IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4315

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 Order Of The United States District Court For The Eastern
District of Pennsylvania Docketed July 1, 2014 at Civil Action No. 11-cv-06968

BRIEF OF AMICUS CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION IN SUPPORT OF APPELLANTS

Henry F. Reichner
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Phone: (215) 851-8100

David J. Bird
Paige H. Forster
REED SMITH LLP
Suite 1200
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288-3131

Counsel for Amicus Curiae Federal Home Loan Mortgage Corporation

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Federal Home Loan Mortgage Corporation ("Freddie Mac") makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE..1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The District Court's Order Will Undermine Mortgage Lending In Pennsylvania, Disrupt The Secondary Market For Mortgage Loans, And Inhibit Freddie Mac's Ability To Fulfill Its Congressional Mission...6

II. The District Court's Order Is Based On Fundamental Legal Errors............11

A. The Pennsylvania Land Recording Acts Do Not Impose A Duty On A Mortgagee To Record A Mortgage Or Mortgage Assignment. 12

B. Any Hypothetical Duty To Record A Mortgage Assignment Would Not Apply To The Transfer Of A Promissory Note And Would Not Obligate A Mortgagee To Create A Special Document Memorializing The Transfer Of A Promissory Note Between Other Parties. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of America, N.A. v. Gibson,
102 A.3d 462 (Pa. Super. Ct. 2014)....................19

Bucci v. Lehman Bros. Bank, FSB,
68 A.3d 1069 (R.I. 2013)....................21

Chesapeake Appalachia, LLC v. Golden,
35 A.3d 1277 (Pa. Commw. Ct. 2012)....................18

Commerce Bank v. Mountain View Vill., Inc.,
5 F.3d 34 (3d Cir. 1993)....................20

Copenhaver v. Markle-Bullers Coal Co.,
13 Pa. D. & C.3d 409, 1980 WL 855 (Pa. Com. Pl. 1980)....................17

Courtney v. Ryan Homes, Inc.,
497 A.2d 938 (Pa. Super. Ct. 1985)....................20

JP Morgan Chase Bank, N.A. v. Murray,
63 A.3d 1258 (Pa. Super. Ct. 2013)....................19

Malamed v. Sedelsky,
367 Pa. 353, 80 A. 2d 853 (1951)....................17

Penn Title Insurance Company v. Deshler,
661 A.2d 481 (Pa. Commw. Ct. 1995)....................17, 18

Appeal of Pepper,
77 Pa. 373 (1875)....................13, 14

Pines v. Farrell,
848 A.2d 94 (Pa. 2004)....................20

Stillwater Lakes Civic Ass'n, Inc. v. Krawitz,
772 A.2d 118 (Pa. Commw. Ct. 2001)....................20

Trautman v. Neidig,
28 Northumb. L. J. 12 (1955) 16

Statutes and Rules

21 P.S. §§ 1-951 20

21 P.S. § 351 ....16, 17

21 P.S. §§ 623-1 – 623-4 10

13 Pa. C.S. §§ 3101-3701 19

12 U.S.C. § 1451 2

Fed. R. App. P. 29(a), (c)(5) 1

Other Authorities

Daniel J. McDonald & Daniel L. Thornton, *A Primer on the Mortgage Market and Mortgage* Finance, 90Fed. Res. Bank of St. Louis Rev. 31, 36 (2008), available at http://research.stlouisfed.org/publications/review/08/01/McDonald.pdf (last visited Feb. 6, 2015) 6, 7

Fed. Hous. Fin. Agency: Office of Inspector Gen., *A Brief History of the Housing Government-Sponsored Enterprises*, available at http://www.fhfaoig.gov/Content/ Files/History %20of%20the%20Government%20Sponsored%20Enterprises.pdf (last visited February 6, 2015) 7

Ladner on Conveyancing in Pennsylvania § 11:04 (3d ed. 1961) 17

Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 808 (1995) 8, 10

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus curiae Federal Home Loan Mortgage Corporation ("Freddie Mac") is one of the largest purchasers of residential mortgage loans in the country, was a founding member of the MERS® System, and holds a significant number of promissory notes secured by mortgages on residential property in Pennsylvania and throughout the United States, including notes secured by mortgages naming Defendant-Appellant Mortgage Electronic Registration Systems, Inc. ("MERS") as mortgagee in a nominee capacity for the originating lender and its successors and assigns. As such, Freddie Mac has a strong interest in cases like this one which concern the obligations that arise from the transfer of promissory notes secured by residential mortgages and the operation of the MERS® System. This amicus curiae brief respectfully is submitted to address what Freddie Mac perceives to be multiple, fundamental legal errors by the district court. Freddie Mac believes that, if the district court's legal errors are not corrected by this Court, the district court's ruling will (1) burden the transfer of promissory notes associated with mortgage loans, (2) disrupt the secondary market for residential mortgage loans, (3) increase the costs associated with mortgage lending, (4) reduce the supply of credit

