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THE MERS MORTGAGE IN MASSACHUSETTS:
GENIUS, SHELL GAME, OR INVITATION TO FRAUD?

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DRAFT

But Mousie, thou art no thy lane,
In proving foresight may be vain:
The best-laid schemes o' mice an' men
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy!

To a Mouse, Robert Burns

MERS, the Mortgage Electronic Registration Systems, was the creation of a mortgage industry beset by a tremendous spike in the rate at which mortgage assets were being passed around on the secondary market in an effort to reap the benefits of securitization. More transfers meant more paperwork, more trips to an increasingly backlogged county land office, more assignments and other mortgage-related documents to record, and of course more filing fees. Finally the industry came up with a plan, ingenious on its face, and yet shrouded in just enough mystery to conceal a number of assertions that are, upon closer scrutiny, decidedly untenable within the framework of existing law. Further gaps in the system have allowed unscrupulous individuals to play fast and loose with the foreclosure process, and although MERS has taken steps to prevent such mischief in the future the damage already done is of potentially staggering proportion.

The mortgage industry had a number of objectives, a salient of which was the creation of a privately run, electronic database that would be far more efficient and cost-effective in tracking the beneficial interests in mortgage loans, servicing rights, and warehouse loans than the traditional system of county recording offices. With today's information technology this proved to be a challenging but nonetheless straightforward undertaking. But there was another objective as well, one that was far more ambitions—and problematic: to design a system that would allow successive owners of a mortgage loan to avoid the time-consuming and costly process of having to run to the local land office to file the necessary paperwork every time a transfer of the mortgage took place. It is in the methodology by which this latter objective would be accomplished that the intrigue begins.

The idea was for MERS to be set up as a member organization the members of which would all individually agree to name MERS as the mortgagee of record in the local land office. MERS would then track the mortgage loan electronically through its database and, because of the agreement with its members, would remain the mortgagee of record at the local land office. Thus the only time an assignment would be recorded would be if the mortgage loan were transferred

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out of the MERS system or the actual owner of the mortgage were planning to foreclose in its own name. This would not only save time and money but add liquidity to the secondary market as well, thereby making mortgage assets more attractive to investors. Simply put, the goal was to enable MERS's designation as mortgagee in the public records to survive and persist in spite of multiple transfers of the underlying economic obligation on the secondary market.

It was a brilliant idea—or so it seemed. After all, barring any illegality of purpose, an originating lender could surely designate MERS as the mortgagee of record, whether in the original mortgage agreement or by subsequent assignment, as could subsequent purchasers of the mortgage obligation. But the devil, as they say, lay in the details, and in practice the arrangement has proved itself to be problematic to say the least. There are several reasons for this, each of them overlapping one or more of the others in some degree—and it bears stating at the outset that in order to reveal what is legally, logically, and morally problematic with the MERS model we must be willing to engage in a bit of excavation.

One of the first challenges facing the industry was to decide the capacity in which MERS would hold the mortgage. Should it do so as the mortgagee—which, in Massachusetts would be the owner of legal title to the secured property—or should it do so in a representative capacity? Then, too, there was the question of the note itself. If MERS were to act solely on the lender's behalf, should it have the authority to assign both the mortgage and the note, and perhaps even to foreclose the mortgage? And what if it were to do so in its own name; might this not be yet more efficient? There were several possible roles, and each of them came with its own benefits and shortcomings. It seemed, though, that the benefits of one tended to offset the shortcomings of another and that they might best work in combination with one another. Hence it was around this idea of multiple roles that MERS began to take shape. It was as revolutionary as it was original, much like a shell game in which every shell conceals a pea.

The problem lies not so much with the idea itself but with the fact that every effort to place the MERS model within the framework of *existing law* reveals itself to be something we might have expected from Procrustes, that rascally giant of Attica given, as he was, to seizing travelers and either stretching them or cutting off their legs in order to make them fit in his iron bed. The down-side is that many courts have satisfied themselves with the fact that there is a pea to every shell and have not bothered to question the legality of the game itself; they have, in other words, simply taken at face value the MERS model's own profession of validity. And yet, a mere inconvenience to the industry does not entail the right to ignore well-settled principles of law and equity or the reasoned analysis by which we expect those principles to be applied. Nor does it entail the right to make an end run around a legislative and democratic process already imperiled by the opacity that pervades the MERS model in its present form.

The source of MERS's authority. The sources of authority by which MERS has claimed its various roles lie in its own rules and regulations, but also in the insertion of a few boilerplate sentences into the lender's mortgage agreement—all of which are subject to the constraints of the legal system and in some degree the terms of the promissory note itself. Although "MERS mortgages" may vary depending on a lender's preference and custom, the following provisions are fairly typical:

> MERS is a separate corporation that is acting solely as a nominee for Lender And Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.

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> This Security Instrument secures to Lender; (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender And Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property . . .
>
> The Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender And Lender's successors and assigns) has the 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 this Security Instrument.

These are the only references to MERS in the entire mortgage—a few lines set against page after page of boilerplate describing the *lender's* rights and the *borrowers* obligations with regard to the secured property.[1] Though they are drafted with just enough clarity to give MERS the authority to play its various roles, they are also possessed of just enough ambiguity to obscure the fact that they are irreconcilable and to some extent in conflict with the mortgage instrument as a whole. Together they form, despite the best-laid schemes of mice and the mortgage industry, a kind of shell game, in effect an attempt to shoehorn into the framework of existing law a novel "person" or "creature" existing law simply cannot embrace at this time but by the most sophistical course of reasoning.

MERS as agent for the mortgagee. We are told in all three sentences that MERS "is acting solely as nominee for Lender and Lender's successors and assigns."[2] But nowhere in the mortgage is the term "nominee" defined. Black's Law Dictionary tells us that a nominee is "[a] person designated to act in place of another, usu[ally] 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."[3] An earlier edition of Black's defined the term as "one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another."[4] The Massachusetts courts have similarly defined the term as indicat-

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[1] The relative promissory note contains no mention of MERS whatsoever.

[2] The sentence is facially illogical. To say that MERS *is acting* as the nominee for the lender's successors and assigns is to suggest that such successors and assigns already exist, in which case the lender named in the mortgage would have already divested itself of any interest in the underlying obligation. On the other hand, if they do not yet exist, we cannot assume, without more, that MERS would be authorized to act as *their* nominee as well since they are not parties to the mortgage instrument. The point is that some courts have

Had the sentence not contained the words "and Lender's successors and assigns" it might have meant either that MERS is acting *solely as nominee,* or that it is acting solely as nominee *for the lender.* The inclusion of "successors and assigns" logically limits us to the former interpretation.

[3] BLACK'S LAW DICTIONARY 1076 (9th ed. 2009) (emphasis added). *See also In re* Marron, Case 10-45395 (Bankr. D. Mass. filed June 29, 2011) (citing Black's 2009 definition of "nominee").

[4] BLACK'S LAW DICTIONARY 947 (5th ed. 1979) (emphasis added).

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ing one designated to act for another as her representative in a rather limited sense,[5] adding that it ordinarily "does not imply the transfer or assignment to the nominee of any property in or ownership of the rights of the person by whom he or she is nominated."[6]

It is fair to say, however, that what all these permutations have in common are the characteristics of representation and limitation. More importantly, *they are all principal specific*—that is to say, the nominee acts on behalf of a particular individual or entity; there cannot be a nominee without a principal by whom the nomination is made, and without whom the term "nominee" becomes meaningless. This appears to be the view of MERS itself. In November of 2010, R. K. Arnold, then President and CEO of MERSCORP, explained to members of the Senate Committee on Banking, Housing and Urban Affairs that "MERS acts as the designated '*common agent*' for the MERS member institutions in the land records, which means that MERS holds the mortgage lien *on behalf* of its members and acts *on their behalf* as mortgagee [emphasis added]."[7] In his testimony he states:

> A fundamental legal principle is that the mortgage follows the note, which means that as the note changes hands, the mortgage remains connected to it legally even though it is not physically attached. In other words, the promissory note is enforceable against the property because of the mortgage, but the mortgage instrument itself is not independently enforceable as a debt. This principle is not changed when MERS is the mortgagee because of the agency relationship between MERS and the lender.

Putting aside for the moment the question of whether the mortgage necessarily follows the note—especially, in view of the MERS model itself [8]—what Arnold appears to be saying here, in so many words, is that because of the agency relationship it is not MERS that really holds the mortgage but *the lender*. This would be a correct and fairly straightforward application of basic agency law—and perhaps a fair indication of MERS's contractual intent as well.[9] Going a bit further, an agency relationship, he says,

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[5] Kolakowski v. Finney, 1983 Mass. App. Div. 360, 363-364 (1983), *aff'd* 393 Mass. 336 (1984) (citing Schuh Trading Co. v. Commissioner of Internal Revenue, 95 F.2d 404, 411 (7th Cir.1938)). *See also In re* Huggins, 357 B.R. 180, 183 (Bankr.D.Mass. 2006) ("A nominee is generally understood as a person designated to act in place of another.").

[6] *Id.*, (citing Cisco v. Van Lew, 60 Cal. App.2d 575, 583-584, 141 P.2d 433, 438 (1943); Middle East Trading & Marine Service, Inc. v. Mercantile Finance Corp., 49 Ill. App.3d 222, 364 N.E.2d 886, 892 (1977)); *see also* Lee v. Ravanis, 349 Mass. 742, 745-746 (1965) ("With regard to the purchase of real property, a nominee has been said to have "no property in or ownership of the rights of the person nominating him" (quoting *Cisco, supra,* at 583-584)).

[7] http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1a958f85-bd10-4ac7-b5e1-9ad0c43d97c6. Remarks of R.K. Arnold, President and CEO of MERSCORP, Inc. Before the Senate Committee on Banking, Housing and Urban Affairs, November 16, 2010

Henceforth "Arnold testimony."

[8] *But see* In re Marron, No. 10-45395-MSH (Bankr. D. Mass June 29, 2011) (Memorandum of Decision on a Creditor's Motion to Lift the Automatic Stay), p. 9, n. 7 ("Ironically, the MERS phenomenon has created a national Massachusetts-like model where the legal and beneficial ownership of mortgages has been separated. Courts in states which do not permit the separation of ownership of notes and mortgages understandably find this a challenge which may account for the inconsistency in decisional authority identified above.").

[9] If one were to speculate, the peculiarity of having title held by the agent of a *disclosed* principal can perhaps be explained by the goal of having MERS serve as a common mortgagee to successive owners of the mortgage loan itself.

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> arises where one party is specifically authorized to act *on behalf of* another in dealings with third persons, and the legal definition of a "nominee" is a "party who holds bare legal title for the benefit of others." Here, the language of the mortgage appoints MERS as nominee, or agent, for the Lender And its successors and assigns for the purposes set forth therein [emphasis added].[10]

This intromission of "nominee" into a description that has up to this point cast MERS as an *agent* fairly raises the question of why its authors would not simply have stuck with the term agent rather than introduce the more murky moniker of nominee. In any event it seems fair to say if the term is to have an effective role it would be to shorten, rather than lengthen, the tether of MERS as an agent—a conclusion further suggested by MERSCORP Rules of Membership: "The Member agrees and acknowledges that when MERS is identified as nominee (*as a limited agent*) of the note owner in the Security Instrument, MERS, as nominee, is the mortgagee, beneficiary, or grantee (as applicable), in the Security Instrument on behalf of and for the benefit of the note owner [emphasis added]."[11]

What, then, do we know about agency? The concept, at common law, rests on the bedrock principle that he who acts through another acts by himself—*qui facit per alium, facit per se*.[12] It is generally defined as "a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person.[13] The principal has the right to control the actions of the agent,"[14] and it is the substance of the relationship and not the label it may be given by the parties that is determinative.[15] Not least, an agent may only do what the principal himself may do and, conversely, may not do what the principal himself might not do

[10] Arnold, *Testimony*, p. 7.

[11] MERSCORP Rules of Membership, Rule 8(b). http://www.mersinc.org/Foreclosures/index.aspx.

[12] H. Alperin, Agency, 14 M.P.S. § 1 (4th ed. 2006) (citing Arkansas State Board of Architects v. Bank Building & Equipment Corp. of America, 225 Ark. 889. 286 S. W. 2d 323, 327 (1956)). *See also* Patterson v. Barnes, 317 Mass. 712, 723 (1945) ("One fundamental element in every master and servant relationship or in any agency is that the alleged agent or servant does something *for or in behalf of* the alleged principal or master [emphasis added].").[12]

[13] *See* Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 1 (2d ed. 1990) ("The basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed.").

[14] *Id. See also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) ("An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling."); *Id.,* comment a; Peters v. Haymarket Leasing, Inc., 64 Mass.App.Ct. 767, 774 (2005) ("The label placed by the parties on their relations is not dispositive, and subterfuges are not countenanced.") (citing S.G. Borello & Sons v. Department of Industrial Relations, 48 Cal. 3d 341, 349 (1989).

[15] RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) ("An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling."); *Id.,* comment a; Peters v. Haymarket Leasing, Inc., 64 Mass.App.Ct. 767, 774 (2005) ("The label placed by the parties on their relations is not dispositive, and subterfuges are not countenanced.") (citing S.G. Borello & Sons v. Department of Industrial Relations, 48 Cal. 3d 341, 349 (1989).

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were he to act on his own behalf.[16] Nor may a principal confer upon the agent the authority to act illegally.[17]

Although an agency relationship is said not to merge, virtually, the principal's personality into that of the agent or that of the agent (whether as an individual or an organization with a distinct legal personality) into that of the principal,[18] the reason for this lies in the fact that the agent's role is limited—that is to say, the agent acts within parameters set by the principal and remains under the control of the principal. Nonetheless, *the agency relationship is principal-specific*; the agent acts presumptively *on behalf of* the principal and there is thus *a functional identity* between the two if not an identity in fact. This is a key point. It means that when the agent acts, it is in effect the principal who acts, even if the "act" is to hold legal title in a secured property. This is precisely why a principal may be held liable for injuries caused by an agent acting within the scope of his authority. It should be especially true in the present context where the principal (the originating lender) is fully disclosed in the mortgage agreement.

When the originating lender ("Lender A") becomes a member of MERS, she creates an agency relationship between MERS and herself with regard to every mortgage she has registered in the MERS system.[19] Additionally, though the mortgage agreement between *the borrower* and Lender A is not *per se* an agency contract between MERS and Lender A, it nonetheless contains a manifestation on Lender A's part to the borrower that MERS will hold the mortgage on its behalf—from which we might infer that it vests in MERS the *apparent authority* to do so.[20] It is clear on both counts that MERS's authority to act on Lender A's behalf is limited to the tracking of mortgage loans and various activities pertaining to the mortgage—that it does not extend to other aspects of Lender A's business. As such, MERS might be considered a "special" agent rather than a "general" agent and its discretion might be even more narrowly circumscribed by the principal.[21]

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[16] *See* 2A C.J.S. *Agency* § 129 (2003) and cases cited therein.

[17] *Id.*, *citing* Lehman Bros. commercial Corp. v. Minmetals Intern. Non-Ferrous Metals Trading Co., 179 F.Supp.2d 118 (S.D.N.Y. 2000).

[18] RESTATEMENT (THIRD) OF AGENCY § 1.01 comment c (2006).

[19] For construction of the agency contract, *see* 2A C.J.S. *Agency* § 130 (2003) and cases cited therein. ("Agency contracts are construed in accordance with the rules of construction for contracts generally; thus, the language employed is examined in light of the object or purpose of the agreement as manifested by the language used and the attendant circumstances.").

[20] RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."); Kansallis Finance LTD. V. Fern, 421 Mass. 659, 665 (1996) ("Agency Section 3 (F); W. Prosser & W. Keeton, Torts Section 69. A principal who requires an agent to transact his business, and can only get that business done if third parties deal with the agent as if with the principal, cannot complain if the innocent third party suffers loss by reason of the agent's act. Similarly, the master who must put an instrument into his servant's hands in order to get his business done, must also bear the loss if the servant causes harm to a stranger in the use of that instrument as the business is transacted. [internal citation omitted]. This overarching principle measures the imposition of vicarious liability in particular contexts and suggests its own limitations. Where there is actual authority to transact the very business or to do the very act that causes the harm, the agent acts as the extension of the will of his principal and the case for vicarious liability is clear. Where the authority is only apparent, vicarious liability recognizes that it is the principal who for his own purposes found it useful to create the impression that the agent acts with his authority, and therefore it is the principal who must bear the burden of the misuse to which that appearance has been put."

