No. 14-4315

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MONTGOMERY COUNTY, PENNSYLVANIA, RECORDER OF DEEDS, by and through NANCY J. BECKER, in her official capacity as the Recorder of Deeds of Montgomery County, Pennsylvania, Plaintiff-Appellee,

v.

MERSCORP, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Pennsylvania Civil Action No. 11-CV-06968 (Honorable Curtis Joyner)

OPENING BRIEF FOR APPELLANTS AND JOINT APPENDIX VOLUME I (JA 1 to JA 109)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, Appellants-Defendants MERSCORP, Inc. (n/k/a MERSCORP Holdings, Inc.) and Mortgage Electronic Registration Systems, Inc. make the following disclosure:

1. Mortgage Electronic Registration Systems, Inc. is a wholly-owned subsidiary of MERSCORP Holdings, Inc., which does not have a parent company.

2. The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association each own 10% or more of the stock of MERSCORP Holdings, Inc.

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PRELIMINARY STATEMENT

This case presents several legal issues regarding the proper interpretation and application of Section 351 of Pennsylvania's Land Recording Acts, 21 Pa. Stat. § 351, a statute enacted in 1925 that traces its origins back to the early 18th century. For the first time ever, the District Court has held that Section 351 requires all Pennsylvania mortgages, mortgage assignments, and promissory note transfers to be recorded in the public land records, and, if they are not, the County Recorder may sue to compel such recording. These issues have arisen because Plaintiff, the Recorder of Deeds for Montgomery County, Pennsylvania ("Plaintiff" or the "Recorder"), seeks to raise revenue by collecting recording fees for services the County did not perform.

The present controversy concerns two principal and distinct financial components of a typical mortgage loan transaction involving the use of borrowed funds. First, the buyer, having arranged to obtain a loan, signs a promissory note agreeing to repay the lender on specified terms. Promissory notes are negotiable instruments that can be transferred from one holder to another by change of possession alone. Second, to provide security for the lender, the buyer executes a mortgage, giving the lender a mortgage lien on the property until the loan is repaid. Lenders commonly record mortgages in the public land records maintained by

public officials, such as Plaintiff, to protect the lien's priority by providing notice of its existence.

Defendant MERSCORP, Inc., now known as MERSCORP Holdings, Inc. ("MERSCORP"), owns and operates the MERS® System, a national electronic registry of loans secured by residential real estate. MERSCORP's wholly-owned subsidiary, Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), serves, by agreement among the members, as the mortgagee of record for mortgage loans registered in the MERS® System. When the promissory note associated with such a loan is transferred from one MERS® System member to another, MERS remains as the mortgagee and title holder of the mortgage. When the loan is transferred, no assignment occurs because MERS continues to serve as the mortgagee for the new holder of the note. There is therefore no need to create and record a written mortgage assignment. As a result, the transfer of promissory notes between members of the MERS® System operates more efficiently and with less expense.

Plaintiff contends that the MERS Defendants violated Section 351 by not recording documents and paying Plaintiff recording fees when a promissory note associated with a mortgage loan is transferred from one MERS® System member to another. There is no dispute that when a mortgage is first created and MERS is named as the mortgagee, the mortgage is recorded and a recording fee is paid to

Plaintiff. But when the *promissory note* associated with that mortgage subsequently is transferred between MERS® System members, MERS remains the mortgagee, there is no assignment of the mortgage, and, therefore, there is no mortgage assignment to be recorded and no recording fee to be paid. Plaintiff's improper attempt to collect recording fees and raise revenue every time a promissory note is transferred should be rejected for at least five independent reasons.

First, Section 351, like its statutory predecessors and like similar statutes in other states, does not *require* or *mandate* the recording of every mortgage and mortgage assignment. Instead, Section 351 simply provides a mechanism for the holder of a mortgage lien to establish the priority of its lien (and thereby protect itself) by recording the mortgage in the county in which the relevant property is located. Recording mortgages and mortgage assignments in Pennsylvania is discretionary.

Second, the transfer of a promissory note between MERS® System members does not itself constitute an assignment of a mortgage, because MERS is and remains the mortgagee before and after the debt transfer. The transfer of the note changes the holder of the debt—not the title holder of the mortgage. As a consequence, there is no assignment to be recorded in the county land records.

Third, Section 351 does not provide the Recorder with a right of action or statutory standing to sue for monetary or injunctive relief. Because the Pennsylvania legislature chose not to provide any such right of action, the Recorder may not pursue the same remedies through a common law action to quiet title or for unjust enrichment.

Fourth, neither MERS nor its parent, MERSCORP, holds, possesses, or has any beneficial interest in any promissory note that is transferred from one member to another. MERS is an agent that serves as the mortgagee on behalf of MERS® System members. It does not serve as an agent with respect to promissory notes or their transfer. Thus, the MERS Defendants cannot be obligated to create and then record documents reflecting promissory note transfers between others.

Fifth, even if the Recorder were permitted to enforce Section 351 through common law claims to quiet title or for unjust enrichment, neither of those claims should have survived the MERS Defendants' motion for summary judgment. The quiet title claim, which the District Court created out of whole cloth, fails because the Recorder does not claim any interest in any real property, nor does the Recorder identify any title dispute concerning such property. Likewise, the purported claim for unjust enrichment fails because the Recorder has conferred no uncompensated benefit on either of the MERS Defendants. All of the mortgages

held by MERS have been recorded, and the applicable recording fees have been paid for those recorded mortgages.

For all of these reasons, the District Court's Order granting partial summary judgment to the Recorder and denying the MERS Defendants' motion for summary judgment should be reversed, and the Recorder's Complaint should be dismissed with prejudice.

JURISDICTIONAL STATEMENT

The District Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). Plaintiff is a citizen of Pennsylvania (as are the other class members). The MERS Defendants are incorporated in Delaware and have their principal place of business in Virginia. The amount in controversy exceeds $75,000.

This Court has jurisdiction under 28 U.S.C. § 1292(b). By an Opinion and Order dated July 11, 2014 (collectively, the "Order"), the District Court granted the Recorder's motion for summary judgment in part and denied the MERS Defendants' motion for summary judgment. (JA 1-47.) On September 8, 2014, the District Court certified its Order for interlocutory appeal under 28 U.S.C. § 1292(b). (JA 48-52.) This Court granted leave to appeal on October 16, 2014. (JA 53.)

ISSUES PRESENTED

1. Whether 21 Pa. Stat. § 351 of Pennsylvania's Land Recording Acts ("Section 351") requires the recording of all mortgages and mortgage assignments. (JA 16-23, 85-88.)

2. Whether Section 351 requires the creation and recording—as a "mortgage assignment"—of a document reflecting the transfer of a promissory note secured by a mortgage on real property, even if the mortgagee remains the same before and after the note transfer. (JA 23-29.)

3. Whether the Recorder has a right of action or statutory standing to enforce the obligations allegedly imposed by Section 351, and, if not, whether the Recorder may nevertheless require payment of recording fees through a common law action to quiet title or for unjust enrichment. (JA 9, 104.)

4. Whether an agent serving as the mortgagee of record, on behalf of the holder of the promissory note, is liable under Section 351 to create and then record documents evidencing the transfer of that note between others. (JA 30-37.)

5. Whether the Recorder's claims to quiet title and for unjust enrichment can survive summary judgment in the absence of any evidence of either a title dispute to real property or some uncompensated benefit allegedly conferred by the Recorder on the MERS Defendants. (JA 37-43, 70-73, 105-106.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously, and there are no related pending cases before this Court. The attached List of Pending Related Cases identifies pending cases at the trial court level that involve issues that are substantially similar to issues in this appeal.

STATEMENT OF THE CASE

This appeal involves a string of unprecedented rulings by the District Court regarding the application of Section 351 of Pennsylvania's Land Recording Acts. Each of these unprecedented rulings was erroneous.

A. Pennsylvania's Land Recording Acts

At common law, no organized central registry existed to resolve competing claims of ownership of interests in land. *See* 14 *Powell on Real Property* § 82.01[1][a] (M. Wolf ed. 2014) (describing history of land recording statutes). Like other state legislatures, the General Assembly enacted Pennsylvania's land records statutes (collectively, the "Pennsylvania Land Recording Acts") to enable property owners and those with liens on property to give public notice of their real property interests and thereby establish priority over later competing claims to the same property.

The first Pennsylvania Land Recording Act was passed in 1715. Among other things, it created an Office for the Recording of Deeds in each Pennsylvania county and provided that "all bargains and sales, deeds and conveyances of lands,

tenements, and hereditaments, *may be recorded* in the said office." Act of May 28, 1715 ("1715 Act"), 1 Sm. L. 94, § 2 (emphasis added), attached as Exhibit A. The 1715 Act was then "supplemented" in 1775 to further protect persons from being "injured in their purchases and mortgages by prior and secret conveyances and fraudulent encumbrances." Act of March 18, 1775 ("1775 Act"), 1 Sm. L. 422, at "Whereas" Clause, attached as Exhibit B. The 1775 Act explained that, if holders of property interests did not record these interests in the county recorder's office, they would forfeit these interests as against subsequent purchasers or mortgagees of the property. *Id.* § 2. As the District Court recognized, these early versions of Section 351 "did not make recording mandatory . . . ." (JA 18.)[1]

In 1925, the Pennsylvania legislature passed what is now Section 351 and then amended it in 1931 with very little change in language. *See* Act of May 12, 1925 ("1925 Act"), P.L. 613, § 1, attached as Exhibit C. Like the 1715 Act and the 1775 Act, Section 351 provides that a person who chooses to record a deed or lien must do so in the county where the property is located:

> All deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intention of the parties executing the same to

[1] The District Court took the position that the Act of April 1, 1863, P.L. 188, which was repealed in 1978, first made recording mandatory for all mortgages and mortgage assignments in Pennsylvania. (JA 18-19 (Order).) It did not. Rather, it authorized present owners (or others) with an interest in property to bring an action in the Pennsylvania court of common pleas against former owners (or others) who refused to deliver or record any written conveyances concerning that property in their possession after six months' notice.

