IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS COUNTY, TEXAS; **HARRIS COUNTY, TEXAS**; and **BRAZORIA COUNTY, TEXAS**, Plaintiffs, **v.** **MERSCORP, INC.**; **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**; and **BANK OF AMERICA, NATIONAL ASSOCIATION**, Defendants.	**CIVIL ACTION NO. 3:11-CV-02733-O**

PLAINTIFFS' FOURTH AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THE COURT:

COME NOW Dallas County, Texas; Harris County, Texas; and Brazoria County, Texas (collectively, "Plaintiffs"), complaining of MERSCORP HOLDINGS, INC. (f/k/a MERSCORP, Inc.); MORTGAGE ELECTRONIC REGISTRATON SYSTEMS, INC.; and BANK OF AMERICA, NATIONAL ASSOCIATION (collectively, "Defendants"), and would show the Court as follows:

I.
STATEMENT OF CLAIMS

1. Defendants are members of the mortgage finance industry. Defendants have violated and continue to violate Texas statutory and common law by:

a. recording, causing to be recorded, or approving the recording of instruments which falsely state that Mortgage Electronic Registration Systems, Inc. ("MERS") has a lien upon or interest in real property[1] which MERS does not have, with the intent to cause MERS to be indexed as a "**Grantee**" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs;

b. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property[2] which MERS does not have, with the intent to cause MERS to be indexed as a "**Grantor**" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs; and

c. releasing, transferring, assigning, or taking other action relating to an instrument that is filed, registered, or recorded in the office of the county clerk without filing, registering, or recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

2. Each Defendant was an active participant in the misconduct alleged herein.

[1] *E.g.*, December 12, 2011 Deed of Trust, Dallas County Clerk's Office Record No. 201100329165 at 2 (Appendix at 1, hereinafter "App. at ____"). MERS is falsely identified as the "beneficiary." Plaintiffs' claims relate to every instance in which MERS is identified in an instrument in a capacity as a party receiving a lien upon or interest in real property.

[2] *E.g.*, MERS has been variously falsely identified by MERS's members as the "Lender," December 31, 2010 Deed of Release, Dallas County Clerk's Office Record No. 201000334223 (App. at 21), "holder of Note and Lien, December 23, 2010 Transfer of Lien, Dallas County Clerk's Office Record No. 2D11XXl3l4692 (App. at 22), "the legal and equitable owner and holder" of the note December 23, 2010 Release of Mortgage, Dallas County Clerk's Office Record No. 201000334689 (App. at 23), or otherwise denominated as a party to the note or payee thereunder for the purpose of causing MERS to be indexed as a "Grantor" in the Plaintiffs' Statutory Grantor/Grantee Indexes. MERS is none of these. Plaintiffs' claims relate to every instance in which MERS is identified in an instrument in a capacity as a party transferring or releasing a lien upon or interest in real property. See also Release of Lien, Harris County Clerk's Office Record No. 20110000149 (App. at 244).

II.
PARTIES

3. Plaintiffs are Dallas County, Texas; Harris County, Texas; and Brazoria County, Texas.

4. Defendant MERSCORP HOLDINGS, INC. f/k/a MERSCORP, INC. ("MERSCORP") is a Delaware corporation.[3] Plaintiffs' claims against MERSCORP arise out of MERSCORP's business activities in Texas, including Dallas County, Texas. MERSCORP has been properly served with citation and has appeared.

5. Defendant MORTGAGE ELECTRONIC REGISTRATON SYSTEMS, INC. ("MERS") is a Delaware corporation and wholly-owned subsidiary of Defendant MERSCORP. Plaintiffs' claims against MERS arise out of MERS's business activities in Texas, including Dallas County, Texas. MERS has been properly served with citation and has appeared.

6. Defendant BANK OF AMERICA, NATIONAL ASSOCIATION ("BOA") is a Delaware corporation. Plaintiffs' claims against BOA arise out of BOA's business activities in Texas, including Dallas County, Texas. BOA has been properly served with citation and has appeared.

III.
JURISDICTION AND VENUE

7. Subject matter jurisdiction herein is based upon 28 U.S.C. § 1332(d)(2)(A) because the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and this is a class action in which at least one member of the class is a citizen of a state different than at least one defendant. Subject matter jurisdiction herein is based upon 28 U.S.C. §

[3] On February 22, 2012, MERSCORP, Inc. filed a *Certificate of Ownership and Merger* with the Secretary of State of the State of Delaware documenting the merger of MERSCORP Holdings, Inc. into MERSCORP, Inc., with MERSCORP, Inc. remaining as the surviving corporation under the name of MERSCORP Holdings, Inc.

1332(a)(1) and § 1441(a).

8. The Court has *in personam* jurisdiction over each Defendant because each Defendant is subject to jurisdiction under the Texas Long Arm Statute, Tex. Civ. Prac. & Rem. Code § 17.041 *et seq*. Venue is based upon 28 U.S.C. § 1391(a) or (b).

IV.
AGENCY AND CORPORATE VEIL/ALTER-EGO

9. At all times material hereto, each Defendant was acting by and through its actual, apparent, ostensible, or by estoppel agents and/or employees.

10. BOA is a shareholder in MERSCORP. Plaintiffs move the Court pierce the MERSCORP and MERS corporate veils and impose liability upon BOA for the actionable conduct of MERSCORP and MERS alleged herein. As demonstrated by the facts set forth below, recognizing the corporate existence of MERSCORP and MERS separate from their shareholders, including MERSCORP as shareholder in MERS and BOA as shareholder in MERSCORP, would cause an inequitable result or injustice, or would be a cloak for fraud or illegality; MERSCORP and MERS were undercapitalized in light of the nature and risk of their business; and the corporate fiction is being used to justify wrongs, as a means of perpetrating fraud, as a mere tool or business conduit for others, as a means of evading existing legal obligations, to perpetrate monopoly and unlawfully gain monopolistic control over the real property recording system in the State of Texas, and to circumvent statutory obligations.

V.
FACTS

11. On January 27, 2011, the Financial Crisis Inquiry Commission ("FCIC") issued its Final Report on the causes of the financial collapse of 2008. According to the FCIC:

> The profound events of 2007 and 2008 were neither bumps in the road nor an accentuated dip in the financial and business cycles we

have come to expect in a free market economic system. This was a fundamental disruption—a financial upheaval, if you will—that wreaked havoc in communities and neighborhoods across this country.

As this report goes to print, there are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away. Businesses, large and small, have felt the sting of a deep recession. There is much anger about what has transpired, and justifiably so. Many people who abided by all the rules now find themselves out of work and uncertain about their future prospects. The collateral damage of this crisis has been real people and real communities. The impacts of this crisis are likely to be felt for a generation. And the nation faces no easy path to renewed economic strength.

We conclude this financial crisis was avoidable. The crisis was the result of human action and inaction, not of Mother Nature or computer models gone haywire. The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public. Theirs was a big miss, not a stumble. While the business cycle cannot be repealed, a crisis of this magnitude need not have occurred. To paraphrase Shakespeare, the fault lies not in the stars, but in us.

Despite the expressed view of many on Wall Street and in Washington that the crisis could not have been foreseen or avoided, there were warning signs. The tragedy was that they were ignored or discounted. There was an explosion in risky subprime lending and securitization, an unsustainable rise in housing prices, widespread reports of egregious and predatory lending practices, dramatic increases in household mortgage debt, and exponential growth in financial firms' trading activities, unregulated derivatives, and short-term "repo" lending markets, among many other red flags. Yet there was pervasive permissiveness; little meaningful action was taken to quell the threats in a timely manner.

The prime example is the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting

prudent mortgage-lending standards. The Federal Reserve was the one entity empowered to do so and it did not. The record of our examination is replete with evidence of other failures: financial institutions made, bought, and sold mortgage securities they never examined, did not care to examine, or knew to be defective; firms depended on tens of billions of dollars of borrowing that had to be renewed each and every night, secured by subprime mortgage securities; and major firms and investors blindly relied on credit rating agencies as their arbiters of risk. What else could one expect on a highway where there were neither speed limits nor neatly painted lines?

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We conclude there was a systemic breakdown in accountability and ethics. The integrity of our financial markets and the public's trust in those markets are essential to the economic well-being of our nation. The soundness and the sustained prosperity of the financial system and our economy rely on the notions of fair dealing, responsibility, and transparency. In our economy, we expect businesses and individuals to pursue profits, at the same time that they produce products and services of quality and conduct themselves well.

Unfortunately—as has been the case in past speculative booms and busts—we witnessed an erosion of standards of responsibility and ethics that exacerbated the financial crisis. This was not universal, but these breaches stretched from the ground level to the corporate suites. They resulted not only in significant financial consequences but also in damage to the trust of investors, businesses, and the public in the financial system.

For example, our examination found, according to one measure, that the percentage of borrowers who defaulted on their mortgages within just a matter of months after taking a loan nearly doubled from the summer of 2006 to late 2007. This data indicates they likely took out mortgages that they never had the capacity or intention to pay. You will read about mortgage brokers who were paid "yield spread premiums" by lenders to put borrowers into higher-cost loans so they would get bigger fees, often never disclosed to borrowers. The report catalogues the rising incidence of mortgage fraud, which flourished in an environment of collapsing lending standards and lax regulation. The number of suspicious activity reports—reports of possible financial crimes filed by depository banks and their affiliates—related to mortgage fraud grew 20-fold between 1996 and 2005 and then more than

> doubled again between 2005 and 2009. One study places the losses resulting from fraud on mortgage loans made between 2005 and 2007 at $112 billion.
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> Lenders made loans that they knew borrowers could not afford and that could cause massive losses to investors in mortgage securities. As early as September 2004, Countrywide executives recognized that many of the loans they were originating could result in "catastrophic consequences." Less than a year later, they noted that certain high-risk loans they were making could result not only in foreclosures but also in "financial and reputational catastrophe" for the firm. But they did not stop.
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> In an interview with the Commission, Angelo Mozilo, the longtime CEO of Countrywide Financial—a lender brought down by its risky mortgages—said that a "gold rush" mentality overtook the country during these years, and that he was swept up in it as well: "Housing prices were rising so rapidly - at a rate that I'd never seen in my 55 years in the business - that people, regular people, average people got caught up in the mania of buying a house, and flipping it, making money. It was happening. They buy a house, make $50,000 . . . and talk at a cocktail party about it . . . Housing suddenly went from being part of the American dream to house my family to settle down - it became a commodity. That was a change in the culture. . . It was sudden, unexpected."[4]

A. The U.S. Mortgage System

12. In the most common residential lending scenario, there are two parties to a real property mortgage – the mortgagee, *i.e.*, a lender, and the mortgagor, *i.e.*, a borrower. When a mortgage lender loans money to a home buyer, it obtains two documents: (1) a promissory note in the form of a negotiable instrument from the borrower and (2) a "mortgage" or "deed of trust"[5] granting the mortgage lender a security interest in the property as collateral to repay the

[4] The Commission's Final Report is 667 pages long. Accordingly, it is not attached hereto. It may be viewed at http://fcic.law.stanford.edu/report/.

[5] State law generally determines whether a "mortgage" or a "deed of trust" is used to pledge real property as security on a note. In lien theory states such as Texas, a "deed of trust" is used and only creates a lien on the property — the title remains with the borrower. *See Taylor v.*

note. The mortgage, as distinguished from the note, establishes the lien on the property securing repayment of the loan. Although the note and mortgage are separate instruments,

> [t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.[6]

13. For the lien to be perfected and inoculate the property against subsequent efforts by the mortgagor to sell the property or borrow against it, the mortgage instrument must be recorded in the deed records of the county in which the property is located.