[21] *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 comment d (2006). This, incidentally, is the scope of authority to which the borrower has assented. *See also* Spencer v. Doyle, 50 Mass. App. Ct. 6, 9 (2000) ("It is axiomatic that agency for one purpose does not equate to agency for all purposes."); Kanamaru v. Holyoke Mutual Ins. Co., 72

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The question, then, is whether it works—whether having MERS serve as a common agent does away with the requirement for a written assignment of the mortgage whenever the mortgage loan is transferred on the secondary market. The answer is an emphatic *no*. As a preliminary matter, in Massachusetts only the present holder of a mortgage has the authority to foreclose on a mortgaged property.[22] That person is not required to obtain judicial authorization if such a power is granted by the mortgage agreement itself.[23] Since our sample MERS mortgage contains a power of sale, let us say for argument's sake that it includes by reference the power of sale set forth in G.L. c. 183, § 21 and further regulated by G.L. c. 244, §§ 11-17C.[24] In Massachusetts, however, the mortgage does not necessarily follow the note; rather, the two interests may be held by different persons.[25] At the same time, it is fairly clear from the language of G.L. c. 183, § 21 that the power of sale may not be exercised unless borrower has defaulted on the obligation secured by the mortgage.[26]

The point is that even though the mortgage may be separated from the note, a foreclosure cannot occur unless the two interests are somehow reconnected. This makes sense, because if they continued to be separately held the note holder would have no contractual right to reach the collateral in the event of default, while the mortgagee would have suffered no default[27] and would, one might think, not meet the requirements of either constitutional or prudential standing in any subsequent legal action.[28] But how is this "merger" to take place—which interest must cleave to the other, or does it matter one way or the other? If we were to apply a purely economic analysis,

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Mass.App.Ct. 396, 405, n. 9 FF(2008) ("the contractual act of the agent has the same legal effect as if done by the principal and makes the principal the actual party to and obligor of the undertaking.") (quoting Medeiros v. Middlesex Ins. Co., 48 Mass. App. Ct. 51 , 57 (1999)).

[22] *See* U.S. Bank National Association v. Ibanez, 458 Mass 637, 647-648 (2011) and cases cited therein.

[23] *Ibanez*, 458 Mass. at 645-646 ("Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. See G. L. c. 183, § 21; G. L. c. 244, § 14. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See Beaton v. Land Court, 367 Mass. 385 , 390-391, 393, appeal dismissed, 423 U.S. 806 (1975)").

[24] *Ibanez*, 458 Mass. at 646.

[25] *See*, Lamson & Co. v. Abrams, 305 Mass. 238, 245 (1940) (The holder of the note and the holder of the mortgage may be different persons); *see also Ibanez*, 458 Mass. at 652 (citing Barnes v. Boardman, 149 Mass. 106 , 114 (1889)); U.S. Bank National Association v. Ibanez, 17 LCR 679, 687 (2009) (Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment), aff'd 458 Mass. 637 (2011) (citing *Barnes*, 149 Mass. at 114).

[26] G.L. c. 183, § 21 ("But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises . . . ").

[27] For an instructive discussion of the subject from a different jurisdiction, s*ee* Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619 (Mo. App. 2009) ("Generally, a mortgage loan consists of a promissory note and security instrument, usually a mortgage or a deed of trust, which secures 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. 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.").

[28] For an engaging discussion of the standing issue s*ee*, Veal v. Am Home Mtg. Servicing, Inc., No. 09-14808 (Bankr. 9th Cir., June 10, 2011); Sprint Communications, Co. v. APCC Services, Inc., 128 S. Ct. 2531, 2550 (2008) ("An assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation.")..

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the more likely scenario would be that since the economic value lies with the note, the note-holder should be the recipient of the mortgage. This finds support in the principle that the mortgagee, if a separate person, is in fact deemed to hold the mortgage in trust for the owner of the economic obligation.

This "in trust for" rule was recently a subject of discussion in *Ibanez*,[29] where purported creditors had argued that because they held the note, they had a sufficient financial interest in the mortgage to allow them to foreclose. The Court disagreed.

> In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106 , 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . . This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6.

If the originating lender ("Lender A") has retained ownership of both the note and the mortgage and is now seeking to foreclose, the point is of course moot because the two interests have never been separated. But let us say that Lender A has sold the note but retained ownership of the mortgage. Massachusetts allows her to do so, but with the proviso that she assign the mortgage to the purchaser of the note in the event of foreclosure. Presumably, this obligation would, for the same reasons, carry over to subsequent owners of note as well—as, for example, where Lender A sells to Owner B who in turn sells to Owner C. In that case the equities would be so arrayed as to oblige Lender A to assign the mortgage to Owner C. However, *the "in trust for" rule is strictly limited*; *it is for the specific purpose of making sure that the assignment will be made and the interests will be reunited—accordingly, at the instant the assignment is made, the obligation ends*. It would be illogical and indeed absurd to assert that the "in trust for" rule establishes a fiduciary relationship that *survives* the transfer and gives the former owner of the mortgage the authority to now act on the principal's behalf with regard to both the note and the mortgage.

The preceding analysis does not change when MERS holds the mortgage as Lender A's agent because of the functional identity between the two; we are dealing essentially with a single

[29] *Ibanez*, 458 Mass. at 652-653.

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player. But by having MERS hold the mortgage *in a representative capacity* something unusual has occurred—something that has drawn surprisingly little attention from the courts, and it is this: in Massachusetts a mortgage is, by definition, already a divided interest. The mortgagee takes "legal" title to the secured property while the mortgagor retains a "beneficial" interest in the form of an equity of redemption. To say, then, that MERS holds legal title to the mortgage as Lender A's agent while Lender A somehow retains the "beneficial" interest is necessarily to posit the division of an already divided interest—that is, to cut the legal interest itself in half. To then call one half a "legal" interest and the other a "beneficial" interest is in a sense misleading; the real "beneficial" interest belongs to the homeowner and no one else, while the legal interest belongs to Lender A with or without MERS as her agent.

Although some courts have tended not to question the integrity of this additional "split" engendered by the MERS model, the fact remains that no established legal doctrine comes rushing forward to claim paternity of the idea—and for good reason: if MERS were acting solely in a representative capacity there would be, in substance, only *one* owner of both "interests" and that owner would be Lender A, the owner of the note.[30] Any further split would reveal itself to be little more than a fiction of convenience, an incidental result of allowing MERS to remain the nominal mortgagee at the local land office while the mortgage obligation itself is passed around behind the scenes on the secondary market. The only time MERS would be subject to the "in trust for" rule would be if it actually *owned* the mortgage—which it cannot do if it is at the same time holding it as the lender's agent. It would be little short of absurd for the "in trust for" rule to require that MERS, as an agent, assign back to the principal an interest she still owns in order to then allow her to fulfill her equitable obligation to assign that interest to a subsequent buyer.

A further point is that the health and viability of the mortgagee are critical factors to any would-be investor in whose mind bankruptcy and other dangers lurking in the marketplace are not likely to strike an especially soothing chord. The securitization process is in fact designed in large part to remove the mortgage loan from the economic fortunes and misfortunes of the issuing lender. To leave the mortgage with Lender A would be an anathema to any smart investor; it would leave too much to chance, to an economic future that cannot be predicted to an acceptable level of certainty. It would seem unlikely that this was not the industry's intention, that we would be hard-pressed to find a MERS member who believed that ownership of the mortgage remained with Lender A and did not follow the note.

The first question, then, is how, exactly, is ownership of the mortgage with its attendant power of sale transferred in the MERS system? Since in Massachusetts the assignment of a mortgage is a conveyance of an interest in land, we might be tempted to say that the transfer would be by an assignment, in writing, signed by the grantor.[31] But that is precisely the result MERS wishes to avoid, and in its place we find a very different mechanism, the qualities of which are in some ways familiar, composed as they are of settled principles of agency and contract law, and in other ways novel and unique. Overall, there is nothing in the rhetorical stockpot,

[30] By further dividing the legal title to a secured property into a "legal title to the legal title" and a "beneficial interest in the legal title" MERS has in effect created its own law to which various courts have, alarmingly, given their tacit recognition. MERS has, in other words, usurped the roles of the legislature and the judiciary by creating both law and precedent.

[31] *Ibanez,* 458 Mass. at 649 ("Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G. L. c. 183, § 3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175 , 177 (1917)").

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no existing category in which to fit the thing. Nor will it reveal itself fully from any one angle; rather, the only to get a clear sense of why it is so problematic is to walk around its complexity, so to speak, and take a series of snapshots that will, unavoidably, overlap in some degree.

A "continuity" made of smoke and mirrors. In the MERS model, the mortgage doesn't pass by assignment from one owner to the next by formal assignment; in fact, it really doesn't pass at all, at least not in any ordinary sense that would involve time and a sequence of events. Rather, in the Mersian world there is a kind of simultaneity of time and event in which all ownerships of the mortgage exist *ab initio* by virtue of the MERS membership agreement and do not have to be independently established. It is very much a framework of interrelationships in the form of a venn diagram. Let's say that a particular mortgage changes hands three times before it is foreclosed—which would mean a total of four owners. And let's use a circle to represent each of the four owners. In the MERS model, these four circles are arranged symmetrically so that each one overlaps the other three in equal measure to form a common area at the center. That common area is MERS acting, as Arnold has said, as a "common agent" with respect to that mortgage. Because each owner is already tied conceptually to the mortgage, there is no need for an assignment and MERS, in its capacity as agent, may therefore simply remain the mortgagee of record at the local land office. Indeed, the MERS model is in many ways quite elegant. But the complex and recondite nature of the thing has served well to obscure its falsity under well-settled principles of agency and contract law.

There is a point about which we must be very clear from the outset, and it is one that has been overlooked in a number of foreclosure cases: what is "common" to MERS members is the use of MERS as their agent—*not the ownership of the mortgage itself*. Membership in MERS cannot and does not establish a joint ownership of the mortgage. Given the functional identity between principal and agent and the fact that MERS is acting in a representative capacity, ownership of the mortgage must still pass from Lender A to Owner B regardless of whether or not they happen to be using the same agent. The same principle would apply to any subsequent transfer, as, say, from Owner B to Owner C, all the way down to the foreclosing entity. *There is no legal authority in Massachusetts that stands for the proposition that the mere use of a common agent serves to transfer ownership of the mortgage with regard to which the agency has been established.*[32]

Putting absurdity aside, let us nonetheless assume for argument's sake that the opposite is true. There is yet a further problem: the MERS model, like our venn diagram, is spatial, but the twin realities of ownership and representation are both spatial *and temporal*; thus the MERS model is unavoidably static, while the transactional reality it seeks to control is dynamic. Stated less abstractly, *before* MERS can represent Lender A with regard to the mortgage, Lender A must in fact *own* the mortgage. The point is elementary and applies in equal measure to all subsequent owners: *the ownership of the mortgage by the principal must precede, in time, any authority the agent may have to act with regard to that mortgage.* This follows from the well-settled principle that an agent cannot do what the principal herself cannot not do.[33] However, the MERS model

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[32] The one exception to this would be if the agent were also to have an ownership interest in the mortgage—which would decidedly contradict the various assurances in the mortgage document itself and elsewhere that MERS is acting "solely as nominee."

[33] *See, e.g.,* 2A C.J.S. *Agency* § 129 (2003) and cases cited therein.

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turns the reality on its head by asserting that ownership of the mortgage passes without the need for an assignment precisely because the agency relationship was established *first* in time via the MERS membership agreement.

A somewhat overlapping problem is this: In the MERS model, there is again no need for a written assignment anytime the mortgage changes hands—unless the mortgage is going to be foreclosed by someone other than Lender A or removed from the MERS system. An unavoidable side-effect of this is that Lender A remains the mortgagee of record at the local land office, albeit with MERS acting on its behalf. In other words, the clear implication is that *Lender A's* status as mortgagee at the local land office somehow survives the multiple transfers of the note that take place along the road to securitization. But MERS cannot have it both ways: the MERS model is designed in its own way to tie ownership of the mortgage to ownership of the note—which means that once Lender A has sold the note it has no further interest in the mortgage and its continuing status as mortgagee in the land office records[34] is at best a negligent misrepresentation and at worst an act of fraud. It is also in any event a breach of the complete transparency required under G.L. c. 244, § 14.[35] This "personality disorder" has a further consequence as well.

Because Lender A remains the mortgagee of record, any subsequent assignment of the mortgage must name Lender A as the grantor in order not to memorialize a discontinuity in the chain of ownership and thus cast a cloud on the title; if Lender A (with MERS as it agent) is the mortgagee of record there cannot be an assignment from the true present owner of the mortgage, say, Owner C. And here we meet the same conundrum: if we accept the validity of the "common agent" device by which MERS avoids the need for assignments, Lender A no longer owns the mortgage and has nothing left to assign; thus an assignment directly from Lender A is also at best a negligent misrepresentation and at worse an act of fraud. Its failure to name the true grantor would be contrary to existing law.[36] If the assignee happened to be a part of the mischief, it would further diminish her authority to foreclose the mortgage.[37] Again, the assignment would violate the statutory requirement of transparency. It is upon this bedrock of sober fact that the mortgage industry and registry officials must weigh the integrity—and indeed the legality—of every recorded assignment directly from MERS as nominee for the originating lender to the foreclosing entity in a case where there have been interim owners.

There is yet another wrench in spokes of the MERS model. Even if the "common agency" mechanism could somehow allow Lender A's role as mortgagee to survive multiple transfers of the note on the secondary market, and if, as Arnold has said, the mortgage follows the note, *the agency relationship vis-à-vis the mortgage ends when the note is transferred*; like Lender A's status as mortgagee, it cannot survive the transfer. This owes itself to a few basic principles of agency law. Without an interest to assign, the agency relationship between MERS and Lender A that was established in order to act with regard to that mortgage interest necessarily ends; Lender A's circle is in effect removed from the Venn diagram previously mentioned.

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[34] If MERS is truly acting on behalf of Lender A, the ownership of the mortgage, as previously explained, remains with Lender A.

[35] U.S. Bank National Association v. Ibanez, 17 LCR 679, 688 (2009) (Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment), aff'd 458 Mass. 637 (2011)

[36] *Ibanez*, 458 Mass. at 649; G.L. c. 259, § 1; G.L. c. 183, § 3.

[37] United States Fidelity and Guaranty Company v. Sheehan. 308 Mass. 321, 324 (1941) ("But we think that . . . there was no legislative intention to abolish the established rule that a party to a fraud cannot acquire a clear title even from an innocent purchaser.") (citing Phillips v. Chase, 203 Mass. 556, 566 (1909); Independent Coal & Coke Co. v. United States, 274 U.S. 640, 647 (1927); Scott, *Trusts* (1939) Sections §§317, 318.

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What has happened is that the purpose for which the agency relationship was created no longer exists with regard to that particular mortgage; there has been "an occurrence" the effect of which is to terminate the agent's authority.[38] Once the originating lender, Lender A, has divested herself of her interest in the mortgage, she can no longer be the mortgagee and therefore MERS can no longer act as mortgagee on her behalf *vis-à-vis* that mortgage. Notice of the termination need not be expressly given to MERS;[39] rather its actual authority "may terminate upon the occurrence of circumstances under which the agent should reasonably conclude the principal would no longer assent to the agent's taking action on the principal's behalf. If the principal has engaged the agent for a particular task, its completion is such a circumstance."[40] Surely, MERS, with its sophisticated tracking system, is presumptively aware of any termination.