> grant, bargain, sell, and convey any lands . . . shall be recorded in the office for the recording of deeds in the county where such lands . . . are situate. Every such deed, conveyance, contract, or other instrument which shall not be acknowledged or proved and recorded, as aforesaid, shall be adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee or holder of any judgment, duly entered in the prothonotary's office of the county in which the lands . . . are situate, without actual or constructive notice unless such deed, conveyance, contract, or instrument of writing shall be recorded, as aforesaid, before the recording of the deed or conveyance or the entry of judgment under which such subsequent purchaser, mortgagee, or judgment creditor shall claim. . . .

Act of July 12, 1931, P.L. 558, codified at 21 Pa. Stat. § 351, attached as Exhibit D. While several statutes in Pennsylvania's Land Recording Acts provide a right of action to enforce their provisions, Section 351 does not.

B. The MERS® System

There is no dispute about the way in which the MERS® System operates. By agreement among the members of the MERS® System, MERS serves as the mortgagee of record in public land records as the nominee or agent for each lender that is a MERS® System member and for that member's successors and assigns. (JA 76 (Mem. in Supp. of Order on Defs.' Mot. to Dismiss); JA 160 (Declaration of William Hultman ("Hultman Decl.").) When one such member sells or transfers a promissory note to another member, MERS "remains the named mortgagee as 'nominee' for the subsequent owners of the note[.]" (JA 77, 162.) Thus, when a note is sold or transferred between members, the mortgagee of record, which is MERS, does not change (although MERS' principal changes). (*Id.*) But the

mortgage itself is not assigned or otherwise transferred, and no mortgage assignment is created or recorded.

MERS and MERSCORP do not own or hold the promissory notes for the secured loans that members register on the MERS® System. (JA 158-159 (Hultman Decl.).) The MERS Defendants therefore neither make nor receive any transfer of promissory notes. *Id.* If a MERS® System member transfers a note to a non-member, then MERS (as mortgagee) will typically assign the mortgage, and that mortgage assignment by MERS is recorded in the public land records and the recording fee is paid. (JA 160-161.)

C. The Recorder's Complaint

The Recorder filed this putative class action against the MERS Defendants on November 7, 2011. Despite being aware since 2004 of how the MERS® System operates, the Recorder never previously attempted to enforce any alleged recording requirement under Section 351 against the MERS Defendants (or any other person or entity). (JA 151 (Deposition of Recorder Nancy Becker ("Becker Dep.").) Indeed, no county recorder had previously interpreted Section 351 to mandate the recording of mortgages, and no county recorder had brought any action to enforce Section 351's supposed mandatory recording requirement. To this day, the Recorder does not allow for the recording of promissory notes or debt

transfers in the public land records. (JA 152, 176, 188 (Becker Dep.); JA 155 (Deposition of Ava Tuturice ("Tuturice Dep."), First Deputy Recorder)).

Nonetheless, the Recorder's case rests solely on the legal theory that the MERS Defendants *violated* Section 351 by not recording with her Office transfers of promissory notes between MERS® System members. (JA 134, 140-141, 144-147 (Complaint).) The Recorder maintains that such debt transfers should be treated as "mortgage assignments." *Id.* And even though such debt transfers are not in a written, recordable form, the Recorder insists that Section 351 requires the MERS Defendants to create a document evidencing the transfer of debt between other parties, and then to record that document with her Office.

The Recorder's Complaint asserted four claims: a statutory claim for a violation of Section 351, unjust enrichment, civil conspiracy, and a request for declaratory relief. (JA 144-147.) No quiet title claim was pled.

D. Decisions Rejecting The Recorder's Legal Theory Under Similar Recording Statutes

Counties and county officials across the country have brought similar actions, based on similar legal theories, under parallel state recording statutes. Courts repeatedly have dismissed these actions for numerous independent reasons, including that state recording statutes do not create a duty to record mortgages or

mortgage assignments;[2] that even if such a duty to record mortgages and mortgage assignments exists, it does not extend to transfers of promissory notes;[3] and that county recorders do not have a right of action to enforce any recording obligation—through common law claims or otherwise.[4]

The MERS Defendants are unaware of any court that has ever held that a county recorder can pursue an action against anyone for choosing not to record mortgages—much less transfers of promissory notes—under a state recording law.

E. The District Court's Denial Of Defendants' Motion To Dismiss

The MERS Defendants moved to dismiss the Recorder's Complaint because, among other things, Section 351 does not impose a duty to record and does not

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[2] *See, e.g., County of Ramsey v. MERSCORP Holdings, Inc.*, --- F.3d ----, No. 13-3026, 2014 WL 7236794, at *2 (8th Cir. Dec. 19, 2014) (Minnesota law); *Plymouth County, Iowa v. MERSCORP, Inc.*,--- F.3d ----, No. 13-2334, 2014 WL 7236780, at *3-4 (8th Cir. Dec. 19, 2014) (Iowa law); *Union County, Ill. v. MERSCORP, Inc.*, 735 F.3d 730, 735 (7th Cir. 2013) (Illinois law); *Brown v. MERS, Inc.*, 738 F.3d 926, 935 (8th Cir. 2013) (Arkansas law); *Bristol County v. MERSCORP, Inc.*, No. 12-1246-BLS 2, 2013 WL 6064026, at *2 (Super. Ct. Mass. Nov. 15, 2013) (Massachusetts law); *Jackson County Mo. v. MERSCORP, Inc.*, 915 F. Supp. 2d 1064, 1071 (W.D. Mo. 2013) (Missouri law).

[3] *See, e.g., Macon County, Ill. v. MERSCORP, Inc.*, 742 F.3d 711, 714 (7th Cir. 2014); *Ellington v. Fed. Home Loan Mortg. Corp.*, 13 F. Supp. 3d 723, 729 (W.D. Ky. 2014); *but see Higgins v. BAC Home Loans Servicing, LP*, No. 12-CV-183-KKC, 2014 WL 1333069, at *4 (E.D. Ky. Mar. 31, 2014), *appeal docketed*, No. 14-6167 & 14-6168 (6th Cir. Sept. 24, 2014).

[4] *See, e.g., Christian County Clerk ex rel. Kem v. Mortg. Elec. Reg. Sys., Inc.*, 515 Fed. Appx. 451, 456, 459 (6th Cir. 2013); *Fuller v. Mortg. Elec. Reg. Sys., Inc.*, 888 F. Supp. 2d 1257, 1270-71 (M.D. Fla. 2012); *Boyd County ex rel. Hendrick v. MERSCORP Inc.*, 985 F. Supp. 2d 823, 829-30 (E.D. Ky. 2013).

allow for a private right of action to enforce its terms. The District Court denied the motion to dismiss, ruling that Section 351 imposes a duty to record mortgages and mortgage assignments. (JA 84-85.)

In addition, when confronted with the fact that Section 351 lacks a right of action in the Recorder's favor, the District Court *sua sponte* amended the Recorder's Complaint to add a quiet title claim, even though the Recorder pled no such claim and has no interest in any mortgaged real property for which she allegedly seeks to quiet title. (JA 88-89, 98.)[5] The MERS Defendants moved to dismiss the quiet title claim added by the District Court, but that motion also was denied. (JA 70-73.)

F. The District Court's Summary Judgment Ruling

Following discovery, Defendants and the Recorder filed motions for summary judgment. There is no factual dispute on any of these points: (1) the mortgages for which MERS is the mortgagee have been recorded in the county land records; (2) the recording fees for those mortgages have all been paid; (3) the MERS Defendants do not possess, transfer, or receive promissory notes, including those notes transferred between MERS® System members; and (4) promissory

[5] The District Court dismissed the civil conspiracy claim. (JA 74.)

notes or documents memorializing transfers of promissory notes have never been recorded with the Recorder. (JA 158-162 (Hultman Decl.).)[6]

The District Court denied Defendants' motion in its entirety and granted Plaintiff's cross-motion for summary judgment in part. (JA 1-2.) In a series of unprecedented rulings, the District Court incorrectly held that:

- Section 351 requires the recording of all mortgages and mortgage assignments;
- Transfers of promissory notes convey title to or interests in real property and are therefore "mortgage assignments" that must be recorded under Section 351;
- The Recorder can bring common law claims to enforce Section 351 even though the statute does not provide the Recorder with a right of action;
- The MERS Defendants are compelled to create and record documents memorializing secured promissory note transfers even though they do not transfer, receive, or possess such notes;
- The Recorder may proceed on her quiet title and unjust enrichment claims even though, *inter alia*, the Recorder has no interest in the real property for which she seeks to quiet title; no title dispute exists as to any of those properties; and the Recorder has not conferred any benefit that the MERS Defendants have wrongly retained with respect to any unrecorded documents.

(JA 3-47.)

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[6] On February 12, 2014, before ruling on the summary judgment motions, the District Court, over Defendants' objections, certified a class under Fed. R. Civ. P. 23(b)(3) of "[e]ach County Recorder of Deeds in Pennsylvania in his or her official capacity." (ECF No. 97.) No notice has been issued to the class, and the proceedings before the District Court have been stayed pending resolution of this appeal. (ECF Nos. 142, 149.)

