

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|--------------------------------------|---|--------------------------|
| DUSTIN ROLLINS <i>and all others</i> | : | |
| <i>similarly situated</i> | : | |
| | : | |
| Plaintiffs | : | |
| v. | : | CASE NO.: 2010-CV-192270 |
| | : | |
| MORTGAGE ELECTRONIC | : | |
| REGISTRATION SYSTEMS, Inc.; | : | |
| and MERSCORP, Inc. | : | |
| | : | |
| Defendants | : | (JURY TRIAL DEMANDED) |
| | : | Proposed Class Action |

COMPLAINT

COMES NOW, the Plaintiff, on behalf of himself and on behalf of all other similarly situated persons, and files this Complaint against Defendants Mortgage Electronic Recording Systems, Inc. and MERSCORP, Inc. (Defendants Mortgage Electronic Recording Systems, Inc. and MERSCORP, Inc. (MERSCORP) are hereinafter referred to collectively as “MERS”), showing the Court as follows:

INTRODUCTION

1.

Plaintiff brings this putative class action lawsuit on behalf of himself and on behalf of all other similarly situated persons who have obtained residential mortgage loans in Georgia, the repayment of which are secured by the pledge of Georgia real property as spelled out in a uniformly written deed to secure debt, like the one that secures the named Plaintiff’s loan (attached hereto as Exhibit B), and which provides that the Grantee of the deed is MERS acting solely as nominee for the lender and the lender’s

successors and assigns, and who have been sent notices of foreclosure on behalf of MERS who auctioned the property that secured the debt at a foreclosure auction. The Plaintiff shows herein that MERS' foreclosure on Plaintiff's property was not valid and was wrongful, as are those foreclosures by MERS on the property in the State of Georgia of all similarly situated persons to the Plaintiff wherein MERS sent the notice of foreclosure to the debtor and wherein MERS purports to have exercised the power of sale and auctioned the property. MERS does not have the authorized power to send a valid notice of foreclosure within the State of Georgia for those deeds where it is "solely a nominee" and does not have the authority or power under Georgia law to foreclose on a property or engage in an auction of sale on such property where it is "solely a nominee" on such deeds.

As a result of such uniform, wrongful conduct by MERS, the Court must, *inter alia*: 1) invalidate the foreclosure sale, 2) order as void the Foreclosure Deed (or Deed Under Power); and/or 3) restore equitable or legal title, if possible, as it existed just prior to the foreclosure sale and award compensation for any damages suffered as a result of MERS' actions. Alternatively, the Court should impose a constructive trust over the proceeds from, or the value of the property as determined by, any such foreclosure auction.

PARTIES

2.

The Plaintiff is Dustin Rollins. He is the rightful owner of property located on Memorial Drive in Atlanta, Georgia that was pledged, pursuant to the terms of a Security

Deed which is attached hereto as Exhibit B and incorporated herein by this specific reference, as security for the repayment of a residential mortgage loan, which is evidenced by a copy of the promissory note Plaintiff executed and which is attached hereto as Exhibit A and incorporated herein by this specific reference. Plaintiff is a resident and citizen of the State of Georgia.

3.

Defendant Mortgage Electronic Recording Systems, Inc. is a foreign corporation that does business in the State of Georgia. Mortgage Electronic Recording Systems, Inc. is not registered with the Georgia Secretary of State. Mortgage Electronic Recording Systems, Inc. is nevertheless subject to jurisdiction by the Courts of the State of Georgia.

4.

Defendant MERSCORP is a foreign corporation that does business in the State of Georgia. MERSCORP not registered with the Georgia Secretary of State. MERSCORP is nevertheless subject to jurisdiction by the Courts of the State of Georgia. MERSCORP claims to be the sole shareholder in Mortgage Electronic Recording Systems, Inc.

5.

MERS is a national electronic registration and tracking system that supposedly tracks the beneficial ownership interests and servicing rights in mortgage loans.

6.

MERS is the party that foreclosed on via a non-judicial foreclosure process, and sold at a non-judicial public auction, the Plaintiff's home and property. At times MERS has claimed to own (or hold) the Plaintiff's mortgage loan debt and at times MERS

purported to be a mere nominee for the lender or the successors or assigns of the lender, whom MERS claimed was the owner (or holder) of the Plaintiff's mortgage loan debt.

JURISDICTION AND VENUE

7.

Jurisdiction and venue are proper in this Court pursuant to the Georgia Constitution and as the Plaintiff's property is located in Fulton County.

FACTUAL ALLEGATIONS

8.

At base, this lawsuit revolves around the actions taken by MERS when it foreclosed on the Plaintiff's above referenced property and the property of the putative plaintiffs. As a matter of routine policy and practice, MERS: a) purposely misrepresents its status in the foreclosure process; b) purposely misrepresents the true holder of the promissory note's status in the foreclosure process; c) knowingly records fraudulent real estate documents and official records; and d) willfully has wrongfully foreclosed on the Plaintiff's property and the property of the putative plaintiffs. MERS' actions that are discussed herein were intentional or taken without regard to the consequences and have caused severe damages to the Plaintiff and putative plaintiffs. Furthermore, MERS' actions constitute bad faith and stubborn litigiousness and were such that MERS is liable for the attorney's fees associated with bringing this action.

9.

As discussed below, MERS had no right to foreclose on the Plaintiff's' or the putative class' property as a matter of contract and as a matter of Georgia Law.

10.

MERS has acted pursuant to a uniform policy, practice, custom or scheme against Plaintiff and the putative class.

11.

MERS' website says this:

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.

12.

William Hultman, Secretary of MERS, has testified in another case that loans are registered to a "MERS Member" who has entered into the MERS Membership Agreement.

13.

MERS Members enter into a contract with MERSCORP, the parent company to Defendant MERS to electronically register and track beneficial ownership interests and servicing rights in MERS-registered mortgage loans.

14.

MERS Members agree to appoint MERS, which is wholly owned by MERSCORP, to act as their "nominee" and to name MERS as the leinholder of record in a "nominee" capacity on all recorded security instruments relating to the loans registered on the MERS System.

15.

When a promissory note is sold by the original lender to others, the various sales of the notes supposedly are tracked on the MERS System.

16.

MERS claims that once MERS becomes the beneficiary of record as “nominee” regarding deeds of trust and becomes grantee of record as “nominee” with respect to security deeds, it remains the beneficiary/grantee when the beneficial ownership interests in the promissory note or servicing rights are transferred by one MERS Member to another and MERS tracks the transfers electronically on the MERS System. In other words, with “nominee” status only, MERS nonetheless claims to be something else entirely at the same time -- a “beneficiary” or “grantee” of a note or the servicing rights on that note, even though (1) it never held and does not hold an ownership interest in either the note or servicing rights at the time of the original loan transaction and even after such note or servicing rights were subsequently sold (and potentially re-sold) in the market, whether as a mortgage backed security or otherwise, and (2) it cannot be a trustee under Georgia law.