---

[1] In accordance with Federal Rule of Appellate Procedure 29(a) and (c)(5), Freddie Mac states that all parties have consented to the filing of this amicus curiae brief, that no party's counsel authored the brief in whole or in part, and that no party, no party's counsel, and no person other than Freddie Mac contributed money that was intended to fund preparing or submitting the brief.

available for mortgage loans, and (5) undermine Freddie Mac's ability to carry out the mandate given to it by Congress.

Freddie Mac's Mission. Freddie Mac was created by Congress in 1970 to further the goal of affordable home ownership for individuals and families across the nation by providing stability and liquidity in the secondary market for residential mortgage loans, including residential mortgage loans issued to low and moderate-income families. 12 U.S.C. § 1451 (historical and statutory notes).

Freddie Mac does not lend money directly to homeowners. Rather, it purchases mortgage loans that meet its lending requirements from originating lenders, and it either holds those loans in its own investment portfolio or transfers the loans to investment vehicles which hold the loans as collateral and issue securities to investors. Through this process, Freddie Mac helps originating lenders replenish their supply of funds quickly and efficiently and, thus, helps lenders make more mortgage loans to individuals and families at lower costs. Freddie Mac also guarantees the residential mortgage-backed security products that it issues, thereby helping to lower the risks associated with investing in mortgage-back securities and, thus, to promote greater stability in the secondary market for residential mortgage loans.

Freddie Mac is one of the oldest, largest, and most important issuers of mortgage-backed security products in the country. Freddie Mac is regulated by the Federal Housing Finance Agency ("FHFA"), which ensures that Freddie Mac is operating safely and soundly and in accordance with its federal mission. It also is regulated by the U.S. Department of Housing and Urban Development for

compliance with fair lending laws and by the U.S. Department of Treasury with respect to the issuance of notes, debentures, unsecured debt obligations, and new types of mortgage-related securities.

Freddie Mac's Response to the 2008 Economic Crisis. During the economic crisis of 2008, Freddie Mac's financial condition was damaged by the sudden and substantial deterioration of the primary housing markets. In September 2008, the FHFA placed Freddie Mac into conservatorship to ensure that Freddie Mac would be able to fulfill its federal mission and help stabilize the secondary market for residential mortgage loans and the primary housing markets. Freddie Mac continues to operate under the FHFA's conservatorship.

Since the economic crisis of 2008-2009, Freddie Mac has provided $2.4 trillion in funding to support residential mortgage lending throughout the United States, including Pennsylvania. During that same period, Freddie Mac has helped more than 12 million individuals and families obtain and maintain their housing by financing 2.5 million home purchases, 8.1 million home refinancings, and 1.8 million units of multifamily rental housing. Freddie Mac also has been a leader in educating homebuyers and homeowners and reforming lending practices nationwide.

Freddie Mac's Interest in this Action. Freddie Mac has a particularly strong interest in cases like this one, which concern the obligations that arise from the transfer of promissory notes secured by residential mortgages and the operation of the MERS® System. Transactions involving the purchase, sale, and transfer of

such notes on the secondary market for residential mortgage loans are essential to Freddie Mac's operations and its ability to fulfill its federal mandate.

Furthermore, Freddie Mac was a founding member of the MERS® System and continues to be a shareholder of Defendant-Appellant MERSCORP, Inc. (now known as MERSCORP Holdings, Inc.).[2] There also are a substantial number of Freddie Mac mortgage loans registered on the MERS® System, including thousands of loans secured by Pennsylvania residences.

Because of its federal mandate, its experience in the secondary market purchasing and transferring notes secured by residential real estate, and its experience as a member of the MERS® System, Freddie Mac is uniquely positioned to assist the Court not only in untangling technical issues involved in the district court's decision, but also the decision's practical significance.

SUMMARY OF ARGUMENT

The district court's grant of summary judgment in this case is likely to have serious negative consequences for countless individuals and institutions involved in the primary and secondary markets for residential mortgages. Residential mortgage lending in Pennsylvania and throughout the United States is predicated on long-standing state laws which the district court repeatedly contravened. If not corrected, the district court's order will disrupt the modern systems used to finance mortgage lending in the United States, leading to fewer and more expensive loans

---

[2] Freddie Mac owns approximately sixteen and one-half percent (16.50%) of MERSCORP Holdings, Inc., the sole owner and parent of MERS.

to Pennsylvania residents to purchase homes. In light of Congress's mandate to Freddie Mac to reduce lending costs and increase the supply of credit for housing purchases, Freddie Mac strongly urges the reversal of the district court's decision.

The district court's order was predicated upon numerous fundamental legal errors that have been documented in detail in the opening brief of the MERS Defendants. In particular, the district court made two fundamental errors when it held that Section 351 of the Pennsylvania Land Recording Acts requires the recording of a "mortgage assignment" whenever a promissory note associated with a mortgage loan is transferred from one note holder to another. First, the district court erred in construing Section 351 to require that a mortgagee record all mortgages and mortgage assignments. The district court's construction of Section 351 is contrary to the text of Section 351 and the Pennsylvania Land Recording Acts as a whole, to the history of the Pennsylvania Land Recording Acts, and to a long line of Pennsylvania precedent from the 19th century to the present. Second, the district court's ruling that transfers of promissory notes secured by mortgages convey interests in real property, and therefore are "mortgage assignments" for purposes of Section 351, conflates personal property with real property. The transfer of a promissory note from one holder to another is a transfer of an interest in *personal property* (a debt instrument), which can be accomplished by simple *negotiation* of the note in the manner provided by Article 3 of the Pennsylvania Uniform Commercial Code; it is *not* a transfer of an interest in *real property* (a mortgaged home) which must be in writing to be effective.

The district court's two fundamental errors threaten to (1) inhibit the use of uniform negotiable instruments in the financing of Pennsylvania housing; (2) make it impossible for the purchasers of residential mortgage loans to use an agent to act as a mortgagee for the benefit of a loan purchaser, and (3) impose costly recording obligations and uncertain legal liability on past, present, and future mortgage loans. Simply put, the district court's errors threaten to thwart those aspects of the MERS® System that operate to lower the costs and the risks associated with servicing residential mortgage loans and transferring promissory notes secured by residential mortgage loans. Such a result would not benefit homebuyers, originating lenders, purchasers of residential mortgage loans, or investors in mortgage-backed securities. The only parties that might conceivably benefit are Plaintiff and other Pennsylvania county recorders and their counsel, who stand to reap large sums from recording fees on past, present, and future promissory note transfers.

ARGUMENT

I. The District Court's Order Will Undermine Mortgage Lending In Pennsylvania, Disrupt The Secondary Market For Mortgage Loans, And Inhibit Freddie Mac's Ability To Fulfill Its Congressional Mission.

Before the late 1960s, most residential mortgage loans were made to homebuyers or homeowners by banks and savings and loan associations that originated the loan, lent the money, held the note, served as the mortgagee of record, collected loan payments, and serviced the loan contract. *See* Daniel J.

McDonald & Daniel L. Thornton, *A Primer on the Mortgage Market and Mortgage Finance*, 90 Fed. Res. Bank of St. Louis Rev. 31, 36 (2008).[3] However, in the late 1960s and early 1970s, Congress sought to promote the development of a "secondary" market for residential mortgage loans whereby originating lenders could sell loans that they originated to wholesalers or investors, replenish their supply of funds quickly and efficiently and, thus, make more mortgage loans to individuals and families at lower costs. *Id.* To this end, Congress privatized the Federal National Mortgage Association ("Fannie Mae") in 1968 and created Freddie Mac in 1970. *Id.* In keeping with Congress's mandate, during the 1970s and 1980s, Fannie Mae and Freddie Mac became the largest and most important purchasers of residential mortgage loans in the country, and Freddie Mac took a leading role in creating mortgage-backed securities products—investment vehicles that hold the residential mortgage loans as collateral and issue securities to investors (a process now known as loan "securitization"). *See generally* Fed. Hous. Fin. Agency: Office of Inspector Gen., *A Brief History of the Housing Government-Sponsored Enterprises*.[4] In the late 1980s, private financial companies, including banks and investment banking firms, also began purchasing residential mortgage loans and issuing securities collateralized by pools of mortgage loans that they had acquired. Thus, by the early 2000s, the great

---

[3] Available at http://research.stlouisfed.org/publications/review/08/01/ McDonald.pdf (last visited Feb. 6, 2015).

