Case No.: 86206-1

SUPREME COURT
FOR THE STATE OF WASHINGTON

KRISTIN BAIN

v.

METROPOLITAN MORTGAGE GROUP, INC. ET AL

AMICUS CURIAE BRIEF BY ORGANIZATION UNITED FOR REFORM OUR - WASHINGTON

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I. INTRODUCTION

MERS serves as the "nominee"[1] for the mortgagee in the land records for loans registered on the MERS system.[2] According to MERS's website,

> MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded.[3]

This claim helped to fuel the mortgage-backed securities (MBS) market[4] by allowing "lenders to circumvent the process or recording assignments and paying recording fees[5] to the county clerk's office."[6] In so doing,

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[1] *See* MERS Resp. Br. App. A-5 (Friedman on Cont. & Conv. Real Prop. § 6:1.5) ("sometimes called a 'dummy,' 'straw,' or 'straw man'" or "limited agent."); *see also* MERSCORP, Inc. Rules of Membership, Rule 8, p. 25 (Feb. 2012), provided as Appendix A-1

[2] *See* MERS Resp. Br. App. A-1.

[3] *About MERS*, http://www.mersinc.org/about/index.aspx (last visited Feb. 8, 2012).

[4] Referred to as the "secondary mortgage market" since the sellers and securitizers are not the loan originators. *See* Dale A. Whitman, *Mortgage Drafting: Lessons from the Restatement of Mortgages*, 33 Real Prop. Prob. & Tr. J. 415, 439 (1998).

[5] The "recording fee" in Washington State for a Deed of Trust is $63 for the first page and an additional $1 for every page thereafter. The $63 includes the following: $5 filing fee (RCW 36.18.010) ; $2 Auditors O&M (RCW 36.22.170); $2 State Centennial (RCW 36.22.170); $1 Commissioner's Preservation (RCW 36.22.170); $2 State Archives - Grants (RCW 36.22.175); $2 State Archives – Regional (RCW 36.22.175); $10 Affordable Housing (RCW 36.22.178); $38 Homeless Prevention 1 & 2 (RCW 36.22.179); and $1 Mortgage Fraud (RCW 36.22.181). An assignment and a resignation/substitution does not pay the $48 housing surcharge so their price is $14 for the first page and $1 for every page thereafter (but since most are only 1 page, the most common price is $14 per doc). In reality, the lending industry already gets a $48 break from the State for every transaction that is an assignment or resignation/substitution.

[6] Michelle Conlin and Curt Anderson, *Mortgage system sued over recording fees: Banks accused of cheating counties out of billions* (Nov. 14, 2010), *available at* http://www.knoxnews.com/news/2010/nov/14/mortgage-system-sued-over-recording-fees-recording (last visited Feb. 10, 2012); *see also* Nolan Robinson, *The Case Against*

MERS clouded the title[7] and identity of the real party in interest: the owner of the note.[8]

The problem is compounded by the facts that roughly 65 million mortgages have been registered on the MERS system[9] and "over ninety-five percent of residential mortgages are securitized."[10] The problem was identified years ago.[11]

Yet, the "housing shell game"[12] continues. A Kafkaesque[13] game that forces homeowners interested in challenging predatory lending

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Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings, 32 Cardozo L. Rev. 101, 103 (2011).

[7] A "cloud on title" refers to a "defect or potential defect in the owner's title to a piece of land arising from some claim or encumbrance, such as a lien, an easement, or a court order." Black's Law Dictionary 291 (9th ed. 2009)]; *See generally*, Dave Krieger, *Clouded Titles* (Law Bulletin Publishing Co. 2012) at 90; *see also U.S. Bank National Ass'n v. Ibanez*, 458 Mass. 637 (2011). In *Ibanez*, the court held that a non-judicial foreclosure was void because the foreclosing party did not have a recorded interest in the mortgage.

[8] Robinson, *supra* at 102; *see* Pl.'s Op. Br. 11, 14.

[9] Brady Dennis, *MERS morass is hanging up negotiations on foreclosure settlement*, Washington Post (Aug. 24, 2011), *available at* http://www.washingtonpost.com/business/economy/mers-morass-is-hanging-up-negotiations-on-foreclosure-settlement/2011/08/24/gIQAX6jNcJ_story.html (last visited Feb. 10, 2012).

[10] Robinson, *supra* at 114 n. 72. "Securitization" refers to the process of converting assets into securities, such as bonds, "for resale in the financial market, allowing the issuing financial institution to remove assets from its books, and thereby improve its capital ratio and liquidity, and to make new loans with the security proceeds if it so chooses." Black's Law Dictionary 1475 (9th ed. 2009).

[11] Gretchen Morgenson, *A Mortgage Tornado Warning, Unheeded*, New York Times (Feb. 4, 2012), *available at* http://www.nytimes.com/2012/02/05/business/mortgage-tornado-warning-unheeded.htm (last visited Feb. 10, 2012).

[12] "The housing shell game was made possible because it was all concealed behind an electronic smokescreen called MERS (an acronym for Mortgage Electronic Registration Systems, Inc.). MERS allowed houses to be shuffled around among multiple, rapidly changing owners while circumventing local recording laws. Title would be recorded in the name of MERS as a place holder for the investors, and MERS would foreclose on behalf of the investors. Payments would be received by the mortgage servicer, which was

practices,[14] or interested in avoiding foreclosure via direct negotiation with the lender, to deal with servicers[15] whose interests conflict[16] with the real beneficiary.[17]

II. ISSUES

1. Did MERS violate the unity of the note and security necessary to have standing to foreclose?

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typically the bank that signed the mortgage with the homeowner. The homeowner usually thinks the servicer is the lender, but in fact it is an amorphous group of investors." Ellen Brown, *Why all the robo-signing? Securitization and the shadow banking system*, San Francisco Bay View National Black Newspaper (last modified Jan. 25, 2012), *available at* http://sfbayview.com/2012/why-all-the-robosigning (last visited Feb. 10, 2012).

[13] "having a nightmarishly complex, bizarre, or illogical quality." www.merriam-webster.com/dictionary/kafkaesque

[14] *See, e.g.*, Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2266 (2007) ("[A]ll across the country, MERS now brings foreclosure proceedings in its own name . . . . This is problematic because MERS is not prepared for or equipped to provide responses to consumers' discovery requests with respect to predatory lending claims and defenses. In effect, the securitization conduit attempts to use a faceless and seemingly innocent proxy with no knowledge of predatory origination or servicing behavior to do the dirty work of seizing the consumer's home."). See, e.g. Walter Hamilton and E. Scott Reckard, *Angelo Mozilo, other former Countrywide execs settle fraud charges*, Los Angeles Times (Oct. 26, 2010). *Compare with* MERS Resp. Br. App. A-7 [Angelo R. Mozilo, *A Century's Milestones in Residential Lending* Mortgage Banking (Jan. 2000)].

[15] MERS uses an 18-digit Mortgage Identification Number (MIN) to identify servicers, not the beneficiary or owner. https://www.mers-servicerid.org/sis/

[16] See Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011).

> [S]ervicer income generally encourages servicers to perform short-term workout agreements, to pile on fees, and to delay (but not avoid altogether) foreclosures. Servicer expenditures, on the other hand, encourage a quick resolution of default, primarily through foreclosure.

Id., at 814

[17] Plaintiff's Opening Br. at 14 [As U.S. District Court Judge Coughenour noted in his order, "And the harm Plaintiff may have suffered because of MERS's conduct may include expending resources to avert an unlawful foreclosure and preventing Plaintiff from identifying the real beneficiary and negotiating a new arrangement to avoid foreclosure." (Dkt. 155 p. 11)]; *see also* RCW 6.23.020(2) (borrower's right of redemption).

2. Is MERS the "person entitled to enforce"[18] under its limited agency authority and the fact it never held or possessed the note?

3. Do changes in MERS's foreclosure rules confirm it lacks standing to foreclose?

III. SUMMARY ARGUMENT

MERS is not "the person entitled to enforce the note"[19] because it never received, held, or possessed the note.

IV. ARGUMENTS:

1. MERS violated the unity of the note and security by purporting to negotiate, transfer and securitize notes it never held.

According to Powell on Real Property,[20]

> It must be remembered that the mortgagee has two interests: (1) the debt or obligation which is owned to him, and (2) the security interest in land represented by the mortgage.... In fact, the primary interest is the personalty debt obligation. The interest in land which is available in case security is necessary because of the debtor's default is considered as collateral interest. Much trouble has been caused by mortgagees attempting to transfer only one of these two interests. Where the mortgagee has "transferred" only the mortgage, the transaction is a nullity and his "assignee," having received no interest in the underlying debt or obligation, has a worthless piece of paper.

This maxim was adopted by the U.S. Supreme Court in 1873.[21]

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[18] RCW 62A.3-301

[19] RCW 62A.3-301

[20] Powell on Real Property: Michael Allan Wolf Desk Edition § 37.27 [2] (LexisNexis Matthew Bender 2010).

[21] *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L. Ed. 313 (1873); *See also, Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo.App. E.D.2009):

> The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

Thus, unity of interest between the note and the security is necessary for a party to have standing to foreclose.

2. MERS is not the "person entitled to enforce"[22] the note because it never held the note. MERS's common agency authority is limited to registering and tracking transfers in mortgage loans.[23]

UCC Article 3[24] governs the obligations of parties on a negotiable mortgage note, "including how to determine who may enforce the obligations and, thus, to whom those obligations are owed."[25] According to the American Law Institute and the National Conference of Commissioners on Uniform State Laws *Report of the Permanent Editorial*

> Generally, a mortgage loan consists of a promissory note and security instrument, usually a mortgage or a deed of trust, which secure payment on the note by giving the lender the ability to foreclose on the property. Typically, the same person holds both the note and the deed of trust.
>
> ...
>
> When the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred. An assignment of the deed of trust separate from the note has no " force." Effectively, the note and the deed of trust are inseparable, and when the promissory note is transferred, it vests in the transferee " all the interest, rights, powers and security conferred by the deed of trust upon the beneficiary therein and the payee in the notes." (internal citations omitted).

[22] RCW 62A.3-301

[23] *See* MERS Resp. Br. 13.

[24] Ch. 62A.3 RCW

[25] American Law Institute and the National Conference of Commissioners on Uniform State Laws, *Report of the Permanent Editorial Board for the Uniform Commercial Code – Application of the Uniform Commercial Code to Selected Issues relating to Mortgage Notes* (Nov. 14, 2011), provided as Appendix A-2 at 4 et seq. (hereinafter "ALI Report")

Board for the Uniform Commercial Code – Application of the Uniform Commercial Code to Selected Issues relating to Mortgage Notes (Nov. 14, 2011),[26]

> In the context of mortgage notes that have been sold or used as collateral to secure an obligation, the central concept for making that determination is identification of the "person entitled to enforce" the note. Several issues are resolved by that determination. Most particularly:
>
> (i) the maker's obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,
> (ii) the maker's payment to *the person entitled to enforce the note* results in discharge of the maker's obligation, and
> (iii) the maker's failure to pay, when due, the amount of the note to *the person entitled to enforce the note* constitutes dishonor of the note.
>
> Thus, a person seeking to enforce rights based on the failure of the maker to pay a mortgage note must identify the person entitled to enforce the note and establish that that person has not been paid.[27]

UCC Section 3-301[28] defines the *Person entitled to enforce instrument* as:

> (i) the holder of the instrument,
> (ii) a nonholder in possession of the instrument who has the rights of a holder, or
> (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even

[26] ALI Report, *supra*, at 4, provided as Appendix A-2.
[27] ALI Report, *supra*, at 4, provided as Appendix A-2 [emphasis in original].
[28] RCW 62A.3-301

> though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Each of these are defined and illustrated in the ALI Report.[29] Illustration #4[30] explains how an agent *in possession* of the note can enforce it.