17.

MERS claims that so long as the subsequent sale of the note or servicing rights involves a member of MERS, MERS remains the “beneficiary” of record on the deed of trust or the “grantee” on the security deed and continues to act as a “nominee” for the new beneficial owner.

18.

Plaintiff obtained a residential mortgage loan to purchase a house and property located on Memorial Drive in Atlanta, Georgia, all or part of which was to be used as a dwelling place by the Plaintiff at the time the promissory note and security deed (attached hereto as Exhibits A&B respectively) were entered into.

19.

At the closing on the loan, Plaintiff executed a promissory note which evidenced the debt incurred by the Plaintiff and a security deed which purported to pledge the Plaintiff's property located on Memorial Drive as security for the debt in the event that the Plaintiff defaulted on the repayment of the debt.

20.

The promissory note executed by the Plaintiff was executed in favor of the Lender who was identified as the note holder. (Plaintiff's promissory note attached hereto as Exhibit A). MERS was not identified as the Lender or an owner of the promissory note.

21.

The Security Deed executed by the Plaintiff as Grantor purportedly named MERS, acting solely as a "nominee" for the Lender, as Grantee. (Plaintiff's Security Deed attached hereto as Exhibit B).

22.

Pursuant to the Security Deed, the Plaintiff authorized the Lender to act as Attorney in Fact for purposes of the exercise of the Power of Sale provisions of the Security Deed.

23.

MERS is named as the Grantee, acting solely as “nominee” for the Lender, in hundreds or thousands for security deeds in the State or Georgia with respect to residential mortgage loans issued by MERS Members. All of these Security Deeds are identical or substantially similar as to their language and terms regarding MERS’ powers and duties. MERS is the “nominee” for its members only.

24.24.

If a note has been transferred to a non-member, then MERS cannot act as the nominee. One cannot assume that just because MERS was named as the initial nominee in the deed of trust that it still retains that relationship with the actual holder of the note.

25.

MERS holds the security in a nominee capacity but without rights to the debt. MERS has no rights to the underlying debt repayment secured by the mortgage; MERS does not even act as the servicing agent to receive the payments and remit them to the lender. MERS’ rights under the deed are pursuant to a nominee capacity. In its ordinary meaning, a nominee represents the principal in only a "nominal capacity" and does not receive any property or ownership rights of the person represented. See, *e.g.*, *Cisco v. Van Lew*, 60 Cal. App. 2d 575, 583-84, 141 P.2d 433 (1943); see also *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 889 (Del. 2002) (referring to nominees "as agents of the beneficial owners").

26.

The deed says that MERS acts "solely as nominee for Lender." There is no express grant of any right to MERS to transfer or sell the mortgage or even to assign its duties as nominee. Nor does MERS obtain any right to the borrower's payments or even a role in receiving payments. (National Landmark Bank v. Kesler No. 98,489 IN THE COURT OF APPEALS OF THE STATE OF KANSAS (Sept. 2008)).

27.

MERS may not act on its own, independent of the direction of the specific Lender who holds the repayment interest in the security instrument at the time MERS purports to act. "An agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do *in light of the principal's manifestation* and the facts as he knows or should know them at the time he acts. (*Hot Stuff, Inc. v. Kinko's Graphic Corp.*, 50 Ark. App. 56, 59, 901 S.W. 2d 854, 856 (1995) citing Restatement (Second) of Agency § 33 (1958)) and (*Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas*, NO. 08-1299 (Sup. St. Ark 2009)).

28.

The Plaintiff's Deed to Secure Debt (or "Security Deed") at issue in this case is a standard Georgia MERS Security Deed as it is a form Deed used as an instrument to secure real property to ensure the repayment of hundreds of thousands of loans in Georgia, including those of the putative plaintiffs. (Security Deed attached hereto as Exhibit "B").

29.

MERS standing alone is not the Grantee of the Security Deed signed by Plaintiff or of the Security Deeds signed by the putative plaintiffs. Rather, MERS acting solely as nominee for the lender and the lender's successors and assigns named as the Grantee of the Security Deed. MERS itself has no interest in, or authority to act under, the security deed. Pursuant to the Security Deed, the borrower "appoints Lender the agent and attorney-in-fact for the Borrower to exercise the power of sale." (Security Deed attached hereto Exhibit "B" @ p. 13). The security deed further provides that "MERS is a separate corporation that is acting solely as a nominee for lender and lender's successors and assigns." (Security Deed attached hereto as Exhibit "B" @ p. 1).

30.

The Security Deed does state that the Plaintiff "grants and conveys to MERS (solely as nominee for lender and lenders successors and assigns). . . with power of sale . . ." (Security Deed @ p. 3). But the grant of power of sale is extremely limited. It can only be exercised in a nominee capacity and, even then, can only be exercised by MERS as nominee if necessary to comply with law or custom. The Security Deed provides: "MERS holds only legal title to the interest granted by borrower in this security instrument, but, *if necessary to comply with law and custom*, MERS (as nominee for lender and lender's successors and assigns) has a right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property; and to take any action required of lender including, but not limited to, releasing and canceling the security instrument." (Security Deed attached hereto as Exhibit "B" @ p. 3)

(emphasis added). (As will be seen below, rather than complying with “law and custom,” Georgia law actually *prevents* MERS from foreclosing on property because it is not the note owner or note holder, and Georgia law prevents MERS from acting in a fiduciary capacity relating to the loan.)

31.

Further, the Security Deed provides that if Lender invokes the power of sale:

Lender shall give a copy of a notice of sale by public advertisement for the time and in the manner prescribed by applicable law. Lender, without further demand on borrower, shall sell the property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more partials and in any order lender determines. Lender or his designee may purchase the property at any sale. Lender shall convey to the purchaser, indefensible title to the property and borrower hereby appoints lender borrower’s agent and attorney-in-fact to make such conveyance.”

(Security Deed attached hereto as Exhibit “B”)@ p. 10).

32.

The Plaintiff and putative plaintiffs’ Security Deeds do not purport to give MERS any greater rights than normally given a nominee. The Security Deed says that MERS acts "solely as nominee for Lender." There is no express grant of any right to MERS to transfer or sell the mortgage or even to assign its duties as nominee. Nor does MERS obtain any right to the borrower's payments or even a role in receiving payments made toward the repayment of the loan. (Security Deed attached as Exhibit B).

33.

MERS was not the owner and/or holder in due course of the Plaintiff and putative plaintiffs’ Promissory Notes at the time of the foreclosure, or at any time, because MERS

is never a holder of residential mortgage loan debt and is never entitled to any mortgage loan payments that debtors make toward the repayment of the mortgage loan debt, including even the debtors whose property MERS, as nominee for the lender and the lender's successors and assigns, holds legal title as security for repayment of the underlying loan.

34.