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[38] RESTATEMENT (THIRD) OF AGENCY § 3.09 (2006) ("an agent's actual authority terminates (2) upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf."); *see also* 2A C.J.S. *Agency* § 117 (2003) ("The agency may terminate by operation of law because of a change in the subject matter thereof, such as where the subject matter is destroyed. Thus there is a termination of the agent's authority to create interests in, or other deal with, a particular subject matter when it is destroyed. Likewise, the agent's authority to affect the interests of the principal in a particular subject matter terminates when the principal has lost his or her interest in it (citing rest 2d agency §124(b)). As a result, an agency is effectually revoked when the principal disposes of his or her interest in the subject matter of the agency in a manner inconsistent with the authority conferred (citing McColgan v. Bank of California Nat. Ass'n, 208 Cal. 329, 281 P. 381 65 A.L.R. 1075 (1929)), by assignment, conveyance, contract for sale, or otherwise (citing Henry S. Grinde Corp. v. Klindworth, 77 N.D. 597, 44 N.W.2d 417 (1950); D'Amato v. Donatoni, 105 Vt. 496, 168 A. 564 (1933). The authority of an agent to sell may be terminated by a conveyance to the agent as trustee. (citing Chenault v. Quisenberry, 21 Ky. L. Rptr 1771, 56 S.W. 410 (Ky. 1900), modified, 22 Ky. L. Rptr. 79, 57 S.W. 234 (Ky. 1900). The authority of an agent acting for two principals, both of whom appoint him or her as agent for goods in which they are jointly interested, is revoked by a severance of their joint interest (citing Rowe v. Rand, 111 Ind. 206, 12 N.E. 377 (1887)").

[39] 2A C.J.S. *Agency* § 106 (2003) ("in the absence of a contractual provision to the contrary, express notice of termination of an agency is not essential if the agent knows or has reason to know of such fact or has been given notification of the occurrence of an event from which an inference of termination could reasonably be drawn. Any method of revocation adopted by the principal which, expressly or impliedly, unambiguously communicates to the agent that his or her authority is revoked is sufficient.").

[40] Gagnon v. Coombs, 39 Mass. App. Ct. 144, 151 (1995) ("A principal may manifest his termination of his agent's authority, either in whole or in part, by conduct that is inconsistent with its continuance. Examples of such implicitly countermanding conduct are "where [the principal] retakes possession of goods which he had authorized the agent to sell, *or where he sells or disposes of the subject matter or of his interest therein*, or voluntarily causes its loss or destruction [emphasis added, internal citations omitted]. [A]ny form of manifestation made known to the [agent] is effective" if, "reasonably interpreted, [it] indicates that the principal no longer consents to have the agent act for him . . . ." Restatement (Second) of Agency Section 119 comment a. "An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as [the agent] knows or should know them at the time he acts." Id. Section 33. "Whatever the original agreement or authority may have been," if the agent "knows facts which should lead him to believe that his authority is restricted or terminated, he has a duty to act only within the limits of the situation as it is currently known to him." Id. Section 33 comment a. The "will [of the principal] may change . . . . Whatever it is at any given time, if the agent has reason to know it, his duty is not to act contrary to it. The fact that in changing his mind the principal is violating his contract with the agent does not diminish the agent's duty of obedience to it." Id. Section 33 comment b. See also id. Section 108(1) & comments b, c, & f. Finally, an "agent has notice that authority to do an act has terminated or is suspended if he knows, has reason to know, should know, or has been given a notification of the occurrence of an event from which the inference reasonably would be drawn . . . by the agent, that the principal does not consent to the act or would not if he knew the facts . . . ." Id. Section 134."), *See also* RESTATEMENT (THIRD) OF AGENCY § 3.09 (2006) comment b. By divesting itself of its interest in the mortgage, the Lender A has created such a circumstance—and it is one of which MERS, because it is tracking the mortgage through its electronic database, would presumably be aware.

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It bears repeating that the MERS model, like the Venn diagram by which it may be conceptualized, is *static*, whereas the actual process it attempts to explain is *dynamic*. A far more apt metaphor, though mechanistic, would be that of a clock—a special clock with only an hour-hand, and only four time intervals marked on its face instead of the usual twelve or twenty-four. MERS would be represented by that one hand and the center axis to which it is attached, while our four mortgage-owners would each be represented by one of the four marked intervals. Imagine that the hour-hand starts its rotation at the beginning of the interval that is Lender A, and that it will pass only once around the face and then stop at the end of the interval that is Owner D.

At any point during this singular rotation—which in turn represents the life cycle of the mortgage from inception to foreclosure—the agency relationship, expressed now more accurately in both space *and time*, exists only between the hour hand (MERS) and the interval (the owner) through which it happens to be passing at that moment. At the precise instant at which the hand crosses to the next interval, the agency relationship with the previous interval ends, even though MERS has been the agent for both. The intervals are not necessarily all of the same size and thus the same duration, but as we can readily see, the agency relationship between the hand and one interval does not survive the crossing of the hand to the next. The metaphor is not without imperfection, but the point is fairly made: *in the MERS model there is not one continuing agency relationship but the juxtaposition of one separate and distinct agency relationship beside another and then another down the chain of ownership.*

The persistence of MERS as Lender A's agent in the public record in effect accomplished with smoke and mirrors—and it conjures a host of evils. Yes, every MERS member establishes its own agency relationship with MERS. But immediately upon transfer of the mortgage from Lender A the agency relationship between MERS Lender A ends. The agency between MERS and Owner B is in fact *a new and distinct agency relationship*—and, given the functional identity between principal and agent, *a new and distinct "MERS"* as well. Again, in the absence of a valid assignment, the status of MERS as the mortgagee in the public records becomes a misrepresentation of material fact at the very instant the mortgage is assigned by Lender A, and from that point on the mortgage industry is, in effect, using a ghost to do its bidding—and one of dubious character at that. Only *the name* "MERS" remains; the "continuity" is a chimera, an illusion, the purpose of which is to make an end run around the need for a formal assignment. It has also served as a red herring, distracting courts from the sober fact that *the role of MERS as a "common agent," for all of its theoretical elegance and self-proclaimed validity, simply cannot in its present form be fit into the framework of existing law without inflicting collateral damage upon the very principles of fairness and transparency on which that framework has been built over many years and through many efforts and sacrifices.*

What this all boils down to it this: in order for MERS to remain the mortgagee of record at the local land office without fraudulently misrepresenting itself as such three things must occur. First, since an assignment of mortgage is a conveyance of an interest in land that requires a writing signed by the grantor,[41] there must in fact be an assignment of the mortgage from Lender A to

[41] *Ibanez*, 458 Mass. at 649 ("Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G. L. c. 183, § 3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175 , 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1 , 6 (2010). Therefore, when a person borrows money to purchase a home and gives the Lender A mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See Vee Jay

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Owner B. If the public record indicates that the mortgage is being held by MERS on behalf of Lender A, the assignment must be from MERS *on behalf of Lender A*. Second, the assignment must make clear that the mortgage will be held by MERS in its capacity as agent for Owner B; that is, it must say something to the effect that "MERS, solely as nominee for Lender A, hereby transfers its interest in the mortgage to MERS, solely as nominee for Owner B." This distinction is not an easy one to draw, but it is essential to knowing the substance of the transaction. And third, to avoid discontinuity in the land office records and allow for proof of ownership in the event of foreclosure, the assignment must be recorded. The same would apply to a subsequent transfer from Owner B, and so forth all along the chain of ownership.

On the subject of recording, we might add, as Marie McDonnell[42] has pointed out, even though G.L. c. 183 does not specify when an assignment of mortgage must be recorded at the country registry of deeds, this is not the case when it comes to registered land. G.L. c. 185, § 67 states, in part, that "such mortgage deed, and all instruments which assign, extend, discharge and otherwise deal with the mortgage, shall be registered, and shall take effect upon the title only from the time of registration." She then makes the following observation:

> The clear statutory requirement codified in M.G.L. ch. 185, § 67 establishes that all instruments that assign the mortgage *shall* be registered. If nothing else, common sense dictates that this requirement carries over to recorded land as well; otherwise, in a situation where a property consists of an assemblage of both recorded land and registered land, the result would be absurd i.e., the chain of title to Parcel I would be different from Parcel II even though both lots were equally impacted by the same transactions. This is not a hypothetical situation as I have just completed an analysis of a case involving this scenario.[43]

There is simply no plausible way to achieve the continuity of MERS as the mortgagee of record *in its capacity as agent* but by the recording of assignments that leave no question as to

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Realty Trust Co. v. DiCroce, 360 Mass. 751 , 753 (1972), quoting Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315 , 316 (1880) (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88 , 90 (1990). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.").

The Massachusetts Statute of Frauds, G.L. c. 259. § 1, states, in part: "No action shall be brought . . . [u]pon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them . . . [u]nless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing *and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized* [emphasis added]. Clearly the party to be charged or bound is the title owner of the property, and although the writing may be signed by the owners agent, it is equally clear that it must be the *owner's* agent and not the agent of a previous owner. The words "by him" refer to the current owner and not some previous owner who had divested himself of any interest in the property. If the original lender no longer owns the interests in the promissory note and mortgage, it cannot legally assign either interest even though it is the owner of record at the local land office. To do so would be a fraudulent misrepresentation. The only way to remedy this would be to record an assignment to the foreclosing entity—which would defeat the entire purpose of MERS.

[42] Marie McDonnell is a mortgage fraud and forensic analyst and credentialed certified fraud examiner who was the amicus in the *Ibanez* and *Eaton* cases.

[43] Eaton v. Federal National Mortgage Association, No. SJC-11041 (Mass. argued October 3, 2011) (Brief of Amicus Curiae Marie McDonnell, CFE at16-17.).

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who actually owns the mortgage. Unfortunately, this undermines the MERS model in its present form because it entails the trouble and expense of running to the land office every time a transfer is made. But such is the unavoidable consequence of an agency relationship. Moreover, without a valid assignment—say, from Lender A to Owner B—there can be no successors and assigns of Lender A. This not only reduces to nonsense the oft-repeated assertion that MERS is acting "solely as nominee for lender *and lender's successors and assigns*," it means that even if MERS had established a new agency relationship with Owner B vis-à-vis a particular mortgage, that agency relationship would be meaningless because Owner B would have no interest with regard to which MERS might act in its role as agent.

This is not to gainsay the mortgage industry's original objective to have MERS serve as a common agent without the need for assignments; rather, it is only to point out the obvious: that its present methodology is flawed and remains without clear support under any existing theory of law. If the need for an assignment with every transfer of the mortgage is neither congenial to the industry nor in line with present-day standards and practice, it is a problem for the legislature to solve. It is not one the resolution of which should be accomplished by fiat from the bench in contravention of the democratic process. As Judge Keith C. Long stated in the original *Ibanez* action,

> If [the plaintiffs] believe a change is warranted to reflect "industry standards and practice," they must seek that change from the legislature. I note, however, that if those "standards and practice" have brought us to the present situation (*see, e.g.,* Chairman Ben Bernanke, *Financial Innovation and Consumer Protection*, speech at the Federal Reserve System's Sixth Biennial Community Affairs Research Conference (Apr. 17, 1009); R. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent Into Depression* (Harvard University Press 2009)) "we should learn something from that experience." *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).[44]

If all of this has come to some sort of denouement, it is this: if MERS were to act solely as an agent, at the end of the day there would still have to be an assignment of the mortgage, in writing and signed by the party to be bound, every time its ownership is transferred to a new owner. Needless to say, this was not an outcome likely to shower the mortgage industry with feelings of gladness and joy, and MERS has in fact solved the problem—by leaving another in its place.

MERS as mortgagee. There is, plausibly, a way for MERS to avoid this burr in saddle of legality and maintain continuity of representation in the land office records—and that is for it to be *the mortgagee,* the actual owner of legal title to the secured property. If this were so, and since in Massachusetts the mortgage and the note may be owned by different persons, MERS could rightfully remain the mortgagee of record and there would be no need for assignments of the mortgage regardless of now many times the note changed hands on the secondary market. Nor would there be any question as to who owned the mortgage. That is exactly what MERS has done: in the MERS mortgage the very next sentence following the one in which we are told that MERS is acting "*solely as nominee* for Lender and Lender's successors and assigns" we are told that "MERS

[44] *Ibanez*, 17 LCR 679, 686-687 (2009) (Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment), aff'd 458 Mass. 637 (2011).

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is *the mortgagee* under this Security Instrument [emphasis added].” Despite the schizophrenic tenor of the wording it cannot be regarded as superfluous,[45] especially given the presumptive level of legal talent behind the creation of the MERS model.

But, as previously stated, MERS has replaced one set of problems with another. For one, if MERS is the mortgagee it *owns* the mortgage and is alone the principal; there can be no agency created in order to act in any way upon that same mortgage. To say that MERS is both owner and agent with regard to the same mortgage at the same time is to create a set of polar opposites for which the law offers nothing in the way of reconciliation. As Professor Christopher L. Peterson has explained forcefully and in some detail, MERS cannot be both principal and agent at the same time with regard to the same economic interest.[46]

Some courts, rather than strike at the root of the problem, have taken the quick and easy way out by simply recognizing one role to the exclusion of the other. This has allowed divergent conclusions to be drawn from identical provisions in the mortgage agreement with regard to ownership. These are not only questions of constitutional and prudential standing but of applicable substantive law to which a blind eye cannot be turned in order to avoid getting a bit of analytical dirt under the fingernails. Fortunately, other courts have begun to question whether the MERS mortgage is simply too muddled to enforce—which, if one may string together a few clichés, will hopefully at some point drive MERS and the mortgage industry back to the drawing board in an effort to build a better mousetrap. In the meantime, the proverbial fan is left to wince and cringe and brace itself as lawsuits begin to circle, increasingly, overhead.

The continuing problem of “successors and assigns.” The role of MERS *as mortgagee* also brings us back to the business of “successors and assigns.” It goes without saying that if MERS is the mortgagee (as opposed to an agent), it necessarily follows that *Lender A* does not own the mortgage and therefore cannot have successors and assigns of that interest—which casts a rather confutative shadow across the many and varied references to “successors and assigns” in the mortgage and elsewhere in the MERS repertoire. Then, too, there is that rather rotund elephant in the closet: the role of mortgagee makes MERS the owner of some thirty-one million mortgages registered in its database—and of course the recipient of the exposure ownership brings. What is really surprising about all of this from a business standpoint is that giving MERS the role of mortgagee in effect replaces the economic fortunes and misfortunes of the originating lender with those of a different entity in the form of MERS itself, thus undercutting the viability of the MERS

[45] *See* Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 501 (1939) (“Contracts are made to be performed, and it must be held that the parties intended to enter into a complete and final arrangement under such terms and conditions as would create and define their obligations and would enable them to accomplish their contemplated aims and objects. With this end in view, every phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties. The literal interpretation of any word or phrase may be qualified by the context in which it appears, by the general purpose manifested by the entire contract and by the circumstances existing at the time the contract was executed. [citation omitted]”); American Venture 594 corp. v. A Russo & sons, Inc., 79 Mass. App. Ct. 770, 775 (2011) (“The agreement must be interpreted ‘n a manner to give effect to the chief design to be accomplished by the instrument’ and in accord with what the parties fairly may be presumed to have intended. Clark (citing v. State St. Trust Co., 270 Mass. 140 , 152-153 (1930); Kerrigan v. Boston, 361 Mass. 24 , 33 (1972))”).

[46] Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System* 78, U. Cin. L. Rev. 1359, 1374-1380 (2010). Henceforth “Peterson.”

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model in the eyes of investors who expect the securitization process to be about making their investment assets as remote as possible from the vicissitudes of the marketplace.

There are some overlapping contract issues as well. One is this: as previously stated, if MERS is acting merely in a representative capacity the mortgage can follow the note provided that it is properly assigned along with the note. With MERS as mortgagee, this is no longer the case and the mortgage is severed from the note. However, as McDonnell has pointed out, the typical MERS mortgage, though allowing for the sale of both the note and the mortgage, expressly states *that they be sold together*.[47] In the uniform covenants section of our sample mortgage we are told that "The Note or a partial interest in the Note (*together with this Security Instrument*) can be sold one or more times without prior notice to Borrower [emphasis added]." Given the clarity of the language and the fact that this is presumed to be the full and final agreement between the borrower and the lender one might argue that the assertion of MERS as a mortgagee is in itself a breach of the very contract in which that assertion is made. And it necessarily means that there must be assignments of the mortgage.