> Agent is the agent of Transferee for purposes of possessing the note and (ii) it is Agent, rather than Transferee, *to whom actual physical possession of the note is given by Payee*. In the facts of Illustration 2, *Transferee is a holder of the note* and a person entitled to enforce it. In the context of Illustration 3, Transferee is a person entitled to enforce the note. Whether Agent may enforce the note or mortgage on behalf of Transferee depends in part on the law of agency and, in the case of the mortgage, real property law.[31]

Unlike this example, MERS never takes actual physical possession of the note.

MERS operates as the common limited agent for its members. The beneficiary member appoints MERS to be its agent to hold the mortgage lien interest, not to hold any interest in the note itself. MERS holds mortgage liens in a "nominee" capacity and, through its electronic registry, tracks changes in the ownership of mortgage loans and servicing rights related thereto. MERS is not the mortgagee. MERS is not a party to the note underlying the security instrument. MERS "lent no money and received no payments from the borrower." MERS does not originate

[29] ALI Report, *supra*, at 5-7, provided as Appendix A-2.
[30] ALI Report, *supra*, at 5-7, provided as Appendix A-2.
[31] ALI Report, *supra*, at 7, provided as Appendix A-2.

or claim any independent ownership interest in the note or the mortgage.[32] MERS has no rights to transfer, assign or collect payments made by the debtor on such note.[33] MERS does not process, service, hold, own or sell the mortgage loans. MERS never takes possession[34] of the note so is never the holder.[35]

The U.S. Bankruptcy Court for Oregon summed this up recently in the case of *In re Allman.*[36] The threshold question in that case was whether or not the title insurance company was required to give notice to

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[32] Robinson, *supra* at 124; *See generally*, Krieger, *Clouded Titles*, *supra* at 67-98.

[33] *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009).

> What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See Sheridan, 2009 WL 631355, at *4 (" MERS is not an economic ' beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See Vargas, 396 B.R. at 517 (" [w]hile the note is ' essential,' the mortgage is only ' an incident' to the note" [quoting *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)]).

[34] The idiom *Possession is nine-tenths of the law* is based on the fact that "possession raises a *prima facie* title or a presumption of the right of property in the thing processed." Black's Law Dictionary (9th ed. 2009).

[35] See, *Bellistri v. Ocwen Loan Servicing*, 284 S.W. 3d 619 (Mo. App. E.D. 2009):

> MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force. As Ocwen holds neither the promissory note, nor the deed of trust, Ocwen lacked a legally cognizable interest in the property, and therefore, it has no standing to seek relief.

See also, Moore v. MERS, CV-10-241-JL (D.N.H. Jan. 27, 2012). In that case, the court held "defendants do not possess the note, and it is enforcement of the note which the Moore's seek to avoid." The court allowed fraud and other claims under both the Real Estate Settlement Procedures Act and the Fair Debt Collection Practices Act to proceed. *Id.*, at 3. *See generally*, ALI Report, *supra*, at 5-7 (provided as Appendix A-2).

[36] 2010 WL 3366405, U.S. Bkptcy. Ct., Oregon (2010)

MERS under ORS 86.720(3).[37] That statute requires that, before a title insurance company releases a trust deed, notice be given to the lender and the beneficiary.[38] The court concluded that MERS was not entitled to notice.

> The relationship of MERS to CIT "is more akin to that of a straw man than to a party possessing all the rights given a buyer." *See Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 539 (2009) (court considered relationship of MERS to parties to a secured real estate transaction). As in *Kesler*, here the trust deed "consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation." *Id.* at 539. The trust deed "consistently limits MERS to acting 'solely' as the nominee of the lender." *Id.* at 539-540. It is apparent that the listing of MERS as beneficiary in the deed of trust is merely to facilitate its ownership tracking function. It is not in any real sense of the word, particularly as defined in ORS 86.705(1), the beneficiary of the trust deed. *Accord Southwest Homes of Ark.*, 301 S.W.3d at 4 (MERS was not the beneficiary, even though designated as beneficiary in the trust deed). Thus, notice to CIT met the statutory requirement that notice be given to the beneficiary.[39]

Under the UCC [40] delivery is required to transfer possession of any negotiable instruments (e.g. promissory note) and become a holder.[41]

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[37] "OCR 86.720. Reconveyance upon performance; liability for failure to reconvey; release of trust deed. ... (3) Prior to the issuance and recording of a release pursuant to this section, the title insurance company or insurance producer shall give notice of the intention to record a release of trust deed *to the beneficiary of record* and, if different, the party to whom the full satisfaction payment was made. The notice shall: ...." [Emphasis added].

[38] ORS 86.720(3) [Emphasis added]

[39] *In Re Allman, supra* [Emphasis added]

[40] 62A.3 (Negotiable instruments).

Transfer of the security[42] does not transfer the note.[43] Since MERS does not take delivery of the note,[44] it cannot claim to be the beneficiary under Washington law.[45] Therefore, MERS cannot pass title to subsequent transferees.[46]

Professor Dale Whitman addressed the "delivery" issue in his article, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*,[47]

> While delivery of the note might seem a simple matter of compliance, experience during the past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to secondary market investors or securitizers, and, in many cases, cannot presently be located at all. The issue is extremely

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[41] RCW 62A.3-201(a) ("'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."); RCW 62A.3-203(a) ("An instrument is transferred when it is *delivered* by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.") (emphasis added).

[42] E.g. mortgage, deed of trust or security deed.

[43] "A transfer of the mortgage automatically transfers the obligation, *except when the UCC prevents that result (as it does with a negotiable note)*." Restatement (Third) of Property: Mortgages (1997) at sec. 5.4(a) and (b) (emphasis added).

[44] *See* MERS Resp. Br. 3 ("For the reasons set forth below, MERS respectfully requests that the Court hold that MERS is a lawful 'beneficiary' under the Act, even if it never holds the promissory note secured by the deed of trust that it has legal interest in.") MERS argues that it is "indisputably the 'holder' of the Deed of Trust." *Id.*, at 22. This presumes the Deed of Trust is a negotiable instrument and that the note follows the Deed. This is not correct. See discussion infra and *Carpenter v. Longan*, 83 U.S. 271 (1873).

[45] RCW 61.24.005(2).

[46] *See Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011). There the plaintiff argued that he had recorded title to the property by virtue of a quitclaim deed granted to him by U.S. Bank as a result of the foreclosure sale. *Id.* at 891. However, MERS failed to assign the mortgage to U.S. Bank prior to executing foreclosure. *Id.*, at 888. The Court held that the plaintiff holds no title to real properly and lacks standing to bring a quiet title action where the foreclosure sale was conducted by someone other than the actual mortgagee or its assigns.

[47] 37 Pepp. L. Rev 738, 757-758 (2010)

> widespread, and, in many cases, appears to have been the result of a conscious policy on the part of mortgage sellers to retain, rather than transfer, the notes representing the loans they were selling.

This policy creates fundamental problems with any foreclosure. This policy is embedded in MERS' Rules of Membership which now require assignments of the security instrument from MERS to the "note owner or the note owner's servicer".[48]

3. Changes in MERS's foreclosure rules confirm it lacks standing to foreclose.

Until recently, one of the benefits of MERS membership was "the legal right to foreclose on a defaulting homeowner in MERS's name rather than the name of the entity who actually owns the mortgage."[49] However, "since July 2011 MERS no longer acts as foreclosing entity." [50] Now MERS prohibits members from initiating foreclosure proceedings in the name of MERS and requires assignments for foreclosure and bankruptcy.[51] Those new rules mandate:

> The note owner or the note owner's servicer shall cause the Certifying Officer to execute the assignment of the Security Instrument from MERS to the note owner's servicer, or to such other party expressly and specifically designated by the note-owner before initiating foreclosure proceedings or

[48] A-1 [Rule 8(a)].
[49] Robinson, *supra*, at 104 n. 16.
[50] A-1. In addition, Freddie Mac eliminated the option of servicers to foreclose in the name of MERS. Freddie Mac Bulletin No. 2011-5 (March 23, 2011), provided as Appendix A-3.
[51] A-1 [Rule 8(d)].