MERS' "Terms and Conditions" identifies MERS' interests. The Terms and Conditions say this:

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. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under a deed of trust and any other form of security instrument under applicable state law. (Emphasis added.)

(MERS Terms and Conditions attached hereto as Exhibit C).

35.

MERS has previously successfully asserted in other lawsuits throughout the country that it does not hold or own Promissory Notes. In a case before Nebraska Supreme Court, *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005), wherein MERS was sued by the Nebraska Banking Commission for the purpose of regulating MERS as a lender, MERS argued successfully that it was not a lender. The Nebraska Supreme Court agreed with MERS holding:

“MERS is a private corporation that administers the MERS system, a national electronic registry that tracks the transfer of ownership interests and servicing rights in support of mortgage loan.” citing *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005).

36.

MERS argued in another forum that it is *not* authorized to engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. In *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005), MERS challenged an administrative finding that it was a mortgage banker subject to license and registration requirements. The Nebraska Supreme Court found in favor of MERS, noting, “MERS has no independent right to collect on any debt because MERS itself has not extended any credit, and **none of the mortgage debtors owe MERS any money.**” 270 Neb. at 535.

35.

The Court in Nebraska further noted the following representation made by MERS:

MERS argues that it *does not acquire mortgage loans* and is therefore not a mortgage banker under § 45-702(6) because *it only holds legal title* to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it *does not own the promissory notes* secured by the mortgages and has no right to 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.”

704 N.W. 2d 784, 787 (citing brief for MERS) (emphasis added). According to the Court, counsel for MERS further explained:

[T]hat 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.

Id. (emphasis added). In finding that MERS was not a “mortgage banker,” the Court stated:

In other words, through its services to its members as characterized by the district court, 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.

Id. at 788. (emphasis added).

MERS’ FORECLOSURES ARE INVALID IN GEORGIA BECAUSE MERS IS NOT A SECURED CREDITOR AND THE NOTICE OF FORECLOSURE MERS’ ATTORNEYS SENT TO PLAINTIFFS AND PUTATIVE PLAINTIFFS DOES NOT QUALIFY AS OCGA 44-14-162.2 NOTICE

37.

Under Georgia law, no sale of real estate under powers contained in security deeds are valid unless the sale is advertised and conducted at the time and place and in the usual manner of the sheriff’s sales in the county in which such real estate or a part thereof is located and unless notice of the sale is given as required by Code Section 44-14-162.2.

38.

O.C.G.A. § 44-14-162.2 provides that notice of the initiation of proceedings to exercise a power of sale in a security deed is to be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure.

39.

Pursuant to O.C.G.A. Sections 44-14-162¹ and 44-14-162.2² the Secured Creditor was required, in order for any non-judicial sale of the Plaintiff's property and the

¹ § 44-14-162. Sales Made On Foreclosure Under Power Of Sale -- Manner Of Advertisement And Conduct Necessary For Validity.

(a) No sale of real estate under powers contained in mortgages, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale shall have been given as required by Code Section 44-14-162.2. If the advertisement contains the street address, city, and ZIP Code of the property, such information shall be clearly set out in bold type. In addition to any other matter required to be included in the advertisement of the sale, if the property encumbered by the mortgage, security deed, or lien contract has been transferred or conveyed by the original debtor to a new owner and an assumption by the new owner of the debt secured by said mortgage, security deed, or lien contract has been approved in writing by the secured creditor, then the advertisement should also include a recital of the fact of such transfer or conveyance and the name of the new owner, as long as information regarding any such assumption is readily discernable by the foreclosing creditor. Failure to include such a recital in the advertisement, however, shall not invalidate an otherwise valid foreclosure sale.

(b) The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located.

History. Amended by 2008 Ga. Laws 576, § 1, eff. 5/13/2008. (emphasis added).

² § 44-14-162.2. Sales Made On Foreclosure Under Power Of Sale -- Mailing Of Notice To Debtor -- Procedure For Mailing Notice.

(a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor. The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. Nothing in this subsection shall be construed to require a secured creditor to negotiate, amend, or modify the terms of a mortgage instrument.

(b) The notice required by subsection (a) of this Code section shall be given by mailing or delivering to the debtor a copy of the notice of sale to be submitted to the publisher.

History. Amended by 2008 Ga. Laws 576, § 2, eff. 5/13/2008. (emphasis added).

property of the putative plaintiffs to be valid, to send notification at least 30 days prior to any intended foreclosure on the property.

40.

Georgia law, at O.C.G.A. § 23-2-114 entitled Powers of sale -- To be construed strictly; manner of sale; who may exercise, provides that “Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised.”

41.

With respect to the named Plaintiff, and the putative plaintiffs, 30 days or more before the Foreclosure sale of the Plaintiff’s property and the property of the putative plaintiffs, MERS sent a knowingly false and defective notice of foreclosure letter that did not comply with O.C.G.A. 44-14-162.2 and which included knowingly false information that was intended to mislead the Plaintiff and putative plaintiffs into believing that the statutory notice requirements were being complied with and into believing that MERS had authority to foreclose on the Plaintiff’s property. The notices sent to the Plaintiff and the putative plaintiffs failed to meet the requirements of O.C.G.A. 44-14-162.2 in that it was not sent “by the secured creditor.”

42.

MERS was not a Secured Creditor in that it neither held the security for the property and it was not a creditor as it was not the holder of the promissory notes and was not the party to whom the Plaintiff and putative plaintiffs owed money for the repayment

of their respective debts. It also could not be the secured creditor, as it is prohibited under Georgia law from acting as a fiduciary in regard to the note.

43.

The foreclosure/non-judicial sales of the Plaintiff's and the putative plaintiffs' property all took place without the issuance of a foreclosure notice that complied with the foreclosure statute. According to O.C.G.A. 44-14-162 the foreclosure sales of the Plaintiff's property and the putative plaintiffs' property are not valid by operation of law and this Court must issue an order that declares that all Deeds under Power (i.e. foreclosure deeds) that were prepared as a result of the invalid non-judicial sales of the Plaintiff's property and the property of the putative plaintiffs and that were recorded on the land records of the Georgia counties wherein the land lies are VOID. Doing so would restore title as it existed just prior to the invalid foreclosure sale.

EVEN IF MERS COULD GET AROUND THE PROBLEM THAT THERE WAS NO PROPER OCGA 44-14-162.2 NOTICE, MERS STILL HAD NO AUTHORITY TO FORECLOSE BECAUSE THE SECURITY DEEDS NAMING MERS THE GRANTEE ACTUALLY CONVEYED NOTHING TO MERS AND ARE VOID

44.

MERS lacked power of sale authority to act as Attorney in Fact for the Plaintiff and putative plaintiffs and could not legally proceed with a non-judicial sale of the Plaintiff's property or the property of the putative plaintiffs.

45.

MERS lacks the capacity to act as a Trust or Corporate Fiduciary in the State of Georgia, thereby rendering void the security deeds of the Plaintiff and putative

plaintiffs that named MERS, acting solely as “nominee” for the Lender and the Lender’s successors and assigns.

46.

The term “nominee” is not defined in the security deed.

47.

Georgia law does not recognize the term “nominee” in a real estate transaction wherein the grantee holds legal title for the benefit of another.

48.

Black's Law Dictionary defines "nominee" as "[a] person designated to act in place of another, usually in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004).

49.

A "beneficiary" is defined as "one designated to benefit from an appointment, disposition, or assignment . . . or to receive something as a result of a legal arrangement or instrument." BLACK'S LAW DICTIONARY 165 (8th ed. 2004).

50.

But it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans.

51.

With respect to a corporation, such as MERS, acting as a fiduciary, O.C.G.A § 7-1-242 declares:

1. No corporation, partnership, or other business association may lawfully act as a fiduciary in this state except:
 - (1) A financial institution authorized to act in such capacity pursuant to the provisions of Georgia law;
 - (2) A trust company;
 - (3) A national bank or a state bank lawfully doing a banking business in this state and authorized to act as a fiduciary under the laws of the United States or another state;

- (4) A savings bank or savings and loan association lawfully doing a banking business in this state and authorized to act as a fiduciary under the laws of the United States or another state;
 - (5) Attorneys at law licensed to practice in this state, whether incorporated as a professional corporation or otherwise;
 - (6) An investment adviser registered pursuant to the provisions of 15 U.S.C. Section 80b-3 or Chapter 5 of Title 10, provided this exception shall not authorize an investment adviser to act in any fiduciary capacity subject to the provisions of Title 53, relating to wills, trusts, and the administration of estates; or
 - (7) A securities broker or dealer registered pursuant to the provisions of 15 U.S.C. Section 78o or Chapter 5 of Title 10 acting in such fiduciary capacity incidental to and as a consequence of its broker or dealer activities.
2. Acting as a fiduciary for purposes of this Code section includes but is not limited to:
- (1) Accepting or executing trusts or otherwise acting as a trustee;
 - (2) Administering real or tangible personal property located in Georgia or elsewhere. For the purposes of this paragraph, "administer" means to possess, purchase, sell, lease, insure, safekeep, manage, or otherwise oversee; and (emphasis supplied)
 - (3) Acting pursuant to a court order as personal representative, executor, or administrator of the estate of a deceased person or as guardian or conservator for a minor or incapacitated person.
- (c) Nothing in this chapter shall be construed to repeal or to change Part 2 of Article 16 of Chapter 12 of Title 53, dealing with foreign trustees, or Part 3 of Article 16 of Chapter 12 of Title 53, dealing with certain foreign corporations acting as fiduciaries, or any other statutes or rules of law on such subjects.

52.

The penalty for a corporation, such as MERS, unlawfully acting as a fiduciary is found in O.C.G.A § 7-1-845:

Miscellaneous felonies; when punished as misdemeanors

- (a) Any person or corporation, including any financial institution or its directors, officers, agents, or employees, who shall perform the following acts or deeds shall be guilty of a felony:

- (3) Willfully engages in the business of:

- (B) A trust company in violation of Code Section 7-1-242... (emphasis supplied)

53.

MERS is clearly acting as a Trust Company as its role with respect to the Deed to Secure Debt is to hold legal title to property for the benefit of another. The Supreme Court of Georgia has ruled:

"No formal words are necessary to create a trust estate. Whenever a manifest intention that another person shall have the benefit of the property is exhibited, the grantee shall be declared a trustee." (emphasis supplied).

Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 182 Ga. 348 (Ga. 1936) (emphasis added).

54.

OCGA Sec. 53-12-24(a), states that a corporation that wishes to act as trustee "must have the power to act as a trustee in Georgia."

55.

OCGA Sec. 7-1-242 provides that only certain corporations or business entities may act as a fiduciary in Georgia. These are basically banks, trust companies, and other financial institutions.

56.

Unless a corporation receives approval to act as a bank or trust company, as set forth in OCGA Sec. 7-1-392 et. seq., it cannot lawfully act as a corporate fiduciary in the State of Georgia.

57.

MERS has never sought, nor has it been granted authority by the Georgia Department of Banking and Finance to act as a trustee or to operate as a Trust Company. It is therefore unlawful for MERS, solely as “nominee” for the lender and the lender’s successors and assigns, to be the Grantee of a Security Deed wherein it is tasked with holding legal title to the property for the benefit of another.

58.

The Plaintiff’s and the putative class plaintiffs’ security deed (“trust instrument”)³ clearly meets all the elements of an “express trust”⁴ in Georgia.

59.

Plaintiff and the putative class plaintiffs, as “settlor”,⁵ conveyed legal title to the “trust property”⁶ to MERS as “trustee”⁷ for the lender and its successors and assigns , the true trust “beneficiaries”.⁸

³ O.C.G.A. § 53-12-2 (9) "Trust instrument" means the document or documents that manifest the elements and other details of a trust.

⁴O.C.G.A. § 53-12-2 (2) "Express trust" means a trust in which the settlor's intention to create the trust is expressly stated, and which meets the requirements of Code Section 53-12-20.

⁵ O.C.G.A. § 53-12-2 (7) "Settlor" means the person who creates the trust. The terms "grantor" and "trustor" mean the same as "settlor."

⁶ O.C.G.A. § 53-12-2 (10) "Trust property" means property placed in trust by the settlor or property otherwise transferred to or acquired or retained by the trustee for the trust. The terms "trust corpus" and "trust res" mean the same as "trust property."

⁷O.C.G.A. § 53-12-2 (11) "Trustee" means the person holding legal title to the property in trust.

60.

Further evidence MERS is acting as a corporate fiduciary can be found in the Exhibit “D” which is attached hereto and is incorporated herein by this specific reference. The Attorney General, Mr. Bowers, Esq., states at ¶ 4 “An examination of the specific persons or entities identified as fiduciaries in O.C.G.A. § 7-1-4(20) reveals that such persons or entities are similar in nature to one another in that the role of each one involves taking possession of or title to the assets of another or exercising control over such assets for the purpose of managing those assets on behalf of the other person.” This is exactly what the Deeds to Secure Debt at issue in this Complaint attempt to require MERS to do – take bare legal title to the property for recordation purposes. As stated, however, MERS lacks the capacity to act as a Trustee, operate as a Trust Company or be a corporate fiduciary.

61.

Thus MERS is acting unlawfully as a corporate fiduciary in the State of Georgia and the term “nominee” is merely an artifice employed to obfuscate the true relationship between the Plaintiff, MERS and the trust beneficiaries.

62.

The security deeds at issue herein violate Georgia public policy because MERS is not a trust company or bank, thus is operating unlawfully as a corporate fiduciary by

⁸ O.C.G.A. § 53-12-2 (1) "Beneficiary" means a person for whose benefit property is held in trust, regardless of the nature of the interest. A beneficiary must be definitely ascertainable at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities.

obtaining legal title to real property in the State of Georgia as a trust or trustee for the benefit of MERS members and non members.

