERS' standing to commence a foreclosure action in New York is a matter of great dispute, and has led to much confusion in the courts. As a general matter, standing to foreclose in New York requires ownership of the note. See, e.g., *LaSalle Bank National Ass'n. v. Holguin*, No. 06-9286, slip opinion at 1 (N.Y. Sup. Ct. Suffolk Cty., Aug. 9, 2006); *Kluge v. Fugazy*, 145 A.D.2d 537, 536 N.Y.S.2d

92 (2d Dept. 1988). Neither MERS' status as nominee for the beneficial owner nor its status as mortgagee is sufficient to create standing.

As noted in a Connecticut case denying MERS summary judgment due to a dispute as to ownership of the note, MERS, as nominee, generally has rather limited rights and standing:

A nominee is one designated to act for another as his/her representative in a rather limited sense...in its commonly accepted meaning, the word 'nominee' connotes the delegation of authority to the nominee in a representative capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him/her.

Mortgage Electronic Registration Systems, Inc. v. Rees, 2003 Conn. Super. LEXIS 2437 (Conn. Superior Ct. September 4, 2003). *See also MERS v. Shuster*, No. 05-26354/06 (N.Y. Sup. Ct., Suffolk Cty., July 13, 2006) (denying MERS's motion for default since MERS is merely nominee); *MERS. v. Burek*, 798 N.Y.S.2d 346 (N.Y. Sup. Ct. 2004) (distinguishing *Fairbanks Capital Corp. v. Nagel*, 289 A.D.2d 99, 735 N.Y.S.2d 13 (1st Dep't 2001), since Fairbanks was a servicer and identified itself as such).

The splitting of the ownership of the note and the mortgage is even more problematic. Under well-established principles, the mortgage follows the note. *See* U.C.C. §§ 9-203(g), 9-308(e); Restatement (3d), Property (Mortgages) § 5.4(a) (1997). As an Illinois court noted, "It is axiomatic that any attempt to assign the

mortgage without transfer of the debt will not pass the mortgagee's interest to the assignee." *In re BNT Terminals, Inc.*, 125 B.R. 963, 970 (Bankr. N.D. Ill. 1990). MERS has no status as mortgagee if the note is in fact owned and held by another entity, as is always the case with MERS. Thus, MERS' status as mere nominee is insufficient to give it standing to foreclose, or take any legal action against a borrower whatsoever. The recording of MERS as mortgagee when it does not and cannot own the note is inherently confusing and misleading.

There have now been a large number of recent New York decisions denying foreclosures brought by MERS, on the basis that MERS does not own the note and mortgage, and therefore does not have either standing to sue or the right to assign ownership of the note and mortgage to a foreclosing plaintiff. *See, e.g., MERS v. Wells*, No. 06-5242, slip op. at 2 (N.Y. Sup. Ct., Suffolk Cty., Sept. 25, 2006) ("It is axiomatic that the Court, for the security of ensuring a proper chain of title, must be able to ascertain from the papers before it that the Plaintiff has the clear authority to foreclose on property and bind all other entities by its actions"); *LaSalle Bank Natl Assn. v. Holguin, supra.*, slip op. at 2 ("Since MERS was without ownership of the note and mortgage at the time of its assignment thereof to the plaintiff, the assignment did not pass ownership of the note and mortgage to the plaintiff", and the plaintiff thus failed to establish ownership of the note and mortgage); *LaSalle Bank v. Lamy*, 2006 N.Y. Misc. Lexis 2127 (NY. Sup. Ct.,

Suffolk Cty., Aug. 17, 2006) (the “assignment of the mortgage to the plaintiff, upon which the plaintiff originally predicated its claims of ownership to the subject mortgage, was made by an entity (MERS) which had no ownership interest in either the note or the mortgage at the time the purported assignment thereof was made”); *MERS v. Burek*, 798 N.Y.S.2d 346, 347 (N.Y. Sup. Ct., Richmond Cty. 2004) (denying summary judgment to MERS since MERS “is merely the self-described agent of a principal”); *MERS v. Shuster*, No. 05-26354/06 (N.Y. Sup. Ct., Suffolk Cty., July 13, 2006) (denying MERS’s motion for default since MERS owns neither the note or mortgage); *MERS v. DeMarco*, No. 05-1372, slip op. at 1-2 (N.Y. Sup. Ct., Suffolk Cty., April 11, 2005) (ex-parte motion for default denied because: a) the plaintiff was not named as the lender in either the note or mortgage, and b) there was no proof that the plaintiff was the owner of the note and mortgage at the time the action was commenced *by reason of assignment or otherwise*”); *Deutsche Bank National Trust Company as Trustee v. Primrose*, No. 05-25796 (N.Y. Sup. Ct., Suffolk Cty., July 13, 2006); *Everhome Mortgage Company v. Hendriks*, No. 05-024042 (N.Y. Sup. Ct., Suffolk Cty., June 27, 2006); *MERS v. Ramdoolar*, No. 05-019863 (N.Y. Sup. Ct., Suffolk Cty., Mar. 7, 2006); *MERS v. Delzatto*, No. 05-020490 (N.Y. Sup. Ct., Suffolk Cty., Dec. 9, 2005); *MERS, Inc. v. Parker*, No. 017622/2004, slip op. at 2 (N.Y. Sup. Ct., Suffolk Cty. Oct. 19, 2004) (denying MERS’ motion for default judgment since MERS does not

own the note); *MERS, Inc. v. Schoenster*, No. 16969-2004, (N.Y. Sup. Ct., Suffolk Cty., Sept. 15, 2004); *see also* Andrew Harris, *Suffolk Judge Denies Requests by Mortgage Electronic Registration Systems*, N.Y. LAW J. (Aug. 31, 2004) (discussing four foreclosure cases in Suffolk County that were dismissed in one day because the judge held that MERS cannot foreclose because it is not the owner of the note or mortgage).