The District Court entered a judgment declaring that under Section 351, Defendants are "*obligated to create* and record written documents memorializing the transfers of debt/promissory notes which are secured by mortgages in the Commonwealth of Pennsylvania for all such debt transfers past, present and future in the Office for the Recording of Deeds in the County where such property is situate." (JA 1-2 (emphasis added).)

On September 8, 2014, the District Court amended and certified its Order for appeal pursuant to 28 U.S.C. § 1292(b). (JA 48-52.) This Court granted interlocutory review.

SCOPE AND STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed *de novo*, utilizing well-settled summary judgment standards. *See Alcoa, Inc. v. United States*, 509 F.3d 173, 175 (3d Cir. 2007). In addition, the interpretation of a statute is an issue of law that is reviewed *de novo*. *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 323 (3d Cir. 2012). Thus, all issues raised by this appeal are reviewed *de novo*, without any deference to the District Court's rulings.

SUMMARY OF THE ARGUMENT

First, the District Court erred in concluding that Section 351 imposes a mandatory duty to record mortgages and their assignment. Pennsylvania law has never imposed such a requirement. The words "shall be recorded" in Section 351

must not be read in isolation but rather in the context of the entire statute, its purpose, and history—which show that the phrase refers to *where* recording shall take place, if a party chooses to record. The General Assembly enacted the Pennsylvania Land Recording Acts, including Section 351, to provide lenders and others with a means to provide constructive notice of their interest in real property. A lender's failure to provide such constructive notice of its lien creates a risk because a subsequent lien on the property may take priority over an unrecorded lien. But, if a lender or other creditor wishes to assume that risk and not record a mortgage, nothing in Pennsylvania law prevents the lender from doing so.

Second, even if Section 351 did impose a duty to record mortgages and mortgage assignments, it cannot properly be read to require the recording of promissory note transfers (under the theory that they are "mortgage assignments"). Unlike a mortgage, a promissory note is *personal* property that may be transferred or negotiated by possession alone. Promissory notes do not convey or affect title to real property, and, thus, transfers do not reflect, under Section 351, the "intention of the parties" to "grant, bargain, sell, and convey any lands." In this case, the mortgagee of real property is MERS, and MERS remains the mortgagee after the transfer of a promissory note between principals. Moreover, the transfer of a promissory note does not result in an "instrument[] of writing" capable of

being recorded, and Section 351 imposes no obligation to create documents that do not currently exist.

Third, the MERS Defendants were entitled to summary judgment because Section 351 does not provide for a right of action or otherwise authorize enforcement by the Recorder, a ministerial actor that records and indexes documents. The General Assembly created a cause of action to allow certain borrowers to enforce certain statutes within Pennsylvania's Land Recording Acts, but no such cause of action exists in the Recorder's favor under Section 351. In addition, because the Recorder has no right of action to enforce Section 351, she may not use common law claims to circumvent the intent of the Pennsylvania legislature.

Fourth, the District Court erred because the MERS Defendants do not transfer or receive promissory notes. Neither MERSCORP nor MERS possesses, holds, or owns any promissory notes secured by property in Montgomery County (or any other Pennsylvania county). MERS is an agent of the MERS® System members in serving as mortgagee for properties as to which members have made secured loans. Although a principal (such as a member-lender) can be responsible for the acts of an agent (such as MERS), the opposite generally is not true: the agent is not, and cannot be, liable for its principal's alleged failure to comply with Section 351. There is no evidence that MERSCORP or MERS has the authority to

create and then record documents memorializing note transfers to which it is not a party. Section 351 creates no such obligation.

Lastly, the District Court erred by holding that Plaintiff's Complaint could survive summary judgment on the common law quiet title and unjust enrichment claims. The unjust enrichment claim fails because it is not a stand-alone tort claim under Pennsylvania law. More fundamentally, recording fees were paid for the mortgages held by MERS, and the Recorder conferred no benefit on the MERS Defendants in connection with documents that were never recorded.

Likewise, the Recorder's quiet title claim that is not pled in the Complaint is fatally flawed. The Recorder did not present evidence (or even plead) that she has an interest in any land or promissory note or that there is a title dispute for any property for which she seeks to quiet title. Moreover, the Recorder failed to join, as she must, all indispensable parties who have an interest in the properties as to which the Recorder allegedly seeks to quiet title.

ARGUMENT

I. PENNSYLVANIA LAW DOES NOT IMPOSE A DUTY TO RECORD.

The Pennsylvania Land Recording Acts are three hundred years old. Early on, the Pennsylvania Supreme Court recognized that recording under these provisions is optional:

> Thus it appears that the language of the Acts of Assembly providing for the recording of written instruments *has not generally been*

> *mandatory*. When recorded, however, we do not understand the effect thereof is in any respect lessened by the absence of an imperative command to record. *It is optional whether or not to record*. When *the election is made* and an instrument authorized by law to be recorded, is actually recorded, all the incidents and force of a public record attach to that record. It is an early and well recognized principle that one great object in spreading an instrument of writing on a public record, is to give constructive notice of its contents to all mankind . . . .

Pepper's Appeal, 77 Pa. 373, 377 (1875) (emphasis added); *see also Mott v. Clark*, 9 Pa. 399, 406 (1848) ("assignee is not bound to register his assignment, and is in no default"); 8 P.L.E. *Commercial Transactions* § 144 (2014) ("*Recording is not obligatory, and is not necessary* as against one with actual notice of the assignment, but the failure to record an assignment may result in a loss of the lien as against innocent third persons." (emphasis in original)).

Section 351, enacted in 1925 (effective on January 1, 1926), did not change the rule that recording is optional. After Section 351 was passed, Pennsylvania courts continued to recognize the rule in Pennsylvania that the recording of mortgages and mortgage assignments is optional, not mandatory. *See Atl. Nat'l Trust, Ltd. Liab. Co. v. Fonthill Corp.*, No. 2708 EDA 2007, slip op., at 13 (Pa. Super. Ct. Nov. 13, 2008) (there is no mandatory duty to record mortgage assignments in the Pennsylvania Land Recording Acts and "there is little to no support in this Commonwealth's law for the proposition that assignments must be recorded to be valid") (attached as Exhibit E); *Easton Rd. Enters. v. Mellon Bank*,

No. 3220, 2007 WL 2024758 (Pa. Com. Pl. June 8, 2007) ("Under Pennsylvania law, an assignee may record the assignment. . . . [R]ecording is not obligatory."), *aff'd* 953 A.2d 844 (Pa. Super. Ct. 2008).

The District Court nevertheless held that Section 351 imposes an *obligation* to record all mortgages and mortgage assignments. The District Court relied on the fact that Section 351 uses the words "shall be recorded" rather than "may be recorded." (JA 87-88 (Mem. in Supp. of Order on Defs.' Mot. to Dismiss).) The District Court further reasoned that recording is mandatory because the statute appears under the general heading "NECESSITY OF RECORDING AND COMPULSORY RECORDING" in Purdon's unofficial statutory compilation. (JA 88.)

These points do not support the District Court's unprecedented conclusion. Under well-settled principles of statutory construction, a single phrase like "shall be recorded" cannot be ripped from context and construed in isolation. The Pennsylvania Statutory Construction Act provides that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. Stat. § 1921(a). Here, every relevant piece of information—the text of Section 351 as a whole, the statute's purpose, its history, the absence of any indication that the General Assembly intended the 1925 enactment to mark a dramatic departure from predecessor statutes, Pennsylvania

case law before and after the enactment of Section 351, and decisions from other jurisdictions interpreting nearly identical statutes—shows that the General Assembly did not intend to overturn over two hundred years of Pennsylvania law by imposing a mandatory duty to record in Section 351.

A. The Text Of Section 351, Read As A Whole, Does Not Mandate Recording.

Statutory language provides the first and often the best indication of legislative intent. *See* 1 Pa. Stat. § 1921(b); *Pa. Fin. Responsibility Assigned Claims Plan v. English,* 664 A.2d 84, 87 (Pa. 1995). In interpreting statutory language, however, courts are to "give[] effect to all of the statute's phrases," rather than focusing on isolated language. *Commonwealth v. McCoy*, 962 A.2d 1160, 1168 (Pa. 2009). They also should interpret a statute in accordance with "common sense and rational meaning[.]" *US Airways & Reliance Nat'l v. W.C.A.B.*, 808 A.2d 1064, 1068 (Pa. Commw. Ct. 2002).

Section 351's text, taken as a whole, does not create a duty to record all mortgages and mortgage assignments. It does not simply state that all conveyances "shall be recorded." Rather, it states that all conveyances "shall be recorded *in the office for the recording of deeds in the county where such lands, tenements, and hereditaments are situate[d]*." *Id.* (emphasis added). The "shall be recorded" phrase dictates *where* an instrument shall be recorded (*i.e.*, the location of

recording), but it does not create a blanket requirement that all mortgages and mortgage assignments must be recorded.

Had the Pennsylvania General Assembly in 1925 intended to change more than two hundred years of Pennsylvania law and mandate recording, it would have said so in a much more definitive manner. For example, it would have placed a period after "shall be recorded" or it would have provided that a secured promissory note becomes unsecured if a mortgage is not recorded. It did not do so, and the District Court erred, as a matter of law, in concluding that Section 351 mandates the recording of all mortgages.

Section 351 lacks key provisions that would signal legislative intent to impose a duty to record. Section 351 does not specify *who* must record the conveyance of real property: the assignor, the assignee, or some other person or entity. The statute does not provide *when* the document must be recorded (*i.e.*, how long after the mortgage or other conveyance is executed). And the statute does not specify any *penalties* (on unspecified persons) for not recording: there is no mention of any possibly aggrieved party (much less the Recorder) being able to obtain relief. Had the General Assembly intended for Section 351 to impose a duty to record, it would have provided these details.