[4] Available at http://www.fhfaoig.gov/Content/ Files/History%20of%20the%20 Government%20Sponsored%20Enterprises.pdf (last visited February 6, 2015).

majority of residential mortgage loans originated in the United States were sold on the secondary mortgage market.

The financing of residential mortgage loans through sales on the secondary market was hampered, however, by cumbersome, paper-intensive, error-prone, and costly processes for tracking changes in servicing rights and beneficial interests in residential mortgage loans. Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 808 (1995). The MERS® System was created by Fannie Mae, Freddie Mac, and other important participants in the secondary market to address these problems. The system was designed to provide (1) a common agent (MERS) that could act as the mortgagee of record for members who originated or purchased mortgage loans and (2) a national electronic database to track changes in mortgage-servicing rights and beneficial ownership interests in loans secured by residential real estate. Prior to the advent of the MERS® System, there was no common agent who could act as mortgagee for those who purchased mortgage loans on the secondary market and no central system to track changes in servicing rights and beneficial ownership in such loans.

Freddie Mac supported the creation of the MERS® System because the system lowers the costs and the risks associated with servicing residential mortgage loans and transferring promissory notes secured by residential mortgages. As the mortgagee of record for promissory notes held by its members, MERS receives service of process, legal notices, and other mail regarding the mortgaged properties, and it sorts, scans, and transmits such documents electronically to the member that holds the promissory note. Furthermore, because

MERS is a common agent for its members as to the mortgage only, MERS's members (including Freddie Mac) can transfer notes to one another without any change in the mortgagee of record (MERS), who is contractually bound to act for the benefit of the MERS member that holds the note. This also reduces transaction costs, increases liquidity, and promotes stability in the secondary market of mortgage loans. These savings, in turn, allow more mortgage loans to be made at lower costs to homeowners.[5]

The success of the MERS® System in reducing costs and furthering residential mortgage lending is indisputable. MERS-as-original-mortgagee loans ("MOM" loans) are approved not only by Freddie Mac, but also by Fannie Mae, Ginnie Mae, the Federal Housing Administration and the U.S. Department of Veterans Affairs, and the California and Utah Housing Finance Agencies, as well as all of the major Wall Street rating agencies. As of January 31, 2015, there were more than 5 million active Freddie Mac residential mortgage loans registered with MERS, with an unpaid principal balance of approximately $919 billion—including more than 178,000 active Freddie Mac mortgage loans, with an unpaid principal balance of approximately $27.6 billion, secured by residential property in Pennsylvania.

[5] The MERS® System provides additional benefits to homeowners and others as well. MERSCORP Holdings, Inc. provides access to data in the MERS® System free of charge to homeowners and regulatory officials (subject to privacy restrictions). Homeowners can access the data on their mortgage loans registered on the MERS® System online or by telephone.

Yet, the district court's order threatens to undermine the benefits of the MERS® System and the stability and liquidity of the secondary market for Pennsylvania residential mortgages. The order holds that mortgagees have a duty to create a written document memorializing each transfer of a promissory note secured by a Pennsylvania residential mortgage and have that document recorded as a "mortgage assignment" by the recorder of deeds in the county in which the mortgaged property is located. And the order makes clear that, to be suitable for recording, each document will have to comply with 21 P.S. §§ 623-1 through 623-4 and thus include (1) an acknowledgment by the transferor before an officer or person duly authorized to take such acknowledgments, (2) a certification of the precise address of the transferee, and (3) a fee to cover the recording of the document in the county's land records. *Id.* The order specifically commands the MERS Defendants to create such documents and have them recorded for all past, present, and future note transfers secured by a Pennsylvania residential mortgage for which MERS is the mortgagee of record—including thousands or even hundreds of thousands of past, present, and future Freddie Mac mortgage loans. The burden and expense that will be borne by parties involved in the secondary market for Pennsylvania residential mortgage loans as a result of the district court's order will be significant. If the order is not corrected, it will be substantially more difficult and expensive for parties to purchase, service, and enforce Pennsylvania residential mortgage loans. And this, in turn, will result in fewer mortgage loans to Pennsylvanians and higher costs on the mortgage loans that are made.

Simply put, the order will interfere with stability and the liquidity of the secondary market for Pennsylvania residential mortgage loans and with Freddie Mac's ability to carry out its Congressional mandate to promote affordable home ownership for individuals and families across the nation by providing stability and liquidity in the secondary market for residential mortgage loans. Indeed, the decision will burden not only the secondary market and Freddie Mac but also the federal government, which has provided more than $189.5 billion in financial support to Fannie Mae and Freddie Mac since September 2008 for the purpose of supporting residential mortgage lending throughout the United States.