Other state courts have also questioned MERS' standing to proceed with foreclosures. For example, in Florida, there have been a string of decisions dismissing foreclosures brought by MERS based on its lack of standing. *See, e.g., Mortg. Elec. Registration Sys., Inc. v. Azize*, No. 05-001295-CI-11 (Fla. Cir. Ct. Pinellas Cty. Apr. 18, 2005) (dismissing 28 individual foreclosures brought by MERS on the basis of MERS' lack of ownership of the notes), appeal docketed, No. 2D05-4544 (Fla. Dist. Ct. App. 2d Dist. 2005); *Mortg. Elec. Registration Sys., Inc. v. Griffin*, No.16-2004-CA-002155, slip op. at 1 (Fla. Cir. Ct. May 27, 2004) (dismissing foreclosure initiated by MERS based on lack of standing); *see also MERS v. Rees, supra.* (denying summary judgment to MERS because a genuine issue of fact existed regarding the current ownership of the note; a discrepancy existed between the affidavit submitted by MERS claiming that it owned the note and the information on the note); *Taylor, Bean & Whitaker, Mortg. Corp. v. Brown*, 583 S.E.2d 844 (Ga. 2003) (reserving for the trial court a determination of

whether “MERS as nominee for the original lender and its successors, has the power to foreclose . . .”).

Amici have represented homeowners in many cases in which MERS has commenced a foreclosure in its name claiming to own the note and mortgage yet has never been able to adduce any proof of its ownership of either. For example, in Kings County Supreme Court, MERS sued Jean Roger M. Bomba and Martin C. Bomba in a foreclosure action. *MERS v. Bomba*, No. 1645/03 (N.Y. Sup. Ct., Kings County). The *Bomba* complaint is riddled with mistruths and obfuscations, including: (1) the true note holder is never mentioned; (2) MERS alleges that its address is 400 Countrywide Way, Simi Valley, CA 93065 (which is actually Countrywide Home Loans’ address, not MERS’ address); and (3) MERS alleges on information and belief that it is the “sole, true and lawful owner of said bond/note and mortgage.” *Id.* *Amicus* SBLIS is representing Martin C. Bomba, and has raised defenses, including the lack of MERS’ standing to bring the foreclosure, but the merits have not yet been reached in the case. The confusion that MERS engenders in the courts is typified by the judge’s order denying MERS’ unopposed motion for an order appointing a referee in *MERS v. Trapani*, No. 04-19057, slip op. at 1 (N.Y. Sup. Ct., Suffolk Cty., Mar. 7, 2005):

The submissions reflect that neither the nominal plaintiff, Mortgage Electronic Recording Systems, Inc. (“MERS”), nor Countrywide Home Loans, Inc. (“Countrywide”), for which MERS purports to be the “nominee”, is the record owner of the mortgage sought to be

foreclosed herein. The note and mortgage that are the subject of this foreclosure action identify the lender as Alliance Mortgage Banking Corp. MERS is identified in the mortgage instrument only as ‘a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.’ There is no allegation or proof in the submissions as to any assignment of the note and mortgage to Countrywide, to MERS, or to any other entity, and plaintiff’s counsel has asserted no authority, statutory or otherwise, for the bare assertion that ‘[w]here ‘MERS’ is the mortgagee of record there is no need to prepare an assignment.’

MERS has, in revisions to its Rule 8 governing how foreclosures are brought, attempted to address the standing problem.³⁷ Now foreclosures can no longer be brought in MERS’ name in Florida. They may be brought in MERS’ name elsewhere only if the note is endorsed in blank, held by the servicer, and MERS cannot be pled as the note holder. MERS thus admits that it does not own the note, and never owns the note. MERS also admits that it is not the entity initiating or controlling the foreclosure. However, MERS still continues to endorse hiding the true owner from the borrower: MERS does not require the note holder to be identified; and MERS permits the owner of the note to designate anyone, other than MERS, to foreclose, so long as the mortgage, but not the note, is assigned to the third party.

In its brief, MERS attempts to characterize the various cases denying standing to MERS to foreclose as cases that are decided based on defective

³⁷ See Jill D. Rein, Significant Changes to Commencing Foreclosure Actions in the Name of MERS, *available at* http://www.usfn.org/AM/Template.cfm?Section=Article_Library&template=/CM/HTMLDisplay.cfm&ContentID=3899.

pleading rather than on fundamental standing problems. MERS Br. at 57-66. However, the pleading defects and the standing problems are one and the same. MERS creates categories not recognized by the law, and intentionally and systematically conceals from borrowers, attorneys, and judges the true owner of the note. It is this concealment that consistently causes both the pleading defects and the standing problems. MERS continues to flaunt rules of civil procedure for private gain, causing massive confusion among borrowers, counsel, and the courts.

CONCLUSION

Without any legal authority, MERS is eroding the public databases of this nation and unjustly withholding critically important information from homeowners. MERS is designed as a profit-engine for the mortgage industry, without regard to its infringement of essential public and individual rights. Because MERS has no beneficial interest in mortgages and should not be permitted to forcibly effect its intentionally obfuscating recordations, this Court should find in favor of Respondents-Appellants, Edward P. Romaine and the County of Suffolk and against Petitioners-Appellants-Respondents, MERS.

Dated: October 6, 2006
 Brooklyn, NY

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief was prepared on a computer using Microsoft Word, and using Point 14 Times New Roman typeface, in double space. The total word count, exclusive of the cover, table of contents, table of citations, proof of service, and certificate of compliance, is 9,451.

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