By contrast, Section 682 of the Land Recording Acts requires the recording of a mortgage or lien satisfaction when the borrower has paid the mortgage in full,

and it specifies all of these details. The "mortgagee" is the party *who* is obligated to record the lien release. 21 Pa. Stat. § 682. The lien release must be recorded "within forty-five days after request and tender" of the loan balance. *Id.* The penalty for failure to record is that "for every such OFFENCE, [the mortgagee shall] forfeit and pay, unto the party or parties aggrieved, any sum not exceeding the mortgage-money." *Id.* None of these elements is present in Section 351.

The proper meaning of Section 351 is confirmed by the statute's second sentence, which describes the *sole* consequence of not recording. It says nothing about paying recording fees as a penalty if a document is not recorded or invalidating the mortgage or mortgage assignment. Instead, it explains that the *only* consequence of not recording is that the unrecorded conveyance will be "adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee or holder of any judgment . . . without actual or constructive notice." 21 Pa. Stat. § 351. The statute is all about establishing priority. Thus, recording is something that a party can choose not to do, subject to losing priority to certain subsequent purchasers.

In addition, the final portion of Section 351's second sentence makes clear that an unrecorded instrument is invalid against a subsequent purchaser without notice "unless such deed, conveyance, contract, or instrument of writing shall be recorded, as aforesaid, before the recording of the [subsequent purchaser's] deed or

conveyance." *Id.* This presupposes that some purchasers may not record, and explains what happens if someone elects not to record. All of this would have been unnecessary if recording were mandatory for everyone.

No Pennsylvania court (before the District Court in this case) has ever interpreted Section 351, or any of its predecessors, as imposing a duty to record mortgages or mortgage assignments. Nor has any county recorder (before this lawsuit) sought to enforce Section 351 by holding a borrower, lender, agent, or any other person or entity liable for not recording a mortgage or mortgage assignment.

Other courts have interpreted nearly identical "shall be recorded" language in state recording statutes as not imposing a duty to record. In *Union County*, for instance, the Seventh Circuit, in an opinion by Judge Posner, affirmed the dismissal of an almost identical lawsuit brought by an Illinois county against the MERS Defendants under Illinois law. The Illinois Recording Statute has the same "shall be recorded" phrase that Section 351 does; it provides that "deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, *shall be recorded in the county in which such real estate is situated . . . .*" 735 F.3d at 733 (emphasis added).

The Seventh Circuit held that the statutory language did not mandate the recording of mortgages or mortgage assignments, and that the "shall be recorded" language refers to *where* the instrument must be recorded, *if* someone chooses to

do so. *Id.* Reading the statutory language in context, the Seventh Circuit reasoned that there is an implicit "if" in the statute, such that "if you want to record your property interest you shall do so in the county in which the property is located." *Id.*[7] It further reasoned that the "purpose of recordation has never been understood to supplement property taxes by making every landowner, mortgagee, etc. pay a fee for a service he doesn't want," but "to protect the property owner or mortgage holder against claims to the property interest . . . ." *Id.* at 733. The Seventh Circuit stressed that "until this case . . . , no Illinois county official had taken the position that recording is mandatory." *Id.* at 734. Taking all of this into account, the Seventh Circuit concluded that "recording is optional." *Id. See also County of Ramsey*, 2014 WL 7236794, at *2 (affirming dismissal of nearly identical putative class action against MERS Defendants brought by Minnesota counties under Minnesota's Recording Statute, which, like Section 351, provides that "[e]very conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated . . . .").[8]

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[7] The Court used the cogent analogy of a department store that notifies consumers that "'All defective products must be returned to the fifth floor counter for refund.'" *Id.* The Court reasoned that "[o]bviously this is not a command that defective products be returned . . . There's an implicit 'if' in the command: If you want to return a product and get a refund, here's where you have to return it." *Id.*

[8] In fact, the MERS Defendants are unaware of any other state law that requires the recording of mortgages or, other than Kentucky statutory law, mortgage assignments. *See, e.g., Plymouth County*, --- F.3d ----, 2014 WL

The logic of these decisions applies here. Just as in *Union County* (Illinois) and *County of Ramsey* (Minnesota), the "shall be recorded" language in Section 351 refers to *where* a mortgage or mortgage assignment must be recorded, *if* someone chooses to record. Ignoring this logic, the District Court improperly relied on the fact that Section 351 (along with other statutory provisions) appears under the broader heading "NECESSITY OF RECORDING AND COMPULSORY RECORDING" in the statutory compilation. (JA 88.) But this heading was not part of the legislation itself, which was captioned "An Act Regulating the recording of certain deeds, conveyances, and other instruments of writing." 1925 Act, Ex. C. Rather, the heading appears to have been added not by the General Assembly but by the publisher of Purdon's unofficial statutory compilation. In such circumstances, where "the Pamphlet Laws do not reflect that this title was ever part of the legislation," courts "do not consider [the title] in [their] analysis." *Montgomery County v. Dep't of Corr.*, 879 A.2d 843, 845 n.1 (Pa. Commw. Ct. 2005). Put simply, Section 351 imposes no duty to record.

7236780, at *3-4 (Iowa law); *Hudson v. JPMorgan Chase Bank, N.A.*, 541 Fed. Appx. 380, 384 (5th Cir. 2013) (Texas law); *Brown*, 738 F.3d at 935 (Arkansas law); *Town of Johnston v. MERSCORP, Inc.*, 950 F. Supp. 2d 379 (D.R.I. 2013) (Rhode Island law); *Jackson County*, 815 F. Supp. 2d at 1070 (Missouri law).

B. The Purpose Of Section 351 Confirms That Pennsylvania Law Imposes No Duty To Record.

In determining legislative intent, courts may consider the "occasion and necessity for the statute," the "circumstances under which it was enacted," and the "mischief to be remedied." 1 Pa. Stat. § 1921(c). The Pennsylvania Supreme Court has held that Section 351's purpose is "to give *subsequent purchasers constructive notice* of the mortgage," so that they are not defrauded by possessors of the property who misrepresent the existence of encumbrances on the property. *First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178, 181 (Pa. 2005) (emphasis added); *see also Salter v. Reed*, 15 Pa. 260, 263 (1851) ("The principle runs through the whole system of our recording acts, that the *object is to give public notice in whom the title resides*; so that no one may be defrauded by deceptious appearance of title" (emphasis added)). To that end, Section 351 makes clear that the *only* consequence of a party choosing not to record a conveyance of land is loss of priority of that party's interest with respect to a subsequent purchaser who lacks notice. 21 Pa. Stat. § 351.

Pennsylvania's Land Recording Acts were never intended to be used by county recorders as a tool for raising revenue. This is clear from the problem that the statues sought to eliminate: "injuries caused by secret pledges of property." *Pa. Game Comm'n v. Ulrich*, 565 A.2d 859, 861-62 (Pa. Commw. Ct. 1989). By creating a statutory means for parties to provide notice of their property interests to

the world, the Pennsylvania Land Recording Acts are intended to provide, and do provide, protection against unscrupulous grantors and mortgagors. They do not, however, operate as a tax for the benefit of the County Recorder.

C. The History Of Pennsylvania's Land Recording Acts Confirms That There Never Has Been A Mandatory Duty To Record.

The District Court recognized that earlier versions of Section 351 did not impose a duty to record, yet did not give any weight to other important statutory provisions in existence when Section 351 was enacted. *See* 1 Pa. Stat. § 1921(c) (intent should be ascertained from "former law, if any, including other statutes upon the same or similar subjects"). When Section 351 was enacted, the Pennsylvania Land Recording Acts already specifically addressed the recording of mortgage assignments:

> All assignments of mortgages and letters of attorney authorizing the satisfaction of mortgages, duly executed and acknowledged, in the manner provided by law for the acknowledgment of deeds, *may be recorded in the office for recording of deeds*, in the county in which the mortgage assigned or authorized to be satisfied *may be or shall have* been recorded . . . .

Act of April 9, 1949, P.L. 524 § 14, codified at 21 Pa. Stat. § 623 (emphasis added), attached as Exhibit F. Section 623 uses the very language—"may be recorded in the office for recording of deeds"—that even the District Court would agree makes recording discretionary.

Section 351 and Section 623 existed together for more than 60 years and should be read as consistent with one another. 1 Pa. Stat. § 1932(b) ("Statutes in *pari materia* shall be construed together, if possible, as one statute"). The General Assembly hardly would have enacted a statute purportedly requiring mortgages and mortgage assignments to be recorded (*i.e.*, Section 351) when there was a preexisting (and continuing) statute providing that mortgage assignments did *not* need to be recorded (*i.e.*, Section 623). If the General Assembly had intended Section 351 to require all mortgages and mortgage assignments to be recorded notwithstanding the language of Section 623, it would have said so. When the two provisions are read together, as they must be, Section 623 confirms that the "shall be recorded" language in Section 351 refers to where a document must be recorded, if someone chooses to record.[9]

Although Section 623 was repealed in 1998, Pennsylvania courts continue to hold that recording mortgage assignments is optional. *See, e.g., Atl. Nat'l Trust L.L.C.*, 2708 EDA 2007, slip op., Ex. E, at 12-13 ("We cannot assume the General Assembly intended to overrule 150 years of settled law simply by repealing section

[9] At a minimum, the coexistence of Section 623 and Section 351 for more than 60 years shows that the Pennsylvania legislature used the word "shall" and "may" in these recording statutes interchangeably—and in a discretionary way. Indeed, "it has long been the rule in Pennsylvania that the word 'shall,' although usually mandatory or imperative when used in a statute, may nonetheless be directory or permissive, depending upon the Legislature's intent . . . ." *Tyler v. King*, 496 A.2d 16, 19 (Pa. Super. Ct. 1985) (collecting cases).

623"); *Easton*, 2007 WL 2024758 (applying rule). Under Pennsylvania law, there has never been any obligation to record mortgages or mortgage assignments.

D. There Is No Duty To Record Because The Pennsylvania Supreme Court Has Made Clear That Unrecorded Deeds And Assignments Remain Valid.

The Pennsylvania Supreme Court has repeatedly held that the decision not to record a mortgage or its assignment does not render the instrument invalid. *See, e.g.*, *Fiore v. Fiore*, 174 A.2d 858, 859 (Pa. 1961) ("The recording of the deed was not essential to its validity or the transition of the title."); *Malamed v. Sedelsky*, 80 A.2d 853, 856 (Pa. 1951) ("Delivery is all that is necessary to pass title, recording is only essential to protect by constructive notice any subsequent purchasers, mortgagees and new judgment creditors."); *see also Fusco v. Hill Fin. Sav. Ass'n*, 683 A.2d 677, 681 (Pa. Super. Ct. 1996) ("Of course, the fact that the assignment was unrecorded did not disprove that there had been a valid assignment[.]").

The Pennsylvania Supreme Court could not have reached these decisions and upheld the validity of unrecorded instruments if failing to record mortgages or mortgage assignments violated Pennsylvania law. *See, e.g.*, *Union County*, 735 F.3d at 734 (finding no duty to record under Illinois law based in part on Illinois Supreme Court precedent upholding "the validity of unrecorded mortgage assignments" and emphasizing that "they wouldn't do this if failure to record violated Illinois law").

E. Requiring The MERS Defendants To Record Under Section 351 Would Raise Serious Questions About The Statute's Constitutionality.

Federal courts should construe a state statute to avoid raising doubts about the statute's constitutionality. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided"); *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006) ("[F]ederal courts construe state statutes to avoid constitutional difficulty when fairly possible" (internal quotations omitted)).

As the Supreme Court has held, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). A statute is unconstitutionally vague when it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," so that they may act accordingly. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also United States v. Fontaine*, 697 F.3d 221, 226 (3d Cir. 2012); *Rising Sun Entm't, Inc. v. Pa. Liquor Control Bd.*, 860 A.2d 1193, 1198 (Pa. Commw. Ct. 2004) (applying rule).[10]

[10] This protection against vague statutes is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I to the Pennsylvania Constitution.

The Recorder's interpretation of Section 351 as imposing liability on the MERS Defendants for choosing not to record a mortgage assignment or a transfer of a promissory note renders Section 351 unconstitutionally vague. Section 351 provides no notice as to *who* must record, *when* the recording must take place, or *what* penalties can be imposed based on a failure to record. These missing essential details (among others) fail to give fair and adequate notice of what is required before a penalty may be imposed.[11]

II. EVEN IF THERE WERE A DUTY TO RECORD UNDER SECTION 351, THAT DUTY WOULD NOT APPLY TO PROMISSORY NOTE TRANSFERS.

Any duty to record that may be imposed by the language of Section 351 cannot apply to promissory note transfers, which do not convey any lands or interest in real property. As the District Court recognized, promissory notes are negotiable instruments that may be and often are transferred by possession alone—without the creation of a new document. (JA 14-15, 29 (Order).) The District Court further recognized that "promissory notes may generally be freely

[11] The MERS Defendants also moved for summary judgment on the basis that if the Recorder's interpretation were correct, Section 351 is unconstitutionally vague. The District Court denied this motion, holding among other things that Section 351 requires any person who "execute[s]" a document conveying "any real estate or interest in property located in the Commonwealth" to record that document. (JA 67.) The District Court's far-reaching interpretation applies to borrowers as well as lenders. It requires every borrower who signs a mortgage to record that mortgage, and, if the borrower does not, he or she is liable to the Recorder under Section 351. This highly improbable result confirms that there is no duty to record.

transferred *without the requirement* of recording." (JA 15 (emphasis added).) Yet the District Court ruled that whenever a promissory note secured by a mortgage is transferred, an "interest in and/or title to the property which secures it has been assigned and conveyed from one party to another under Pennsylvania law," such that Section 351 requires a document memorializing the promissory note transfer to be *created and recorded*. (JA 28.)

This legal conclusion ignores settled Pennsylvania law. Section 351 applies only to an existing "*written instrument*" memorializing an "intention of the parties" executing the document to "*convey any lands*." 21 Pa. Stat. § 351 (emphasis added). The transfer or sale of a promissory note is not a conveyance of land; and it does not necessarily involve any "written instrument." Moreover, interpreting Section 351 to require the recording of every promissory note transfer is not consistent with the purpose of the Pennsylvania Land Recording Acts.

A. Transfers Of Promissory Notes Do Not "Convey Any Lands" Under Section 351.

Under Pennsylvania law, a mortgage is quite different from the promissory note it secures. *See, e.g.*, *Courtney v. Ryan Homes, Inc.*, 497 A.2d 938, 942 (Pa. Super. Ct. 1985) ("A mortgage and an accompanying note are separate obligations. The note is evidence of the debt; and the mortgage provides collateral security for the debt."). Unlike a mortgage, *a promissory note is personal property* and its transfer, as a matter of law, is not a conveyance of land; it is a transfer of personal

property. *See MacKay v. Benjamin Franklin Realty & Holding Co.*, 135 A. 613, 614 (Pa. 1927) (referring to notes as personalty); *Fisher v. Burkholder*, 42 Pa. D. & C. 257, 259 (Pa. Com. Pl. 1942) ("'A promissory note is personal property . . . .'" (citation omitted)); *see also Planters' Bank of Miss. v. Sharp*, 47 U.S. 301, 321 (1848) ("promissory notes . . . come under the category of movable goods or personal property").

Thus, when a promissory note changes hands between MERS® System members, the owner or holder of the debt changes—but no land (or interest in land) is "conveyed" from one member to another. The mortgagee retains legal title to the mortgage, but now holds it for the benefit of the new promissory note holder, who has an equitable interest in the mortgage lien. *See McCall v. Lennox*, 1823 WL 2180, at *2 (Pa. Apr. 7, 1823) ("An assignment of the debt carries with it the *benefit* of the mortgage, although the mortgage be not specifically assigned; from the moment the debt is assigned, the mortgagee becomes the trustee of the assignee." (emphasis added)); *Andrews v. Marine Nat'l Bank of Erie*, 33 A.2d 75, 76 (Pa. Super. Ct. 1943) ("A change in the personnel of the bondholders *does not affect* the assets or security behind the bonds" (emphasis added)).

Well-settled legal principles make clear that the transfer of a promissory note does not "convey any lands" within the meaning of Section 351. The promissory note carries with it the beneficial rights to the mortgage securing

repayment, but title to the property—and the mortgagee of record—do not change simply because a promissory note is transferred. *See, e.g.*, *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 292 (1st Cir. 2013) ("[T]he transfer of the note does not automatically transfer the mortgage"); *Ellington*, 13 F. Supp. 3d at 729 ("While the transfer of a promissory note by MERS on behalf of a MERS financial member transfers an equitable interest in the mortgage, the transfer is not a mortgage assignment or a recordable event"); *Warren v. Homestead*, 33 Me. 256, 258 (Me. 1851) ("The mere selling of a note does not assign the mortgage, which secures it."); *but see Higgins*, 2014 WL 1333069, at *3 ("[E]very assignment of a note secured by a mortgage also transfers the mortgage").[12]

The District Court relied on *Carpenter v. Longan*, 83 U.S. 271 (1872), in support of the proposition that the mortgage and promissory note are "inseparable," so that when the promissory note is transferred, title to the property

[12] *See also Brandrup v. ReconTrust Co. N.A.*, 303 P.3d 301, 316 (Or. 2013) ("Because a promissory note generally contains no description of real property and does not transfer, encumber, or otherwise affect the title to real property, it cannot be recorded in land title records."); *Gregg v. Williamson*, 98 S.E.2d 481, 485 (N.C. 1957) ("Transfer of a note secured by a mortgage does not pass title to the land . . . . The assignment by Bagwell and Sanford to Gordon sufficed to transfer the debt only. It did not pass any title to the land."); *Citizens' Nat'l Bank v. Harrison Doddridge Coal & Coke Co.*, 109 S.E. 892, 894 (W.Va. 1921) ("[A]n assignment of a mortgage carries the legal title, while an assignment of the note or bond secured by it does not. . . . [A]n express assignment of the lien, the mortgage, or deed of trust is recordable, while an assignment of the note or bond it secures is not"); *Perry v. Fisher*, 65 N.E. 935, 936 (Ind. Ct. App. 1903) ("[T]he assignment of the note, while it did carry with it the mortgage, was not an assignment of the mortgage, within the meaning of this [recording] act").

through the mortgage is also passed. (JA 23.) But this reliance is misplaced. *Carpenter* addressed Colorado territorial law and federal common law. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 254 (5th Cir. 2013) (explaining that *Carpenter* "is inapposite, because the Court was addressing Colorado Territorial law and federal common law"). Nor did *Carpenter* address whether the transfer of a promissory note results in a conveyance of land, particularly when the mortgagee of record remains the same before and after the transfer. *Carpenter* is inapplicable to this case.