> filing Legal Proceedings and promptly send the assignment of the Security Instrument (in recordable form) for recording in the applicable public land records.[52]

This effort to "put Humpty together again"[53] (i.e. reunite securitized loans with their corresponding security instruments) would be unnecessary if MERS was the note owner, holder or assignee.[54]

In *Bank of New York v. Silverberg*,[55] the court addressed an issue similar to the certified question before this court[56]:

> This matter involves the enforcement of the rules that govern real property and whether such rules should be bent to accommodate a system that has taken on a life of its own. The issue presented on this appeal is whether a party has standing to commence a foreclosure action when that party's assignor— in this case, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS)— was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the

[52] *Id.* [Rule 8(e)(i)].

[53] I. Opie and P. Opie, The Oxford Dictionary of Nursery Rhymes (Oxford: Oxford University Press, 1951, 2nd ed., 1997). The most common modern text is:

Humpty Dumpty sat on a wall,
Humpty Dumpty had a great fall.
All the king's horses and all the king's men
Couldn't put Humpty together again

[54] This contradicts how MERS markets itself on its website:

> MERS is an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked. Created by the real estate finance industry, *MERS eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.*

Available at http://www.mersinc.org (last visited Feb. 10, 2012) (emphasis added).

[55] 926 N.Y.S.2d 532, 86 A.D.3d 274 (2011).

[56] "Whether Mortgage Electronic Registration Systems, Inc., a corporation formed to provide a national electronic registry to track the transfer of ownership interests and servicing rights in mortgage loans, and nominated by many lenders as mortgagee of record and beneficiary under deeds of trust, may lawfully serve as beneficiary under the Washington Deed of Trust Act." Pl.'s Op. Br. 3.

> actual holder or assignee of the underlying notes. We answer this question in the negative.[57]

The *Silverberg* court concluded:

> In sum, because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose.
>
> MERS purportedly holds approximately 60 million mortgage loans (*see* Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan,* New York Times, March 5, 2011), and is involved in the origination of approximately 60% of all mortgage loans in the United States (*see* Peterson at 1362; Kate Berry, *Foreclosures Turn Up Heat on MERS,* Am. Banker, July 10, 2007, at 1). This Court is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.[58]

These same considerations are echoed by Judge Coughenour in his Order:

> A ruling favorable to Plaintiff in this case and others like it cannot and should not create a windfall for all homeowners to avoid upholding their end of the mortgage bargain – paying for their homes. But a homeowner's failure to make payments cannot grant lenders trustees and so-called beneficiaries like MERS license to ignore the law and foreclose using any means necessary.[59]

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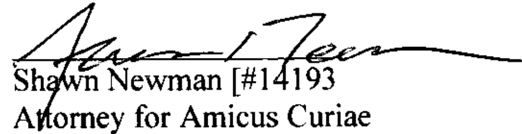
[57] *Silverberg*, *supra*, at 533 (emphasis added).
[58] *Id.*, at 539-540 (emphasis added).
[59] Pl.'s Op. Br. 14-15.

V. CONCLUSION

Therefore, because MERS was never the lawful holder or assignee of the notes, it is not the "beneficiary"[60] under the Washington Deed of Trust Act[61] and cannot initiate any foreclosures or appoint any trustee.

Dated: 2/13/12



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[60] RCW 61.24.005(2) ("'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.")
[61] 61.24 RCW.