Given the serious negative consequences for countless individuals and institutions involved in the primary and secondary markets for residential mortgage loans, the Court should scrutinize the district court's order with special rigor and care. Yet, the order cannot withstand such legal analysis for the reasons discussed by the MERS Defendants.

II. The District Court's Order Is Based On Fundamental Legal Errors.

The opening brief of the MERS Defendants describes in detail the many fundamental legal errors made by the district court in the order under review. Freddie Mac wishes to focus on two errors that are particularly important and that led directly to the district court's ruling that Section 351 requires the recording of a "mortgage assignment" whenever a promissory note associated with a mortgage loan is transferred from one note holder to another.

A. The Pennsylvania Land Recording Acts Do Not Impose A Duty On A Mortgagee To Record A Mortgage Or Mortgage Assignment.

For starters, the district court held that, under the Pennsylvania Land Recording Acts, a mortgagee has a legal duty to record any mortgage or assignment of a mortgage that the mortgagee receives. Yet, that has *never* been the law in Pennsylvania. The first Pennsylvania Land Recording Act was passed on May 2, 1715. It created an office for recording deeds, mortgages, and other written conveyances and encumbrances in each 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 2, 1715, § 2 (emphasis added), attached as Exhibit A to Appellant's Opening Brief. In 1775, the General Assembly "supplemented" the 1715 Act. The 1775 Act explained that deeds and conveyances "shall be" "acknowledged" by a grantor or "proved" by a subscribing witness and "recorded" in the county recorder's office in which the real property is located within six months after the execution of the instrument, or otherwise been adjudged fraudulent and void against a subsequent purchaser or mortgagee of the property for valuable consideration. Act of May 28, 1775, § 2, attached as Exhibit B to Appellant's Opening Brief.

The 1715 and 1775 acts were understood at the time and by later generations as establishing a *voluntary* recording system whereby a person who had been granted a deed, mortgage, or other interest in real property could *elect* to have the written grant recorded in the land records of the county where the real property was located and then receive priority over subsequent assignees, purchasers, or

mortgagees of the same property. Over time, issues periodically would arise about a party's *right* to record a document of a particular type or form. Subsequent Pennsylvania Land Recording Acts addressed these issues using language similar to that of the Acts of 1715 and 1775. The "may be recorded" language was used in section 1 of the Act of April 15, 1828 (providing for the recording of the release of a mortgage or lien based on the payment or satisfaction of the underlying debt); section 12 of the Act of May 5, 1841 (authorizing the recording of deeds, mortgages, and other written conveyances and encumbrances acknowledged before the mayor or recorder of the city of Philadelphia); section 1 of the Act of March 14, 1846 (authorizing the recording of patents granted by the Commonwealth as well as deeds of sheriffs, coroners, marshals and treasurers); section 2 of the Act of April 5, 1849 (authorizing the recording of deeds of county commissioners); section 24 of the Act of April 26, 1850 (authorizing the recording of a release made out of the state); section 1 of the Act of April 27, 1854 (providing for the recording of releases executed without subscribing witnesses); and section 1 of the Act of May 17, 1866 (authorizing the recording of releases executed in other states). *See Appeal of Pepper*, 77 Pa. 373, 375-76 (1875) (describing each act).

Other Pennsylvania Land Recording Acts enacted during this period stated that deeds, mortgages, and other written instruments were "entitled to be recorded" in the county in which the land was located—stressing the *right* of an interest holder to have his deed, mortgage, or other written instrument recorded in an appropriate county's land records and the ministerial *duty* of a county recorder to record such documents. The "entitled to be recorded" language was used in

section 1 of the Act of March 23, 1819 (authorizing the recording of deeds, mortgages, and other written conveyances and encumbrances acknowledged before federal and state judges); section 15 of the Act of April 16, 1840 (providing for the recording of deeds theretofore executed by husband and wife and acknowledged before an officer of another state); section 8 of the Act of April 10, 1849 (providing for the recording of deeds, mortgages, and other written conveyances and encumbrances acknowledged out of state); section 42 of the Act of April 25, 1850 (authorizing the recording of acknowledgments theretofore made before federal or state judges); section 1 of the Act of May 5, 1854 (providing for the recording of deed acknowledged before an officer of another state if the officer was authorized under the law of that state to take such acknowledgments). *See Appeal of Pepper*, 77 Pa. at 376-77 (describing each act).