The mutual exclusivity and contradiction between the roles of agent and owner bereft the mortgage of the requisite certainty of terms that a contract must have.[48] The only other possibility would be for MERS to be able to switch back and forth—but when, and under what circumstances, and on what legal authority? Would this calculus of switching from one role to another not amount in substance to a succession of unilateral modifications and would this not be an impermissible result?[49] Which is it—principal or agent, mortgagee or representative for the real mortgagee? Clearly this is at the very least an ambiguity[50] that would require that the mortgage agreement be construed against the drafting party[51] and of course those to whom the drafting party's rights have passed by assignment. An additional factor to be considered in construing the

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[47] Eaton v. Federal National Mortgage Association, No. SJC-11041 (Mass. argued October 3, 2011) (Brief of Amicus Curiae Marie McDonnell, CFE at 16-17.).

[48] RESTATEMENT (SECOND) CONTRACTS § 38 (1979) ("(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain; (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy; (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.")

[49] Cochran v. Quest Software, Inc., 328 F.3d 1, 9 (1st Cir. 2003) ("Under Massachusetts law, the parties to a contract must agree to a modification"), *cited in* Dynamic Machine works, Inc. v. Machine & Electrical consultants, Inc., 444 Mass. 768, 772 (2005); Sargent v. Tenaska, Inc., 914 F. Supp. 722, 727 (D. Mass. 1996), aff'd, 108 F.3d 5 (1st Cir. 1997) ("Under Massachusetts law, generally speaking, one party cannot unilaterally change the obligations of another under contract. . . . Rather, the parties must expressly or impliedly agree to a modification").

[50] "Contract language is ambiguous where 'an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" Suffolk Construction Co. Inc., v. Lanco Scaffolding Co. Inc., 47 Mass. App. Ct. 726, 729 (1999), citing Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989).

[51] *See* Bowser v. Chalifour, 344 Mass. 348, 352 (1956) ("It is settled that a written instrument is construed strongly against the party who drew it if ambiguous or uncertain language is used [citations omitted]." *See also* Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 146 (1982); LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d. 4 (1st Cir. 1984) (" . . . even if we were to agree that the phrase is completely ambiguous, so that neither possible meaning was more likely to have been intended than the other, a fundamental principle would control: *an ambiguous contract should be construed against the drafting party* . . . [citations omitted] [emphasis added]").

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mortgage agreement against the drafting party is that we are dealing with an adhesion contract and the borrower is in a far weaker bargaining position than the lender.[52]

To this is should be added that the mere recording of an assignment in anticipation of foreclosure does not in itself constitute proof that the assignor actually owned the rights in the promissory note and that the promissory note was in fact merged with the mortgage prior to assignment. Such an assumption would be decidedly naïve in light of what we have learned from a foreclosure epidemic in which proper transfers of the note have not always been made at every step and that in some cases the final transfer was simply cooked-up in a foreclosure mill and robo-signed by one of its hireling lackeys. As the Supreme Judicial Court has recently made clear in *Bevilacqua*,[53] "there is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect."

> Recording may be necessary to place the world on notice of certain transactions. See, e.g., G.L. c. 183, § 4 (leases and deed); G.L. c. 203, §§ 2-3 (trust documents). Recording is not sufficient in and of itself, however, to render an invalid document legally significant. See *Arnold v. Reed*, 162 Mass. 438, 440 (1894); *Nickerson v. Loud*, 115 Mass. 94, 97-98 (1874) ("mere assertions . . . whether recorded or unrecorded, do not constitute a cloud upon title, against which equity will grant relief"). As a result, it is the effectiveness of a document that is controlling rather than its mere existence. See *Bongaards v. Millen*, 440 Mass. 10, 15 (2003) (where grantor lacks title "a mutual intent to convey and receive title to the property is beside the point"). The effectiveness of the quitclaim deed to Bevilacqua thus turns, in part, on the validity of his grantor's title. Accordingly, a single deed considered without reference to its chain of title is in sufficient to show "record title" as required by G.L. c. 240, §1,[54]

The MERS model was designed with a measure of promiscuity in mind—with the idea that the note could be passed around on the secondary market while it remained legally wedded to one mortgagee of record. And to deliver on its promise, *MERS must play both roles*. It must play the role of mortgagee in order to remain the mortgagee of record without the need for assignments at every step, and it must also play the role of agent in order to avoid the exposure and other potential difficulties of ownership. And that is exactly what MERS has done. The bottom line is that MERS appears to be an entirely new kind of commercial entity, one that is vying for but has yet to receive recognition from a legal system that lacks the plasticity to do so but through the creative torturing of existing principle—which is evident from some of the court opinions to emerge from the foreclosure crisis. Simply put, the pieces of the MERS puzzle do fit together but with the assistance of a rhetorical bludgeon.

MERS as agent for the note-holder. The question of whether or not MERS can assign the note is one that carries with it yet another complex of problems. To begin, the assignment of a con-

[52] *See* RCI Northeast Services Div. v. Boston Edison Co., 637 F.Supp. 1178 (D.Mass.1986), aff'd, 822 F.2d 199 (1st Cir. 1987); Chase Commercial Corp. v. Owen, 32 Mass.App.Ct. 248, 254 (1992) (adhesion contract as a factor).

[53] SJC-10880, slip op. at 5 (Mass. October 18, 2011) (citing S & H Petroleum Corp. v. Register of Deeds for the County of Bristol, 46 Mass.App.Ct. 535, 537 (1999).

[54] *Id.*

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tract right requires that the assignor be the promisee, the owner of that right—which, in the present case, is the right to received the economic value of the mortgage obligation.[55] Clearly Lender A, as the originating lender, has that right and may enforce it either directly or through MERS as her duly appointed agent. But chances are that if a mortgage is registered in the MERS system the underlying obligation has been transferred one or more times on the secondary market and that the originating lender no longer owns it.

The first question, then, is whether or not the note has been correctly transferred either by assignment or by negotiation at every step along the road to securitization and that owner C has acquired proper ownership. Let us assume for argument's sake that this is the case and that all of the requisite formalities of ownership have in fact been met; after all, it makes no sense to suggest that an agent might represent a principal vis-à-vis an economic obligation in which the principal has no legal interest. Next, we would need to determine whether or not Owner C has created an agency relationship with MERS,[56] and, if so, whether or not the scope of MERS's authority within that agency relationship extends to the note as well as the mortgage. Were such an agency relationship to exist, MERS might then enforce the note as a non-holder in possession with the rights of a holder—a subject to which we will return.

The note in our present example contains a right of assignment but says nothing about an agency relationship, whether it be with MERS or anyone else. And the mortgage instrument that allows in a rather schizophrenic way for MERS to be both agent and principal is just that—an agreement between the borrower and the lender. The mortgage is already an oddity because even though it makes numerous references to MERS it is not in any ordinary sense a contract (let alone an agency contract) between *MERS* and the originating lender. It does not *directly* establish an agency relationship between the two. It does, however, contain one sentence that may arguably vest in MERS the *apparent* authority to act as the originating lender's agent with regard to the note as well as the mortgage,[57] thus evincing, perhaps, the existence of a separate agency contract. If we were again for argument's sake to assume that this is the case, it would mean that, in addition to its twin roles of principal and agent with regard to the mortgage, MERS has the additional role of agent with regard to the note. How amazingly murky it is.

A fuller appreciation of what would be a comedic reality were it not for the seriousness and potential finality of foreclosure counsels us to take a more exegetic look at the language in question—at a sentence that is especially problematic because, until now, MERS has been tied only to the mortgage, not the note. Again, the section reads:

> The Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender And Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to

[55] See *Peterson, supra*, at pp. 1376-1380.

[56] Given that the agency relationship between MERS and the originating lender cannot survive the sale of the mortgage obligation by the originating lender, a new agency relationship must be established between MERS and every subsequent purchaser who chooses to use the MERS system.

[57] "The Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender And Lender's successors and assigns) has the 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 this Security Instrument."

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> foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

In the first part, we're told that MERS holds "*only*" legal title to the interests granted by the borrower "in *this* security instrument [emphasis added]." But the only interest granted in *this* security agreement—that is to say, the mortgage—is the legal title to the secured property. We are then told, with seeming accord, that MERS, "a*s nominee*" for the lender, has the right to exercise "any or all of *those* interests [emphasis added]," the use of "those" a presumptive reference to the same interests—that is, the legal title to the secured property. But the latter part of the sentence then blatantly contradicts the former and leads us into a darkening wood from which logic and legality have altogether fled.

We are told that "those interests" include the right to foreclose and sell the property and "to take any other action required of Lender"—which presumably would include the right to make assignments. Bear in mind here that the promissory note that is companion to the mortgage in our example contains a right of assignment but makes no mention whatsoever of MERS, nor has the mortgage agreement tied MERS to the note in any way until now. Moreover, the note itself in this case defines a holder as one who not only has possession of the note but is entitled to the payments due—which in itself would preclude MERS from being a holder; after all, it has advanced no monies, nor would it be entitled to the proceeds from the foreclosure sale. It has suffered no default, nor could it do so. MERS's own rules and regulations also preclude it from owning any economic interest in the mortgage loan, and, not least, a mortgage agreement is just that—a *mortgage* agreement. Perhaps a more appropriate place of residence for an agency with regard to the note would have been the note itself.

But even if we again assume for argument's sake that it is within the scope of MERS's agency authority to assign the note with the mortgage, we find ourselves facing the same question as to whether or not that agency relationship survived the sale of the note from Lender A to Owner B and to every subsequent purchaser down the line. And, as previously explained, the answer is an emphatic no; on well-settled principles of agency and contract law (to say nothing of common sense) a *new* agency relationship must be created with every transfer. Not least, the same provision also expressly states that MERS may exercise the rights set forth in the mortgage only "if necessary to comply with law or custom." Clearly this is a condition precedent, and yet nowhere is it precisely defined—what law, what custom are we talking about? Given the finality and seriousness of taking someone's home, this leaves an awful lot to chance. But MERS is about to add yet another role to its repertoire.

MERS as holder of the note. We know that if MERS were the mortgagee it might assign *the mortgage* in its own name—putting aside of course the unresolved question of how it could be both principal and agent with regard to the same interest. And we also know that it might assign *the note* in its capacity *as agent* for the owner—again, provided that the note has been properly transferred by assignment or negotiation to every previous owner. But what if MERS were to assign the note or even foreclose,[58] not in its capacity as an agent for the present owner, but *in its*

[58] It appears that MERS is now prevented by its own rules from foreclosing in its own name. MERSCORP Inc., Rules of Membership (July 2011), Rule 8, §1("The authority to initiate foreclosures and file Legal Proceedings in

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own name—that is to say, as the actual holder of the note? It would mean one less assignment and greater cost effectiveness.[59] And there have been numerous cases in which MERS has done precisely that.[60] But how, and on what authority? As it turns out, MERS has a rather neat and simple explanation:

> If the note-owner chooses to have Mortgage Electronic Registration Systems, Inc. foreclose, then the note-owner endorses the note in blank (if it has not already done so), making it bearer paper, and grants possession of the note to a MERS certifying officer. This makes MERS the noteholder. Since MERS is already the mortgagee in the land records, MERS is now able to legally begin the foreclosure process on behalf of the note-owner.[61]

Simply endorse the note in blank and hand it to MERS. In fact, there is nothing neat or simple about it. For one, it is quite clear from the plain language of the mortgage that MERS is not the "note-owner" but merely the note-owner's agent. This would indicate an agency relationship and would preclude MERS from holding the note. For another, if MERS were an actual holder it would be the beneficial owner of the note's economic value—which is exactly what MERS and its members wish to avoid from a liability standpoint and which is, accordingly, prohibited by its own rules and regulations. Because of this prohibition, MERS cannot be a purchaser of the right to payment—that is, it could not acquire ownership of the note as part of a regular contract of sale governed by Article 9 of the Uniform Commercial Code ("UCC").[62]

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the name of MERS granted to a Member's Certifying Officers under such Member's MERS Corporate Resolution is revoked for actions initiated on or after July 22, 2011, the effective date of this Rule. (the "Effective Date"). Effective September 1, 2011, the Member whose Certifying Officer initiates a foreclosure in MERS' name could be sanctioned by MERS pursuant to Rule 7, provided however, if the Member voluntarily dismisses such foreclosure or withdraws the filed Legal Proceedings within 21 days of filing the action, no sanction shall be levied.").

[59] Arnold, *Testimony* at 14.

[60] Rule 8, §§ 1(a) and 1(c) of the MERSCORP Rules of Membership state: (a) With respect to each mortgage loan for which Mortgage Electronic Registration Systems, Inc. is the mortgagee of record, the beneficial owner of such Mortgage loan or its servicer shall determine whether foreclosure proceedings with respect to such mortgage loan shall be conducted in the name of Mortgage Electronic Registration Systems, Inc., the name of the servicer, or the name of a different party to be designated by the beneficial owner; (c) In the event that the beneficial owner or its designated servicer determines that foreclosure proceedings shall be conducted in the name of a party other than Mortgage Electronic Registration Systems, Inc., the servicer designated on the MERS® System shall cause to be made an assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. to the person designated by the beneficial owner, and such beneficial owner shall pay all recording costs in connection therewith. *See also* Remarks of R.K. Arnold, President and CEO of MERSCORP, Inc. Before the Senate Committee on Banking, Housing and Urban Affairs, November 16, 2010 (henceforth "Arnold Remarks"), at 2 (If MERS holds the mortgage lien, foreclosures can occur in two ways: Either the MERS mortgage interest is reassigned in the land records to the lender holding the note and the lender initiates the action on its own, or MERS initiates the action as the mortgagee of record in the land records.").

[61] Arnold, *Testimony* at 13. *See also* MERS Rules of membership, Rule 8, § 2(a).

[62] M.G.L c. 106, § 9-109(a)(3) ("this article applies to . . . a sale of . . . promissory notes."); G.L. c. 106, § 109(b) ("The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply."); G.L. c. 106, 9-102(c) ("Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article."); G.L. c. 106, § 1-201 (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9."); G.L. c. 106, § 9-102(a)(65) ("Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not

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Rather, the substantive law more likely to govern in this case would be Article 3,[63] which deals with the obligations of the note's maker and the identity of the proper party to be paid—that is to say, the "holder" of the note.[64] Article 3 is not necessarily determinative on the question of ownership or the requirements for transfer of an ownership interest, since the holder of the note and the person enforcing it may not be the same person.[65] The distinction is critical because in Massachusetts a foreclosure may only be carried out by the owner or by someone acting on the owner's behalf. Furthermore, the companion note to our sample mortgage also happens to state that "The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" The right to receive payment is an integral part of the definition and cannot be brushed aside.[66]

But the idea that an endorsement in blank will necessarily and in every circumstance transform a note into a negotiable instrument overlooks the fact of its own falsity. For one, in order to foreclose, the borrower must obviously be in default—and a promissory note in default is arguably no longer a negotiable instrument but a *non-negotiable instrument,* perhaps a "chose in action." This is logical: given that a negotiable instrument is an unconditional promise to pay a sum certain,[67] it stands to reason that once that promise has been broken the note becomes something more akin to a check drawn against insufficient funds. The holder may have recourse against the maker of the note but is no longer the purchaser of a payment right within the contemplation of settled commercial law and is left instead to engage in the more tenuous business of collecting on the underlying debt.

It follows that the purchaser of a non-negotiable instrument is in effect nothing more than an assignee subject to all the formalities of any other assignment—which would be invalid if

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evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.").

[63]G.L. c. 106, § 3-102 ((a) This Article shall apply to negotiable instruments . . .); § 3-104 ((a) . . . "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor. (b) "Instrument" means a negotiable instrument. (e) An instrument is a "note" if it is a promise . . . "); G.L. c. 106, § 3-201. (20) ("Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder", with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.).