63.

MERS has no authority to hold legal title to real property and promissory notes in the State of Georgia as a trust or trustee.

64.

MERS has no authority to sell real property and/or promissory notes as a trust or trustee for any entity.

65.

MERS is acting as a trust or trustee without appropriate approval from the Georgia Department of Banking and Finance.

66.

MERS cannot register to act as a trust or trustee in the State of Georgia because it does not now meet the registration requirements to be registered by the Georgia Department of Banking and Finance.

67.

In addition to being void because MERS cannot lawfully be a Grantee of a Security Deed acting solely as a nominee for a lender because MERS would be acting as a corporate fiduciary in Georgia when it lacks the capacity to act as a corporate fiduciary, the Security Deeds of the Plaintiff and the putative plaintiffs naming MERS, acting solely as nominee, and thereby conveying legal title to the property to MERS, acting solely as nominee, as opposed to conveying legal title to the Lender, also causes a problem with

the ability to foreclose on the property in the event of a default in repayment of the loan. The ability to foreclose on the property at issue is affected because the security deed has been separated or split from the note. Loans originated with MERS as the original Grantee purport to separate the borrower's promissory note, which is made payable to the originating lender, from the security deed, which contains borrower's conveyance of legal title to MERS as nominee.

68.

With the creation of MERS, the mortgage industry has created a system whereby the deeds or mortgages are required to be separated or split from the notes. The Mortgage Industry decided to commit to the MERS system despite the U.S. Supreme Court's holding that "the note and the mortgage are inseparable." Carpenter v. Longan, 83 U.S. 271, 274 (1872). *See also* Nagle v. Macy 9 Cal. 426, 1858 WL 818 (Cal. 1858) ("The debt and the mortgage are inseparable.") Indeed, it went on to state that a "mortgage can have no separate existence" from a promissory note. Carpenter, 83 U.S. at 274. As such, the MERS security agreement that purports to grant a deed independent of the promissory note attempts to convey something that cannot exist by law.

69.

Many courts have held that a document attempting to convey an interest in realty fails to convey that interest when an eligible grantee is not named. Disque v. Wright, 49 Iowa 538, 1878 WL 623 (Iowa 1878) ("It has been frequently held that slight omissions in the acknowledgment of a deed destroy the effect of the record as constructive notice. *A fortiori*, it seems to us, should so important and vital an omission as that of the name of

the grantee have that effect.”); Chauncey v. Arnold, 24 N.Y. 330 (N.Y. 1862) (“No mortgagee or obligee was named in [a mortgage], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper.”); Richey v. Sinclair, 47 N.E. 364 (Ill. 1897) (“The law is well settled that a deed without the name of a grantee is invalid. It is said there must be in every grant a grantor, a grantee, and a thing granted; and a deed wanting in either essential will be void.”); Allen v. Allen, 51 N.W. 473, 474 (1892) (omission of name of grantee invalidated conveyance because “A legal title to real property cannot be established by parol.”); 59 CJS MORTGAGES § 306 (“Notice may be deemed not present in cases of insufficient attestation or where the instrument itself is so defective as to be void as a matter of law, as where it wholly omits the name of the mortgagee.”) (citations omitted).

70.

Courts around the country have long held: “there must be, in every grant, a grantor, a grantee and a thing granted, and a deed wanting in either essential is absolutely void.” Whitaker v. Miller, 83 Ill. 381, 1876 WL 10353 (Ill. 1876); Trout v. Taylor, 32 P.2d 968 (Ca. 1934); Green v. MacAdam, 346 P.2d 474, 485 (Cal.App. 1959); Hulsether v. Peters, 167 N.W. 497, 498 (S.D. 1918); Allen v. Allen, 51 N.W. 473, 473 (Minn. 1892); Beard v. Griggs, 1 J.J.Marsh. 22, 1829 WL 1139 (Ky.App. 1829); Morris v. Stephens, 46 Pa. 200, 1863 WL 4942, 10 Wr.Pa. 200 (Pa., 1863). Indeed, this common sense rule dates back to Blackstone’s Commentaries which state: “What are the requisites of a deed? ... There must be persons able to contract and be contracted with, for purposes

intended by the deed; and also a thing, or subject matter, to be contracted for; all of which must be expressed by sufficient names.” 2d Blackstone’s Commentaries, 296. And more recently, Patton and Palomoar’s treatise agrees that: “It is axiomatic that a deed will be inoperative as a conveyance unless it designates someone to whom the title passes. A grantee is as necessary to the validity of a grant as that there should be a grantor or a property granted.” 2 PATTON AND PALOMAR ON LAND TITLES § 338 (3d ed. 2009).

71.

In *Chauncey v. Arnold*, 24 N.Y. 330, 332 (N.Y. 1862), the trial court, intermediate appellate court and New York’s highest court all agreed that the attempt to convey an “in blank” mortgage failed. The Court of Appeals explained, “No mortgagee or obligee was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper.” *Id.* at 335.

72.

The Supreme Court of California reached a similar result in a deed of trust state. In *Trout v. Taylor* 32 P.2d 968 (Cal. 1934), a shady finance company induced “an elderly woman, without business experience, and of very limited schooling and education” into signing a blank deed conveying her land. After execution and delivery of the deed, the finance company filled in the name of a company insider, took out a few loans against the land and sold them to investors. In analyzing whether the deed was enforceable the Court

pointed to the absence of a named grantee and held that “the deed in question was not voidable, but was void *in toto*; a nullity.” *Id.* at 970.

THE MERS SYSTEM IS CONTRARY TO HUNDREDS OF YEARS OF BLACK LETTER PROPERTY LAW AND IT CRACKS THE PUBLIC RECORDING OF PROPERTY OWNERSHIP FOUNDATION UPON WHICH A PROPERLY FUNCTIONING NON-JUDICIAL FORECLOSURE SYSTEM RELIES

73.

As alluded to above, in the case of the Plaintiff and putative plaintiffs, the functioning of the MERS system which requires that the deed be separated, i.e. split, from the note, if given the stamp of approval by this Court, will turn hundreds of years of black letter property law on its head.

74.

Since the founding of the American republic each county in the United States has maintained records of who owns the land within that county. PATTON AND PALOMAR ON LAND TITLES § 4 (3d ed. 2003).

75.

Most states have tracked changes in ownership of land, including mortgages and deeds of trust, by maintaining records indexed through the names of grantors and grantees. 14 POWELL ON REAL PROPERTY §82.03[2][b]. These grantor-grantee indexes allow individuals and businesses contemplating the purchase of land to investigate (or hire a title insurer to investigate) whether a seller or mortgagor actually owns the land they are offering for sale or mortgage.

76.