1. <u>The Public Recording System</u>

14. The origins and reasons for public recordation of mortgage interests in the United States dates back to at least the middle of the 17th Century. According to one commentator:

> One of the most striking features of Anglo-American law is the requirement to file notice in public files of a non-possessory secured transaction in order to enforce the transaction in the court against third parties. The transaction of interest first developed during the early seventeenth century. English mortgage law developed for real estate. Originally, the parties structured mortgages with the secured-mortgagee in possession of the landed collateral, not the debtor-mortgagor. But by the early seventeenth century, the English had developed the technique of leaving the debtor-mortgagor in possession of the land to work off the loan.
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> Not all legal systems have the filing requirement. Roman law recognized the transaction, but did not require a filing. The

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Brennan, 621 S.W.2d 592, 593 (Tex. 1981). In title theory states, a "mortgage" is generally used, and it conveys ownership to the lender.

[6] *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); *see, generally, West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934); *Pope v. Beauchamp*, 219 S.W. 447, 449 (Tex. 1920) (providing that a mortgage "is an incident of the instrument assured; and if that is negotiable and is transferred according to the law merchant, the mortgage passes with it, *ipso facto*, without assignment in words"); *Solinsky v. National Bank*, 17 S.W. 1050, 1051 (Tex. 1891); *Perkins v. Sterne*, 23 Tex. 561, 563 (1859).

> Napoleonic Code banned the transaction. The modern explanation of these three different legal rules involves the secret lien. When debtors retain possession of the personalty serving as collateral under the nonpossessory secured transaction, subsequent lenders and purchasers have no way of discovering the prior ownership interest of the earlier secured creditors unless the debtor's honesty forces disclosure. Without that disclosure, the debtor could borrow excessively, offering the same collateral as security several times, possibly leaving some of the debtor's creditors without collateral sufficient to cover their loan upon the debtor's financial demise. Roman law solved the problem by providing a fraud remedy against the debtor. The Napoleonic Code solved the problem by banning the transactions. Anglo-American law solved the problem by requiring a filing. Potential subsequent lenders and purchasers could then become aware of the debtor's prior obligation by examining the public files and protect themselves by taking the action they deemed appropriate, either not lending or charging higher interest.[7]

15. Mortgage recordation in Texas is governed by Chapter 12 of the Texas Property Code. Section 12.001 of the Property Code provides, in part, "An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law." Once properly filed, a mortgage is "notice to all persons of the existence of the instrument," protects the mortgagee's (lender's) security interest against creditors of the mortgagor, and places subsequent purchasers on notice that the property is encumbered by a mortgage lien. Unless the mortgage is recorded, the "mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice."[8]

16. Recordation of a security instrument in real property is not mandatory in Texas. Once a security interest is recorded, however, "[t]o release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county

[7] George Lee Flint, Jr. and Marie Juliet Alfaro, *Secured Transactions History: The First Chattel Mortgage Act in the Anglo-American World*, 30:4 William Mitchell Law Review 1403, 1403-05 (App. at 69, 69-71).

[8] TEX. PROP. CODE § 13.001(a).

clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded."[9]

17. Until recently, when a loan secured by a mortgage was sold, the assignee would record the assignment of the mortgage to protect the security interest. If a servicing company serviced the loan and the servicing rights were sold—an event that could occur multiple times during the life of a mortgage loan—multiple assignments were recorded to ensure that the proper servicer and/or note-holder appeared in the land records in the county clerk's office.[10] This basic model has been followed throughout the United States for over three hundred years to provide the public with notice of the ownership of, and liens encumbering, real property throughout the United States. Defendants and others similarly situated have changed all of this and collapsed the public recordation system throughout Texas and the United States.

18. The MERS business plan, as envisioned and implemented by the Defendants is based in large part on amending the traditional model of recording security interests in real property and changes thereto, and introducing a third party into the equation—MERS. The motivation for creating MERS was Wall Street's and BOA's desire to alleviate the "inconvenience" of the public recording system and create their own privately owned shadow electronic recording system - the MERS System – to increase the velocity and ease with which mortgages could be bought and sold. In the words of one court, the MERS System was designed "as a replacement for our traditional system of public recordation of mortgages."[11] The MERS System fails to comply with Texas law.

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[9] TEX. LOC. GOV'T CODE § 192.007.

[10] Some sources estimate that mortgage loans or servicing rights are transferred an average of five times or more during the life of a mortgage — transfers which would necessitate recordation.

[11] *In Re Agard*, 444 BR 231, 247 (E.D.N.Y. 2011).

2. Mortgage Origination

19. For most Americans, a mortgage is the largest and most serious financial obligation ever undertaken. Mortgages are originated by a variety of financial institutions. In order to fully understand the genesis of the MERS System, one must consider the historical context in which it was created.

20. Depository institutions, which accept deposits from the public and lend that money to households and businesses, are one type of originator. Depository institutions include commercial banks as well as credit unions, savings and loan associations, and mutual savings banks. Depository institutions are regulated by a set of federal and/or state agencies charged with ensuring the safety and soundness of these institutions.

21. Non-depository institutions, called mortgage companies or mortgage banks, also originate mortgages. Mortgage companies borrow money from banks (or by issuing bonds) and lend that money to consumers in the form of mortgage loans. They typically then sell those loans to other financial institutions and use that money to originate additional mortgages.

22. Mortgage lenders are sometimes owned by holding companies or other financial institutions. Some mortgage companies are owned by depository institutions, and are therefore subsidiaries of a depository institution. Others are owned by holding companies that also own a depository institution and are therefore an affiliate of a depository institution. Mortgage companies that are not a subsidiary or an affiliate of a depository institution are called independent mortgage companies.

23. Federal Housing Administration ("FHA") loans are made by private lenders and insured by the FHA. They are usually made to low-income or moderate-income borrowers, often

with weaker credit histories, and require smaller down payments. Historically, the size limits on these loans were low.

24. Veterans' Administration ("VA") loans are offered to military personnel and are guaranteed by the Department of Veteran Affairs. These too require little or no down payment.

25. One common type of mortgage is a 30-year fixed rate mortgage ("FRM"), in which the interest rate is fixed for the entire term of the loan and the borrower is required to make a series of equal monthly payments until the loan is paid off. The fixed payment amount that results in the loan being fully paid off at the end of the term is called the fully amortizing payment amount. By contrast, an adjustable rate mortgage ("ARM") has an interest rate that is specified in terms of a margin above some interest rate index. For example, "Prime + 3%" means that the borrower is charged interest based on an interest rate equal to the prime rate plus 3 percentage points. The interest rate on an ARM adjusts at regular intervals. Other mortgages are hybrids of FRMs and ARMs in which the interest rate is fixed for some introductory period and then adjusts at regular periods according to some interest rate index. Other types of mortgages involve the borrower paying less than the fully amortizing amount each month.

26. For example, a balloon mortgage is one in which the borrower pays less than the fully amortizing payment amount but must then pay some relatively large fixed sum at the end of the term – "balloon payment" – to pay off the mortgage. Interest-only mortgages allow the borrower to pay only the interest accrued each month. Option ARMs, also called negative amortization ARMs, allow the borrower to pay less than the interest charged for some period so that the balance on the loan grows over time before the required payment amount resets to the fully amortizing rate. Interest-only mortgages grew from only 2 percent in 2004 to 20 percent by 2007. Option ARMs and balloon mortgages also grew in this period.

B. The Commoditization of Mortgages

27. In the decades leading up to the early 1970s, the housing finance system was relatively simple: banks and savings and loan associations made mortgage loans to households and held them until they were repaid. Deposits provided the major source of funding for these lenders, as most were depository institutions.

28. In the 1970s, the housing finance system began to shift from depository-based funding to capital markets-based funding. By 1998, 64 percent of originated mortgage loans were sold by originators to large financial institutions that package bundles of mortgages and sell the right to receive borrowers' payments of principal and interest directly to investors. Key to this shift to capital markets-based funding of mortgage lending were Fannie Mae and Freddie Mac, the government-sponsored enterprises ("***GSEs***"), created by the federal government to develop a secondary mortgage market. The GSEs did this in two ways:

a. by issuing debt to raise capital and using those funds to purchase mortgages to hold in their portfolios; and

b. by securitizing mortgages, that is, by selling to investors the rights to the principal and interest payments made by borrowers on pools of mortgages through what is referred to as mortgage-backed securities ("MBSs").

29. MBSs are securities that give the holders the right to receive the principal and interest payments from borrowers on a particular pool of mortgage loans. The GSEs purchase mortgages to hold in portfolios and to securitize into MBSs that the GSEs guarantee against default. MBSs issued by the GSEs or Ginnie Mae are referred to as agency MBSs.

30. Fannie Mae and Freddie Mac provide a guarantee that investors in their MBSs will receive timely payments of principal and interest. If the borrower for one of the underlying mortgages fails to make his payments, the GSE that issued the MBSs will pay the scheduled

principal and interest payments. In return for providing this guarantee, Fannie Mae and Freddie Mac deduct an ongoing guarantee fee, which is charged by setting the pass-through annual interest rate (*i.e.*, the interest rate received by holders of the MBSs) about 20-25 basis points (*i.e.*, 0.20 - 0.25 percentage points) below the weighted average interest rate of the mortgages in the pool. MBSs issued by GSEs were generally thought by investors to be implicitly backed by the federal government, thereby removing their credit risk.

31. Other financial institutions also create MBSs, referred to as non-agency MBSs, which have a structure similar to agency MBSs but typically have no guarantee against default risk. In a non-agency securitization, the sponsor of the securitization, which could be an investment bank, commercial bank, thrift, or mortgage bank, first acquires a set of mortgages, either by originating them or by buying them from an originator. The sponsor then creates a new entity, a "special purpose vehicle" ("SPV"), and transfers the mortgages to the SPV in trust. The principal and interest payments on the pool of mortgages held in trust by the SPV are then passed through to the purchasers of the SPV's MBSs.[12]

32. Subject to satisfying certain requirements of the Internal Revenue Code, an SPV may qualify as a "real estate mortgage investment conduit" ("REMIC"). An SPV which qualifies as a REMIC offers its MBSs purchasers two potential benefits that boost the SPV's MBSs value relative to other investment options: bankruptcy-remoteness and favorable tax treatment. Bankruptcy remoteness means both that the SPV that issues the mortgage-backed securities cannot file for bankruptcy and that the SPV's assets cannot be brought into the bankruptcy estate

[12] An SPV often enters into contracts in order to manage the risk it faces. For example, to reduce interest rate-related risks, an SPV may enter into interest rate swap agreements that provide floating interest rate-based payments to the SPV in exchange for a fixed set of payments from the SPV.

of other entities in the mortgage loans' chain of title. These features isolate the SPV's mortgage payment cash flow from claimants other than the MBSs' investors, thereby reducing the risks investors assume on the MBSs. Additionally, REMIC status ensures that only the investors, and not the SPV, are taxed on the SPV's cash flow.

33. In order for an SPV to qualify for REMIC status, the SPV must be formed in a particular way, and its assets must be transferred to it in a particular manner. There are two documents in particular that need to be properly transferred to the SPV - the promissory note and the mortgage or deed of trust. Possession of a note without a mortgage amounts to possession of unsecured debt and will ordinarily disqualify the SPV from enjoying REMIC status.