[64] S*ee Veal, supra.*

[65] *Id.*

[66] Robbins v. Krock, 73 Mass.App.Ct. 134, 138-139 (2008) ("'In interpreting a written contract, such as a [promissory note], the court gives full effect to all the terms expressed by the parties. The terms stated by the parties will be taken in their plain and ordinary sense unless otherwise indicated by the contract. It is not the role of the court to alter the parties' agreement [citation omitted].' We are guided by '[j]ustice, common sense and the probable intent of the parties' when interpreting the written agreement [citations omitted]. 11 Williston, Contracts § 32:5 (4th ed. 1999)."); c*f* Sprint Communications, Co. v. APCC Services, Inc., 128 S. Ct. 2531, 2550 (2008) ("An assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation."

[67] G.L. c. 106, §3-104.

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merely endorsed in blank.[68] This is, for example, why, although a bona fide purchaser in due course of a negotiable instrument will ordinarily take the mortgage securing it free from all equities and defenses the mortgagor may have had against the prior mortgagee, *an assignee taking a mortgage after the secured debt is in default is not a bona fide purchaser* and therefore takes "subject to all equities and defenses between the original parties which arose out of the mortgage transaction prior to the assignment."[69] In such a case, "*[a]s against the assignee*, the mortgagor may avail him or herself of the defense of the invalidity of the mortgage for fraud, duress, or the want or inadequacy of the consideration."[70]

The point finds resonance in the UCC itself, which disqualifies as a holder in due course any person who takes delivery of the note knowing that it is in default.[71] To repeat, it follows that when the note ceases to be a negotiable instrument, it becomes a contract right; thus the only way it could be enforced by MERS in its own name would be for it to take an assignment from Lender A—which would in turn be subject to the formalities of any other contract, including the names of the assignor and the assignee. The mere delivery of the note endorsed in blank would not suffice. This is the position taken by G.L. c.183, § 54(a) which defines "Note holder" (for the purposes of §§ 54 to 55, inclusive) as "the holder of a note evidencing a debt or any other obligation secured by a mortgage; but, if the note holder is not the holder of record of the mortgage, *the note shall contain the appropriate endorsements evidencing the transfer of ownership thereof to said holder* [emphasis added]." This language cannot be regarded as superfluous.[72] One might assume that this would be the case, too, if MERS were then to make a further assignment. Not least, variable interest notes are not for a sum-certain and would appear to be nonnegotiable as well even in the absence of default.[73]

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[68] *See* Guaranty Mortg. & Ins. Co. v. Harris, 182 So.2d 450 (1966 Fla App.), *rev'd on other grounds*, Guaranty Mortg. & Ins. Co. v. Harris, 193 So.2d 1, (1966 Fla.) ("[i]t appears that the assignee of defaulted negotiable paper occupies the status of the holder of a nonnegotiable instrument.").

[69] 59 C.J.S., Mortgages, §§ 438, 439, 443 (2009); *see also* G.L. c. 106, § 3-302(a) ("Subject to subsection (c) of this section and to subsection (d) of section 3-106, "holder in due course" means the holder of an instrument if: (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored . . . "); G.L. c. 106, § 3-306 ("A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument."). *See also* Perry v. Blum, 629 F.3d 1 (1st Cir. 2010) ("Thus [the appellants],are subject to the axiom that the rights of a transferee who is not a holder in due course rise no higher than the rights of the transferor [internal citations omitted]. It follows that the appellants, as transferees, are subject to the trilogy of defenses described in section 3-305(a) to the same extent that those defenses would have been available against the transferor (Brown)") (citing 25 Herbert Lemelman, Massachusetts Practice § 3:150, at 428 (3d ed. 2002) (stating in essence that a holder who is not a holder in due course is treated under Massachusetts law as the assignee of a contract.)). See also, Blye International Ltd. V. Robinson, 59 Mass.App.Dec. 50 (1976).

[70] *See Harris*, 182 So.2d at 453; Losner v. Cashline, L.P., 303 A.D.2d 647, 648, 757 N.Y.S.2d 91 (2d Dep't 2003) ("an assignee of a mortgage takes subject to any defense that would have prevailed against its assignor") *aff'd* 41 A.D.3d 789 (2007); 2 James J. White & Robert S. Summers, Uniform Commercial Code § 17-11, at 226 (5th ed. 2008) *cited in* Perry, supra. Cf U.S. Bank National Association v. Taylor, Fla. District Court of Appeals, 3rd Dist. (2010); 59 C.J.S., Mortgages, § 443 (2009).

[71] G.L. c. 106, § 3-302(a)(2).

[72] Trace Construction, Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346, 352 (2011) ("It is [an] elementary rule of statutory construction that a statute should not be read in such a way as to render its terms meaningless or superfluous.") (citing Bynes v. School Comm. of Boston, 411 Mass. 264, 268 (1991), citing Globe Newspaper Co. v. Commissioner of Revenue, 410 Mass. 188 , 192 (1991).)

[73] New Connecticut Bank and Trust Co. v. Stadium Management Corp., 132 B.R. 205, 208-209 (Bankr. D. Mass. 1991) ("Neither § 3-104 nor § 3-106, which defines the phrase "sum certain," discuss whether a variable interest

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There is yet another matter regarding the transfer of the note to MERS that would take us beyond the scope of the present discussion, but briefly it is this: As Professor Adam J. Levintin sees it, the securitization process is governed by private contractual law—that Article 1 of the UCC allows the parties to contract around the provisions of Articles 3 and 9.[74] This contractual arrangement is then accomplished through pooling and servicing agreements—the securitization documents that create the trust into which the notes are eventually transferred. These agreements set forth the respective rights and duties of the various parties, but are also very specific as to how and when the transfers are to take place and require that the mortgage loan be current and not in default.

Typically, there must be an endorsement in blank to the trust, but also "a complete chain of endorsements from all preceding transfers," which means, to use a simplified example, that there must be a special endorsement from Lender A (the originating lender) to Owner B (the sponsor), then a special endorsement from Owner B to Owner C (the depositor), and finally the endorsement in blank from Owner C to Owner D (the trust). Any failure to comply with this requirement, or to comply within the specified timeframe, is a breach of the pooling and servicing agreement that would, one might reasonably expect, strip the trust of the ownership it would need in order to foreclose pursuant to G.L. c. 244, § 14 and G.L. 183, § 54B—which is essentially what it would need to qualify as a real party in interest in any related action where prudential and constitutional standing must be established. Moreover, the majority of securitization trusts have chosen as their governing law the trust laws of New York. Since these laws require strict adherence to the terms of the trust documents, any failure to do so would, one might expect, constitute a violation of law as well.[75]

Some courts, as we will see, have attempted to give MERS a helping hand by pointing out that Article 3 allows a negotiable instrument to be enforced not only by a holder but also by "a non-holder in possession with the rights of a holder."[76] Putting aside the obvious—that MERS has in some cases invoked its alter ego and heralded itself *as a holder* and not as a non-holder in possession—there are still some hurdles it must clear. To qualify as a non-holder in possession, it

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rate note may qualify as a promise to pay a sum certain. Nevertheless, several courts have concluded that an interest provision that cannot be determined without reference to an external, variable rate renders a note nonnegotiable [citations omitted]. This court agrees.") *cited in* Desmond v. F.D.I.C., 798 F.Supp. 829, 840-841 (D. Mass. 1992)

[74] *See* G.L. 106, § 1-102: (1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies. (2) Underlying purposes and policies of this chapter are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions. (3) The effect of provisions of this chapter may be varied by agreement, except as otherwise provided in this chapter and except that the obligations of good faith, diligence, reasonableness and care prescribed by this chapter may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable. (4) The presence in certain provisions of this chapter of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

[75] There is no overall agreement among the courts of various states on this issue, and some have, in so many words, taken the position that as long as the mortgage and note are in the current owner's hands with MERS as its agent there is no need to question how they got there. It will be interesting to see how it plays out in Massachusetts, where certainty of ownership is heavily weighted.

[76] G.L. c. 106, § 3-301(i) ("Person entitled to enforce" an instrument means (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 section 3-309 or subsection (d) of section 3-418. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.")

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must first take delivery of the note *by transfer*[77] (which would not render the transferee a holder but would vest in her the right to enforce the instrument)[78] rather than *by negotiation* (which would render the transferee a holder[79]) and, presumably, it must demonstrate not only the fact of delivery but the intent behind it.[80] And yet, in various instances where MERS has assigned or foreclosed in its own name, the courts have been surprisingly indifferent to all of this and have simply taken for granted that an endorsement in blank and possession alone are the dispositive factors. Thus Arnold may well mean it when he says that "MERS believes that borrowers are entitled to know that the company foreclosing has all of the necessary paperwork and rights to do so," but he is completely off the mark when he says that "Showing up with the original note provides the borrower and the court with proof that the foreclosing company is the proper party to foreclose."[81]

But getting back to the question of ownership, MERS has again vanquished all difficulty by way of an ingenious device, and it is this: As omnipresent as it has become, MERSCORP had, in November of 2010, some about fifty employees working in its Reston, Virginia offices, while its "technology partner," Hewlett Packard, was said to maintain the actual database with about 150 employees.[82] In short, there is simply no way a MERS official can run to the land office every time an assignment must be made, whether in anticipation of foreclosure or because the mortgage loan is being transferred out of the MERS system. But MERS has solved the problem by anointing as its own "certifying officer" an individual who works for the actual owner or the owner's agent. That individual becomes a "certifying officer" simply by going to the MERS website, filling out a form, and taking a test. The website then spits out a corporate resolution naming her as an "assistant secretary" or "vice president" of MERS.[83]

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[77] G.L. c. 106, § 3-301(ii).

[78] G.L. c. 106 § 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; (b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument."). *See* Duxbury v. Roberts, 388 Mass. 385, 387-88 (1983) ("One does not become a holder of a negotiable instrument unless there is a negotiation of that instrument as required under the Uniform Commercial Code, G. L. c. 106, Section 3-202 (1). To have a negotiation of an instrument payable to order, the instrument must be delivered with any necessary indorsement. G. L. c. 106, Section 3-202 (1). 'An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.' G. L. c. 106, Section 3-202 (2), as appearing in St. 1957, c. 765, Section 1.").

[79] G.L. c. 106, § 3-201 ("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.").

[80] For a good discussion of the subject in the context of a Bankruptcy case, s*ee* Veal v. Am Home Mtg. Servicing, Inc., No. 09-14808 (Bankr. 9th Cir. June 10, 2011). *See also* Marks v. Braunstein, 439 B.R. 248 (Bankr. D. Mass. Sept. 14, 2011) ("The purpose of the possession requirement in Article 3 is to protect the Debtor from multiple enforcement claims to the same note.").

[81] Arnold, *Testimony* at 15.

[82] *Id.* at 10.

[83] MERSCORP Rules, Rule 3, § 3(a) *Obligations of MERS*, states in part: "Upon request from the Member, Mortgage Electronic Registration Systems, Inc. shall promptly furnish to the Member, in accordance with the Procedures, a corporate resolution designating one or more officers of such Member, selected by such Member, as "certifying officers" of Mortgage Electronic Registration Systems, Inc. to permit such Member (i) to release the lien of any mortgage loan registered on the MERS® System to such Member, *(ii) assign the lien of any mortgage naming MERS as the mortgagee when the Member is also the current promissory note-holder, or if the mortgage is registered on the MERS® System, is shown to be registered to the Member* [emphasis added], (iii) to foreclose upon the property securing any mortgage loan registered on the MERS® System to such Member, (iv) to take any and all actions necessary to

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The title is little more than a fiction created by industry players with the click of a mouse on the MERS website. A MERS certifying officer is not employed by MERS in any ordinary sense—that is, she receives no salary or other economic benefit from MERS itself and performs no work for MERS beyond the verification and signing of documents supposedly relating to beneficial interests held *by her actual employer.* The MERS certifying officer wears one hat on top of the other—essentially the same artifice that allows MERS to assume its multiple roles. As of November 15, 2010, there were some 20,302 MERS "vice presidents" and "assistant secretaries" signing countless documents related to active loans registered on the MERS system.

Arnold attempts to justify the practice by saying that under the laws of Delaware, where MERS is incorporated, "there is no requirement that an officer of a corporation also be an employee of that corporation."

> A corporation is allowed to appoint individuals to be officers without having to employ those individuals or even pay them. This concept is not limited to MERS. Corporations cannot operate without officers; they can and often do operate without employees. It is not uncommon for large organization to have all its employees employed by an operating company and for those employees to be elected as officers of affiliated companies that are created for other purposes (all corporations are required by law to have officers to act for it [sic]). Even for loans where MERS is not the mortgagee, employees of the servicer are generally delegated the power to take actions (e.g. initiate foreclosures) and execute documents (e.g. lien releases and assignments) on behalf of the owner of the loan (and the servicer, in turn, may further delegate such authority to a third-party vendor).[84]

The argument entirely misses the point. The issue here is not whether or not a company may appoint as its agents the employees of other companies; rather the issue is whether or not those "agents" have the requisite personal knowledge a MERS certifying officer must have in order to execute assignments and other related documents in anticipation of foreclosure. *MERS's*

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protect the interest of the Member or the beneficial owner of a mortgage loan in any bankruptcy proceeding regarding a loan registered on the MERS® System that is shown to be registered to the Member, (v) to take such actions as may be necessary to fulfill such Member's servicing obligations to the beneficial owner of such mortgage loans (including mortgage loans that are removed from the MERS® System as a result of the transfer thereof to a non-Member), (vi) to take action and execute all documents necessary to refinance, amend or modify any mortgage loan registered on the MERS® System to such Member, (vii) endorse checks made payable to MERS to the Member that are received by the Member in payment on any mortgage loan registered on the MERS® System that is shown to be registered to the Member. In instances where Mortgage Electronic Registration Systems, Inc. designates an officer of a Member as a certifying officer of MERS for the limited purposes described above, such Member shall indemnify MERS and any of its employees, directors, officers, agents or affiliates against all loss, liability and expenses which they may sustain as a result of any and all actions taken by such certifying officer."

Rule 3, § 3(b)(b): Upon request by Mortgage Electronic Registration Systems, Inc., the Member shall deliver to Mortgage Electronic Registration Systems, Inc. a corporate resolution naming the Corporate Secretary of Mortgage Electronic Registration Systems, Inc. as a "certifying officer" of the Member solely for the purpose of installing Mortgage Electronic Registration Systems, Inc. as mortgagee of record on mortgage loans which have been registered on the MERS® System by the Member.

Rule 3, § 4: Unless otherwise specifically stated herein, any action required or permitted to be taken by MERS or Mortgage Electronic Registration Systems, Inc. pursuant to these Rules shall be taken on behalf of MERS *by such persons as may from time to time be designated by the respective Boards of Directors of MERS* and Mortgage Electronic Registration Systems, Inc. [emphasis added].

[84] *Id.* at 12.

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policy of requiring that a certifying officer work for the actual owner of the interests in question is to assure the accuracy and integrity of the assignment and other documents signed and acknowledged by that individual; in other words, to assure that she has sufficient personal knowledge of the mortgage loan and its history. As Arnold himself put it,

> To be a MERS certifying officer, one must be an officer of the member institution who is familiar with the functions to be performed, and who has passed an examination administered by MERS. Generally, these are the same individuals who would handle the foreclosure if the lender was involved without MERS.[85]

In this respect MERS got it right. But the mere designation of an other firm's employee as an agent, whatever the benefits may be in terms of efficiency, does not in itself accomplish the necessary level of trustworthiness and integrity—let alone the transparency—demanded of the foreclosure process.[86] It does not imbue one with the requisite level of personal knowledge any more than going on line and printing out a certificate declaring one to be an ordained minister brings one any closer to the divine. Moreover these "agency relationships" have too often been used as a red herring to divert attention not only from the total absence of personal knowledge but also from actions that are decidedly fraudulent. This is among the most important lessons the foreclosure crisis has to offer.