For centuries American mortgage lenders have recorded their mortgages loans with county recorders because of incentives created by state land title laws. For example, if a mortgagee fails to properly record its mortgage, and then someone subsequently buys or lends against the home, the subsequent purchaser can often take priority over the first mortgagee.

77.

Similarly, where a mortgagee assigns a mortgage to an investor, that investor would eagerly record documentation reflecting the assignment to protect herself from the possibility that the original mortgagee would assign the same mortgage to a different investor.

78.

In the mid-1990s mortgage bankers decided they did not want to pay recording fees for assigning mortgages anymore. Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 ID. L. REV. 805, 810-12 (1995) (describing an Ernst & Young study commissioned by mortgage banker to study how much money they could avoid paying to county governments through the MERS system). This decision was driven by securitization—a process of pooling many mortgages into a trust and selling income from the trust to investors on Wall Street. Securitization, also sometimes called structured finance, usually required several successive mortgage assignments to different companies. To avoid paying county recording fees, mortgage bankers formed a plan to create one shell company, MERS, that would pretend to own all

the mortgages in the country—that way, the mortgage bankers would never have to record assignments since the same company would always supposedly “own” all the mortgages. Peterson, *Foreclosure, supra* note 5, at 1368-73; Howard Schneider, *MERS Aids Electronic Mortgage Program*, MORTGAGE BANKING, January 1, 1997.

79.

MER was created even though not a single state legislature or appellate court had authorized this change in the real property recording.

80.

Currently about 60% of the nation’s residential mortgages are recorded in the name of MERS, Inc. rather than the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt. For the first time in the nation’s history, there is no longer an authoritative, public record of who owns land in each county.

81.

In boilerplate security agreements included in mortgages and deeds of trust of the Plaintiff and the putative class plaintiffs, lenders included this clause: “MERS” is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is *acting solely as nominee for Lender* and Lender’s successors and assigns. *MERS is the mortgagee* under this Security Instrument.”

82.

On the one hand, MERS purports to be acting as a nominee—a fiduciary (which is prohibited to MERS under Georgia law). On the other hand, it also is claiming to be an

actual mortgagee, which is to say an owner of the real property right to foreclose upon the security interest.

83.

It is axiomatic that a company cannot be both an agent and a principal with respect to the same right.

84.

In litigation all across the country, attorneys representing MERS frequently take inconsistent positions on the legal status of the company, depending on the legal issue at hand.

85.

If MERS is merely an agent of the actual lender, it does not have the authority to list itself as a grantee with power of sale in the security deed, then while it may have authority to record mortgages in its own name, both MERS and financial institutions investing in MERS-recorded mortgages run afoul of longstanding precedent on the inseparability of promissory notes and mortgages.

86.

Since the 19th century a long and still vital line of cases has held that mortgages and deeds of trust may not be separated from the promissory notes that create the underlying obligation triggering foreclosure rights. *In re Bird*, 2007 WL 2684265, at ¶¶ 2-4 (Bkrtcy.D.MD. 2007) (“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. . . . It is equally absurd to assume that

such bifurcation was intended because such a bifurcation of the note from the deed of trust would render the debt unsecured.”); [In re Leisure Time Sports, Inc.](#) 194 B.R. 859, 861 (9th Cir.1996) (stating that “[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures” and that, “[i]f the debt is not transferred, neither is the security interest”); [In re BNT Terminals, Inc.](#), 125 B.R. 963 (Bankr. N.D. Ill. 1990) (“An assignment of a mortgage without a transfer of the underlying note is a nullity. . . . 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.”); [Yoi-lee Realty Corp. v. 177th Street Realty Associates](#), 208 A.D.2d 185, 626 N.Y.S.2d 61, 64 (N.Y.A.D. 1 Dept.,1995) (“The mortgage note is inseparable from the mortgage, to which the note expressly refers, and from which the note incorporates provisions for default.”); [In re AMSCO, Inc.](#), 26 B.R. 358, 361 (Bkrtcy. Conn., 1982) (reaffirming that “[t]he note and mortgage are inseparable”); [Barton v. Perryman](#), 577 S.W.2d 596, 600 (Ark., 1979) (“[A] note and mortgage are inseparable.”); [Trane Co. v. Wortham](#), 428 S.W.2d 417, 419 (Tex. Civ. App. 1968) (“The note and mortgage are inseparable. . . .”); [Kirby Lumber Corp. v. Williams](#), 230 F.2d 330, 333 (5th Cir. 1956) (“The rule is fully recognized in this state that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note. * * * The note and mortgage are inseparable. . . .”); [Kelley v. Upshaw](#), 39 Cal.2d 179, 192, 246 P.2d 23 (1952) (“In any event, Kelley's purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity.”); [Hill v. Favour](#), 52 Ariz. 561, 84 P.2d 575 (Ariz. 1938) (“The note and mortgage are inseparable; the former as

essential, the latter as an incident.)”); Denniston v. C.I.R., 37 B.T.A. 834, 1938 WL 373 (B.T.A. 1938) (“All the authorities agree that the debt is the principal thing and the mortgage an accessory. . . The mortgage can have no separate existence.”); West v. First Baptist Church of Taft, 123 Tex. 388, 71 S.W.2d 1090, 1098 (Tex. 1934) (“The trial court's finding and conclusion ignore the settled principle that a mortgage securing a negotiable note is but an incident to the note and partakes of its negotiable character. . . . The note and mortgage are inseparable; the former as essential, the latter as an incident.”) (citations omitted); First Nat. Bank v. Vagg, 65 Mont. 34, 212 P. 509, 511 (Mont. 1922) (“A mortgage, as distinct from the debt it secures, is not a thing of value nor a fit subject of transfer; hence an assignment of the mortgage alone, without the debt, is nugatory, and confers no rights whatever upon the assignee. 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 the assignment of the latter alone is a nullity. The mortgage can have no separate existence.”) (citations omitted); Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at ¶ 7 (N.H. 1831) (“[T]he interest of the mortgagee is not in fact real estate, but a personal chattel, a mere security for the debt, an interest in the land inseparable from the debt, an incident to the debt, which cannot be detached from its principal.”).

87.

The above cases do not merely hold that mortgages follow notes as a matter of default law, but that mortgages cannot legally be separated from notes. Thus, in Carpenter v. Longan 83 U.S. 271, 274, (1872) the United States Supreme Court announced the classic statement of this rule: “the note and mortgage are *inseparable*....,

the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”

88.

To date, every state Supreme Court that has looked at the issue has concluded that, despite its boilerplate language, MERS is not a mortgagee or deed of trust beneficiary. For example, in MERS, Inc. v. Southwest Homes of Arkansas, 2009 Ark. 152, 301 S.W.3d 1 (Ark. 2009) a first position lender named MERS as the beneficiary on its deed of trust. Later the family took out a second mortgage which did not use the MERS system. When the family fell behind on the second mortgage, the subsequent lender’s assignee foreclosed without notifying either MERS or the real owner of the first mortgage. When MERS, acting through local counsel attempted to set aside the foreclosure, a unanimous Supreme Court of Arkansas, with its Chief Justice writing, held that MERS had no property rights with respect to the loan whatsoever. Even though MERS never had service of process, the court allowed the foreclosure to stand because MERS had lost nothing. In the Court’s words, “MERS is not the beneficiary, even though it is so designated in the deed of trust.”