If the transfer of a secured promissory note conveyed title to real property, there would be no legal distinction under Pennsylvania law between the mortgagee and the note holder. As a matter of law, the note holder would always be the mortgagee. Pennsylvania law, however, has long recognized this distinction and the rule that the note holder and mortgagee do not need to be the same entity; title to property can reside in the name of one entity, as the mortgagee, for the benefit of a different entity who holds the note. *See* 21 Pa. Stat. § 721-2 (defining "Mortgagee" to include "the personal representatives, agents, nominees, successors or assigns of the current holder of the mortgage or note"); *McCall v. Lenox*, 1823 WL 2180, at *2 ("[F]rom the moment the debt is assigned, the mortgagee becomes the trustee of the assignee"); *Bank of America, N.A. v. Gibson*, 102 A.3d 462, 464-65 (Pa. Super. Ct. 2014) (affirming ability of MERS to serve as mortgagee of

record and assign the mortgage as agent for lender, who holds the promissory note).

The District Court also cited several Pennsylvania Supreme Court decisions which make clear that an "assignment of the debt transfers the right to the mortgage itself." *Moore v. Cornell*, 68 Pa. 320, 322 (1871). But having an equitable "right to the mortgage" or obtaining the benefits of the mortgage is not the same as a conveyance of land. When a note holder transfers a note, it is a transfer of personal property. The legal title to the corresponding mortgage does not transfer by operation of law. Rather, as stated, the note carries with it an equitable right to the mortgage. This equitable interest is not *title* to the property, much less a "convey[ance] [of] any land." 21 Pa. Stat. § 351.[13]

The Recorder's own actions confirm that a promissory note transfer is not a conveyance of land under Section 351. The Recorder has never recorded promissory notes, has never recorded any document that reflects the transfer of promissory notes, and makes no allowance for the recording of debt evidenced by promissory notes. (JA 176 ("We don't record notes."); JA 187 ("We do not record

[13] The District Court also cited the Pennsylvania Supreme Court's decision in *Russell's Appeal*, but that decision involved assignments of real estate purchase agreements, which, because they intend to convey title to land, constitute mortgages as a matter of Pennsylvania law. *See, e.g.*, *Russell's Appeal*, 15 Pa. 319, 1851 WL 5736, at *3 (1850) (holding that assignment of contract to purchase property was "merely a mortgage or security for a debt" because it created an interest in real estate). Even so, the Pennsylvania Supreme Court in *Russell* did not require the purchase contract to be recorded.

promissory notes."); JA 188 ("[I]f it was a promissory note that was transferred, we have no knowledge of it. We only record mortgages.").) In fact, in her ten years as the County Recorder, Ms. Becker has never seen anyone attempt to record a promissory note or *any document* evidencing the transfer of a promissory note. (JA 152 (Becker Dep.); *see also* JA 155 (Tuturice Dep.); JA 157 (Deposition of Joyce Gallagher, Administrative Deputy).) This testimony shows that the Recorder's claims are unfounded—and merely an improper effort to generate unearned revenue for the County.

B. Transfers Of Promissory Notes Do Not Result In An "Instrument Of Writing" Under Section 351.

Section 351 applies only to *existing* "instruments of writing." 21 Pa. Stat. § 351. It says nothing about requiring a party to create a document and then record it. This necessarily excludes promissory note transfers, because a promissory note is a negotiable instrument that can be, and often is, transferred by possession alone without any "instrument of writing." 13 Pa. Stat. § 3205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone."); *see also Sturdivant Bank v. Schade*, 195 F. 188, 195 (8th Cir. 1912) (holding that "[t]his transfer [of a promissory note] never was in writing, and could not be recorded . . . . There being no written instrument . . .

there was nothing to record and nothing which the laws of Missouri require to be recorded.").[14]

Here, the Recorder introduced no evidence to show that the MERS Defendants possess any existing "instruments of writing" memorializing promissory note transfers. Nor did the District Court identify any such written instrument that the MERS Defendants failed to record. Rather, the District Court improperly went well beyond the text of Section 351 and invented a new obligation *to create* a written document memorializing a note transfer, which then would be recorded. This requirement is nowhere found within Section 351.

In the District Court's view, this new obligation to create a document showing the assignment of a mortgage whenever a note transfer takes place flows from Section 623-1 (JA 28-29), which provides that "no assignment of any mortgage shall be entered of record in any county of the second class, unless such assignment shall be in writing . . . ." 21 Pa. Stat. § 623-1. But Section 623-1 says nothing about *promissory notes*, much less about whether transfers of promissory notes that have not been reduced to writing must be recorded. It merely reiterates the requirement that *only written assignments* can be recorded. Because Section

[14] The promissory note itself does not contain many of the requirements for a recordable document under Pennsylvania law, such as being acknowledged (21 Pa. Stat. § 623-2) and describing in detail the property that is securing the promissory note. *See, e.g., O'Connell v. Cease,* 110 A. 266, 267 (Pa. 1920); *In re Mirkin*, 100 B.R. 221, 227 (Bankr. E.D. Pa. 1989).

351 does not and cannot apply to non-existent documents and because the MERS Defendants do not have any existing recordable documents memorializing note transfers in their possession (JA 159 (Hultman Decl.)), the MERS Defendants should have been granted summary judgment.

C. Requiring The Recording Of Promissory Note Transfers Under Section 351 Is Inconsistent With The Purpose Of Pennsylvania's Recording Statute And Pennsylvania Law.

Section 351's purpose is not served by recording a document evidencing the transfer of a promissory note. Pennsylvania's Land Recording Acts, including Section 351, were not passed to provide the public with information about *who* owns the *debt* secured by the mortgage lien, which is what a promissory note represents. Indeed, the question of who owns the debt is separate and apart from the existence of the lien on the property, and recording who owns the debt has nothing to do with protecting "subsequent bona fide purchasers from injuries caused by secret pledges of property." *Ulrich*, 565 A.2d at 861-62.[15]

[15] Courts across the country have recognized this basic point. *See, e.g.*, *Mortg. Elec. Reg. Sys., Inc. v. Roberts*, 366 S.W.3d 405, 413 (Ky. 2012) ("The identity of the lender is not truly relevant to whether the purposes of the recording statutes are being promoted . . . ."); *Deutsche Bank Nat'l Trust Co. v. Pietranico*, 928 N.Y.S.2d 818, 829, (N.Y. Sup. Ct. 2011) ("The basic concept of a recording statute is that a person or company claiming an interest in land protects its interest by recording that interest at the county recorder of deeds office. . . . The concept of nominees appearing in the land records on behalf of the true owner has long been recognized. *It has never been the case that the true owners of interests in real estate could be determined using land records*.") (emphasis added); *see also In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("Under established rules, the maker [of the note]

Although Section 351 has been in existence for ninety years (and predecessor versions date back to 1715), no Pennsylvania court has ever interpreted Section 351 to require the recording of promissory note transfers. And no Pennsylvania county recorder has ever sought to enforce Section 351 by requiring all persons who transfer promissory notes to create documents evidencing such transfers, and then to record those documents.[16]

III. NO RIGHT OF ACTION EXISTS UNDER SECTION 351, AND THE RECORDER CANNOT USE COMMON LAW CLAIMS AS A MEANS OF CIRCUMVENTING THE LEGISLATURE'S INTENT.

Section 351 does not provide the County Recorder with a right of action to enforce its terms, and in the absence of a statutory cause of action, the Recorder lacks standing to bring common law claims to enforce Section 351.

A. Section 351 Contains No Express Right Of Action.

When the language of a statute does not expressly provide for a cause of action to enforce its terms, the general rule in Pennsylvania is that the legislature

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should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note . . . .").

[16] Although the Recorder argued before the District Court that borrowers rely on the public land records to determine *who owns the debt*, this is not true. If a borrower wishes to know who owns his debt or loan, he may ask his loan servicer, and federal law requires the servicer to provide the borrower with that information. 12 U.S.C. § 2605(e)(1). Also, no later than 30 days after a mortgage loan is sold or transferred to a third party, the borrower *must be notified* in writing of the sale or transfer of the debt, and he must be provided with, among other things, the identity and contact information of the new holder of the loan. 15 U.S.C. § 1641(g); *see also* 12 U.S.C. § 2605(b),(c), (i)(2), (i)(3).

did not intend for the statute to be enforced through a civil action. *Estate of Witthoeft v. Kiskaddon*, 733 A.2d 623, 626 (Pa. 1999) (affirming dismissal of claims based on alleged violation of Pennsylvania statute because "neither the Code nor the regulations expressly authorize a private cause of action"); *Solomon v. U.S. Healthcare Sys. of Pa., Inc.*, 797 A.2d 346, 353 (Pa. Super. Ct. 2002) (holding that a Pennsylvania statute does not provide for a right of action where the statute's provisions express no intent to create one). This rule has special force when the legislature has prescribed remedies under other provisions of the same statutory scheme. *See, e.g.*, *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 307 (3d Cir. 2007).

Here, Section 351 does not provide a right of action to any person—neither to an owner or mortgagor of real property, nor to the County Recorder in her ministerial task of recording mortgages. Rather, Section 351 establishes where and how a party with an interest in land secures priority—by recording that interest in the county where the land is located. And it establishes the only consequence for not recording—potential loss of priority to a bona fide purchaser or mortgagee who records first. Had the Pennsylvania legislature intended for the Recorder to have a right of action under Section 351, it would have expressly provided for one.

Indeed, elsewhere in the Pennsylvania Land Recording Acts, the legislature expressly created a right of action under certain circumstances. *See, e.g.*, 21 Pa.

Stat. §§ 681-682 (prescribing cause of action and penalties for failing to timely discharge a mortgage in the public land records); 21 Pa. Stat. § 762 (creating action for borrower against installment mortgage holder where mortgage holder fails to timely record evidence of installment payments); 21 Pa. Stat. § 764 (creating action for borrower against mortgagee who refuses to record information relating to mortgage payments). The legislature did not do so for Section 351.