Having said all of this, in order for MERS to foreclose *in its own name rather than in a representative capacity* it must own both the mortgage and the note at the time of foreclosure. And yet a MERS "certifying officer" cannot hold the note *in her capacity as a MERS certifying officer*—for to do so would imply on settled principles of agency and contract law that MERS actually owned it, which is again contrary to the MERS rules and regulations. The only plausible way for the certifying officer (a term, which, by the way, presumes the capacity to *certify*, to confirm as true and accurate the contents of a given document) to hold the note is *in her capacity as an employee of the actual holder, the owner of the economic interest.* [87] And here is where it becomes creative: because she holds the title of MERS "vice president" or "assistant secretary" on top of whatever title she holds at her regular job, MERS can rightfully declare itself to be the holder of the promissory note.

[85] Arnold, *Remarks* at 2. *See also* Arnold, *Testimony* at 13 ("The foreclosure is managed entirely by the member institution's MERS certifying officer. This person typically works in the default department within the MERS member institution so they are familiar with the various state foreclosure requirements. The member manages the relationship with the law firm that is handling the foreclosure. The member retains the law firm on behalf of MERS and the member provides the necessary documents and information to the law firm. The member obtains these documents and information from the servicing files and system, which are maintained by the member. . . . As noted earlier, the MERS certifying officers are the same employee officers who handle foreclosure function for the MERS member institutions. Whether a foreclosure is initiated in the name of MERS and handled by the Certifying officers, or by the lender in it own name, the same people would be doing the work. Likewise, the loan file remains with the servicer as it did before MERS existed. MERS is not a repository for mortgage documents or promissory notes.").

[86] U.S. Bank National Assn. v. Ibanez, 17 LCR 679, 688 (2009) *aff'd* U.S. Bank National Assn. v. Ibanez, 458 Mass. 637 (2011) ("G.L. c. 244, § 14 requires complete transparency.").

[87] By analogy, s*ee* UCC §1-203(a), (b) for the role of economic interests in determining the difference between a lease and a security interest. For guidance from other jurisdictions, s*ee* Lee v. Barnes, 362 P.2d 237, 240 (Wash. 1961) ("The label affixed to a security interest by the parties does not necessarily determine its legal significance."); Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1919) ("[a] note so given is not made for 'value received,' However its maker may have labeled it."); *In re* Homeplace Stores, Inc., 228 B.R. 88, 93-94 (Bankr. D. Del. 1998) (Under 1987 revision of UCC § 1-201(37) (economic realities are determinative in distinguishing security interest from lease, not the intent of the parties.).

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This means that somehow, as if by incantation, enough of her authority to hold the note on behalf of the true owner rubs off on MERS for MERS to then proclaim itself the owner for purposes of assignment and foreclosure, but not quite enough to actually make it the true owner and subject it to the responsibilities and exposure of ownership. It is an artful enterprise, a bit more of thimblerigging. The sober fact is that MERS cannot itself own or itself take delivery of the note—not really. It is a fool's errand to think otherwise, and we can only imagine the reaction if we were to tell the true owner that, by having one of its employees become a MERS certifying officer, it no longer owned the promissory note and right to payment.

Invitation to fraud. But why, then, all the fuss? Isn't this much ado about nothing? After all, at the end of the day did the borrower not receive the loan and did she not default on her obligation to pay it back? It is not that simple. In an ideal world, or perhaps in our own past, questions such as these might have had merit; but to raise them today is to miss what lies at the heart of the matter and represents what to this writer appears to be an intellectual dishonesty by which the misfortunes or even carelessness of the borrower are used to obscure and tacitly condone not only sloppy procedures on the part of the mortgage industry but outright fraud—and even if we were to assume for argument's sake the legality of the MERS model, there can be no question at this point that it has, and perhaps despite the best of intentions, left the backdoor ajar and allowed the unscrupulous to work their mischief.

MERS has very few employees of its own and relies on the employees of its member companies to serve as its agents, companies that often follow suit by appointing as *their* agents the employees of yet other companies. Thus it is not unusual, for example, to see Betty sign, as "vice president" for Lender A, an assignment from Lender A to Lender B, and then a short time later sign, as "vice president" for Lender B, a power of attorney from Lender B to Attorney C, even though she has only ever been employed by Lender A. In fact, because of the inbred nature of the mortgage industry in matters of securitization and foreclosure it would not be unusual for Betty to have resolutions declaring her to be the agent for multiple companies. Although this mix-and-match arrangement serves the needs of the mortgage industry, it raises serious questions about the integrity of having such individuals sign and acknowledge documents of such importance and finality; after all, the signature implies the personal knowledge and accuracy of the facts they contain.[88] The practice, widespread during the boom, has come to be known as "robo-signing."

A more onerous scenario is this: Lender A, with MERS as its nominee, assigns directly to the foreclosing entity, Company D—a trust. Putting aside the fact that Lender A has long ago divested itself of its interest in the promissory note and mortgage and no longer has anything left to assign, there is a further problem: the assignment is signed and acknowledged by Willy as vice president of MERS. According to the MERS rules, Willy should work for Lender A and thus be personally familiar with the mortgage loan and its genealogy. But in fact, he does not work for MERS, nor does he work for Lender A or even for the true but undisclosed present owner, Owner C. Instead, he works for Company X, an anonymous foreclosure services company and robo-signing haven that was hired by Lender D (the foreclosing entity) to cook-up, typically with the assistance of some hireling lackey from the legal profession, a fraudulent assignment from Lender

[88] "Signature. The act of putting one's name at the end of an instrument to attest its validity . . . " BLACK'S LAW DICTIONARY 1239 (5th ed. 1979).

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A in order to "establish" Company D's ownership—perhaps because the original had been lost, destroyed, or never memorialized in the first place.

It is here that we find yet another shell game. As it turns out, Willy has been appointed as an agent for all of the players that were involved with the mortgage in question along the road to securitization—and it is upon this clever but ultimately stupid pretext that his signature, his acknowledgement, and the assignment itself are all heralded by the industry as perfectly legitimate. The issue here is not whether the machinations of some legal sophist can formulate an argument creating an agency relationship between the certifying officer and the assignor, but *whether the certifying officer has the requisite personal knowledge to be signing at all.* This is not an isolated example, and MERS appears woefully ill-equipped to deal with it. Because of its small size, there is little it can do beyond setting rules of behavior, imposing fines, or in some instances ejecting recalcitrant members. It simply does not have the means to effectively police the multitude it has authorized to act in its name. The "certifying officer" like the "continuity" of MERS as the mortgagee of record in the county recording office, is done largely with smoke and mirrors.

In a recent ground-breaking study commissioned by John O'Brien, Register of the Essex Southern District Registry of Deeds in Salem, Massachusetts, McDonnell examined some 2,000 mortgage-related documents. Only 60 percent of the 473 mortgages examined have a traceable ownership, and 46 percent are registered to MERS. Shockingly, only 16 percent of the examined assignments are valid, 75 percent are invalid, and the remainder are questionable. Twenty-seven percent of the invalid assignments are actually fraudulent, 35 percent have been robo-signed by individuals lacking the requisite personal knowledge, and 10 percent violate G.L. c. 266, § 35A(b)(4), the Massachusetts fraud statute. Six-hundred eighty-three assignments are missing. More shocking is that what O'Brien and McDonnell have discovered is obviously but the tip of an iceberg that likely underlies every registry in every county across the country.

The problem is especially insidious because, at least until recently, many home owners who were in default would simply walk away from their homes, thus leaving the fraud undetected in the land office records and missing out on the requirements of integrity and exactitude required of any foreclosing entity regardless of whether or not the homeowner was in default. The bad news is this—that any registered title produced in this way is in fact defective. An unscrupulous individual signing and acknowledging an assignment can easily hide behind his appointment as a MERS certifying officer even though he does not work for the originating lender—and MERS would likely be never the wiser for it unless the homeowner decided to challenge the foreclosure in court. MERS simply has no way of knowing that its "vice president" or "assistant secretary" actually works for the assignor named on the assignment—who is typically not the current owner but the originating lender. We[re left to ask: what shell conceals the pea—or perhaps more to the point, *is* there even a pea? Such is the MERS system in all its subterranean majesty.

Arnold maintains that since 2009 MERS has enhanced its procedures to insure that its certifying officer is in fact an officer of the member company and that it has "suspended relationships with some prominent players involved in the foreclosure process."[89] The robo-signers who were MERS officers have had their authority suspended and "will not be recertified until they retrain and submit to reexamination, and the members who employed them provide MERS with a

[89] Arnold, *Testimony* at 19

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plan on what will be changed within their companies to prevent this from happening again." [90] One might find this a small price to pay for individual wrongs that may seem equally small but have in concert caused untold damage to the integrity of the foreclosure process and the principles of fairness and transparency on which it must be based. But perhaps of greater concern is the fact that much of the mischief occurred in the years prior to 2009, and no one has yet to squarely address the frightening probability that countless assignments and foreclosures that have taken place across the country are in fact illegal.

What can go wrong. As previously intimated, some courts have got the measure of the MERS model while others have managed to enucleate from the statutes and the common law principal enough to give it a gloss of validity while at the same time avoiding the level of analysis that would have produced a more compelling and opposite result. The story behind *Marron*[91] begins in 2005 with a mortgage given to MERS, "solely as nominee" for the Fieldstone Mortgage Company,[92] along with a promissory note that was made at the same time and at some point endorsed in blank. It appears that the loan was sold a number of times on the secondary market and securitized before going into default. Sometime later, foreclosure proceedings began.

There are two recorded assignments of both the note and mortgage. The first [93] is directly from MERS to HSBC.[94] There is no indication that MERS is still acting "solely as nominee" for Fieldstone; in fact, there is no mention of Fieldstone at all. It was signed and acknowledged in Texas by one Marti Noriega, purportedly a MERS certifying officer and therefore a presumptive employee of Fieldstone as well, though Fieldstone is said to have been located in Columbia, Maryland.[95] Following the recording of a confirmatory mortgage, a confirmatory assignment was recorded as well. [96] It too was signed and acknowledged in Texas, this time by one Debra Lyman. On October 29, 2010, the Marrons filed for relief under Chapter 7 of the Bankruptcy Code, and HSBC then filed a motion for relief from the automatic stay. The following discussion is based on the Memorandum of Decision [97] entered on June 29, 2011 relative to that motion. Although a full dissection of the case would carry us well beyond the scope of the present discussion, it is interesting to see how some of the salient arguments are fielded by the Court. [98]

[90] *Id.* At 20

[91] *In re* Marron, No. 10-45395-MSH (Bankr. D. Mass June 29, 2011), Memorandum of Decision on a creditor's motion to life the automatic stay.

[92] Hereinafter "Fieldstone." The company had declared bankruptcy in late 2007 and rejected its executory contract with MERSCORP.

[93] Bk: 28635, pg. 448, South Essex Registry of Deeds.

[94] HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage Investment Trust, Series 2005-2.

[95] It appears that Fieldstone had by then divested itself of its interest in the mortgage obligation.

[96] Bk 29618, pg: 142, South Essex Registry of Deeds.

[97] Henceforth "Memorandum."

[98] HSBC had argued that it had validly acquired the mortgage by assignment from MERS and that the power of sale in the mortgage allowed it to foreclose. The Marrons, through their bankruptcy trustee, had argued, among other things, that MERS was merely acting as Fieldstone's nominee, that it held no interest in the economic value of the promissory note, and that because of this, it had no authority to foreclose the mortgage. Accordingly, if MERS lacked the authority to foreclose the mortgage, it lacked the requisite ownership interest to assign the mortgage to HSBC—a foreclosing entity. HSBC also argued that since the question of standing had been previously adjudicated in the Land Court the trustee's objections were barred by the principle of *res judicata* or by the *Rooker-Feldman* doctrine. The Court did not find it necessary to address the issue but rather decided the case on other grounds. It appears that the Trustee, relying on *Agard*, 444 B.R. at 254, also argued that MERS lacked the power to assign a mortgage absent ex-

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Reading through the Memorandum, the first question presented is whether or not a party who receives a mortgage by way of an assignment from MERS in fact has the power to foreclose—the threshold question to which is whether or not MERS itself has the power to foreclose and therefore the power to assign that right; that is, whether or not MERS can exercise the power of sale contained in the mortgage. That the Court answers both questions in the affirmative is not in itself especially surprising as judges around the country continue to grapple with MERS-related issues. [99] Rather, what makes *Marron* so interesting is that it steps beyond the MERS model and in effect creates a new conceptual framework on which to hang the legitimacy of a MERS assignment—that it has, to use the idiom, done MERS one better. However, its reasoning is flawed.

As the foundation for its conclusion, the Court lays out a sequence of points: (1) that a note may be enforced either "by a holder or by a non-holder in possession with the rights of a holder;" [100] (2) that if the note is secured by a mortgage, the holder may not foreclose unless she is also the mortgagee; (3) that in Massachusetts the note and the mortgage may be held by different persons; (4) that if the two interests are in fact split, the mortgagee holds the mortgage in trust for the holder of the note who is therefore the "beneficial owner" of the mortgage; and (5) that the mortgagee must then assign the mortgage to the holder if the holder wishes to enforce the note—a clear reference to the "in trust for" rule previously discussed.

These are correct statements of Massachusetts law. But the Court then adds two further points that hint at the possibility that its reasoning has begun to drift off course. The first is that until such an assignment is made, the mortgagee retains legal title to the mortgage subject to a fiduciary duty to act on behalf of the holder, and the second is that the mortgagee has the right to assign the mortgage, but in a way that is consistent with his fiduciary duty as trustee for the holder of the note. What is worrisome here is the use of the terms "fiduciary duty" and "trustee." As previously explained, the "in trust for" rule creates an obligation on the mortgagee's part to assign the mortgage back to the owner of the note in the event of foreclosure—but nothing more. Where, then, is the Court going with this?

We are told that this analysis "does not change just because MERS, as nominee, is the mortgagee" and that "Massachusetts law does not require a unity of ownership of a mortgage and its underlying note prior to foreclosure." It is here that we arrive at the crux of the matter:

> Taken to its logical conclusion, a mortgagee who is not the note holder may exercise the power of sale and foreclose the mortgage, but as a fiduciary for the note holder, to whom it must account for the foreclosure sale proceeds.

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press authority from the servicer or owner of the loan and that no such authority was granted with respect to the debtors' loan in this case. The Trustee also argued that each transfer of the beneficial ownership of the mortgage on the debtors' home should have been accompanied by a written assignment, and since none had been presented, there was no transfer of the beneficial (as opposed to the legal) ownership of the mortgage to HSBC. Because there was no chain of written assignments by the successors of Fieldstone, MERS remained the nominee for Fieldstone, which in turn remained the beneficial owner of the mortgage, thus Fieldstone never directed MERS to assign the mortgage to HSBC.

[99] *Memorandum* at 7. Although the question "has been the subject of extensive litigation across the country," we are told, "[n]o clear pattern of judicial guidance has emerged." Here in Massachusetts, however, the courts "have generally held that MERS may both foreclose and assign mortgages held in its name."

[100] *See* G.L. c. 106, § 3-101 *et seq*.

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> As Massachusetts law allows a mortgagee with no interest in the underlying obligation to foreclose, the trustee's argument that MERS did not have a sufficient interest in the debtors' property to foreclose the mortgage fails.