89.

Similarly, the Kansas Supreme Court has also refused to allow MERS to set aside a first mortgagee’s default judgment in a foreclosure action. Landmark Nat. Bank v. Kesler, 216 P.3d 158,169 (Kan. 2009). In its opinion, the Kansas Supreme Court diagnosed MERS’ schizophrenic self characterization as a nominee, puzzling:

What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time.

90.

Kansas followed Arkansas' skepticism regarding whether MERS actually owns anything: "MERS did not demonstrate, in fact, did not attempt to demonstrate, that it possessed any tangible interest in the mortgage beyond a nominal designation."

91.

Likewise, the Supreme Court of Maine reached similar results when MERS itself filed a foreclosure complaint. In MERS, Inc. v. Saunders, Slip op. 2010 ME 79, at ¶ 1 (August 12, 2010) MERS filed a foreclosure complaint, but during the pending case, Deutsche Bank attempted to substitute itself into the action instead of MERS.³⁴ When the trial court awarded summary judgment to Deutsche Bank the family appealed arguing that MERS lacked standing and that this jurisdictional defect could not be cured by substitution of another party during the pending case. The appeal forced the Maine Supreme Court to look at the simple question of whether MERS has standing to bring a foreclosure action on behalf of the real economic loan owner. Despite contrary boilerplate language in the security agreement, the Court flatly rejected MERS' ownership claim stating: "MERS is not a mortgagee... because it has no enforceable right in the debt obligation securing the mortgage." Because MERS lacked standing, the court reversed summary judgment to give the family an opportunity to "appropriately defend the foreclosure action against the real party in interest."

In Missouri, appellate courts have gone a step further in challenging MERS' ownership claims vis-à-vis mortgages tracked on its database. In Bellistri v. Ocwen Loan Servicing, 284 S.W.3d 619 (Mo.App. E.D.,2009) MERS' involvement in the loan effectively led to the stripping of deed of trust lien from the land. In this case, a debtor borrowed money from a mortgage lending company named BNC Mortgage and signed a deed of trust naming MERS as beneficiary of the trust. After the loan closed, no one paid property taxes on the residence for several years. Eventually the local government established a tax lien and sold the property at auction to Bellistri. Hoping to make his rights clear, Bellistri sued in state court to quiet title on the land he had purchased. Because the debt had still not been repaid Ocwen, a mortgage loan servicing company, attempted to argue that the tax sale did not transfer title to the land from the original debtor to Bellistri. Ocwen produced an assignment of the deed of trust from MERS to Ocwen that had been recorded by an employee of Ocwen pretending to be a Vice President of MERS. The Missouri Court of Appeals treated the recorded assignment as a legal nullity. Looking to the American Law Institute's Third Restatement of Property Law the court stated:

Typically, the same person holds both the note and the deed of trust. In the event that the note and the deed of trust are split, the note, as a practical matter becomes unsecured. Restatement (Third) of Property (Mortgages) § 5.4. Comment. The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. Id. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. Id.

The mortgage loan became ineffectual when the note holder did not also hold the deed of trust.

Ultimately, the Court held that “MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force.” The Court effectively quieted title in favor of Bellistri, stripping off the lien.

93.

The policy justifications behind recording statutes are as germane today as they were hundreds of years ago when the first American colonies began adopting the statutes. Society needs an authoritative, transparent source of information on who owns land in order to protect property rights, encourage commerce, expose fraud, and avoid disputes.

94.

The MERS database does not provide reliable, authoritative information on legally cognizable beneficial ownership of loans registered in its system. County real property records that hold only a reference to the MERS system now have a systemic break in chains of title. Perhaps this is what MERS means by its corporate slogan: “Process Loans, Not Paperwork.” *See* Welcome to MERS, www.mersinc.org.

95.

MERS, whose stated purpose is to track the true ownership of notes and servicing rights, knew at the time of the foreclosure on the Plaintiff’s property and at the time of its foreclosure on the property of the putative plaintiffs that its statements in the notices of foreclosure were false and that it, acting on its own, had no authority to act as Attorney

in Fact for the Plaintiff or the putative plaintiffs or to accelerate the debt or exercise the power of sale.

**MERS VIOLATED THE STATUTORILY REQUIRED OBLIGATION TO
FAIRLEY EXERCISE THE POWER OF SALE**

96.

In addition to conducting and invalid foreclosure sale as a matter of law, MERS also violated O.C.G.A. § 23-2-114 in that is violated its duty to fairly exercise the power of sale as concerns the Plaintiff's property and the property of the putative plaintiffs and is therefore liable in tort for any damages resulting from its actions.

97.

As a result of the above described actions of MERS the Plaintiff and putative plaintiffs have suffered tremendous injuries including, but not limited to severe emotional pain and suffering, anger, sadness, humiliation, embarrassment, etc.

98.

Based on the above undisputed facts, the Plaintiff and putative plaintiffs are therefore entitled to recover all of their damages that resulted from MERS action in proceeding with the foreclosure, including, damages for severe emotional pain and suffering, punitive damages and for attorney's fees.

CLASS ACTION ALLEGATIONS

99.

The class of persons sought to be represented by the named Plaintiff is so numerous that joinder of all members is impracticable, as Plaintiff believes there are

thousands of putative plaintiffs in Georgia who were subject to the same language in the deeds and the same policy and practices by MERS in the non-judicial foreclosure process and non-judicial foreclosure sale process.

100.

Questions of law and fact implicated in this action are common to the named Plaintiff and the class of persons they seek to represent. These include the validity of the form deed used and discussed herein with Plaintiff and the putative class plaintiffs; the power (or lack thereof) for MERS to act; whether MERS is properly a fiduciary (or not); and whether MERS was a security holder when it acted to foreclose.

108.

The claims of the named Plaintiff are typical of the claims of the class of persons he seeks to represent.

109.

The named representative Plaintiff will fairly and adequately represent the interests of the class of persons he seeks to represent and he has engaged capable counsel experienced in conducting class litigation.

110.

The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of other class members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

111.

Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

112.

The interests of individual members of the class in individually controlling the prosecution of potential individual claims are minimal in light of the defenses that would or might be interposed and that would be applicable to the claims of the class as a whole.

113.

There are no particular difficulties that are likely to be encountered in the management of this case due to it being afforded class action status.

114.

All questions presented in this case—both of law and fact -- are common to the members of the class and predominate over any questions affecting only individual members of the class.

115.