B. No Basis Exists For Implying A Right Of Action Under Section 351.

No basis exists for implying a right of action in the Recorder's favor under Section 351. Under rare circumstances, a statute may provide for an implied right of action if: (1) the plaintiff is "one of the class for whose *especial* benefit the statute was enacted"; (2) there is clear legislative intent to create a private remedy; *and* (3) such a private remedy would be consistent with the underlying purpose of the legislative scheme. *Estate of Witthoeft*, 733 A.2d at 626 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)) (emphasis in original); *Solomon*, 797 A.2d at 352. None of these requirements is met here.

First, Section 351 was not created for the Recorder's special benefit. Courts applying Pennsylvania law have long recognized that Section 351 was enacted to benefit two groups: (1) the mortgagee on a loan, which has the option of recording

its interest to ensure priority over subsequent purchasers;[17] and (2) subsequent purchasers, mortgagees, and judgment holders, who then can make an informed decision on whether to purchase the encumbered land or extend credit with knowledge that a prior lien exists on the property.[18]

The Recorder does not fall into either category. She is a custodian of records, who is obligated to accept and record documents presented for recording. *See Chesapeake Appalachia, LLC v. Golden*, 35 A.3d 1277, 1281 (Pa. Commw. Ct. 2012); *Woodward v. Bowers*, 630 F. Supp. 1205, 1207 (M.D. Pa. 1986) ("The Recorder is truly just a 'custodian' of documents."). Although the Recorder receives a fee for performing the service of recording documents, that does not change the fundamental purpose of Section 351 or transform the statute into a revenue-raising measure for the Recorder's special benefit. *See Alfred M. Lutheran Distributors, Inc. v. A.P. Weilerbacher, Inc.*, 650 A.2d 83, 90 (Pa. Super. Ct. 1994) ("The fact that the statute bestows an incidental benefit upon [the

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[17] *See, e.g.*, *US Bank N.A. v. Mallory*, 982 A.2d 986, 994 n.6 (Pa. Super. Ct. 2009) ("Mortgages are recorded to provide notice to the world as to whose interest encumbers title."); *Salter*, 15 Pa. at 260 ("The object of the recording acts is to give public notice in whom the title to real estate resides . . . .").

[18] *See McCannon v. Marston*, 679 F.2d 13, 15 (3d Cir. 1982) ("Pennsylvania law [Section 351] gives subsequent purchasers of real property priority over the rights of prior purchasers if the subsequent purchasers are bona fide purchasers for value without notice."); *Land v. Pa. Hous. Fin. Agency*, 515 A.2d 1024, 1026 (Pa. Commw. Ct. 1986) ("The effect of [Section 351] is to protect subsequent bona fide purchasers.").

plaintiff] does not alter the fundamental purpose for which the statute was enacted, nor does it otherwise transform the [plaintiff] into a member of the class to whom the statute was designed to apply.").

Second, there is no evidence of legislative intent to create a right of action in the Recorder's favor. The Pennsylvania Supreme Court is "hesitant to infer or imply a legislative intent" where, as here, "the impact of such a leap would constitute a drastic change in law." *Estate of Witthoeft*, 733 A.2d at 627. Section 351 has never been enforced through a civil action to compel a mortgagee, mortgagor, or private individual to record a document and to pay recording fees. Had the Pennsylvania legislature wished to allow a ministerial actor, like the Recorder, to bring an action like the present one, it would have said so.

Third, as discussed, the Pennsylvania legislature passed Section 351 to give subsequent purchasers and lenders notice of the existence of liens on property. Allowing the Recorder to compel the recording of note transfers solely to obtain recording fees does not serve Section 351's purpose.

C. The Recorder Cannot Circumvent The Legislature's Intent By Using Common Law Claims To Enforce Section 351.

This Court has recognized the general rule that where a statute contains no right of action, a plaintiff cannot use common law claims to sidestep the legislature's intent. *See Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 66 (3d Cir. 2008) (affirming dismissal where "complaint attempts to use state common

law to circumvent the absence of a private right of action"). Pennsylvania law follows this rule. *See, e.g.*, *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 314 (Pa. Super. Ct. 2012) ("Absent legislative authority to pursue a private right of action, the Exchange is similarly barred from independently raising a claim for breach of a contract—a contract purporting to obligate Appellants to comply with, and pay fines imposed by, Rule 651.12"); *see also Frank B. Fuhrer Wholesale Co. v. MillerCoors LLC*, No. 13-1155, 2013 WL 5875819, at *7-8 (W.D. Pa. Oct. 30, 2013) (plaintiff could not assert common law claims relying on violation of statute lacking right of action because "[t]o do so would directly contradict the Pennsylvania legislature that decidedly did not directly create a private right of action"); *Kurtz v. Am. Motorist Ins. Co.*, No. 95-1112, 1995 WL 420034, at *2 (E.D. Pa. July 13, 1995) (applying rule).

If a plaintiff could assert common law claims based solely on an alleged violation of a statute lacking an enforcement mechanism and remedy, then every statute would be subject to an enforcement action regardless of the legislature's intent. This is not the law in Pennsylvania or elsewhere. Indeed, courts repeatedly have dismissed claims brought by county officials against the MERS Defendants, like the Recorder's here, that are premised entirely on a violation of land recording statutes that lack a right of action. *See, e.g.*, *Christian Cnty. Clerk ex rel. Kem*, 515 Fed. Appx. at 458-59; *Fuller*, 888 F. Supp. 2d at 1270.

All of the Recorder's claims, including the claims to quiet title and for unjust enrichment, are based solely on alleged violations of Section 351. The Recorder cannot use common law claims to do what Section 351 does not permit.

IV. IN ANY EVENT, THE MERS DEFENDANTS WERE NOT THE PROPER PARTIES TO BE SUED.

The MERS Defendants did not negotiate, sell, or otherwise transfer any promissory notes secured by mortgages recorded in Pennsylvania. (JA 159 (Hultman Decl.).) Thus, even if Section 351 somehow requires either or both parties to a note transfer to create and record a document memorializing that transfer, the MERS Defendants are not the proper parties to perform that task.

As an initial matter, MERSCORP, the parent of MERS, has no connection to any mortgages, mortgage assignments, or promissory note transfers, and it is not the designated mortgagee of record on any Pennsylvania mortgages. (JA 159.) MERSCORP's status as the parent of MERS is insufficient to impose liability on MERSCORP. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries").

Nor is MERS' role as the mortgagee of record an adequate basis for imposing liability on MERS. MERS does not transfer or receive any promissory notes secured by property in Montgomery County (or any other county in Pennsylvania). (JA 159, 162 (Hultman Decl.).) Thus, even if promissory note

transfers somehow give rise to a recording requirement under Section 351 (and they do not), MERS is not the proper party to perform any such recording.

MERS serves in the limited capacity of *mortgagee* of record (as nominee for the lender and its successors and assigns). (JA 160-161 (Hultman Decl.).) Although members possess and transfer promissory notes, MERS does not. (JA 159.) A principal can be held responsible for the acts or omissions of an agent, but the opposite generally is not true: an agent is not responsible, and cannot be held liable, for the acts or omissions of its principal. *See Levin v. Temple Shalom,* Civ. A. No. 90-4302, 1990 WL 143639, at *1 (E.D. Pa. Sept. 27, 1990) ("agents are not liable for their principal's conduct"); *Bash v. Bell Tel. Co. of Pennsylvania*, 601 A.2d 825, 833 (Pa. Super. Ct. 1992) (affirming dismissal of claims against agent because claims were premised on principal's wrongful conduct), *superseded on other grounds* by Pa. R. App. P. 341. The Recorder even acknowledges that the MERS Defendants are not responsible for the transfer of promissory notes. (JA 197 (Becker email) ("Now we have to go after the banks, *because MERS really can't do anything*. But it is a step in the right direction." (emphasis added).)

In fact, MERS does not have any authority to create and record documents memorializing note transfers as part of its role as an agent for members of the MERS® System. As explained, MERS functions only as the mortgagee of record on behalf of members. (JA 161 (Hultman Decl.).) That is the extent of its agency

relationship with members. MERS is *not* the agent for the members in regard to promissory notes (which are separate from mortgages) and their transfer. *Id.* Because creating and recording documents evidencing the transfer of promissory notes are not within the scope of MERS' agency role, MERS lacks authority to perform any such acts. *See Field v. Omaha Standard, Inc.*, 582 F. Supp. 323, 327 (E.D. Pa. 1983) *aff'd*, 732 F.2d 145 (3d Cir. 1984) ("Merely because a party is an agent for some purposes does not mean that the party is an agent for all purposes."); *Dougherty Distillery Warehouse Co. v. Binenstock*, 143 A. 195, 197 (Pa. 1928) ("The agent must adhere strictly to his instructions; he is bound to obey the instructions of his principal to the letter, and they cannot be enlarged or extended in any particular without the consent of the principal." (citation omitted)).

Brushing these legal principles aside, the District Court wrongly applied what it referred to as an "undisclosed agent" theory. (JA 33-37.) In contract law, there is a narrow exception to the general rule that agents are not liable for the acts of their principal. Under this exception, "an agent who enters into a *contract without disclosing* that he is acting for a principal is personally liable on *the contract*." *Burton v. Boland*, 489 A.2d 243, 245 (Pa. Super. Ct. 1985) (emphasis added). But this exception is limited to *contract* law and to situations where the contracting party is misled by the agent into believing that there is no principal. Here, however, the Recorder is not claiming that she entered into any contract with

MERS, much less that MERS misled the Recorder in any way. Thus, the contract law exception on which the District Court relied is inapposite.

In any event, MERS' agency relationship *is disclosed* in the recorded mortgages between lenders and borrowers, which explicitly designate MERS as the mortgagee, in its capacity as the nominee or agent for the lender and its successors and assigns. (JA 32 (Order), 160 (Hultman Decl.), 276-278 (Mortgage).) These mortgages are the very documents that are recorded in the Pennsylvania land records. Any contention that MERS is an "undisclosed" agent for MERS® System members fails for this additional reason. *See Burton*, 489 A.2d at 245 (holding that doctrine is inapplicable where the agency relationship has been disclosed); *In re N. Am. Commc'ns, Inc.*, 154 B.R. 450, 454 (Bankr. W.D. Pa. 1933) (same).

V. EVEN IF THE RECORDER COULD PURSUE HER UNJUST ENRICHMENT AND QUIET TITLE CLAIMS, SHE CANNOT SATISFY THE ELEMENTS OF THOSE CLAIMS.

The District Court should have granted summary judgment to the MERS Defendants, because the Recorder failed to introduce evidence needed to support her unjust enrichment and quiet title claims.

A. The Recorder Introduced No Evidence To Support Her Unjust Enrichment Claim.

Under Pennsylvania law, an unjust enrichment claim "is not a substitute for failed tort claims." *Zafarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 560-61 (E.D. Pa. 2010); *see Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*,

171 F.3d 912, 937 (3d Cir. 1999) (finding "no justification for permitting plaintiffs to proceed on their unjust enrichment claim once . . . District Court properly dismissed the traditional tort claims"). The elements of an unjust enrichment claim are: "(1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." *Mitchell v. Moore*, 729 A.2d 1200, 1203 (Pa. Super. Ct. 1999). There is no evidence to support any of these elements.

The Recorder did not confer any uncompensated benefit on the MERS Defendants. There is no dispute that the MERS Defendants paid for the recording of mortgages and mortgage assignments that were recorded—those naming MERS as mortgagee and all mortgage assignments to or from MERS. (JA 190-191 (Becker Dep.) ("We only record the documents when we get the fees up front.").) And the Recorder performed no service—and conferred no benefit—in regard to documents that were not recorded. Documents memorializing the transfer of promissory notes were never presented for recording, so the Recorder took no "actions" to record them, rendered no services, and, thus, did not confer any benefit on the MERS Defendants with respect to any such *unrecorded* documents.

Moreover, even if the MERS Defendants obtained some benefit from failing to *record* documents, any such benefit necessarily would have been one provided

by Pennsylvania law—not by the Recorder, a ministerial actor who is only empowered to record, index, and maintain documents. For this additional reason, courts have dismissed nearly identical unjust enrichment claims brought by counties or their recorders against the MERS Defendants. *See, e.g.*, *Christian Cnty. Clerk*, 515 F. App'x at 459-60; *Fuller*, 888 F. Supp. 2d at 1275; *Guilford Cnty. ex. rel. Thigpen v. Lender Processing Serv., Inc.*, No. 12 CVS 4531, 2013 WL 2387708, at *8 (N.C. Super. Ct. May 29, 2013).

There is nothing inequitable about not paying to record promissory note transfers that need not be recorded. *See, e.g.*, *Plymouth Cnty.*, --- F.3d ---, 2014 WL 7236780, at *3 ("when state law imposes no duty to record a mortgage or subsequent assignment, a county cannot successfully state a claim for unjust enrichment"); *Brown*, 738 F.3d at 934-935 (same); *Macon Cnty., Ill.*, 742 F.3d at 714 (same). Therefore, the MERS Defendants were not unjustly enriched.

B. The Recorder Introduced No Evidence To Support Her Quiet Title Claim.

Similarly, the Recorder introduced no evidence to support her quiet title claim. The District Court *sua sponte* revised the Recorder's Complaint to include a quiet title claim *that the Recorder never pled*. Having created this claim, the District Court then proceeded to ignore its many flaws.

First, the Recorder lacks an interest in any land as to which she supposedly seeks to quiet title. It is well-settled that "[t]he purpose of an action to quiet title is

to resolve a *conflict over an interest in property*." *Nat'l Christian Conference Ctr. v. Schuylkill Twp.*, 597 A.2d 248, 250 (Pa. Commw. Ct. 1991) (emphasis added). Thus, in order to pursue a quiet title claim, the Recorder must show that she has an interest in some specific land as to which she seeks to quiet title. *Id.* Here, the Recorder cannot do so because her quiet title claim is premised solely on an interest in recording fees—not an interest in any land (much less an interest in any mortgage or promissory note to which the Recorder was not a party). *See, e.g.*, *Jobe v. Bank of Am., N.A.*, No. 3:10-CV-1710, 2011 WL 4738225, at *6 (M.D. Pa. Oct. 6, 2011) (applying rule and dismissing quiet title claim); *Easton*, 2007 WL 2024758, at *3 (rejecting quiet title claim because plaintiff was trying to enforce a monetary judgment on property and "[t]he rule is plain on its face that the plaintiff/appellant's interest must be in land.").

Second, the Recorder has not provided, and cannot provide, any evidence of competing interests in any land as to which she supposedly seeks to quiet title. Under Pennsylvania law, a plaintiff must show that its interest in the subject property is superior to that of one or more adverse parties. *See, e.g.*, *Moore v. Pa. Dep't of Envtl. Res.*, 566 A.2d 905, 907 (Pa. Commw. Ct. 1989). Here, the Recorder claims no interest in any property, and has presented no evidence of any conflict over any interest in any property.

Third, the quiet title claim is flawed because the Recorder never pled—much less described or identified—any real property for which she supposedly seeks to quiet title. Pa. R. Civ. P. 1065 (plaintiff "shall describe the land in the [quiet title] complaint"); *MacKubbin v. Rosedale Mem'l Park, Inc.*, 198 A.2d 856, 857 (Pa. 1964) ("a complaint in an action to quiet title must describe the land in question"). The Recorder failed to describe any real property to which she seeks to quiet title, and her claim therefore should have been rejected as a matter of law. *MacKubbin*, 198 A.2d at 857 (affirming dismissal of quiet title claim where the "appellant has failed to comply with Rule 1065"); *see also Grace Bldg. Co., v. Parchinski*, 467 A.2d 94, 96–97 (Pa. Commw. Ct. 1983); *Cheesman v. Yurkanin*, 73 Pa. D. & C. 378, 379-80 (Pa. Com. Pl. 1950).

The District Court ignored this well-settled rule. It concluded that although the Recorder never pled a quiet title claim, her Complaint somehow incorporated the description of each unidentified property as to which the Recorder seeks to quiet title. (JA 71-72 (Order Denying Defs.' Mot. to Dismiss Pl's Quiet Title Claim).) But generic references to unidentified properties fail to satisfy Pennsylvania law and the requirement that the Recorder identify the specific property for which she seeks to quiet title. *See Cheesman*, 73 Pa. D. & C. at 380 (dismissing quiet title claim and rejecting attempt to "incorporate by reference any

matter of record which would include a reference to a record in the office of the recorder of deeds").

Finally, the Recorder failed to join the property owners or other persons with an interest in the property as necessary and indispensable parties to any quiet title action. Pennsylvania law is settled that any person with an interest in the land at issue, such as a property owner, is an indispensable party that must be joined in a quiet title action. *See Pocono Pines Corp. v. Pa. Game Comm'n*, 345 A.2d 709, 711 (Pa. 1975) (where decision in quiet title action would affect its property rights, federal government was "an indispensable party to the action"); *see also Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *Mains v. Fulton*, 224 A.2d 195, 196 (Pa. 1966). Because the Recorder failed to join all property owners and other interested parties, her purported quiet title claim should have been dismissed.

CONCLUSION

For all of the foregoing reasons, the District Court's Order granting summary judgment in part in the Recorder's favor and denying the MERS Defendants' motion for summary judgment should be reversed. Judgment should be entered in favor the MERS Defendants.

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Under Third Circuit LAR 28.3(d), I certify that I am a member of the bar of this Court.

January 30, 2015

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,974 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

January 30, 2015

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CERTIFICATE OF IDENTICALLY FILED BRIEFS

Counsel for Appellants-Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP Holdings, Inc. certify that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief filed with the Court.

January 30, 2015

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CERTIFICATE OF VIRUS CHECK

Counsel for Appellants-Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP Holdings, Inc. certifies that a virus check using McAfee VirusScan Enterprise, Version 8.0 was performed on the electronic version of this brief on January 30, 2015, prior to electronic filing with the Court.

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LIST OF PENDING RELATED CASES

The following pending cases arise from substantially the same case or controversy as this appeal or involve an issue that is substantially the same, similar, or related to an issue in this appeal:

1. *Montgomery County Pa. Recorder of Deeds v. Bank of New York Mellon, et al.*, No. 2:14-cv-5500-JCJ (E.D. Pa.).

2. *Loveless v. Bank of America, N.A., et al.*, No. 3:13-CV-01546-ARC (M.D. Pa.).

3. *Delaware County, Pa. Recorder of Deeds v. MERSCORP, Inc., et al.*, Civil Action No. 2013-010139 (Pa. Com. Pl.).

4. *County of Washington, PA v. U.S. Bank Nat'l Ass'n*, Civil Action No. 2011-7095 (Pa. Com. Pl.).

5. *County of Chester, Pa. Recorder of Deeds v. MERSCORP Holdings, Inc., et al*., Civil Action No. 2014-10113 (Pa. Com. Pl.).

6. *County of Bucks, Pa. Recorder of Deeds v. MERSCORP Holdings, Inc., et al*., Civil Action No. 2014-07427 (Pa. Com. Pl.).

7. *Kochersperger v. Mortgage Electronic Registration Systems, Inc., et al.*, Civil Action No. 2014-006711 (Pa. Com. Pl.).