For the *Marron* Court's argument to work, a number of things must happen. Let us say that the note is actually owned by Owner C. First, in order for MERS to hold the mortgage "in trust for" Owner C, MERS it must be the mortgagee, the owner of the legal interest in the secured property.[101] In an agency relationship there would be, functionally speaking, no real separation of interests and the "in trust for" rule would not apply. The Memorandum does not address the question of how MERS can be both principal and agent for the same interest but appears to accept at face value that it may do so. Second, in order for MERS to foreclose as Owner C's "trustee" Owner C must herself have the authority to foreclose. Third, for Owner C to have that authority, she must own the note *and* the mortgage. And fourth, in order for Owner C to own both interests there must be an assignment of the mortgage from MERS to Owner C; Owner C's "beneficial" interest in the mortgage changes nothing in this regard. The point has been reaffirmed beyond question in *Ibanez*.[102]

Thus off the bat, *Marron* runs into difficulty. There was no assignment of the mortgage from MERS to the current owner of the note—who is not even identified in the Memorandum. It follows, again pursuant to *Ibanez*, that (i) ownership of the mortgage remained with MERS and that the note owner did not own both interests; (ii) that the note owner did not have the authority to foreclose; (iii) that MERS did not have the authority to foreclose on her behalf; and therefore (iv) that MERS did not have the authority to assign that right to HSBC. Moreover, even if there had been no need for an assignment, the "in trust for" rule was created for the limited purpose of

[101] To say that the "in trust for" rule also creates an actual trust with the owner as beneficiary and MERS as the trustee is to write into the mortgage agreement a fifth role in addition to the four already created by MERS itself: that of *trustee* with regard to the mortgage—even though in substance what it describes is an agency relationship or partnership and not a true trust because of the level of control retained by the principal or beneficiary. As such it would be more akin perhaps to a nominee trust—and it would bring us once again to the fact that any agency relationship between MERS and Fieldstone—even if we were to accept for argument's sake that both the mortgage and the note were within the scope of MERS's authority as an agent—came to an end on the day Fieldstone sold the mortgage obligation on the secondary market. *See*, Bellemare v. Clermont, 69 Mass. App. Ct. 566, 571 (2007) ("In the nominee trust context, the trustees act only at the direction of the beneficiaries. Roberts v. Roberts, 419 Mass. 685 , 687 (1995), citing Morrison v. Lennett, supra. Thus, "[n]ominee trusts have characteristics of both agency and trust," Roberts v. Roberts, supra at 688, in that the trustees hold title for the benefit of others, but also take direction from those persons or entities who hold the beneficial interests. "Where a person is both agent and trustee for another, 'the agency relation . . . predominates.' " Penta v. Concord Auto Auction, Inc., 24 Mass. App. Ct. 635 , 640 (1987), quoting from 1 Scott, Trusts § 8, at 95 (4th ed. 1987). It is for these reasons that "[i]n prior decisions, involving nominee provisions in trust instruments, this court has disregarded the trustees' record ownership of the property and liability has been imposed directly on the beneficiaries." Morrison v. Lennett, supra at 862, citing First Natl. Bank v. Chartier, 305 Mass. 316 , 320-321 (1940), and Birnbaum, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364, 368 (1976). Liability has been imposed directly upon beneficiaries on the theory that the trustees are agents for the principals' convenience. See Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass. App. Ct. 385 , 388 (1988); Federal Deposit Ins. Corp. v. Porter, 46 Mass. App. Ct. 241 , 244 (1999)").

[102] *Ibanez*, 458 Mass. at 652-653 (referencing G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6) "In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," *but not to a party that is the equitable beneficiary of a mortgage held by another* [emphasis added].".

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merging the two interests in the hands of the note owner who should, in fairness, have access to the secured property in the event of a default on the borrower's part.

That "trusteeship" therefore necessarily comes to an end at the very instant an assignment is made. The idea that it somehow survives and establishes between MERS and the current owner of the note an actual trust that gives MERS the authority to foreclose on behalf of the real current owner—this is not only an arbitrary and exponential expansion of the rule, but one that runs roughshod over many an established legal formality in Massachusetts with regard to both the creation of a trust and the vesting of authority in a trustee. And it reads into the mortgage yet a fifth role for MERS to play—that of trustee.[103] This is wholly without support under any theory of law or equity; in fact, the only "authority" cited by the court in this regard is that provision in the mortgage agreement itself:

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: [sic] to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

But there is more. *The assignments are of both the mortgage and the note—and they are in MERS's name alone*; in other words, they herald MERS as the owner of both interests. If this is not the case (and it is probably not the case), the assignment is defective for its failure to identify the actual grantor. Though MERS is prevented by its own rules and regulations from owning the note, the Court simply avoids the problem by invoking the UCC and implying that MERS may act as a non-holder in possession with the rights of a holder. As previously stated, however, this would require a showing that MERS took delivery by transfer rather than negotiation; that the note did not have a variable rate; and that it was not in default at the time the assignment was made.[104] The subject is not addressed in the Court's analysis. Instead, it goes on to say:

> To the extent MERS held only bare legal title to the mortgage on the debtors' residence in its capacity as trustee for the note owner, MERS was able to assign its interest to HSBC.
>
> The fact that the debtors' promissory note passed like a hot potato down a line of owners, including some in bankruptcy and liquidation, with no accompanying assignment of the note owner's beneficial interest in the mortgage, changes nothing. Through all of these transfers right up until it finally assigned the mortgage to HSBC, MERS remained the mortgagee in its capacity as trustee and as nominee for whomever happened to own the note.[105]

[103] No explanation is offered as to how—given, among other things, the high level of control retained by the MERS member—the relationship could possibly be defined as a trust, save, perhaps, a kind of nominee trust—which would in any event lead us down a conceptual dead end because, as explained earlier in the present discussion, a nominee trust may for that very reason be viewed more as an agency or partnership.

[104] This latter requirement is based on the principle that a promissory note endorsed in blank is no longer a negotiable instrument once the borrower is in default, and that, as a chose in action, it may not be transferred without naming the transferee.

[105] *Id.*, at 9-13.

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Here we are told again that MERS is acting as nominee—which flatly contradicts the fact that both assignments are, again, from MERS alone. It also contradicts the fact that MERS has pronounced itself *both* agent and principal, and yet no articulable basis is given as to why one role deserves recognition to the exclusion of the other or how one can be reconciled with its polar opposite. The Court's argument simply trips over the multiplicity of roles MERS has bestowed upon itself. As for MERS "in its capacity as trustee"—for the "in trust for" rule to apply in this case, MERS would have to own the mortgage, which would in turn wipe out any possibility that Fieldstone could have assignees or successors in interest relative to that mortgage and make nonsense of all such references in the mortgage.

Stated differently, the Court on the one hand posits that MERS is an agent and on the other hand uses as its foundation for MERS's authority to assign and foreclose a rule that would require MERS to be the actual mortgagee. It bears repeating that the "in trust for" rule reaffirmed by *Ibanez* presumes that there has been a true separation of interests and that the mortgagee in question is the actual owner of the legal title to the secured property; it does not contemplate a situation where the mortgage is merely held nominally by the lender's agent. It would be both comedic and absurd for the "trustee" and the "beneficiary" to be, functionally, the same person with regard to the same property interest and for that person to then seek a judicial order compelling her to assign the mortgage back to herself in the event she would not voluntarily do so.

To say that the Court's analysis "does not change just because MERS, as nominee, is the mortgagee" is to miss a further point of some substance—namely, that if MERS is acting in its representative capacity, the "MERS" of record, as previously explained, no longer has any legal existence even though a "new" MERS may be representing the current owner. The original agency relationship did not survive the sale of the mortgage loan by the originating lender. This is not a technical distinction but one that goes to the very core of the matter, to the question of who actually owns the mortgage and the note and who has the authority to assign. On the other hand, the recognition of MERS as mortgagee has the risky effect of withdrawing from judicial scrutiny the fatality of MERS's continuing status as the mortgagee of record in the absence of an assignment by MERS as nominee for the originating lender to MERS as nominee for the new owner.

To support its position the Court refers to language from *Kiah*, [106] a case that goes so far as to recognize that the mortgage agreement between the borrower and the lender establishes the borrower's assent to have MERS represent the lender's successors and assigns but stops short of addressing the critical question of whether such agency relationships were actually created and memorialized by way of assignment in the first place, given that they are conveyances of an interest in land. By this reasoning, a court can take at face value the legitimacy of MERS's own assertion that it is acting on behalf of Lender A and Lender A's successors and assigns, which is to say, in so many words, that the "law of the contract" absolves a court of any responsibility to see whether or not the assignments pass muster under well-settled principles of contract and agency law—that the architects of a contract have the license to do as they wish as long as they can get the other side to agree even when we are dealing with an adhesion contract and a playing field tilted in the lender's favor.[107]

[106] Kiah v. Aurora Loan Services, LLC, 2011 WL 841282 (D. Mass. Mar. 4, 2011),

[107] The *Kiah* Court appears to misconstrue Massachusetts law, including *Ibanez*, by positing that "[b]y law, the transfer of the note automatically transfers the underlying security, even without a formal assignment (citing Carpenter v. Longan, 83 U.S. 271, 275 (1872) ("transfer of the note carries with it the security, without any formal assign-

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The Court next addresses the argument that a mortgage assignment from MERS is valid only if MERS can prove both its nominee relationship with whomever happens to be the current note-holder and that the note owner authorized MERS to assign the mortgage. [108] Turning first to the question of authority, the Court responds:

> By this reasoning, in our case, HSBC would have to establish MERS' authority to assign to it the debtors' mortgage by demonstrating that at the time of the assignment (i) HSBC was entitled to enforce the note and was thus the beneficial owner of the mortgage, (ii) that either HSBC or the loan servicer was a member of MERS and (iii) that the MERS officer executing the assignment was authorized to do so on behalf of MERS for this particular loan.
>
> As has been pointed out, however, both in *Kiah* and a subsequent decision of Judge Joseph L. Tauro of the United States District Court in Massachusetts, under Massachusetts, law, an assignment of a mortgage is effective without the need to independently establish the authority of the assignor to make the assignment [citations omitted]. [109] Mass. Gen. Laws ch. 183, § 54B provides that an assignment of a mortgage executed before a notary public
>
>> by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary . . . or other officer . . . including assistant to any such office or position, of the entity holding such mortgage . . , or otherwise purporting to be an authorized signatory for such entity . . . acting in its own capacity . . . shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording.
>
> Because the assignments of both the mortgage and confirmatory mortgage on the debtors' property were executed before notaries public on MERS' behalf by individuals identified as MERS assistant vice presidents, under Mass. Gen. Laws ch. 183, § 54B these assignments are binding and neither HSBC nor MERS must prove the authority of the signatories [citations omitted]. The existence of the Massachusetts statute renders *Agard's* analysis inapposite and the trustee's argument unavailing with respect to assignments of Massachusetts mortgages.

To begin, there is a critical difference between the question of whether or not the person signing has *the authority* to do so and the question of whether or not she is doing so on behalf of *the owner*. The glaring omission here is that G.L. c. 183, § 54B is not just about authority but also about *ownership*; it clearly ties one to the other. As explained earlier in this paper, nowhere

ment or delivery, or even mention of the latter"))," and that "[a]ny rights in the mortgage held by First Magnus were therefore transferred with the note." It then wraps up the point by stating that since "MERS had the power to act as the agent of the note holder, even after transfer to a new holder, Plaintiff's theory that the note and the mortgage somehow became disconnected from one another, and that the mortgage should disappear as a result, is not tenable as a matter of law." This contradicts the Marron Court's position that "the MERS phenomenon has created a national Massachusetts-like model where the legal and beneficial ownership of mortgages has [sic] been separated. Courts in states which do not permit the separation of ownership of notes and mortgages understandably find this a challenge which may account for the inconsistency in decisional authority identified above." *Marron* at 9, note 7.

[108] *Marron*, Memorandum of Decision at 10. The Marrons' argument was based on *Agard, supra.*

[109] *Kiah*, Memorandum of Decision at 10.

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does the statute even remotely suggest that the party signing may do so for a non-owner—which would, in effect, be a legalized invitation to fraud. On the contrary, the statute expressly and clearly states that the position held by the person signing must be "*of the entity holding such mortgage* . . . or otherwise purporting to be an authorized signatory *for such entity*." The language cannot be ignored,[110] and the fact that the signatory need not establish authority does not absolve the foreclosing entity from proving its ownership, nor does it excuse the courts from the requisite determination of what is, in the end, a question of law. Again, the assignments are of the mortgage *and* the note, and the only assignor named is MERS with no suggestion that it is acting in a representative capacity.

To repeat, the critical issue in *Marron* was not whether MERS can legally act as an agent for successive owners of the mortgage or the note; there is no law preventing it from doing so. However, on well-settled principles of agency and contract law the *original* agency relationship does not and cannot not carry over to those subsequent owners but must be established separately with each transfer. Yes, the MERS model ostensibly accomplishes this by creating, through its membership agreement, a series of separate and distinct agency relationships between itself and successive owners of the mortgage. And yes, this too is arguably permissible, provided of course that they are all MERS members. But again, this is not the issue.

Rather, the issue—and it is a definitive issue here and in others cases—*is whether or not MERS, "solely as nominee" for the originating lender, must file and record an assignment of the mortgage now to MERS "solely as nominee" for the new owner in order for MERS to maintain its status as mortgagee of record.* And the answer is, emphatically, yes, that it must do so. As previously explained, under *Ibanez* and its supporting authorities, without a written assignment the mortgage does not change hands;[111] thus the continuing presence of MERS as nominee in the land office records is at best a misrepresentation of material fact and in some cases the product of fraud—a fraud that allows an unscrupulous foreclosing entity with no valid proof of ownership to record an assignment to itself directly from MERS as nominee for the originating lender (who is long out of the picture) and hope that no one will be the wiser for it. And again, the mere act of recording does not impart legitimacy to an invalid document.[112]

[110] *See* Rate Setting Commission v. Faulkner Hospital, 411 Mass. 701, 705, n. 8. (1992) ("Where the language of a statute is clear and unambiguous it must be given its ordinary meaning"), citing Hashimi v. Kalil, 388 Mass. 607, 610 (1983). *See* Global Naps, Inc., v. Awiszus, 457 Mass. 489, 505 (2010) ("It is a cardinal rule of statutory construction, however, that no provision in a statute "is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature [internal citations omitted]") ((Botsford, J., concurring in part and dissenting in part, with whom Gants, J., joins; and with whom Marshall, C.J., joins in relevant part). *See also* Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412 (2009) ("A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage."); Wolfe v. Gormally, 440 Mass. 699, 704 (2004); Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998); William McCarty's Case, 445 Mass. 361, 364 (2005) ("in construing a statute, its words must be given their plain and ordinary meaning according to the approved usage of language . . . and that the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it."), quoting Taylor's Case, 44 Mass. App. Ct. 495 , 499 (1998), quoting Johnson's Case, 318 Mass. 741 , 746-747 (1945); Rate Setting Commission, supra, at 705; Bronstein v. Prudential Ins. Co., 390 Mass. 701 , 704 (1984) "When the use of the ordinary meaning of a term yields a workable result, there is no need to resort to extrinsic aids such as legislative history.".

[111] *Ibanez*, 458 Mass. at 652-653.

[112] *Bevilacqua*, SJC-10880, slip op. at 5 (Mass. October 18, 2011) (citing S & H Petroleum Corp. v. Register of Deeds for the County of Bristol, 46 Mass.App.Ct. 535, 537 (1999).

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By the same token, even if we were to accept that the mortgage agreement establishes at least an apparent authority for MERS to act as *an agent* with regard to the note—which the one-way "in trust for" rule does not—that agency relationship ended too upon the sale by Fieldstone. And without proof that a new agency relationship was created with each and every subsequent owner MERS would not have the authority to assign the note or foreclose as an agent for the current owner. The chain of title would be defective. This is not rocket science, obscured as it may be by the assertive rhetoric and ambiguity of the mortgage agreement. What *Marron* misses in its analysis is that even though the present schizophrenic personality of the MERS model allows it to achieve its goal of minimizing both its exposure and the number of trips a note-purchaser must make to the local land office, it is in fact wholly without support under any existing theory of law and is, in effect, an entirely new legal entity which the courts may legitimate only at the peril of assuming a legislative role one must assume would be open to constitutional challenge.

But authority too should have been an issue in *Marron*. MERS has sought in its rules and regulations to ensure the integrity of an assignment signed and acknowledged by one of its certifying officers. It has done so by requiring that she be a person who would have the authority to sign and acknowledge the assignment were it to come directly from the owner without MERS as its agent. In this way, the person signing and acknowledging might reasonably be presumed to have the requisite personal knowledge and authority to do so. To sign and acknowledge without such personal knowledge is what has come to be known in the patois of the foreclosure crisis as robo-signing. In *Marron*, consider the first assignment alone: it was signed and acknowledged in Texas by one Marti Noriega, even though Fieldstone, the mortgagee of record, was based in Maryland. This may or may not be of significance, but missing from the Memorandum is any mention of the issue, which is in itself surprising given the weight placed by the Court on G.L. c. 183, § 54B—which, despite its liberal approach[113] as to who may sign, cannot be construed so as to turn a blind eye to the long-standing revulsion to fraud, a revulsion that lies at the center of our ordered system of justice.[114] If Noriega was not a regular employee of Fieldstone, there would be a question of authority and the assignment may well have been fraudulent.