A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

COUNT I

WRONGFUL FORECLOSURE AS A MATTER OF LAW

FORECLOSURES INVALID BY OPERATION OF OCGA 44-14-162.2

116.

The Plaintiff incorporates by this specific reference the preceding paragraphs of this Complaint as if stated fully herein.

117.

Under Georgia law, no sale of real estate under powers contained in security deeds are valid unless the sale is advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale is given as required by Code Section 44-14-162.2.

118.

MERS had no right to proceed with a foreclosure and non-judicial sale of the Plaintiff's property or the property of the putative plaintiffs as proper notice of the sale was not given as required by OCGA 44-14-162.2. The letter sent to the Plaintiff and the letters sent to the putative plaintiffs which were sent on MERS behalf did not comply with the requirements of OCGA 44-14-162.2. OCGA 44-14-162.2 requires that the Secured Creditor send the notice and MERS is not the Secured Creditor as concerns the Plaintiffs' loan or the loans of the putative plaintiffs.

119.

According to O.C.G.A. 44-14-162 the foreclosure sales of the Plaintiff's property and the putative plaintiffs' property are not valid by operation of law and this Court must

issue an order that declares that all deeds under power (i.e. foreclosure deeds) that were prepared as a result of the invalid non-judicial sales of the Plaintiff's property and the property of the putative plaintiffs and that were recorded on the land records of the Georgia counties wherein the land lies are VOID and which restores title as it existed just prior to the invalid foreclosure sale.

COUNT II

WRONGFUL FORECLOSURE AS A TORT

120.

The Plaintiff incorporates by this specific reference the preceding paragraphs of this Complaint as if stated fully herein.

121.

In Georgia there exists a statutory duty upon a mortgagee to exercise fairly and in good faith the power of sale in a deed to secure debt. Although arising from a contractual right, breach of this duty is a tort compensable at law. [Clark v. West, 196 Ga. App. 456, 395 S.E.2d 884 \(1990\)](#)

122.

Because of any one of the reasons identified above, including but not limited to (1) the fact that no notice meeting the requirements of OCGA 44-14-162.2 was sent to the Plaintiff or the putative plaintiffs by the secured creditor because, (2) the fact that MERS was not a holder in due course of the promissory note, (3) the fact that the security deed only granted power of sale to MERS, acting solely as nominee for the lender, in the very limited and extraordinary circumstance that it becomes necessary to comply with local

law or custom and there is nothing about Georgia law or custom that makes it necessary for MERS, acting as nominee for a lender, to exercise the power of sale which the deed expressly granted to the lender and the lenders successors and assigns, (4) the fact that MERS cannot legally act as a corporate fiduciary in Georgia, which is what (a) the operation of the deed requires and (b) exercise of the power of sale as attorney-in-fact for the Plaintiff and putative plaintiffs requires, thus making the Security Deeds and the Foreclosure Deeds relating to the Plaintiff and putative plaintiffs void, (5) the fact that the MERS system of registration requires the note and the deed separate or split, which causes the loan to become unsecured as the deed cannot be enforced apart from the note, and (6) the fact of MERS failure in many respects to fairly exercise the power of sale under OCGA 23-2-114, MERS, whether standing alone or together, MERS actions in foreclosing on, and selling at a non-judicial auction, the property of the Plaintiff and that of the putative plaintiffs, constitute the tort of wrongful foreclosure

123.

MERS chose to proceed with the non-judicial sale of the Plaintiff's and putative class plaintiffs' property even though it knew or should have known it lacked authority to act as attorney in fact for the Plaintiffs and putative plaintiffs and exercise the power of sale. MERS actions were willful and wanton and exercised with a complete disregard for the consequences, such that the plaintiff and putative plaintiffs are entitled to an award of punitive damages.

124.

MERS above described actions constitute the tort of wrongful foreclosure under Georgia law entitling the Plaintiff and putative plaintiffs to recover from MERS all damages that were caused by MERS tortuous conduct, including damages for severe emotional distress and for punitive damages and attorneys' fees.

COUNT III

EQUITABLE RELIEF

125.

The Plaintiff incorporates by this specific reference the preceding paragraphs of this Complaint as if stated fully herein.

126.

Because of any one of the reasons identified above, including but not limited to (1) the fact that no notice meeting the requirements of OCGA 44-14-162.2 was sent to the Plaintiff or the putative plaintiffs by the secured creditor because, (2) the fact that MERS was not a holder in due course of the promissory note, (3) the fact that the security deed only granted power of sale to MERS, acting solely as nominee for the lender, in the very limited and extraordinary circumstance that it becomes necessary to comply with local law or custom and there is nothing about Georgia law or custom that makes it necessary for MERS, acting as nominee for a lender, to exercise the power of sale which the deed expressly granted to the lender and the lenders successors and assigns, (4) the fact that MERS cannot legally act as a corporate fiduciary in Georgia, which is what (a) the operation of the deed requires and (b) exercise of the power of sale

as attorney-in-fact for the Plaintiff and putative plaintiffs requires, thus making the Security Deeds and the Foreclosure Deeds relating to the Plaintiff and putative plaintiffs void, (5) the fact that the MERS system of registration requires the note and the deed separate or split, which causes the loan to become unsecured as the deed cannot be enforced apart from the note, and (6) the fact of MERS failure in many respects to fairly exercise the power of sale under OCGA 23-2-114, MERS, whether standing alone or together, the Plaintiff and putative plaintiffs are entitled to an Order that declares that the foreclosure actions that MERS took that make up the subject matter of this Complaint resulted in the wrongful foreclosure with respect to the Plaintiff's and putative plaintiffs' property and that declares that all deeds under power (i.e. foreclosure deeds) that were prepared as a result of the invalid non-judicial sales of the Plaintiff's property and the property of the putative plaintiffs and that were recorded on the land records of the Georgia counties wherein the land lies are VOID and which restores title as it existed just prior to the invalid foreclosure sale, thus reversing said foreclosure sale and returning the parties to their respective positions and holding their respective interests in the Property as they existed prior to the foreclosure sale.

COUNT IV

PUNITIVE DAMAGES

127.

The Plaintiff incorporates by this specific reference the preceding paragraphs of this Complaint as if stated fully herein.

128.

As a direct and proximate result of MERS' flagrant disregard of the rights of the Plaintiff and putative plaintiffs as explained in detail above, Plaintiff and putative plaintiffs should be awarded punitive damages pursuant to O.C.G.A. § 51-12-5.1 for MERS willful misconduct, malice, fraud and wantonness in an amount to be proved at trial.

COUNT V

ATTORNEY'S FEES

129.

The Plaintiff incorporates by this specific reference the preceding paragraphs of this Complaint as if stated fully herein.

130.

MERS above described actions give rise to this claim for attorneys' fees under Georgia law as MERS has acted in bad faith and has been stubbornly litigious such that the Plaintiff is entitled to recovery of the attorneys fees associated with bringing this action.

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