34. SPV's are usually formed pursuant to, and governed by, contracts called Pooling and Servicing Agreements ("PSAs"), which are crafted to ensure that the benefits of mortgage securitization flow to the SPV. In order for an SPV to qualify for the bankruptcy-remoteness benefits of a REMIC, there must be a "true sale" of the mortgage loans, which means that all rights to the mortgage loan are transferred to the SPV so that no other entity in the chain of title could claim control of the assets in the event of bankruptcy. True sale status also leads to an SPV attaining higher ratings from rating agencies, which, in turn, means that the SPV can charge a higher issuing price for the securities relative to the interest rate paid on the securities.

35. Each class of securities in a MBSs offering is referred to as a tranche. Unlike agency MBSs, non-agency MBSs are not typically guaranteed against credit loss. A crucial goal of the capital structure of the SPVs was to create some tranches that were deemed low risk and could receive investment-grade ratings, such as AAA, from the rating agencies. Credit enhancements were used to achieve this goal.

36. One key credit-enhancement tool was subordination. The classes of securities issued by the SPV were ordered according to their priority in receiving distributions from the SPV. The structure was set up to operate like a waterfall, with the holders of the more senior tranches being paid prior to the more junior (or subordinate) tranches. The most senior set of tranches—referred to simply as senior securities—represented the lowest risk and consequently paid the lowest interest rate. They were set up to be paid prior to any of the classes below and were typically rated AAA. The next most senior tranches were the mezzanine tranches. These carried higher risk and paid a correspondingly higher interest rate. The most junior tranche in the structure was called the equity or residual tranche and was set up to receive whatever cash flow was left over after all other tranches had been paid. These tranches, which were typically not rated, suffered the first losses on any defaults of mortgages in the pool.

37. The payments of principal and interest by borrowers flow first to make the promised payments to the AAA senior bondholders, then down to pay the AA bonds, and so forth. If there is any money left over after all bondholders have been paid, it flows to the residual tranche of securities.

38. An example of typical subprime MBSs in which cumulative losses on mortgages in the SPV were expected to amount to 4 percent of the total principal amount is as follows. Assume that AAA senior bonds make up 92 percent of the principal amount of debt issued by the SPV, AA bonds account for 3 percent, mezzanine BBB bonds make up 4 percent, and the residual tranche amounts to 1 percent. If the SPV does indeed experience a 4 percent loss on its mortgage assets, then 4 percent of the total principal amount on its bonds would default. Because of the SPV's subordination structure, these losses would first be applied to the residual tranche. The residual tranche, which accounts for 1 percent of the principal amount of the SPV's bonds,

would fully default, paying nothing. That would leave 3 percent more of the total principal amount in losses to apply to the next most junior tranche, the mezzanine BBB tranche. Since the mezzanine BBB tranche totals 4 percent of the deal, the 3 percent left in losses would reduce its actual payments to 1 percent, meaning that 75 percent of the BBB bonds' principal value would be lost. The AA and AAA bonds, however, would pay their holders in full. In this simple example, the junior tranches below the AA and AAA bonds would be large enough to fully absorb the expected loss on the SPV's mortgages.

39. Another credit enhancement technique was overcollateralization. The principal balance of the underlying mortgages often exceeded the principal balance of the debt securities issued by the SPV. Thus, some underlying mortgages could default without any of the MBSs bonds defaulting on their promised payments to investors.

40. Similarly, the weighted average coupon interest rate on the underlying mortgage pool would typically exceed the weighted average coupon interest rate paid on the SPV's debt securities by an amount sufficient to provide a further buffer before the debt tranches incurred losses. In essence, the SPV received a higher interest rate from mortgage borrowers than it paid to investors in its bonds. The resulting excess spread gave the SPV extra cash flow to pay its bond holders, further insulating the MBSs from credit risk in the underlying mortgages.

41. With both over-collateralization and excess spread, the total amount of cash that had been promised to be paid to the SPV by mortgage borrowers was greater than the total amount of cash that the SPV had promised to pay out to investors. This gave the SPV a cushion in case some of the mortgage borrowers defaulted on their promised payments.

42. The prospectus for MBSs would include a description of the mortgages held by the SPV, such as information about the distribution of borrowers' credit scores and loan-to-value

ratios, and the geographic distribution of the homes that were to serve as collateral for the mortgages. The underwriting practices used by the originators usually would also be described. For example, Goldman Sachs disclosed the following about the underwriting standards used by the originator - New Century Mortgage - of the mortgages it packaged in a 2006 MBSs offering:

> The mortgage loans will have been originated in accordance with the underwriting guidelines established by New Century. On a case-by-case basis, exceptions to the New Century Underwriting Guidelines are made where compensating factors exist. It is expected that a substantial portion of the mortgage loans will represent these exceptions.

43. The originators of the mortgages also generally made representations and warranties to the SPV, described in the prospectus, regarding the nature of the mortgages in the pool. For example, they typically represented that the mortgages had never been delinquent and that they complied with all national and state laws in their origination practices. Moreover, in the event that any of the representations and warranties were breached, or if any of the mortgages defaulted early (within some fixed period after being transferred to the SPV), the originator typically agreed to repurchase the mortgage from the SPV.

44. The SPV would contract with a firm to service the mortgages in the pool, i.e., to collect payments from borrowers. The mortgage servicer would also handle defaults in the mortgage pool, including negotiating modifications and settlements with the borrowers and initiating foreclosure proceedings. In exchange, the mortgage servicer would get an ongoing servicing fee from the flow of interest payments from borrowers of typically between 25 and 50 basis points, or 0.25 and 0.50 percentage points, at an annual rate.

45. Servicers also typically would retain late fees charged to delinquent borrowers and would be reimbursed for expenses related to foreclosing on a loan. The borrowers would be

informed by the originator or the new servicer when servicing rights to their mortgages were transferred so that they knew how to make payments to the new servicer.

46. The sponsor of MBSs typically approached Fitch, Standard & Poor's, or Moody's to obtain credit ratings on the classes of debt securities issued in the deal. The credit rating agencies analyzed the probability distribution of cash flows associated with each tranche using proprietary models based on historical data and assigned a credit rating to each debt tranche. These ratings were intended to represent the riskiness of the securities and were used by investors to inform their decision whether to invest in the security. Sponsors of MBSs typically structured them to produce as many bonds with the highest credit rating (*e.g.,* AAA) while offering attractive yields. AAA-rated bonds were in demand by investors who required low-risk assets in their portfolio. The internal credit enhancements used in non-agency securitizations, discussed above, enabled the transformation of mortgages, including relatively risky mortgages, into bonds that were considered to be low risk but relatively high yield.

47. The junior tranches of MBSs typically received lower ratings because they were more likely to default than the senior tranches. This is because, as discussed above, senior securities would be paid before the junior securities would be paid, so that the more junior a tranche, the more likely it would be to bear losses if the underlying mortgages defaulted.

48. The same credit-enhancement techniques that produced highly rated tranches out of a pool of mortgages were used to create highly rated securities out of pools of junior tranches of MBSs. This was done using a product known as a collateralized debt obligation ("CDO").

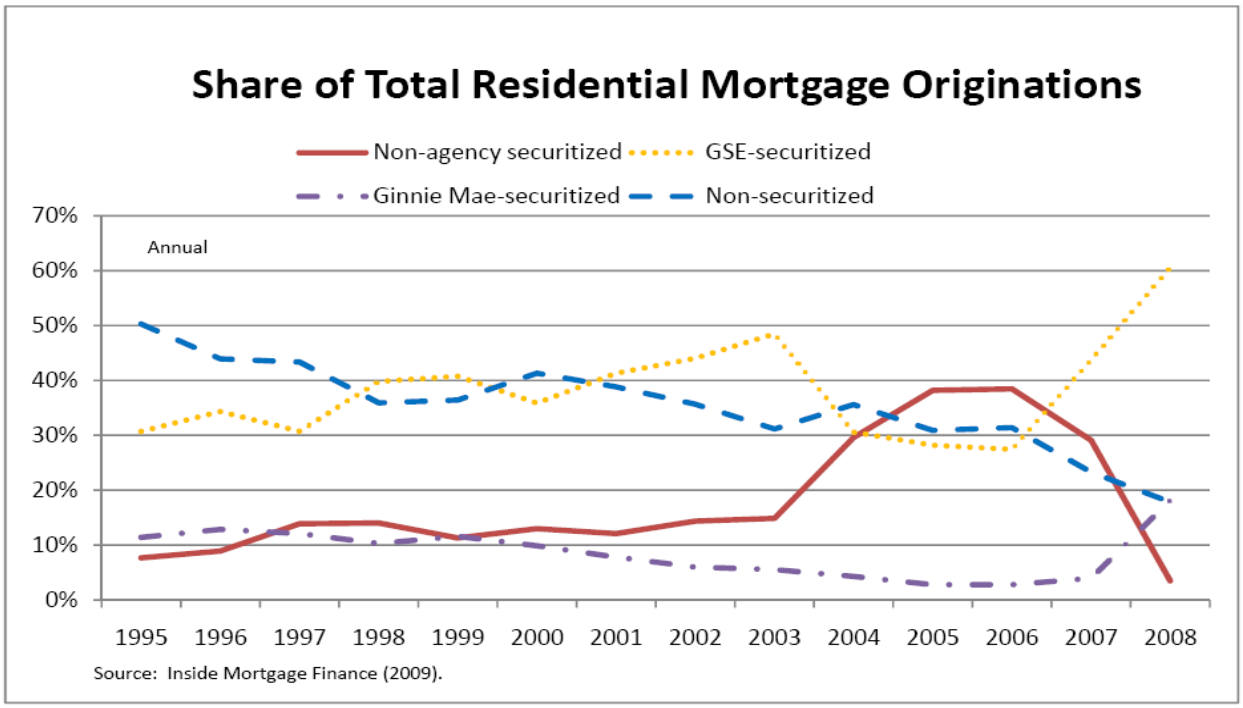
49. The sponsor of such a CDO assembled a pool of junior tranches from many different MBSs, for example mezzanine tranches rated BBB, transferred them to an SPV, and using the same tools of subordination, over-collateralization, and excess spreads issued AAA-

rated senior securities from that SPV, along with junior tranches and a first-loss residual tranche.

50. Credit default swaps ("CDS") were also used to protect against the risk of default of the obligations under MBSs. In a CDS, the buyer agreed to pay the seller a fixed stream of payments. In return, the seller agreed to pay the buyer a fixed amount if the SPV experienced a "credit event," which was typically some sort of default. CDSs were used by holders of MBSs and CDOs for the purpose of reducing their exposure to credit risk of MBSs and CDOs.

C. The Growth of Non-Agency MBSs

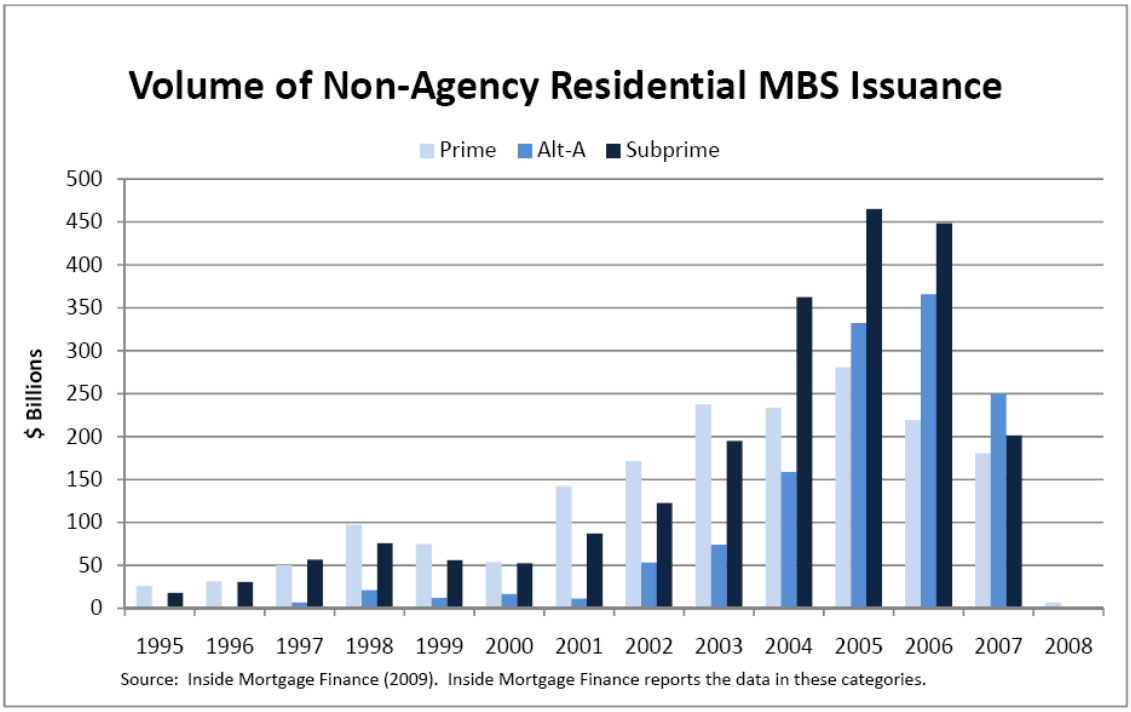
51. The following chart demonstrates that the late 1990s and early 2000s saw a large increase in the market share of non-agency securitization.



52. The chart shows the fraction of total residential mortgage originations in each year that were securitized into non-agency MBSs, GSE MBSs, and Ginnie Mae MBSs, as well as the fraction nonsecuritized (*i.e.*, held as whole loans by banks, thrifts, the GSEs, and other institutions). Four trends are notable. Non-securitized mortgage originations declined steadily

from half the market in 1995 to under 20 percent in 2008. Non-agency MBSs hovered between 8 and 12 percent until 2003; non-agency MBSs then more than trebled in market share to a peak of 38 percent in 2006. During the growth years for non-agency MBSs, Ginnie Mae's market share dropped considerably. Finally, both GSEs and Ginnie Mae rapidly escalated their market share as nonagency securitization dropped in 2008.

53. The following chart plots the volume of prime, subprime, and alt-A (self-identified as such by the sponsors) non-agency MBSs issued from 1995-2008.



54. This chart reveals that early in the period covered, the prime nonagency MBSs, which contained largely jumbo mortgages, were the biggest of the three types of non-agency MBSs. But by 2006 the subprime and alt-A non-agency MBSs had each surpassed prime non-agency MBSs in volume. In particular, subprime non-agency MBSs showed a dramatic increase from 2003 to 2005. Alt-A non-agency MBSs saw their largest jump in volume in 2005. Notably, the non-agency MBSs market was nearly nonexistent by 2008.

D. The Collapse

55. By 2004, commercial banks, thrifts, and investment banks caught up with Fannie Mae and Freddie Mac in securitizing home loans. By 2005, they had taken the lead. The two government-sponsored enterprises maintained their monopoly on securitizing prime mortgages below their loan limits, but the wave of home refinancing by prime borrowers spurred by very low, steady interest rates petered out. Meanwhile, Wall Street focused on the higher-yield loans that the GSEs could not purchase and securitize—loans too large, called jumbo loans, and nonprime loans that did not meet the GSEs' standards. The nonprime loans soon became the biggest part of the market—"subprime" loans for borrowers with weak credit and "Alt-A" loans, with characteristics riskier than prime loans, to borrowers with strong credit. Mortgage underwriting became so loose that one banker was heard to say "if you could fog a mirror, you got a loan."

56. By 2005 and 2006, Wall Street, including Defendant BOA, was securitizing one-third more loans than Fannie and Freddie. In just two years, private-label mortgage-backed securities had grown more than 30 percent, reaching $1.15 trillion in 2006; 71 percent were subprime or Alt-A.

57. To feed the MBSs demand, Wall Street's and BOA's system made virtually unlimited funds available to unqualified buyers. More buyers in the market caused housing prices to rise thereby creating a housing bubble. Pretty soon, there were not enough buyers, qualified or not, to sustain the model, and the entire system collapsed. "Securitization could be seen as a factory line," former Citigroup CEO Charles Prince told the FCIC. "As more and more and more of these subprime mortgages were created as raw material for the securitization process, not surprisingly in hind-sight, more and more of it was of lower and lower quality. And

at the end of that process, the raw material going into it was actually bad quality, it was toxic quality, and that is what ended up coming out the other end of the pipeline. Wall Street obviously participated in that flow of activity." One theory for the demand Wall Street and BOA were so intent on satisfying pointed to foreign money.

58. Developing countries were booming and, due to past financial vulnerabilities, strongly encouraged saving. Investors in these countries placed their savings in apparently safe and high-yield securities in the United States. Federal Reserve Board Chairman Ben Bernanke called it a "global savings glut." As the United States ran a large current account deficit, flows into the country were unprecedented. Over six years from 2000 to 2006, U.S. Treasury debt held by foreign official public entities rose from $600 billion to $1.43 trillion; as a percentage of U.S. debt held by the public, these holdings increased from 18.2 to 28.8 percent. According to Frederic Mishkin, former member of the Board of Governors of the Federal Reserve System:

> You had a huge inflow of liquidity. A very unique kind of situation where poor countries like China were shipping money to advanced countries because their financial systems were so weak that they [were] better off shipping [money] to countries like the United States rather than keeping it in their own countries.

59. The demand for what was perceived to be the safety of MBSs created a surplus in liquidity, thereby helping to lower long-term interest rates and providing easy money to mortgage originators. According to Paul Krugman, an economist at Princeton University:

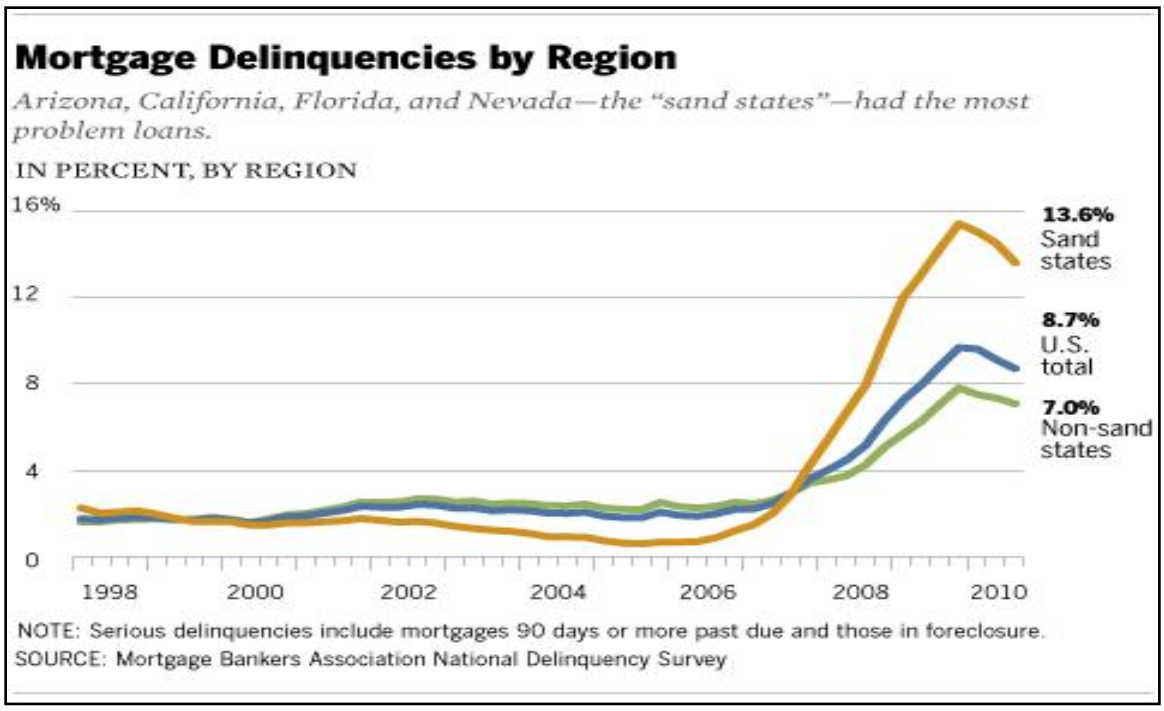
> It's hard to envisage us having had this crisis without considering international monetary capital movements. The U.S. housing bubble was financed by large capital inflows. So were Spanish and Irish and Baltic bubbles. It's a combination of, in the narrow sense, of a less regulated financial system and a world that was increasingly wide open for big international capital movements.

60. As more and more foreign capital became available, underwriting standards were lowered to extend credit to borrowers who represented a new risk paradigm. Predictably,

borrowers who had been extended credit without having been adequately qualified began to default on their loans in escalating numbers beginning in late 2006. As 2007 went on, increasing mortgage delinquencies and defaults compelled the ratings agencies to downgrade first mortgage-backed securities, then CDOs.

61. Because of the instability in the MBSs market which began in late 2006, 2007 saw a near halt in many securitization markets. For example, a total of $75 billion in subprime securitizations were issued in the second quarter of 2007 (already down from prior quarters). That figure dropped to $27 billion in the third quarter and to only $12 billion in the fourth quarter of 2007. Alt-A issuance topped $100 billion in the second quarter but fell to $13 billion in the fourth quarter of 2007. Once-booming markets were gone—only $14 billion in subprime or Alt-A mortgage-backed securities were issued in the first half of 2008, and almost none after that.

62. Alarmed investors sent prices plummeting. Hedge funds faced with margin calls from their repo lenders were forced to sell at distressed prices; many would shut down. Banks wrote down the value of their holdings by tens of billions of dollars. As demonstrated by the following chart, defaults peaked in 2010.



63. The ease with which non-agency MBSs were created, and mortgages transferred into them, would not have been possible without the MERS System—a shadow recording system created by Wall Street, including Defendant BOA, to facilitate the commoditization of the American mortgage and issuance of MBSs.

E. Wall Street and Defendant BOA Ignore 300 Years of History and Create the "MERS System"

64. To facilitate the commoditization of mortgages and increase the velocity with which mortgages could be bought and sold and non-agency MBSs issued, Wall Street, including Defendant BOA, needed to create a mechanism that would enable them to buy and sell mortgages and mortgage servicing rights multiple times, packaged with thousands of other mortgages, without the "inconvenience," expense, or time associated with recording each transfer. In order to issue MBSs, however, the issuer was and is required by law and industry standards to record (and pay recording fees on) every assignment of a mortgage loan from origination through deposit in an SPV. Faced with this dilemma, Wall Street, including

Defendant BOA, simply wrote their own rules and created MERSCORP and MERS, ignoring property laws throughout the United States, including Texas. In order for the MERS System to work, however, the SPV had to qualify for REMIC status.

65. In order for an SPV to have REMIC status, substantially all of its assets must be qualified mortgages.[13] A qualified mortgage is defined as "any obligation (including any participation or certificate of beneficial ownership therein) which is principally secured by an interest in real property."[14] REMIC status is lost when too many non-qualified mortgages are in the trust. For the SPV, retention of REMIC pass-through tax status was imperative because its loss added significant costs to securitization, driving investors to other investments.

66. The PSAs contain express language to ensure that all rights to the mortgage loans have been transferred to the SPV, so that the transaction is considered a true sale and, accordingly, bankruptcy-remoteness is achieved and the SPV maximizes its ratings. The express language also required that the loans sold to the SPV were subject to a security interest.

67. The security interests transferred to the SPV must be perfected security interests. Accordingly, an SPV wishing to provide REMIC benefits to its investors was required to record assignments in states where assignments must by law be recorded or where a ratings agency required recording for the SPV to obtain initial ratings. As to mortgages or deeds of trust where MERS is identified as the "mortgagee" or "beneficiary," however, the assignments are not ordinarily recorded. The prospectus for an SPV might explain this election not to record by stating:

[13] 26 U.S.C. § 860D(a)(4).
[14] 26 U.S.C. § 860G(a)(3).

> The mortgages or assignments of mortgage for some of the Mortgage Loans may have been recorded in the name of Mortgage Electronic Registration Systems, Inc., or MERS, solely as nominee for the related Originator and its successors and assigns, including the Issuing Entity. Subsequent assignments of those mortgages are registered electronically through the MERS system.
>
> ****
>
> . . . Mortgage Loans will not be recorded . . . (ii) with respect to any Mortgage which has been recorded in the name of Mortgage Electronic Registration Systems, Inc. ("MERS") or its designee. With respect to any Mortgage that has been recorded in the name of MERS or its designee, no mortgage assignment in favor of the [SPV] will be required to be prepared or delivered.[15]

1. How MERS Works

68. MERS is a subsidiary of MERSCORP. MERSCORP is owned by various mortgage banks, title companies, and title insurance companies, including Defendant BOA. When a lender which is a "member" of MERS makes a mortgage loan, the lender instructs the title company to show not only the lender but also MERS, as "mortgagee" under a mortgage or "beneficiary" under a deed of trust. The lender then registers the loan on the MERS System and causes the mortgage or deed of trust to be recorded in the deed records of the county in which the property subject to the mortgage or deed of trust is located. Because MERS is shown in the mortgage or deed of trust as having a security interest in the real property, the county clerk will ordinarily[16] index MERS in the deed records index as a "grantee." MERS has described its role in the mortgage banking industry as follows:

> [MERS] and MERSCORP, Inc. were developed by the real estate

[15] *Prospectus - Bank of America Funding 2007-6 Trust* (August 1, 2007) at S-24, S-48.

[16] Plaintiffs have identified some instances in which a clerk has not indexed MERS as a "Grantee" because of the clerk's conclusion that MERS does not in its own right have a lien upon or an interest in real property, despite the express statement in the mortgage or deed of trust that it does. This has occurred in only a small fraction of the total number of instruments recorded.

industry to serve as the mortgagee of record and operate an electronic registration system for tracking interests in mortgage loans. . . Specifically, the MERS® System tracks the transfers of mortgage servicing rights and beneficial ownership interests in mortgage loans on behalf of MERS Members.

The promissory note is a negotiable instrument under Article 3 of the Uniform Commercial Code, and originating lenders routinely sell these notes on the secondary markets to investors. "The ability of lender to replenish their capital by selling loans in the secondary market is what makes money accessible for home ownership."

****

At the origination of the loan by a lender who is a MERS Member, the lender takes possession of the note (and becomes the holder of the note), and the borrower and lender designate MERS (as the lender's nominee) to serve as the mortgagee or beneficiary of record. The lender's secured interest is thus held by MERS. . . Rules, which are incorporated into all MERS' agreements with its members, provide that members "shall cause Mortgage Electronic Registration System, Inc. to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System."

Accordingly, when a MERS Member originates a loan, the original lender and the borrower contractually agree in the mortgage that MERS will be the mortgagee and will serve as nominee for the lender and its successors and assigns. In the event of a default on the loan, MERS as the beneficiary or mortgagee, is authorized to foreclose on the home. After the borrower signs the mortgage agreement, it is recorded in the public, local land records with MERS as the named beneficiary or mortgagee.

The MERS Member then registers the mortgage loan information from the security instrument on the MERS® System. When the beneficial interest in a loan is sold, the promissory note is still transferred by an endorsement and delivery from the buyer to the seller, but MERS Members are obligated to update the MERS® System to reflect the change in ownership of the promissory note.

So long as the sale of the note involves a MERS Member, MERS remains the named mortgagee of record, and continues to act as the mortgagee, as the nominee for the new beneficial owner of the note (and MERS' Member). The seller of the note does not and need not assign the mortgage because under the terms of that security

> instrument, MERS remains the holder of title to the mortgage, that is, the mortgagee, as the nominee for the purchaser of the note, who is then the lender's successor and/or assign. Accordingly, there is no splitting of the note and mortgage for loans in the MERS® System. If, however, a MERS' Member is no longer involved with the note after it is sold, an assignment from MERS to the party who is not a MERS Member is executed by MERS, that assignment is recorded in the County Clerk's office where the real estate is located, and the mortgage is "deactivated" from the MERS® System.[17]

69. The lender agrees when registering a loan and security interest on the MERS System that the lender will update the MERS System with regards to any changes in mortgage loan. Rule II, Section 3 of the MERSCORP Rules of Membership[18] sets out a member's duties as regards keeping the MERS System current:

> Section 3. Each Member shall promptly, or as soon as practicable, register on the MERS® System, in accordance with the Rules of Membership and the Procedures, any and all of the following transactions to which such Member is a party which involve a mortgage loan registered on the MERS® System until such time as the mortgage loan is deactivated from the MERS® System:
>
> a) the pledge of any mortgage loan or security interest therein and the corresponding release of such security interests;
>
> b) the pledge of any servicing rights or security interest therein and the corresponding release of such servicing rights or security interests;
>
> c) the transfer of beneficial ownership of a mortgage loan by a Member to a Member;
>
> d) the transfer of beneficial ownership of a mortgage loan by a non-Member to a Member;
>
> e) the transfer of beneficial ownership of a mortgage loan by a Member to a non-Member;

[17] *In Re Agard*, 444 BR 231, 247 (E.D.N.Y. 2011), *Supplemental Brief of Mortgage Electronic Registration Systems, Inc. in Further Support of Motion to Lift Stay* (App. at 159, 161-62; 163-64)

[18] *See Merscorp Rules of Membership* at Rule II.3 (App. at 24, 31-33).

f) the transfer of servicing rights with respect to a mortgage loan by a Member to a Member;

g) the registration of servicing rights with respect to a mortgage loan from a non- Member to a Member;

h) the transfer of servicing rights with respect to a mortgage loan from a Member to a non-Member (requiring deactivation);

i) the initiation of foreclosure of any mortgage loan registered on the MERS® System;

j) the release of a lien with respect to a mortgage loan registered on the MERS® System;

k) the creation of a sub-servicing relationship with respect to a mortgage loan registered on the MERS® System; and

l) any renewal, extension or modification of a mortgage loan registered on the MERS® System that involves the recording of a new security instrument and does not merely change the rate, principal balance or term.

2. The MERS Lie – *[W]hat is a lie? 'Tis but the truth in masquerade.*[19]

70. According to MERS, it appears as the mortgagee or beneficiary of record in over 70 million mortgages recorded in the deed records of counties throughout the United States.[20] Thirty million of these mortgages remain active.[21] MERS, however, does not actually have a security interest in the real property that is the subject of such mortgages or deeds of trust. Indeed, according to MERS:

> MERS has no interest at all in the promissory note evidencing the mortgage loan. MERS has no financial or other interest in whether or not a mortgage loan is repaid. . .

[19] George Gordon Noel Byron, Lord Byron (1788–1824), *Don Juan*. Canto xi. Stanza 37.

[20] *See* MERS Quick Facts at www.mersinc.org/files/filedownload.aspx?id=248&table=Newsroom (App. at 67, 67).

[21] *Id*.

> MERS is not the owner of the promissory note secured by the mortgage and has no rights to the payments made by the debtor on such promissory note. . . . MERS is not the owner of the servicing rights relating to the mortgage loan and MERS does not service loans. **The beneficial interest in the mortgage (or the person or entity whose interest is secured by the mortgage) runs to the owner and holder of the promissory note.** In essence, MERS immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur. (citation omitted).[22]

71. MERS has also admitted that under its agreement with its members, such as Defendant BOA, MERS "cannot exercise, and is contractually prohibited from exercising, any of the rights or interests in the mortgages or other security documents" and has "no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans."[23]

72. At this point one might ask how MERS can be the "mortgagee" in a mortgage or "beneficiary" of a deed of trust as to which the beneficial interest "runs to the owner and holder of the promissory note."[24] Plainly, it cannot. As one court has observed:

> MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of the traditional mortgage recording process. This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.
>
> ****
>
> Aside from the inappropriate reliance upon the statutory definition of "mortgagee," MERS's position that it can be both the mortgagee and an agent of the mortgagee is absurd, at best.
>
> ****

[22] *Mortgage Electronic Registration Systems, Inc. Nebraska Dept. of Bnkng and Fin.*, 704 N.W.2d 784 (Neb. 2005), *Brief of Appellant* (emphasis added) (App. at 131, 146-47).

[23] *Id*. at 10.

[24] *Id*. at 11-12.

> This Court finds that MERS's theory that it can act as a "common agent" for undisclosed principals is not supported by the law. The relationship between MERS and its lenders and its distortion of its alleged "nominee" status was appropriately described by the Supreme Court of Kansas as follows: "The parties appear to have defined the word [nominee] in much the same way that the blind men of Indian legend described an elephant – their description depended on which part they were touching at any given time." *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 166-67 (Kan. 2010).[25]

73. With regards to the legal accuracy of MERS's recitation that it is the "mortgagee" or "beneficiary," one scholar has stated:

> At the most simple level, mortgages and deeds of trust recorded at origination represent that MERS is the mortgagee or deed of trust beneficiary. Taking the appellate decisions in Arkansas,[26] Kansas,[27] Maine,[28] and Missouri[29] at face value, (citation omitted), mortgages naming MERS as the mortgagee contain a false statement. Accordingly, MERS and its members use false information to avoid paying recording fees to county governments. While MERS-recorded mortgages and deeds of trust have qualifying language suggesting that MERS is also a nominee, the representation that MERS is the (citation omitted) owner of the lien is not some innocuous legalism. It causes county recorders that maintain grantor-grantee indexes to list MERS in the chain of title for the land. The false designation of MERS as a mortgagee or beneficiary creates a false lead in the true chain of title that defeats an essential purpose of recording mortgages and deeds of trust.[30]

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[25] *In Re Agard*, 444 BR 231 (E.D.N.Y. 2011).

[26] *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes*, 301 S.W.3d 1 (Ark. 2009).

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

[28] *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2 A.3d 289 (Me. 2010).

[29] *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. Ct. App. 2009).

[30] Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 1 at 143-44 (2011), http://scholarship.law.wm.edu/wmlr/vol53/ (App. at 179, 212-13). In its sales pitches, MERS used projections of the filing fees that its members would save by using the MERS System, rather than the public recording system, to track mortgage loan transactions. By MERS's own estimate, as of 2007, the MERS System had cost counties nationwide in excess of $1 billion. *See* May 24, 2007 MERS Press Release, *50 Millionth Loan Registered on the MERS® System* at http://www.mersinc.org/newsroom/press_details.aspx?id=194 (App. at 231).

74. The havoc wrought by MERS was summarized aptly in an April 6, 2011 letter from the Guilford County, North Carolina Register of Deeds and Southern Essex District of Massachusetts Register of Deeds to Iowa Attorney General Tom Miller, leader of the Mortgage Foreclosure Multistate Group, comprised of state attorneys general in all 50 states. The letter outlines the concerns shared by county clerks and recorders nationwide and states, in part:

> As County Land Record Recorders in Massachusetts and North Carolina, we have been gravely concerned about the role of the Mortgage Electronic Registration Systems (MERS) in not only foreclosure proceedings, but as it undermines the legislative intent of our offices as stewards of land records. MERS tracks more than 60 million mortgages across the United States and we believe it has assumed a role that has put constructive notice and the property rights system at risk. We believe MERS undermines the historic purpose of land record recording offices and the "chain of title" that assures ownership rights in land records.[31]

75. The MERS System has created massive confusion as to the true owners of beneficial interests in mortgage loans and mortgages throughout the United States, including Texas, and the loss of revenues has harmed U.S. counties, including Plaintiffs. In short, the MERS System has collapsed the public recording system in the United States and the State of Texas.

F. Texas County Deed Records

76. Section 11.004 of the Texas Property Code requires that county clerks in the State of Texas "correctly record, as required by law, within a reasonable time after delivery, any instrument authorized or required to be recorded in that clerk's office that is proved, acknowledged, or sworn to according to law." Section 193.003 of the Texas Local Government Code requires that a county clerk maintain "a well-bound alphabetical index to all recorded

[31] April 6, 2011 Letter from John O'Brien and Jeff Thigpen to Iowa Attorney General Tom Miller at 1-2, http://www.co.guilford.nc.us/departments/rod/ROD_Letter_To_AG_Miller.pdf (App. at 232, 232).

deeds, powers of attorney, mortgages, and other instruments relating to real property" with "a cross-index that contains the names of the grantors and grantees in alphabetical order."

1. MERS as "Grantee"

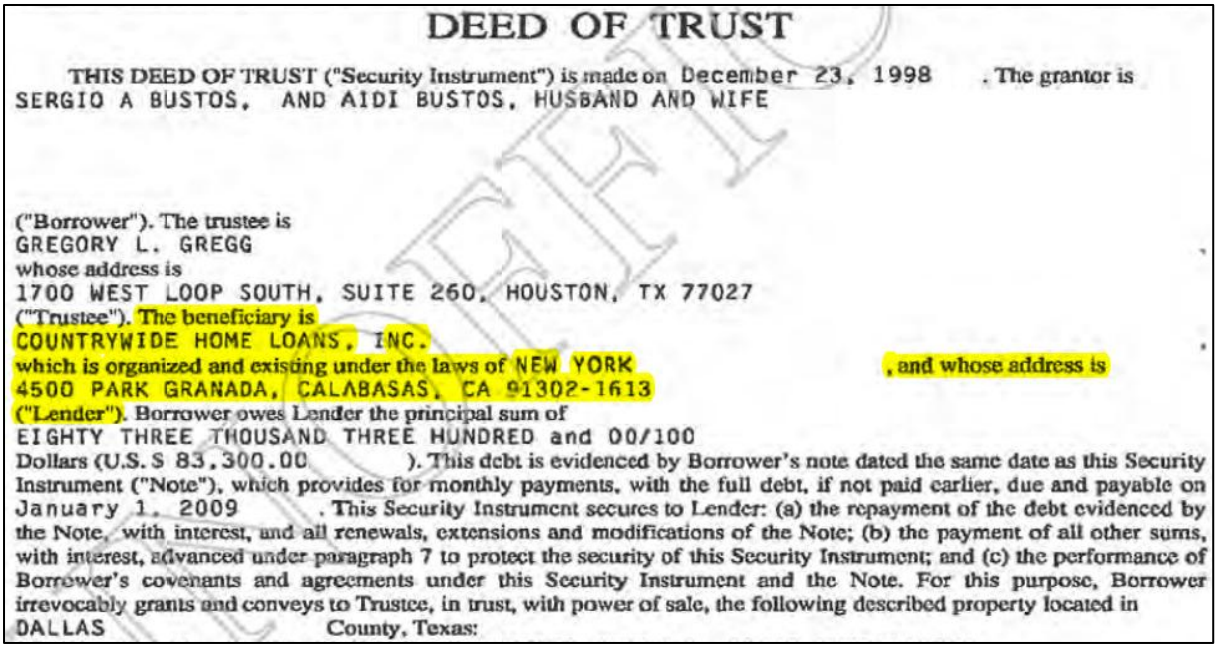
77. Under policies in effect for many years, employees of Plaintiffs County Clerks' Offices ordinarily record as a "Grantee" any person identified as a "lender," "beneficiary,"[32] or "grantee" in a deed of trust and as a "Grantor" any person who is denominated in an instrument as the person releasing, transferring, assigning, or taking any other action pursuant to which a lien upon or interest in real property is released, transferred, or assigned, *e.g.*, "assignor," "lender," "holder of Note and Lien," or "the legal and equitable owner and holder" of a promissory note.

78. In the past, the lender whose note was secured by a deed of trust would be identified in the deed of trust as the deed of trust's "beneficiary." For example, in a December 23, 1998, deed of trust recorded in the Dallas County deed records, the relevant recitals identified Countrywide Home Loans, Inc. ("Countrywide")[33] as the "lender" and the "beneficiary:"[34] Countrywide was indexed as the "grantee."

[32] Plaintiffs Brazoria County does not index MERS as a "Grantee" of a deed of trust if the lender is also identified in the instrument.

[33] Countrywide was acquired by BOA in 2008. *See* http://www.msnbc.msn.com/id/22606833/ns/business-real_estate/t/bank-america-acquire-countrywide/.

[34] December 23, 1998 Deed of Trust, Dallas County Clerk's Office Record No. 9900302057 (App. at 234, 234). Please note that the graphic is only selected excerpts of the instrument.



DEED OF TRUST

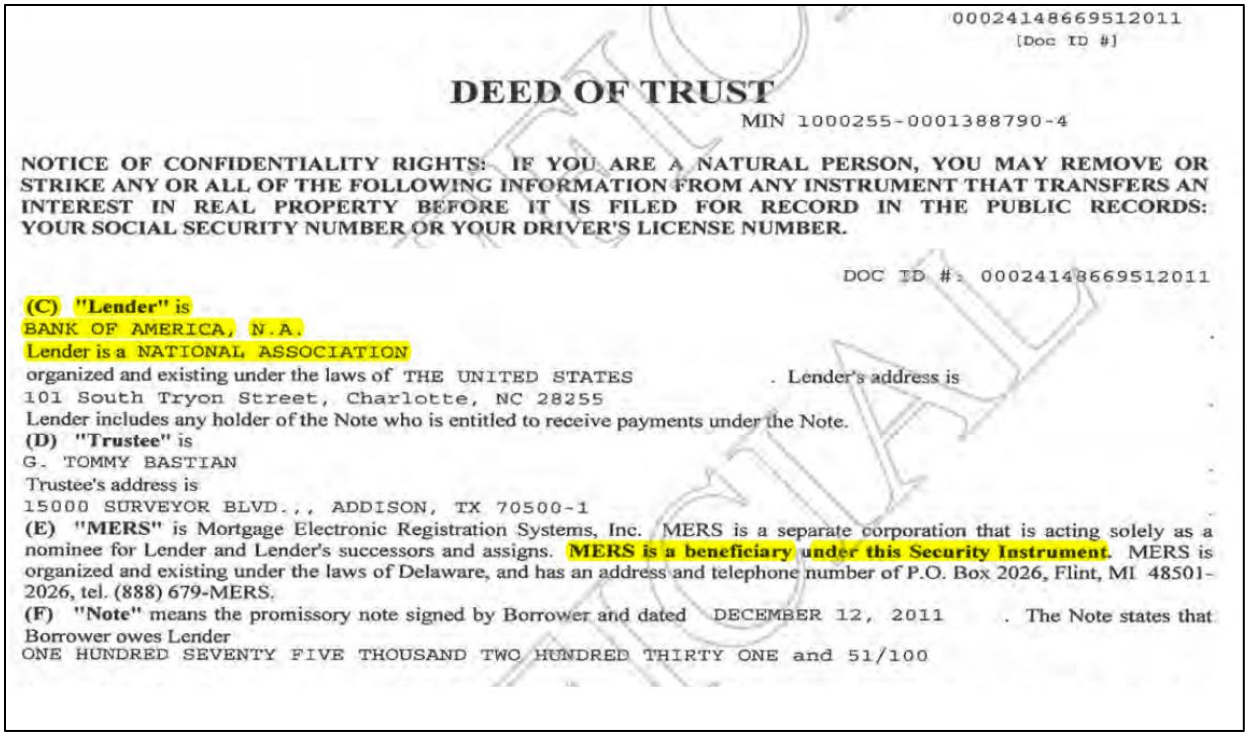
THIS DEED OF TRUST ("Security Instrument") is made on December 23, 1998 . The grantor is SERGIO A BUSTOS, AND AIDI BUSTOS, HUSBAND AND WIFE

("Borrower"). The trustee is
GREGORY L. GREGG
whose address is
1700 WEST LOOP SOUTH, SUITE 260, HOUSTON, TX 77027
("Trustee"). The beneficiary is
COUNTRYWIDE HOME LOANS, INC.
which is organized and existing under the laws of NEW YORK , and whose address is
4500 PARK GRANADA, CALABASAS, CA 91302-1613
("Lender"). Borrower owes Lender the principal sum of
EIGHTY THREE THOUSAND THREE HUNDRED and 00/100
Dollars (U.S. $ 83,300.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on January 1, 2009 . This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in
DALLAS County, Texas:

79. By 2007, however, lenders such as BOA were routinely identifying MERS as the "beneficiary" of deeds of trust recorded in Texas and nationwide. For example, in a December 12, 2011 deed of trust securing a promissory note payable to Defendant BOA, BOA caused MERS to be identified as "a beneficiary under this Security Instrument."[35] This instrument was recorded in the Dallas County deed records, and MERS was indexed as a "grantee."[36]

[35] December 12, 2011 Deed of Trust, Dallas County Clerk's Office Record No. 201100329165 at 1. Please note that the graphic is only selected excerpts of the instrument. (App. at 1, 1).

[36] Plaintiffs have located instances where MERS is indexed in the Statutory Grantor/Grantee Indexes as a "grantee" in its capacity as the lender's nominee or agent.



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DEED OF TRUST

MIN 1000255-0001388790-4

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

DOC ID #: 00024148669512011

(C) "Lender" is
BANK OF AMERICA, N.A.
Lender is a NATIONAL ASSOCIATION
organized and existing under the laws of THE UNITED STATES . Lender's address is
101 South Tryon Street, Charlotte, NC 28255
Lender includes any holder of the Note who is entitled to receive payments under the Note.
(D) "Trustee" is
G. TOMMY BASTIAN
Trustee's address is
15000 SURVEYOR BLVD.,, ADDISON, TX 70500-1
(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is a beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated DECEMBER 12, 2011 . The Note states that Borrower owes Lender
ONE HUNDRED SEVENTY FIVE THOUSAND TWO HUNDRED THIRTY ONE and 51/100

80. BOA's denomination of MERS as the "beneficiary" of this deed of trust is false. Defendants have engaged in the same conduct in Harris County and Brazoria County.

81. The reason that BOA did not limit its denomination of MERS to that of BOA's nominee or agent is simple— in order to be shown in deed records in Texas as a "grantee," and therefore a party whose interest is protected by recording, one must ordinarily be identified in a deed of trust as a "lender," "mortgagee," "grantee," or "beneficiary" of the deed of trust. As noted above, however, MERS has admitted that it is none of these. According to MERS:

> MERS has no interest at all in the promissory note evidencing the mortgage loan. MERS has no financial or other interest in whether or not a mortgage loan is repaid. . .
>
> MERS is not the owner of the promissory note secured by the mortgage and has no rights to the payments made by the debtor on such promissory note. . . MERS is not the owner of the servicing rights relating to the mortgage loan and MERS does not service loans. **The beneficial interest in the mortgage (or the person or entity whose interest is secured by the mortgage) runs to the owner and holder of the promissory note.** In essence, MERS

> immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur. (citation omitted).[37]

82. Defendants' conundrum is that, as the lender's "nominee" or "agent," MERS itself has no security interest in the real property that is the subject of the deed of trust and therefore MERS has no rights which qualify it to assert that it is a beneficiary of the deed of trust. But unless MERS itself is identified as a "beneficiary," MERS will not ordinarily be indexed as a "grantee" in the deed records. And unless MERS is identified as a "grantee" in the deed records, the MERS System does not work because the protections of the recording statutes are not extended to MERS. For Defendants, the solution was to ignore the law and falsely state in recorded instruments that MERS has a lien upon or interest in real property,[38] which MERS does not actually have, in order to cause MERS to be indexed as a "Grantee" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs.[39]

83. Another example of Defendants' disregard of long-settled Texas law is Defendants' inclusion of the following language in the subject deeds of trust:

> 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

[37] *Mortgage Electronic Registration Systems, Inc. Nebraska Dept. of Bnkng and Fin.,* 704 N.W.2d 784 (Neb. 2005), *Brief of Appellant* (emphasis added) (App.at 131, 146-47). MERS does not explain how it can be a "mortgage lien" holder or how it can "inoculate" loans "against future assignments" while simultaneously insisting that "MERS is not the owner of the promissory note secured by the mortgage.

[38] December 12, 2011 Deed of Trust, Dallas County Clerk's Office Record No. 201100329165 (App. at 1, 2). In this deed of trust MERS is falsely denominated as the beneficiary.

[39] For over 100 years, Texas law has been that the beneficiary of the security interest created by a deed of trust is the lender whose note is secured by the deed of trust. *See Lawson v. Gibbs*, 591 S.W.2d 292, 294 (Tex. Civ. App.—Houston [1st. Dist.] 1979, writ ref'd n.r.e.). Moreover, a deed of trust in Texas creates a lien in favor of the lender; it does not operate as a transfer of title. *See McLane v. Paschal*, 47 Tex. 365, 369 (1877); *see also Johnson v. Snell*, 504 S.W.2d 397, 399 (Tex. 1973).

> 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.[40]

84. The infirmity of this assertion is manifest. Texas has been a lien theory state for well over 150 years. A deed of trust does not transfer legal title to anything; it creates a lien.[41] Therefore, MERS cannot be the holder of "legal title" to the security interest conveyed, just as it has no beneficial title to the security interest conveyed.

2. MERS as "Grantor"

85. Defendants have also violated Texas law by falsely stating in recorded instruments that MERS has a lien upon or interest in real property (which MERS does not have) with the intent to cause MERS to be indexed as a "Grantor" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs.

86. MERS has been variously falsely identified by MERS's members as the "Lender,"[42] "holder of Note and Lien"[43], "the legal and equitable owner and holder" of the note,[44] or otherwise denominated as a party to the deed of trust or note (or payee thereunder) for the purpose of causing MERS to be indexed as a "Grantor" in the statutory Grantor/Grantee

[40] December 12, 2011 Deed of Trust, Dallas County Clerk's Office Record No. 201100329165 (App. at 1, 3).

[41] *See Flag-Redfern*, 744 S.W.2d at 8 (Tex. 1987) (A deed of trust does not convey legal title; the legal title remains in the mortgagor as long as the debt is outstanding.); *Rudolph v. Hively*, 188 S.W. 721, 722-23 (Tex. Civ. App.—Amarillo 1916, writ ref.) ("The well-established rule in this state is that a deed of trust is simply a security for the debt, and before foreclosure vests no title in the beneficiary.").

[42] December 31, 2010 Deed of Release, Dallas County Clerk's Office Record No. 201000334223 (App. at 21).

[43] December 23, 2010 Transfer of Lien, Dallas County Clerk's Office Record No. 2011XXl3l4692 (App. at 22).

[44] December 23, 2010 Release of Mortgage, Dallas County Clerk's Office Record No. 201000334689 (App. at 23).

Indexes maintained by Plaintiffs. MERS is none of these, and denominating it as such is fraudulent.[45]

87. A common scenario where this happens is as follows: (a) BOA originates a mortgage loan, (b) BOA registers it on the MERS System, (c) BOA records the deed of trust securing the note in the deed records, and (d) then BOA sells that mortgage loan to another MERS member ("Second Owner"). Under Rule II.3.c of the *Merscorp Rules of Membership*, BOA would be responsible for updating the MERS System with the identity of the Second Owner. BOA would not, however, record the transfer in the deed records. According to MERS, recordation of the transfer from BOA to the Second Owner is not necessary because MERS continues to be shown in the deed records as the "grantee" of the security interest created by the deed of trust; now as the nominee or agent of the Second Owner.

88. Assume that following the acquisition of the mortgage loan by the Second Owner, the Second Owner sells the note to a non-MERS member, or the mortgage loan is paid by the borrower. In these instances, the Second Owner would record the transfer (in the case of a transfer to a non-MERS member) or a release of lien (in the case of a discharge of the indebtedness). There is, however, a problem — the Second Owner's interest is not in the chain of title, as the transfer to the Second Owner was never recorded. To overcome this gap, the Second Owner simply pretends that it is MERS and inserts MERS's name in the transfer or release of lien as the party conveying the interest, or releasing the lien. This scenario has played out millions of times throughout the United States and Texas.

[45] Although MERS promulgates a form assignment which recites that MERS is acting in its capacity as nominee (App. at 265), MERS's members often use their own forms and falsely recite that MERS is acting for itself.

3. Failure to Record Transfers, Assignments, Releases, and Other Actions

89. Defendants have also violated Texas law by releasing, transferring, assigning, or taking other action relating to instruments filed, registered, or recorded in the offices of the county clerk of Plaintiffs without filing, registering, or recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

90. As demonstrated by the criminal and civil penalties for filing false or deceptive real estate liens, Texas public policy favors a reliable functioning public recordation system to avoid destructive breaks in title, confusion as to the true identity of the holder of a note, fraudulent foreclosures, and uncertainty as to title when real property is sold. The MERS System has all but collapsed this system throughout the United States, including Texas.[46]

G. Corporate Veils of MERSCORP and MERS

91. MERSCORP is the operating company that owns and operates the MERS System, charges and receives all fees for use of the MERS System, establishes and promulgates Rules of Membership in MERSCORP for those lenders and loan servicers desiring to become members for purposes of utilizing the MERS System, determines the *bona fides* of membership

[46] On April 12, 2011, MERSCORP and MERS entered into a *Consent Order* with several federal agencies. According to the findings contained in the *Consent Order*, MERS and MERSCORP "(a) have failed to exercise appropriate oversight, management supervision and corporate governance, and have failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services to Examined Members; (b) have failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration and delivery of services to Examined Members" and, that "MERS and MERSCORP engaged in unsafe or unsound practices that expose[d] them and Examined Members to unacceptable operational, compliance, legal, and reputational risks." *Consent Order*, April 12, 2011, OCC No. AA-EC-11-20; Board of Governors Docket Nos. 11-051-B-SC-1 and 11-051-B-SC-2; FDIC-11-194b; OTS No. 11-040; FHFA No. EAP-11-01 at 4-5.

applications in MERSCORP, and is responsible for the day-to-day operation of the MERS System. Accordingly, the acts of misconduct alleged herein against MERS are alleged as well against MERSCORP as the owner and operator of MERS.

92. Pleading further, Plaintiffs would show that at all times material hereto, MERS has been a wholly-owned subsidiary of MERSCORP. MERS has been utilized by MERSCORP to shift liability away from MERSCORP and its shareholders for the violations of Texas statutes and law as set forth herein, to perpetrate a fraud in the form of falsely stating in instruments recorded in Plaintiffs' deed records that MERS has a lien upon or interest in real property which MERS does not have, to evade the ongoing obligation to maintain the accuracy of deeds of trust and other instruments recorded in the deed records of Plaintiffs, and to justify the wrongs set forth herein. Thus, MERSCORP is liable for all of the acts of misconduct alleged against MERS herein. According to MERSCORP in its June 4, 2012, MERS® OnLine User Guide (Version 22.0):

> MERSCORP [] owns and operates a national electronic registry to track ownership and changes to ownership of mortgage rights, and Mortgage Electronic Registration Systems, Inc. (MERS), its wholly owned subsidiary which acts as the mortgagee of record in the public land records and as nominee for the lender and its successors and assigns, were created by the real estate finance industry to eliminate the need to prepare and record assignments.

The electronic registry to which this passage applies is also referred to as "the MERS System" and MERSCORP "is the service provider for MERS."

93. BOA (or its predecessor-in-interest) established MERSCORP, and MERSCORP established MERS, without sufficient capitalization in view of the businesses in which MERSCORP and MERS engage. MERSCORP and MERS have failed to retain an appropriate number of employees to engage in the activities legally attributable to MERSCORP and MERS,

opting instead to direct MERS System members to have the members' employees appointed as "Vice-Presidents" or "Secretaries" of MERS for purposes of having the members, including BOA, purport to take actions as "MERS" through members' employees falsely or improperly denominated as offices of MERS. MERSCORP and MERS are effectively "front" organizations for MERS System members, including Defendant BOA, which have created a systemically important mortgage registry but fail to properly oversee that registry or enforce their own rules on the members that participate in the registry. For example, rather than maintaining an adequate staff to provide MERSCORP's and MERS's services, MERSCORP and MERS operate through a network of over 20,000 non-employee "corporate officers," including employees of BOA, who cause MERSCORP and MERS to act without any meaningful oversight from anyone who works at MERSCORP or MERS. Instead of meaningful internal controls, MERSCORP and MERS rely on an "honor system" of MERS System members which fails to ensure the integrity of the MERS System. The lack of internal controls at MERSCORP and MERS have facilitated MERS System members' recording of so-called "robosigned" documents in the deed records of Plaintiffs and has also resulted in MERSCORP's and MERS's failure to follow their own rules regarding proper institution of foreclosure proceedings.

94. The 20,000 individuals who identify themselves as MERS's corporate officers are actually employees of MERS's members, including BOA, rather than MERS. These so-called "corporate officers" act on behalf of MERS in foreclosing mortgages and deeds of trust in which MERS is identified as a "mortgagee" or "beneficiary," and in recording, causing to be recorded, or approving the recording of instruments falsely denominating MERS as the "assignor," "lender," "holder of Note and Lien," "the legal and equitable owner and holder" of a promissory note, "payee" of a promissory note secured by the security interest created by a deed of trust, or

in other capacities which falsely purport to vest in MERS, or assert that MERS has, a lien upon or interest in real property and with the intent to cause MERS to be indexed as a "Grantee" or "Grantor" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs.

95. By way of example, in a December 23, 2010 Transfer of Lien,[47] the MERS member that prepared and recorded the instrument identified MERS as the "Holder of Note and Lien" and the "payee" of the original note. MERS was none of these.

96. In reality, MERSCORP, MERS, and the MERS System operate like puppets whose strings are pulled by MERS System members' employees, including BOA. Members' employees undertake legally operable actions using MERS's name, such as assigning mortgages, signing checks, and foreclosing on homeowners. MERS System members purchase corporate seals for their signing officers from MERS at a cost of $25 each. While MERS purports to act as agent for the holder or owner of a note, each act MERS purportedly performs on a MERS System member's behalf is actually done by that member's own employee, acting as a MERS "signing officer." Moreover, MERSCORP and MERS encourage the widespread use of MERS's corporate authority but perform no meaningful oversight over the acts of these signing officers. This use of member employees purportedly acting as MERS "officers" obfuscates the real entity dealing with consumers.

97. Employees of MERS System members who identify themselves as MERS "officers" are not paid any compensation by MERS, nor does MERSCOPR or MERS supervise or direct (nor have the right to supervise or direct) any of the work performed by these so-called

[47] December 23, 2010 Transfer of Lien, Dallas County Clerk's Office Record No. 201000334692 (App. at 243).

MERS "signing officers." MERS "signing officers" do not seek, nor do they receive, any instruction, permission or approval from MERSCORP or MERS to act on MERS's behalf.

98. The structure of MERSCORP and MERS and the fact that they undertake virtually no action except through the members of MERS, including BOA, justify the Court's ignoring the corporate fiction and imposing liability for the conduct of MERSCORP and MERS on the shareholders of MERSCORP, including Defendant BOA.

99. In addition to the actionable conduct of BOA alleged herein, Plaintiffs seek a determination of the Court that it is appropriate to pierce the MERSCORP and MERS corporate veils for the reasons set forth above and hold BOA as a shareholder of MERSCORP liable for the conduct of MERSCORP and its subsidiary, MERS. Recognizing the corporate existence of MERSCORP and MERS separate from their shareholders, including BOA, would bring about an inequitable result or injustice, or would be a cloak for fraud or illegality.

VI.
CAUSES OF ACTION

A. Fraudulent Misrepresentation – All Defendants

100. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

101. Defendants engaged in fraudulent misrepresentation by:

a. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent, in part, to cause MERS to be indexed as a "Grantee" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs; and

b. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent, in part, to cause MERS to be

> indexed as a "Grantor" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs.

102. Defendants intended that Plaintiffs detrimentally rely upon the false statements described above, and Plaintiffs did so rely, by accepting such instruments for recording and, in most instances, by indexing MERS as a "Grantee" or "Grantor" in their Statutory Grantor/Grantee Indexes.

103. Defendants undertook such conduct for the purpose of avoiding the recordation of subsequent transfers and payment of attendant filing fees.

104. Defendants' fraudulent misrepresentations were and continue to be a proximate cause of damages to Plaintiffs for which they seek judgment of the Court. These damages include, but are not limited to, direct and consequential damages in the form of: (a) loss of revenues that would have been received in recording subsequent assignments, transfers, and other activities related to recorded instruments had Defendants not undertaken to avoid such recordation by engaging in the fraudulent misrepresentation described herein; (b) damages to and corruption of the Statutory Grantor/Grantee Indexes maintained by Plaintiffs in the form of rendering such records opaque and inaccurate; and (c) the cost of remediating the Statutory Grantor/Grantee Indexes maintained by Plaintiffs so that such records accurately reflect collateral pledges of, liens upon, and interests in real property located in Plaintiffs.

105. The conduct of each Defendant as set forth herein constituted a violation of Chapter 41 of the Texas Civil Practice & Remedies Code so as to make each Defendant liable for exemplary damages for which Plaintiffs seek judgment of the Court.

B. Unjust Enrichment - MERSCORP and MERS

106. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

107. MERSCORP and MERS have by their conduct described herein been unjustly enriched by fraud and by taking undue advantage of the real property recording systems of Plaintiffs. MERSCORP, MERS, and members of the MERS System, including BOA, have recorded, caused to be recorded, or approved the recording of instruments which falsely represent that MERS has a lien upon or interest in real property which MERS does not have in order to avoid recording subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the office of the county clerk of Plaintiffs.

108. But for the fraudulent misrepresentations alleged above, members of the MERS System would have been required by applicable state and federal law and, upon information and belief, the internal policies of such members of the MERS System to record such subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the office of the county clerk of Plaintiffs.

109. The unjust enrichment of MERSCORP and MERS consists of the fees that MERS and MERSCORP received to track unrecorded transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the offices of the county clerks of Plaintiffs.

110. Damages to Plaintiffs have been proximately caused by MERS's and MERSCORPs' conduct described herein, measured by the filing fees that would have been received by Plaintiffs had all of the transfers, assignments, and other actions described herein been recorded or, in the alternative, as measured by the fees received by MERSCORP and MERS for tracking the mortgage loans and mortgages tracked by MERS but not recorded in the

deed records of Plaintiffs, for which damages Plaintiffs seek judgment of the Court against MERS and MERSCORP.

111. The conduct of MERSCORP and MERS as set forth herein constituted a violation of Chapter 41 of the Texas Civil Practice & Remedies Code so as to make MERSCORP and MERS liable for exemplary damages for which Plaintiffs seek judgment of the Court.

C. Unjust Enrichment – BOA

112. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

113. BOA has by its conduct described herein been unjustly enriched by fraud and by taking undue advantage of the real property recording systems of Plaintiffs. As set out above, BOA recorded, caused to be recorded, or approved the recording of instruments which falsely represent that MERS has a lien upon or interest in real property that MERS does not have, in order to avoid recording subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the office of the county clerk of Plaintiffs. The purpose of the fraudulent misrepresentations was avoidance of filing fees associated with recording subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the office of the county clerk of Plaintiffs.

114. But for the fraudulent misrepresentations contained in the original instruments, BOA would have been required by applicable state and federal law and, upon information and belief, BOA's internal policies to record such subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the office of the county clerk of Plaintiffs.

115. Plaintiffs seek judgment of the Court against BOA for the unjust enrichment of BOA set forth herein. The unjust enrichment of BOA includes the filing fees that BOA saved by not recording subsequent transfers, assignments, and other actions relating to instruments filed, registered, or recorded in the offices of the county clerks of Plaintiffs, plus all savings realized by BOA in using the MERS System rather than paying for the preparation and recordation of subsequent transfers, assignments, or other actions.

116. The conduct of BOA as set forth herein constituted a violation of Chapter 41 of the Texas Civil Practice & Remedies Code so as to make BOA liable for exemplary damages for which Plaintiffs seek judgment of the Court.

117. Plaintiffs also seek judgment against BOA as the alter-ego of MERSCORP and MERS for the unjust enrichment of MERSCORP and MERS as set forth above.

D. <u>Declaratory Judgment</u>

118. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

119. Plaintiffs hereby seek a judicial declaration pursuant to 28 U.S.C. § 2201 that:

a. the following actions of Defendants constitute a violation of Texas law:

i. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent to cause MERS to be indexed as a "Grantee" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs;

ii. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent to cause MERS to be indexed as a "Grantor" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs;

and

iii. releasing, transferring, assigning, or taking other action relating to an instrument that is filed, registered, or recorded in the office of the county clerk without filing, registering, or recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

b. Plaintiffs are not required by Texas Law to index MERS as a "grantee" or "grantor" in the Statutory Grantor/Grantee Indexes of Plaintiffs when MERS is acting in a representative capacity in an instrument presented for recording.

E. Request for Injunctive Relief

120. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

121. Section 12.003 of the Texas Civil Practice & Remedies Code provides, *inter alia*, that a district attorney or a county attorney "may bring an action to enjoin violation of this chapter or to recover damages under this chapter." Accordingly, Plaintiffs seek injunctive relief enjoining Defendants and all those in active concert or participation with them from:

a. recording, causing to be recorded, or approving the recording of instruments which state that MERS has a lien upon or interest in real property which MERS does not have; and

b. releasing, transferring, assigning, or taking other action relating to any instrument that is filed, registered, or recorded in the office of the county clerk without filing, registering, or recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

122. Plaintiffs further seek an order of this Court requiring Defendants, jointly and severally, to correct the false and deceptive filings described herein by causing the recordation of

corrective instruments setting forth accurately the identity of the actual parties-in-interest to the instruments about which complaint is made.

123. Plaintiffs further seek an order of this Court requiring Defendants, jointly and severally, to correct the false and deceptive filings described herein by causing the recordation of corrective instruments setting forth the entire chain of title for each instrument described herein, and to pay all lawful fees associated with such recordings.

VII.
CONSPIRACY

124. Plaintiffs incorporate by reference all factual allegations made above as though set forth completely herein.

125. Defendants and each of them conspired together in the actionable conduct alleged herein so as to make each of MERSCORP, MERS, and BOA jointly and severally liable for all damages suffered by Plaintiffs, for which Plaintiffs pray judgment of the Court. The conspiracy included: (a) establishing the objects to be accomplished; (b) a meeting of minds on the object or course of action; (c) one or more unlawful, overt acts; and (d) damages to Plaintiffs as the proximate result.

126. The goal of the conspiracy was to avoid the costs and time associated with properly recording the creation and transfer of liens upon or interest in real property in Texas. The meeting of the minds is demonstrated, *inter alia*, by the Defendants' creation and operation of the MERS System. The unlawful, overt acts included:

a. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent to cause MERS to be indexed as a "Grantee" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs;

b. recording, causing to be recorded, or approving the recording of instruments which falsely state that MERS has a lien upon or interest in real property which MERS does not have with the intent to cause MERS to be indexed as a "Grantor" in the Statutory Grantor/Grantee Indexes maintained by Plaintiffs; and

c. releasing, transferring, assigning, or taking other action relating to an instrument that is filed, registered, or recorded in the office of the county clerk without filing, registering, or recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

127. The damages to Plaintiffs include, but are not limited to, direct and consequential damages in the form of: (a) loss of revenues that would have been received in recording subsequent assignments, transfers, and other activities related to recorded instruments had Defendants not undertaken to avoid such recordation by engaging in the fraudulent misrepresentation described herein; (b) damages to and corruption of the Statutory Grantor/Grantee Indexes maintained by Plaintiffs in the form of rendering such records opaque and inaccurate; (c) the cost of remediating the Statutory Grantor/Grantee Indexes maintained by Plaintiffs; and (d) the damages set out in the claims for unjust enrichment alleged above against Defendants.

VIII.
JURY DEMAND

128. Plaintiffs request trial by jury.

IX.
PRAYER

Wherefore, premises considered, Plaintiffs request that Defendants be cited to appear and answer and, upon trial of this matter, Plaintiffs be awarded actual and exemplary damages, declaratory relief, and injunctive relief as prayed for herein. Plaintiffs further request the costs of bringing this action, including all court costs, attorney's fees, and related expenses of bringing the action (including investigative expenses), pre- and post-judgment interest at the highest rate allowed by law, and for such other and further relief, in law and in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on December 17, 2012, I electronically transmitted the foregoing document to the clerk of the court and all counsel of record using the ECF system for filing and service in accordance with the Court's ECF order.

/s/ Stephen F. Malouf

Stephen F. Malouf