[113] The story behind G.L. 183, § 54B, as amended retroactively by St. 2010, c. 282, § 2, reveals the intention of the real estate and mortgage industries to bring Massachusetts in line with the national trend toward precisely the level of efficiency and economy embodied in the MERS system—which has had the unfortunate side-effect of incorporating now into the General Laws the same unfortunate side-effect of the MERS system itself—namely, that of greasing the skids for the unscrupulous with regard to the ownership of legal title to secured property. One might hope that the Massachusetts judiciary will figure this one out, where the legislature has yet to do so. Clearly it is open to constitutional challenge.

[114] In addition to the principles of common law fraud, *see e.g.* G.L. Chapter 266, Section 35A (b) (4) ("Whoever intentionally: files or causes to be filed with a registrar of deeds any document that contains a material statement that is false or a material omission, knowing such document to contain a material statement that is false or a material omission, shall be punished by imprisonment in the state prison for not more than 5 years or by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not more than $10,000 in the case of a natural person or not more than $100,000 in the case of any other person, or by both such fine and imprisonment."); G.L. c. 185, § 62 ("In all cases of registration procured by fraud, the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice however to the rights of any innocent holder for value of a certificate of title. After the transcription of the judgment of registration on the original complaint, any subsequent registration procured by the presentation of a forged deed or other instrument shall be null and void."); G.L. c. 185, § 45 ("But any person aggrieved by such judgment in any case may pursue his remedy in tort against the plaintiff or against any other person for fraud in procuring the judgment"); M.G.L c. 185, § 101 ("A person who, without negligence on his part, sustains loss or damage by reason of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in a registration book, or a person who, without negligence on his part, is deprived of land or of any estate or interest therein, by the registration of another person as owner of such land or of any estate or interest

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Finally, the Court turns to the somewhat overlapping question of whether or not a foreclosing entity must prove ownership of the mortgage through a chain of assignments. Its conclusion is this:

> The trustee's last argument concerning the need for a chain of written assignments of the beneficial interest in the debtors' mortgage from note holder to note holder collapses under the cumulative weight of the law discussed thus far. Having a beneficial interest in a mortgage is an attribute of being a note holder or owner or the party entitled to enforce the note. Whether a party has that right is governed by UCC §§ 3-205, 3-305 and Article 9 [citation omitted]. There is no requirement for a separate assignment of the note holder's beneficial interest in the mortgage. The Massachusetts legal doctrine where a mortgage can and often does exist on a separate plane from its underlying note reinforces this conclusion.[115]

Foremost, to say that the "in trust for" rule does away with the need for a formal assignment of the mortgage to the note-holder is an outright contradiction of *Ibanez,* which, again, makes clear that "[i]n the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," *but not to a party that is the equitable beneficiary of a mortgage held by another*. G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6 [emphasis added]."[116] Thus in effect a federal court has taken upon itself the task of re-writing Massachusetts law.

More specifically, the Ibanez Court established beyond question that an entity exercising a statutory power of sale must actually be the mortgage holder at the time of the notice of sale and foreclosure or that it be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14.[117] If there has been an assignment, there must be proof that it was made by a party that itself held the mortgage.[118] A foreclosing entity can meet this burden by providing "a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage."[119] *Ibanez*, which has the final say in the matter,[120] made equally clear that its holding is retroactive and merely a reassertion of existing law.[121] The

therein, *through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in a registration book* may institute an action . . . "); *see also* Kozdras v. Land/Vest Properties, Inc., 382 Mass. 34 (1980); State St. Bank & Trust Co. v. Beale, 353 Mass. 103 (1967).

[115] *Marron* at 13.

[116] Ibanez, 458 Mass. at 653.

[117] *Id.*, at 650-651.

[118] *Id.,* at 651.

[119] *Id.,* (citing *In re Parrish*, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant")).

[120] "It bears noting that only one Massachusetts court, the Supreme Judicial Court, may definitively prescribe binding rules of decision on matters of Massachusetts law." U.S. District Court Judge Douglas P. Woodlock in Vertex Surgical Inc. v. Paradigm Biodevices, Inc., 648 F.Supp. 2d 226, 231, n. 2 (D. Mass. 2009). As an opinion of the Supreme Judicial Court, it goes without saying that *Ibanez* must be the final word on the subject.

[121] "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities." 458 Mass. at 654-655.

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idea that the "in trust for" rule somehow obviates the need for an assignment and that MERS may then represent, say, Owner C with regard to an interest she does not own but that is instead owned by MERS itself—this is without support under any recognized principle of law in Massachusetts.

To repeat, the assignments in *Marron* are from *MERS* in its own name. Since MERS is barred by its own rules and regulations from being a holder, that is, from owning the mortgage obligation, Article 9 of the UCC would not apply in this case. And unless it could be proven that MERS took delivery by transfer rather than by negotiation, and, further, that the note did not have an adjustable rate and was not in default (that MERS was, in other words, a "non-holder in possession") Article 3 of the UCC would likewise not apply and the transaction would be governed instead by the laws of agency, contract, the alienation of land, and foreclosure, among others. And if there was a transfer, from whom would it come?[122] The issue was far from black and white and is clearly one of fact as well as law.

The person foreclosing on a mortgage, either directly or through its agent must own some or all of the economic value of the underlying obligation; they would, in other words, essentially have to meet the prudential standing status of a party in interest. A mere right to *enforce* the note would not do—and this is to say nothing of the assignments' questionable parentage. This is the very issue that lay at the center of the *Veal* case, which dealt, among other things, with the issue of prudential standing and what it takes to qualify as a real party in interest. This in turn requires "a determination of the applicable substantive law, since it is that law which defines and specifies the wrong, those aggrieved, and the redress they may receive."[123] The question is also vital to establishing the ownership required to foreclose in Massachusetts.[124]

A final word on *Marron*: even if we were to accept as sound the Court's analysis, it would not change the fact that an equally sound but totally opposite conclusion may be reached as well, which adjures the articulation not only of the reasons for choosing one, but the reasons for denying the other. And even if this were done, MERS has given itself *multiple* roles—which brings us face-to-face with the nagging question of whether or not, by bestowing its imprimatur upon one role alone, the Court has not, in effect, engaged in a modification of the mortgage to which the mortgagor never assented. The case is in itself witness to the fact that the two roles cannot exist simultaneously and that only one can be operative at any point in time—which again leads us to the question of which it is and who decides, and also to the question of whether the mortgage agreement and power of sale are simply too flawed to enforce in the first place.

Perhaps a lesson to be drawn from all of this is that the mere application of precedent can, without more, invite the very harm that the following of precedent itself was meant to dispel. *Marron* is but one in a line of fairly recent cases in which various federal and bankruptcy courts have dealt with foreclosure-related issues in Massachusetts. Most have accepted at face-value the validity of the MERS model, and it is upon this surface alone that they have placed their analyses. Conspicuous by its absence is an attempt to provide an articulable basis for failing to question the integrity of the MERS model itself, to question, vigorously, the integrity of that "surface" and what lies below. Although they purport to apply Massachusetts law, they typically cite few if any

[122] Then, too, there is the perennial question of whether or not the assignments were properly procured (given that the mortgage obligation was securitized and, even if MERS had been acting as nominee for Fieldstone, by that time Fieldstone no longer held any interest in the mortgage.

[123] *Veal* at 6.

[124] *See, e.g.* G.L. c. 244, § 14; G.L. c. 183, § 54B; *Ibanez, supra.*

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Massachusetts authorities beyond *Ibanez*, from which they draw principles that are correct, but on top of which they then place the arbitrary and in some instances implausible interpretations of other bankruptcy and federal courts. One has simply justified its decision by resort to the decisions of one or more of the others, thus repeating and compounding a host of errors the result of which has been to further normalize and validate the MERS model.[125] It will be interesting to see, in the weeks and months to come, how Massachusetts views the integrity of the MERS model and what questions the federal courts may certify to the Supreme Judicial Court.

MERS and the democratic process. MERS is innovative and modern. But innovation seldom arrives without a few wrinkles, and the MERS system, even on its own terms, is no exception. Beyond the points already made, it has drawn fire too in recent months for the economic impact it is having, directly or indirectly, on taxpayers, given that the substantial monies saved by the mortgage loan industry in filing fees must be directly proportional to the revenues lost at the local level. Since these are revenues that would otherwise have been used to fund the democratic recording system and perhaps other public functions as well, the burden of loss has in effect fallen directly or indirectly on private individuals who then suffer either an incremental loss in services or a like increase in state and local taxes. This has prompted some registry officials and legal scholars to view MERS as a tax or revenue-evasion device. The point has been made both forcefully and insightfully by Peterson.[126]

The counterpoint to this is of course that the avoidance of fees paid for a service that is no longer needed cannot be characterized as tax evasion but is simply a reality of the times and the demands of the marketplace analogous, say, to one in which a new and better product causes a loss in profit to the manufacturer of an older one of lesser quality. But the marketplace argument is intellectually dishonest in this instance because it fails to take into account the fact that what may appear as a truth when taken out of context may well prove itself to be a falsehood when seen in context—that is to say, there is something far more troubling about the MERS system than economic loss alone.

The context we're talking about here is our broader system of democracy, a system in which transparency is an essential quality. Long in the tooth and imperfect as it may be, the local land office operates not only as a repository for paperwork but as a watchdog for the preservation of precisely that kind of transparency,[127]specifically with regard to the ownership of real property

[125] *See, e.g*. Rosa v. Mortgage Electronic Systems, Inc., 10-12141-PBS (D. Mass. September 9, 1911) 2011 U.S. Dist. LEXIS 110151. *Rosa* cites eight bankruptcy and federal decisions, relying especially on the reasoning of the *Marron* court: *In re* Agard, 444 B.R. 231 (Bankr. E.D.N.Y. 2011); *In re* Huggins, 357 B.R. 180 (Bankr. D. Mass. 2006); Kiah v. Aurora Loan Services, LLC, No. 10-40161-FDS WL 841282 (D. Mass. Mar. 4, 2011); *In re* Moreno, No. 08-17715-FJB, 2010 WL 2106208 (Bankr. D. Mass. May 24, 2010); Aliberti v. GMAC Mortgage, LLC, No. 11-10174-NMG, 2011 WL 1625036) (D. Mass. Apr. 28, 2011); *In re* Marron, No. 10-45395-MSH (Bankr. D. Mass June 29, 2011); *In re* Lopes, 446 B.R. 12 (Bankr. D. Mass. 2011);Valerio v. U.S. Bank, N.A., 716 F. Supp. 2d 124 (D. Mass. 2010). On the dispositive issues, *Agard* and *Moreno* actually ran against MERS. Aside from *Ibanez*, only one other Massachusetts case is cited by *Rosa*, and that is relative to a slander of title claim not reached by the court. Powell v. Stevens, No. 2000-0089, 2004 WL 1047451 (Mass. Super. May 3, 2004) *aff'd* 69 Mass. App. Ct. 87 (2007) (defining the burden of proving slander of title).

[126]Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System. University of Cincinnati Law Review, Vo. 78. No. 4, Summer, 2010.

[127] U.S. Bank National Assn. v. Ibanez, 17 LCR 679 (2009) ("G.L. c. 244, § 14 requires complete transparency.").

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and the integrity of title. Beyond a few points of intersection required by law—as, for example, the filing of an original mortgage or an assignment in anticipation of foreclosure—MERS all but replaces the democratic system of local recording offices with a markedly private and privileged universe in which mortgage loans are bought and sold *sotto voce* amidst shadows and whispers beneath the horizon of everyday public awareness.

Critics of MERS argue that if the mortgage loan industry is going to carry out what is tantamount to a palace coup and herald MERS as the new registry—whether or not this is justified by the times and the dictates of the marketplace—then we should at least hope—and indeed demand—that it not put honor and integrity in trade for the intoxicating effects of efficiency and profit while turning a blind eye to the importance of transparency and the democratic process. The argument is not without substance. Unfortunately, there is at present simply no angle from which to view the MERS model that does not reveal its principal contribution to what is, for all but the initiated few, a sort of cabalic mystery surrounding the secondary market and the critical questions of ownership and title. We are left, in effect, to take its word that the owner of record in the local land office is in fact that actual owner at the time of foreclosure.

Surely the mathematical and electronic wizardry that has made the MERS system possible—and that has helped to make possible the very ability to predict with some accuracy the future behavior of mortgage-backed assets—could and should be placed in the service of transparency as well. That this has not been the case, and that MERS has instead, with the imprimatur of the mortgage industry, mounted a major effort in the courts to legitimate and maintain its present model rather than rise to the occasion, return to the drawing board, and reinvent itself—this is troubling to say the least. Granted, MERS does provide a range of helpful information to the consumer, such as the identity of servicers, and it can be a useful resource for law enforcement officials.[128]

But all of this goes but tangentially to the question of ownership; the MERS system does not publically reveal the actual path a mortgage loan has taken through the secondary market let alone confirm that the expected transfers of ownership were correctly made—questions that are, given that the moral sense burns more brightly in some individuals than in others, of importance in determining the right to foreclose a person's mortgage and take their home. What is clear, then, especially to any lawyer who has recently represented a client in foreclosure defense case, is that the present MERS model has had and continues to have a corrosive effect on the democratic process and leaves the truth about ownership to be unveiled by experts with access to privileged information—experts many homeowners already in economic and emotional distress can ill afford to hire. Just how formidable a task the uncovering of this truth can be is evidenced in the forensic work of Marie McDonnell in *Ibanez* and other cases.

MERS has also taken some rather striking liberties with existing law—liberties that some judges have had the courage to recognize while others, for various reasons, have not. It bears pointing out in this regard that although we tout ourselves a nation of laws and not of "men" it remains a fact that our laws are made, interpreted, and applied by "men," some more insightful than others, some more honorable than others. It is a fool's errand to think for a moment that the law can in any sense be entirely separated from the mentality—the characterology—of those we trust, though blindly at times, to be its guardians, that by its mere reduction to the printed word

[128] *Id.*

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the law has somehow been cleansed of human bias and imperfection and thus placed beyond question. This is no less the case with the legislative process, where history has repeatedly shown that laws can be passed and amended at the behest of special interests who, to borrow, *mutatis mutandis,* from the words of Frederick Douglass, attire themselves in the livery of democracy in order to achieve a result that is typically self-serving and anything but democratic.[129]

It is naïve to think that very political freedom our government is so wonderfully designed to protect is somehow insulated from the tyrannous acts of private actors, and that government alone is the source of oppression. Some of the most tyrannous events in our relatively brief time as a nation—and indeed perhaps the present economic crisis—were without exception carried out under color of law by private actors who heralded their actions as legitimate expressions of our democracy. These were individuals who saw political freedom not as a pathway to equality and the affirmation of rational individual difference but as a perfect medium in which to control, exploit, and at times brutalize others in an effort to conform the world to their own psychic and spiritual limitation.

The democratization of a corporate universe that thrives in a democracy but is in itself anything but democratic may be an impossible task. However, given the incredible power that the corporate universe in fact has, perhaps it is time to apply some of our seemingly boundless creativity to at least changing *the relationship* between it and society as a whole—to restore some semblance of balance between the two. Transparency might be a good place to begin. It would behoove us to remember, too, that our political freedom carries with it the responsibility to look beyond the words and the labels with which we are wont to gild our intentions and to look instead at the actual results we wish to produce. That there is, in other words, this greater yardstick against which law itself must be measured is precisely the context of the present discussion, and it is one we misplace but at our peril. And finally, lest we forget, if truth were simply a matter of agreement the world would still be flat.

[129] The recent amendment to G.L. c. 183, § 54B, for example, permits the MERS model to operate more efficiently but incorporates many of its infirmities as well—infirmities that may be exploited by unscrupulous players who then record foreclosure-related documents that are fraudulent.

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