

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

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IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION #: 2005-CP-43-0278

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

PLAINTIFF

VERSUS:

LEONARD F. GIRDVAINIS, JR., ET. AL.,

DEFENDANTS

SUPPLEMENTAL ORDER
DENYING RULE 59(e)
MOTIONS

On October 20, 2005, I issued an order dismissing this action with prejudice. The order was filed on October 21, 2005. On November 7, 2005, the Plaintiff filed a Rule 59(e) motion "to alter or amend [the] Final Order Dismissing Action." I denied the motion in an Order which was filed with the Clerk of this Court on January 11, 2006.

In the meantime counsel for the defendant submitted an Affidavit (copy attached) which he asked that I consider in support of the motion. I have reviewed the affidavit, but I have concluded that the contents are irrelevant and/or of no substantive value, because:

1. Although the assignment to MERS [recorded in volume 852 at page 9] purports to convey the mortgage "together with the note thereby secured," MERS contractual relationship with lenders is such that the lender retains the note, the debt thereby represented, and the right to collect the debt.

The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, *in an administrative capacity*, for the beneficial owner or owners thereof from time to time. **MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.**¹

2. In the Nebraska case, which MERS initiated to avoid having to pay fees levied in that State against mortgage bankers, MERS represented to the Court and/or the Court found:

MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights

¹ *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784, 787

in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

MERS ... does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. **MERS explains that it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur."**

To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee, however, **the lender retains the note and servicing right.** The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower. *** MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members

MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while **MERS acquires legal title to the mortgage for recordation purposes. MERS serves as legal title holder in a nominee capacity**, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction. But, simply stated, **MERS HAS NO INDEPENDENT RIGHT TO COLLECT ON ANY DEBT BECAUSE MERS ITSELF HAS NOT EXTENDED CREDIT, AND NONE OF THE MORTGAGE DEBTORS OWE MERS ANY MONEY.**

3. Since MERS initiated the Nebraska litigation and prevailed in it, it is judicially estopped to disavow the positions it advanced during the litigation process there or to avoid the findings and conclusions articulated by the Nebraska Court.²
4. The affiant's representation that Guaranty assigned the note and mortgage to MERS "**for valuable consideration**" is diametrically opposed to the way MERS operates, as described in the Nebraska case. As evidenced by the text of the Nebraska decision, MERS does not acquire the notes or the debts thereby represented for or without consideration. It has neither the right nor the obligation to service the debts represented by the notes and/or secured by the mortgages. As its sole source of revenue "MERS is compensated for its services through fees charged to participating MERS members."³

² *State v. McCall*, 364 S.C. 205, 612 S.E.2d 453, (S.C.App.,2005); *Hawkins v. Bruno Yacht Sales, Inc.* 353 S.C. 31, 577 S.E.2d 202 (S.C.,2003).

³ *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784, 786.

5. Furthermore, the principal/agent (nominee) relationship between its members and MERS is such that the "close-connectedness doctrine" would prevent MERS from qualifying as a holder in a due course without notice, even if it did acquire some ownership interest in the debt.⁴

6. Although there is implicit in the affidavit a suggestion that the process through which MERS "acquires" a mortgage qualifies it as a holder in due course and protects it from defects in transactions which preceded the acquisition, the affiant does not state whether MERS even sees (much less examines for impropriety) the mortgage, the note, or any of the loan documents. However, the MERS method of operation, as reported in its contracts with its "members" and as found by the Nebraska Court, would indicate that it doesn't. Certainly, there is no reason for it to do so, since it has nothing invested in the transaction and will receive payment from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the affidavit would be disingenuous, if not an outright misrepresentation.

AND IT IS SO ORDERED: JANUARY 19, 2006

Lawrence S. Evans, Jr.
MASTER IN EQUITY

⁴ *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.* 893 F.Supp. 1304 (1994), *1318 -1319 (D.S.C., 1994: "A transferee does not take an instrument in good faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction."