NO. 86206-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN:

KRISTIN BAIN,

Plaintiff,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., et. al,

Defendants.

BRIEF OF *AMICUS CURIAE* NATIONAL CONSUMER LAW CENTER

David A. Leen
WSBA No. 3516
520 East Denny Way
Seattle, WA 98122
(206) 325-6022

Attorney for *Amicus Curiae*
Leen & O'Sullivan, PLLC

Geoff Walsh
VT. Sup. Ct. No. 2570
7 Winthrop Square
Boston, MA 02110
(617) 542-8010

Attorney for *Amicus Curiae*
National Consumer Law Center

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In Washington, and in slightly over the half the states, non-judicial proceedings are the predominant method of foreclosure against residential properties. In the early years of the foreclosure crisis, a considerable amount of litigation ensued in judicial foreclosure states over the issue of who had "standing" to bring a foreclosure action. The process of securitization brought this question to the forefront when millions of homeowners, like Ms. Kristin Bain, found themselves facing foreclosure by entities they had never heard of before.

This brief addresses the securitization issues in Ms. Bain's case and explains why the Mortgage Electronic Registration System, Inc. (MERS) is not a "beneficiary" under the Washington law.

II. STATEMENT AND INTEREST OF AMICUS CURIAE

Amicus' interest is set out in the Motion to participate as *Amicus.*

III. STATE OF THE CASE

Amicus adopts the Plaintiff's Statements of the Case.

IV. ARGUMENT

A. The Authority to Foreclose in Non-Judicial Foreclosure States

To the extent that the notes evidencing a home loan debt are negotiable instruments, the provisions of Article 3 of the Uniform

Commercial Code ("the U.C.C.") govern transfer and enforcement of the notes.[1] The key U.C.C provision describing who is entitled to enforce a negotiable instrument is section 3-301. Under U.C.C § 3-301, a party seeking to enforce a negotiable instrument must at a minimum be a party in possession of the note that was properly transferred or "negotiated" to the party.[2]

In its brief, MERS does not dispute that the U.C.C. provisions governing negotiable instruments apply to the obligation in question.[3] Washington courts have routinely acknowledged that the right to enforce the promissory note is what establishes authority to foreclose.[4]

In non-judicial foreclosures, the rules of constitutional and prudential standing applicable in court proceedings do not apply.

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[1] The holder of a non-negotiable note relying on non-U.C.C. contract law to establish a right to enforce the note must meet even stricter requirements to show, based on the note's documented chain of title, that the holder is entitled to enforce the obligation.

[2] RCWA 62A.3-301(i) and (ii). *See e.g. Bank of New York v. Raftogianis*, 13 A.3d 435 (N.J. Super. 2010) (lender must show note in its possession properly endorsed at time it commenced judicial foreclosure action); *U.S. Bank Nat'l Ass'n v. Kimball*, 27 A3d 1087, 2011 WL 2937311 at ¶ 13-14 (Vt. 2011) (transfer of possession and endorsement of note essential to enforcement); *U.S. Bank, N.A. v. Collymore*, 890 N.Y.S. 2d 578 (N.Y. App. Div. 2009) (foreclosing plaintiff must establish it was holder of note and assignee of mortgage at time commenced foreclosure action).

[3] Response Brief of Defendant MERS at 16.

[4] *Fidel v. Deutsche Bank National Trust Co.*, 2011 WL 2436134 * 3 (W.D. Wash. Jan. 14, 2011) ("In contrast, defendant has provided the Note, which was endorsed to defendant and is currently in defendant's possession. Accordingly, defendant has the authority to institute foreclosure proceedings"); *Hone v. Carlson*, 2001 WL 27382 *3 (Wash. App. Jan. 11, 2011) ("A negotiable instrument, by definition, is not dependent upon any other document for its validity. RCW 62A. 3-104. And, a mortgage is dependent upon the validity of the underlying obligation to be enforceable."); *In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009).

Nevertheless, state non-judicial foreclosure statutes typically set out detailed requirements that must be followed by a party seeking to exercise a power of sale contained in a security instrument. When parties execute a deed of trust, the provisions of the foreclosure statutes of the state where the property is located become implied terms of their agreement.[5] These statutes define who may exercise the rights of a creditor under the statutory non-judicial foreclosure scheme. The question of who has "standing" to foreclose non-judicially is perhaps better phrased as who has "authority to foreclose." However, the underlying issue is the same.[6]

Bankruptcy courts apply similar standing and authority to foreclose concepts in determining whether appropriate parties have brought motions for relief from the bankruptcy stay. Bankruptcy courts

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[5] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934).

[6] *Perry v. Federal National Mortgage Association*, -- So. 3d -- , 2011 WL 6848485 * 4-5 (Ala. App. Dec. 30, 2011)(timely possession of promissory note required for valid non-judicial foreclosure sale); *Culhane v. Aurora Loan Services of Nebraska*, -- F. Supp. 2d -, 2011 WL 5925525 * 5 (D. Mass. Nov. 28, 2011) (foreclosing entity must have authority to enforce promissory note and be current assignee of mortgage); *Leyva v. National Default Servicing Corp.*, 255 P.3d 1275, 1279-80 (Nev. 2011) (entity seeking to foreclose under non-judicial process must comply with statutes governing enforcement of promissory note, including RCWA 62A. 3-301 if the note is a negotiable instrument); *In re Adams*, 693 S.E. 2d 705, 708 (N.C. Ct. App. 2010) (applicable power of sale statute required showing of "valid debt of which the party seeking to foreclose is the holder" and this standard required showing that the note was indorsed, transferred or otherwise made payable to the foreclosing party). *See also Hooker v. Northwest Trustee Services, Inc.*, 2011 WL 2119103 (D. Or. May 25, 2011) (proceeding with non-judicial sale without recording all assignments of deed of trust violated Oregon Trust Deed Act); *U.S. Bank v. Ibanez*, 458 Mass. 637, 941 N.E. 2d 40 (2011) (non-judicial foreclosure sale invalid where foreclosing party had not taken assignment of mortgage before commencing foreclosure proceedings);

have applied similar standards to make this determination in judicial and non-judicial foreclosure jurisdictions.[7] In *In re Mitchell*[8] the Nevada bankruptcy court considered the same question presented in the instant appeal – whether MERS could proceed to seek relief as a "beneficiary" to foreclose under Nevada's non-judicial foreclosure statute. The court held that because MERS' contractual arrangement with its members precluded MERS from receiving any benefit from borrowers' loans, MERS could not possibly be a "beneficiary" under the Nevada statute. [9]

The Washington bankruptcy court in *In re Jacobson*[10] similarly concluded that a "beneficiary" entitled to foreclose under the DTA must be capable of establishing that it is entitled to enforce the promissory note.[11] According to *Jacobson*, a party seeking to proceed on behalf of some undisclosed entity without evidence of that entity's entitlement to enforce the obligation lacked authority to proceed under the DTA. More

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[7] *In re Veal*, 450 B.R. 897 (B.A.P. 9th Cir. 2011) (to proceed with motions for relief from stay and file proofs of claim mortgage creditors must show entitlement to enforce promissory note as well as assignment of mortgage, applying Arizona law); *In re Box*, 2010 WL 2228289 (Bankr. W.D. Mo. June 3, 2010) (movant denied motion for relief from stay because it could not prove possession of negotiable instrument); *In re Vargas*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) (servicer denied stay relief motion after failed to produce competent evidence of right to enforce note).

[8] *In re Mitchell*, 2009 WL 1044368 (Bankr. D. Nev. Mar.31 2009) aff'd.423 B.R. 914 (D. Nev. 2009) (the district court's reservations about some aspects of the bankruptcy court's reasoning turned out to be uncalled for in view of the later Nevada Supreme Court decision in *Leyva v. National Default Servicing Corp.*, 255 P.3d 1275, 1279-80 (Nev. 2011))

[9] *Id.* at * 3.

[10] *In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009).

[11] *Id.* at 367-70.

recently a different Washington bankruptcy court adopted the reasoning of *Jacobson.*[12]

B. The plain meaning of RCW 61.24.005(2) and the context of the DTA preclude MERS from acting as a "beneficiary" to foreclose under the statutory scheme.

The DTA limits authority to foreclose to a "beneficiary" as defined in the statute. The DTA defines a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."[13] This court has adopted a plain meaning standard in interpreting the DTA.[14] RCW 61.24.005 opens by stating that the definitions contained in the section "apply throughout this chapter unless the context clearly requires otherwise." The "context" referred to is the DTA. MERS argues that the relevant "context" should be the MERS data base system.[15] This is clearly not what the DTA and this Court's interpretive standard mean by "context." Under the appropriate standard, definitions must be given their ordinary meaning and viewed in the context of the DTA. MERS' argument ignores this context. The statutory scheme of the DTA refers to a beneficiary that is owed money,

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[12] *In re Reinke*, 2011 WL 5079561 *10-12 (Bankr. W.D. Wash. Oct. 26, 2011)
[13] RCW 61.24.005(2).
[14] *Udall v. T.D. Escrow Services, Inc.*, 159 Wash. 2d 903 at 11, 909 154 P.3d 882 (2007) ("Plain meaning 'is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.' " quoting *Tingey v. Haisch*, 152 P.3d 1020 (2007).
[15] MERS Brief at18-20.

can declare a default when the money is not paid, may accept a cure in an amount that it has defined as due, and, based on recent DTA amendments, engages in negotiations over loss mitigation with borrowers. MERS does none of these things. A rule of construction that allowed for interpretation of statutory language in any context a party found convenient would be meaningless.

For its second argument, MERS grossly distorts the language of section 61.24.005(2).[16] The definition plainly refers to two distinct documents: (1) "the instrument or document evidencing the obligations" (the promissory note), and (2) the "deed of trust" which secures that obligation. With slight regional variations in nomenclature, these are the two standard documents that make up mortgage loans around the country. In section 61.24.005(2), the words "secured by the deed of trust" modify the terms "the instrument or document evidences the obligations." The beneficiary is the entity that holds the instrument or document evidencing the obligation – the party with the right to enforce the obligation. The deed of trust is a distinct document securing that obligation. MERS wants the section to mean that an entity holding only the deed of trust and not the promissory note is a "beneficiary." This is not what the section says.

[16] MERS Brief at 20-23.

The plain meaning and context analysis should end here. However, MERS goes on to refer to various provisions of its uniform deed of trust.[17] These terms describe the borrower's obligation to pay for certain items, such as taxes, assessments, and other charges that could be assessed against the security property. The borrower's duty to pay these charges is described in the Deed of Trust. MERS argues that, because the borrower's obligation to pay for these items appears in the deed of trust, MERS as the nominal beneficiary under the deed of trust is owed these payments. MERS fails to note, however, that the deed of trust states that if the borrower were required to make any of these payments, they would be owed to the "Lender" and not to MERS. The deed of trust plainly states: "This Security Instrument secures to *Lender:* (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements *under this Security Instrument* and the Note." (emphasis added). "MERS" and the "Lender" are defined as separate entities. The Borrower owes the "Lender" any money due under the Note and under the Deed of Trust. The "Lender" invokes the power of sale if the Borrower does not make payments owed to the Lender (Deed of Trust at 22).

[17] MERS Brief at 22.

Thus, contrary to MERS misleading suggestion, the current holder of the obligations originally held by IndyMac Bank is owed all sums due under both the deed of trust and the note. Neither document provides for anything to be paid to or owed to MERS.

C. MERS' role is limited to selling loan identification labels and selling to employees of other companies the right to sign documents in MERS' name

MERS is in the business of doing two basic things: (1) it sells identification labels for home loans, and (2) it sells to non-employees of MERS the right to sign documents as officers of MERS. The identification labels are "Mortgage Identification Numbers" (MIN numbers). Mortgage lenders and servicers who become MERS members can register their loans for a fee with the MERS system. Upon registration with MERS, the loan receives a MIN number. As the loan is sold to new buyers after registration, MERS members can track changes in ownership of the debt among other MERS members through reference to the loan's MIN number. The mortgage recorded in local land records in MERS' name as nominee remains in place while MERS' members buy and sell the loan, tracking the loan by its MIN number.

For additional fees, MERS members can purchase a corporate resolution from MERS which designates certain employees of the MERS member as officers of MERS for the purpose of signing documents.

MERS members are typically mortgage servicers or law firms that specialize in foreclosure work. Once they have been provided with a form corporate resolution from MERS, these employees of the law firm or servicer sign documents as vice presidents or other officers of MERS. Typically the documents include assignment of mortgages or deeds of trust, documents related to commencement of a foreclosure, deeds executed after foreclosure sales, and mortgage satisfactions. At last report there were estimated to be twenty thousand individuals, employees of mortgage servicers and foreclosure law firms around the country, who have been named in MERS corporate resolutions as vice presidents of MERS. None of these individuals are actually employees of MERS or MERSCORP, the corporation with offices in Virginia that owns and operates MERS.[18]

Many people perform services related to a home loan. A telephone service provider allows a loan servicer to call the borrower to ask for payments when they are overdue. The United States Postal Service delivers mail related to the loan. Clerks in government and

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[18] *See generally Culhane v. Aurora Loan Services of Neb.*, -- F. Supp. 2d --, 2011 WL 5925525 * 12-18 (D. Mass. Nov. 28, 2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage lending, and the Mortgage Electronic Registration System*, 78 U. of Cincinnati Law Review, 1359 (Summer 2010) and Christopher L Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 William and Mary L. Rev. (forthcoming) available at http://ssrn.com /abstract=1684729.

private offices file documents related to the loan. Sheriffs deliver papers and conduct sales to enforce payment obligations under the loan. These individuals do not own an interest in the loan simply because they perform a service related to the loan.[19] Likewise, MERS does not acquire an ownership interest in the debt simply because it sells a MIN number that identifies the debt.

The MERS Terms and Conditions describe the relevant agreement between MERS and its members. The standard MERS deed of trust defines the relationship among MERS, the lender, and the borrower. These documents undercut any claim that MERS is a party authorized to foreclose under RCW 61.24.005(2).

The MERS Terms and Conditions state:

> The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS© System. ***MERS shall serve as mortgagee of record with respect to such mortgage loans solely as a nominee, in an administrative capacity***, for the beneficial owner or owners thereof from time to time. ***MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans***, or to any mortgaged properties securing such loans.[20]

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[19] A hardware store may sell aluminum numbers and letters that can be nailed to the front porch of a house to read "521 Elm Street." This is a helpful way to identify the property and distinguish it from other houses. However, the hardware store does not acquire an ownership interest in the home by selling the identification label to the homeowner.
[20] MERS Terms and Conditions at 2. (Emphasis added).

Basic rules of contract interpretation must be followed in construing the terms of the MERS deed of trust. For the past few years, judges in federal and state courts around the country have devoted considerable judicial time and energy to puzzling their way through the language of MERS' form documents. Learned judges reviewing identical MERS' contract terms have come to different conclusions as to what the language means. Yet, MERS' repeatedly emphasizes that consumers "agreed" to be bound by these terms. This contention must be taken with some rather large grains of salt. These deeds of trust are typically presented to consumers with a pile of documents as they are led through real estate closings. The idea that consumers knowingly agree to these terms is a legal fiction. The standard MERS' contract terms meet all the elements of a classic contract of adhesion.[21] On this basis alone the terms need not be enforced in accordance with whatever gloss MERS chooses to place on them in a given litigation context.[22] At a minimum, the terms must be construed "most strongly" against MERS as the party

[21] See e.g. *Vodopest v. MacGregor*, 128 Wash. 2d 840, 847, n.2 913 P.2d 779, 792 n.2 (Talmadge J. concurring) (1996) (to determine whether document is contract of adhesion court considers: (1) whether contract is a standard form printed contract; (2) whether the contract was prepared by one party and submitted to the other on a "take it or leave it" basis; and (3) whether there was true equality of bargaining power between the parties.)
[22] *McKee v. AT&T Corp.*, 164 Wash.2d 372, 191 P.3d 845 (2008) (terms of contract drafted by large phone service provider requiring confidentiality in dispute resolution, shortening the Washington CPA statute of limitations for claims, and limiting availability of recovery of consumers' attorney's fees construed as contract of adhesion terms and not enforceable).

who drafted the documents.[23] When the contract language is ambiguous, any doubt created by the ambiguity must be resolved against MERS.[24]

Based on the deed of trust language, two significant limitations on the rights of MERS are apparent. First, the deed of trust consistently limits MERS' role in all respects to "solely" that of a nominee. Second, MERS may only exercise this nominee status "if necessary to comply with law or custom." These two limitations preclude any serious argument that MERS was ever a true beneficiary of Ms. Bain's debt obligation.

D. MERS cannot be "solely" a nominee and at the same time have other rights and obligations under the mortgage and note.

Both the MERS' Terms and Conditions and the MERS' deed of trust unequivocally define MERS' role as "solely" that of a nominee. The Terms and Conditions limit MERS to an "administrative" role and expressly disclaim any right of MERS to payments incurred under the deed of trust and note. The MERS deed of trust states the same. Under the deed of trust, the Borrower grants rights in the property to MERS "solely as nominee for the Lender and the Lender's successors and assigns." Other than to serve as a nominee for the owner of the debt, the

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[23] *Guy Stickney, Inc. v. Underwood*, 67 Wash. 2d 824, 827, 410 P.2d 7, 9 (1966).
[24] *Felton v. Menan Starch Co.*, 66 Wash. 2d 792, 797, 405 P. 2d 585, 588 (1965).

deed of trust does not grant MERS any rights, duties, or obligations of any kind.

E. Foreclosure by MERS was not necessary by law or custom.

The other significant limitation the deed of trust language places upon MERS' exercise of its nominee status is that any such exercise must be "necessary to comply with law or custom." It is not *necessary* that a non-judicial foreclosure in Washington be conducted in the name of MERS. MERS suggests that the relief Ms. Bain seeks would bar non-judicial foreclosures in all instances in which MERS had been named as a nominee on the deed of trust. (MERS Brief at 23). This contention is flatly wrong. MERS goes so far as to suggest that barring MERS foreclosures would give a windfall to borrowers such as Ms. Bain. *Id.* This rhetoric ignores the obvious. MERS is fully aware that deeds of trust with MERS listed as nominee can be foreclosed under the DTA. If the deed of trust designating MERS as nominee is assigned in compliance with state law to the party lawfully entitled to enforce the debt obligation (the party who can enforce the note), a foreclosure can proceed in accordance with the DTA.[25]

[25] See Culhane v. Aurora Loan Services of Nebraska, -- F. 2d --, 2011 WL 5925525 * 17 (D. Mass. Nov. 28, 2011) (rejecting same "as necessary to comply with law or custom" argument of MERS).

MERS own recent policy changes represent another rebuttal to MERS' contention that foreclosures must be conducted in its name in order to comply with state law or custom. MERS has amended its membership rules to prohibit foreclosures in MERS' name. As of July 22, 2011 MERS Member Certifying Officers have been prohibited by MERS' rules from initiating foreclosures and filing legal proceedings in the name of MERS.[26] MERS members who do so can be sanctioned under the MERS' rules.[27] MERS' members are directed to ensure that no representation is made implying that MERS is a note holder or has authority to enforce a note. MERS' decision follows earlier announcements to the same effect by the GSEs. In early 2010 Fannie Mae announced a policy prohibiting servicers of any loan owned or insured by Fannie Mae from foreclosing in the name of MERS, either judicially or non-judicially.[28] Freddie Mac promulgated a similar policy in 2011.[29]

Finally, MERS admits in its Brief that beneficiaries participating in the MERS system are capable of conducting foreclosures in compliance with the DTA without recourse to conducting the foreclosure in MERS'

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[26] MERSCORP, Inc. Rules of Membership, Rule 8(d). MERS announced this rule change with MERS Announcement No. 2011-01 (Feb. 16, 2011).
[27] Id.
[28] Fannie Mae Announcement SVC-2010-05 (Mar. 30, 2010).
[29] Freddie Mac Bulletin No. 2011-5 (March 23, 2011, effective April 1, 2011).

name. (MERS Brief at 42). MERS views this process as requiring a simple assignment of the deed of trust to the appropriate party. This is hardly consistent with any contention that foreclosing in MERS' name is "*necessary* to comply with law or custom."

F. The courts have consistently recognized that MERS has no right to benefit from the underlying debt obligation

In prior litigation, MERS has freely admitted that it "does not own the promissory notes secured by the mortgages and has no rights to payments under the notes."[30] In 2009, Arkansas' highest court held that "MERS is not the beneficiary, even though it is so designated in the deed of trust. . . . [T]he lender on the deed of trust, was the beneficiary. It receives the payments on the debt." [31] Other state appellate courts have recognized that MERS is not a beneficiary with a right to payments due under mortgage loan obligations.[32] Additionally, courts in Maine, New York, California, Oklahoma, and Massachusetts recently held that a party seeking to foreclose must establish its own right to enforce the promissory note and could not rely on an alleged transfer of a beneficial

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[30] *Mortgage Electronic Registration Systems v. Nebraska Department of Banking*, 270 Neb 529, 533; 704 N.W.2d 784, 788 (Neb 2005). See also *Mortgage Electronic Registration Systems v Estrella*, 390 F3d 522, 524-25 (7th Cir 2004); *In re* Chong, 2009 WL 6524286 * 3 (D. Nev. Dec. 4, 2009) ("MERS admits that it does not actually receive or forfeit money when borrowers fail to make their payments.").

[31] *Mortgage Electronic Registration Systems v Southwest Homes*, 2009 Ark 152; 301 S.W. 3d 1, 3 (2009).

[32] *Landmark National Bank v Kesler*, 289 Kan. 528, 216 P.3d 158, 161 (Kan. 2009); *Bellistri v Ocwen Loan Servicing*, 284 SW3d 619, 623-24 (Mo Ct App 2009); *.Graham v. Mortgage Electronic Registration Systems, Inc.*, 247 P.3d 223, 229 (Kan. App. 2010).

interest from MERS.[33] MERS could not transfer or assign the right to enforce a note because MERS itself never held this right.

Compliance with the plain meaning of "beneficiary" as defined in the DTA ensures that the party conducting a non-judicial foreclosure sale is a party with authority to enforce the underlying debt obligation.[34] Thus, in requiring that the foreclosing party own or have an interest in the underlying debt obligation, DTA section 61.24.005(2) is consistent with and complements Washington's U.C.C sections 3-602 and 3-301.

G. MERS' agency arguments do not support a right to foreclose under the DTA

No one questions the basic principle that a beneficiary can employ an agent to assist it in carrying out a non-judicial foreclosure. The bankruptcy court's decision in *In re Alcide* provides a thorough analysis and summary of case law on this point.[35] In order to foreclose on behalf of a beneficiary the agent must show two things: (1) it must show authority from a principal to perform the acts in question, and (2) it must show that the principal for whom it is acting in fact has authority to

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[33] *Mortgage Electronic Registration Systems, Inc., v. Saunders*, 2 A.3d 289, 2010 ME 79 (2010); . *Bank of New York v. Silverberg*, 86 A.D. 3d 274, 926 N.Y.S. 2d 532 (N.Y.A.D. 2011); *In re Doble*, 2011 WL 1465559 (Bankr. S.D. Cal. April 14, 2011); *BAC Home Loans Servicing, L.P. v. White*, 256 P.3d 1014 (Okla. App. 2010) (*cert. denied* Mar. 7, 2011); *Culhane v. Aurora Loan Services of Nebraska*, -- F. Supp. 2d --, 2011 WL 5925525 * 17 (D. Mass. Nov. 28, 2011). See also *In re Lippold*, 457 B.R. 293 (Bankr. S.D.N.Y 2011); *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011) .

[34] See e.g. *In re Veal*, 450 B.R. 897, 910 (BAP 9th Cir. 2011) .

[35] 450 B.R. 526 (Bankr. E.D. Pa. 2011).

perform the acts in question.[36] MERS reliance on the placeholder status designated in a deed of trust fails on both of these counts. First, MERS does not act on behalf of a disclosed principal. In Ms. Bain's case, we have no idea who the current assignee and transferee of the rights formerly held by IndyMac may be. The loan could have been transferred out of the MERS system entirely. MERS' answer that it is acting for the party with the right to enforce the debt obligation, whoever that might be, does not respond to the first prong of the agency test. Similarly, we have no idea whether the party for whom MERS purports to act has authority to enforce the note. We do not know whether that party complied with Article 3 of the UCC. If the note is not a negotiable instrument, we do not know the basis for that party's claim to be entitled to enforce the note. A beneficiary under the DTA must be more than a name plate in land records reading "anonymous."

MERS suggests that the "facts" supporting its agency status are "incontrovertible."[37] Yet, there are no clear facts about MERS' agency relationship in this case. As one commentator noted, MERS constantly asks courts to accept its role as "a self-identified agent for an

[36] *Id.* at 539.
[37] MERS Brief at 8.

unidentified beneficiary."[38] MERS assertion of agency in Ms. Bain's case is a theory and not a fact. This Court has noted, "[d]etermination of an agency relationship is not controlled by the manner in which the parties contractually describe their relationship."[39] In reality, none of the sixty-five actual MERS employees in Virginia direct the actions of the more than 20,000 foreclosure firm employees around the county who routinely sign documents as officers of MERS.[40] In the MERS structure, it is not clear who is the principal and who is the agent. Purporting to act as a MERS officer, the same employee of a foreclosure firm can execute mortgage and deed of trust assignments for multiple parties in multiple roles. Nothing stops the same employee from signing as assignor and assignee for the same deed of trust or mortgage at various times.

H. The Michigan courts' Saurman decisions

The Michigan appellate courts recently produced a set of divided decisions regarding MERS' right to foreclose under that state's foreclosure by advertisement statute. The statute permits non-judicial foreclosure by "the owner...of an interest in the indebtedness secured by the mortgage.[41] The majority of a divided Michigan Court of Appeals in

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[38] Karl E. Geier, *Show Me Your papers: Sales and Assignments for Secured Real Estate Loans and the California Foreclosure Process*, 22 Miller & Starr Real Estate Newsalert.
[39] *RHO Company v. Dept. of Revenue*, 113 Wash. 2d 561, 570, 782 P.2d 986, 991(1989).
[40] *Culhane, supra*, 2011 WL 5925525 * 17.
[41] Mich. Cons. Laws Ann. § 600.3204(1)(d).

Residential Funding Co., L.L.C. v. Saurman held that the statute did not authorize a non-judicial foreclosure in MERS' name.[42] Later, four of Michigan's seven Supreme Court justices voted to reverse the Court of Appeals in the context of deciding upon a petition for review.[43]

Michigan's Supreme Court interpreted the state's foreclosure by advertisement statute to allow a party having only an interest in the mortgage and no interest in the note to foreclose. In holding that a foreclosure could be conducted in MERS' name, the Court noted "[w]e clarify, however, that MERS' status as an 'owner of an interest in the indebtedness' does not equate to an ownership interest in the note."[44] Instead, the court interpreted the word "interest" in the statute to include a lien on the property. In the Supreme Court's view,payment of the debt affected the interest in the lien because the lien must be removed when the underlying debt is paid. According to the court, this speculative "interest" (a "contingent" interest in the court's words) allowed a party to foreclose under the statute even though the party did not own any beneficial interest in the debt. This interpretation would allow someone who performs ministerial tasks remotely associated with the debt to

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[42] *Residential Funding Co., L.L.C. v. Saurman*, 292 Mich. App. 321, -- N.W. 2d --, 2011 WL 1516819 (Mich. App. April 21, 2011).
[43] *Residential Funding Co., L.L.C. v. Saurman*, 490 Mich. 909, 805 N.W. 2d 183 (Mich. Nov. 16, 2011).
[44] *Id.* at 909.

foreclose under the statute simply because the performance of those tasks might be triggered by payment or non-payment of the debt. A similar analysis cannot be made regarding RCW 61.25.005(2). Washington's statute requires the party seeking to foreclose to be an actual "holder of the instrument or document evidencing the obligations secured by the deed of trust." This is an absolute requirement and there is nothing contingent about it. While the Michigan statute does not refer to any documents embodying these concepts, the language of RCW 61.24.005(2) is explicit. Washington recognizes the existence of an "instrument or document evidencing the obligation" that is distinct from the security instrument.

V. CONCLUSION

The Court of Appeals majority in *Saurman* harmonized the language of the foreclosure statute with state statutes governing the enforcement of promissory notes.[45] The Michigan Supreme Court's summary order failed to clarify this point, leaving in limbo the question of enforcement of the note by a non-mortgagee or by other parties. Ms. Bain's case presents this Court with the unique opportunity to clarify this point for Washington homeowners.

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[45] *Residential Funding Co., L.L.C. v. Saurman*, 292 Mich. App. 321, 2011 WL 1516819 * 8.

Leen & O'Sullivan, PLLC

By: _____
David Leen, WSBA No. 3516
520 East Denny Way
Seattle, WA 98122
(206) 325-6022

National Consumer Law Center

By: _____ for
Geoffry Walsh
Vt. Sup. Ct. No. 2570
7 Winthrop Square
Boston, MA 02110
(617) 542-8010