In 1875, the Pennsylvania Supreme Court surveyed each of the aforementioned statutes and concluded that "the language of the Acts of Assembly providing for the recording of written instruments has not generally been mandatory" and that "[i]t is optional whether or not to record." *Appeal of Pepper*, 77 Pa. at 377 (holding that assignees of mortgages had a right to record their mortgage assignments under the Recording Acts). The Court went on to conclude that, under section 14 of the Act of April 10, 1849, the assignee of a mortgage had a right to have his written mortgage assignment recorded in the land records where the mortgaged property was located. *Id.* In subsequent years, no court has ever overruled or disagreed with *Appeal of Pepper* or suggested that the Pennsylvania

Land Recording Acts impose a duty on interest holders to record their deeds, conveyances, or other written instruments concerning interests in real property.

In the Act of May 12, 1925, P.L. 613, No. 327, the General Assembly attempted to tie together the various Pennsylvania Land Recording Acts. The purpose of the 1925 Act was to "[r]egulat[e] the recording of certain deeds, conveyances, and other instruments of writing and fix[] the effect thereof as to subsequent purchasers, mortgagees, and judgment creditors." Act of May 12, 1925, preamble attached as Exhibit C to Appellant's Opening Brief. Nothing was said in the act's preamble about obligating interest holders to record all deeds, mortgages, or other written conveyances or encumbrances. Section 1 of the act provided that "[a]ll deeds, conveyances, contracts, and other instruments of writing [that are intended] to grant, bargain, sell, and convey any lands, tenements, or hereditaments situate in this Commonwealth, upon being acknowledged by the parties executing the same or proved in the manner provided by the laws of this Commonwealth, shall be recorded in the office for the recording of deeds in the county where such lands, tenements, and hereditaments are situate." Act of May 12, 1925, § 1 attached as Exhibit C to Appellant's Opening Brief. The next sentence explained that, if an interest holder elected not to record a deed, conveyance, contract, or other written instrument, the instrument "shall be adjudged fraudulent and void as to any subsequent bona fide purchaser or mortgagee without actual or constructive notice [of the instrument.]" In 1931, the act was amended to explain that, if an interest holder elected not to record a deed, conveyance, contract, or other written instrument, the instrument "shall be

adjudged fraudulent and void" as to any subsequent judgment creditor, too. Act of June 12, 1931, P.L. 558, No. 191, § 1 attached as Exhibit D to Appellant's Opening Brief. As amended, the act is now codified at 21 P.S. § 351.

The 1925 Act did not impose a duty on an interest holder to record a deed, mortgage, or other written conveyance or encumbrance. The act's statement that deeds, mortgages and other written instruments "shall be recorded" in the county recording office where the real property is located is not a command addressed to grantees of deeds, mortgages and other written instruments. Grantees of deeds, mortgages, and other written conveyances and encumbrances are not even *mentioned* in the text, much less *commanded* to do anything. Rather, the "shall be recorded" language serves the same purpose as the "entitled to be recorded" language used in the prior Land Recording Acts. The language stresses the *right* of an interest holder to have his deed, mortgage, or other written conveyance or encumbrance recorded in the county in which the real property is located and the ministerial *duty* of a county recorder to record such documents.

No court ever has held, or even suggested, that the 1925 Act changed two hundred years of Pennsylvania law and imposed a duty on interest holders to record their deeds, mortgages, and other written conveyances and encumbrances. To the contrary, courts have construed the 1925 Act as a *continuation* of the voluntary recording system established in 1715. For example, following the 1925 Act, courts repeatedly have held that unrecorded deeds, mortgages, or other written conveyances and encumbrances are valid and binding between the grantor of the interest and the grantee or the grantee's assigns. *E.g., Trautman v. Neidig*, 28

Northumb. L. J 12, 18 (1955) (after a deed is delivered, the recording of the deed by the grantee is not essential to its validity or the transition of title as between the parties). In *Malamed v. Sedelsky*, 367 Pa. 353, 358, 80 A. 2d 853, 855-56 (1951), the Pennsylvania Supreme Court considered the 1925 Act and held that "[d]elivery [of a deed, conveyance, mortgage, or other written instrument] is all that is necessary to pass title[;] recording [of the instrument] is only essential to protect by constructive notice any subsequent purchasers, mortgagees and new judgment creditors." Several years later, in *Copenhaver v. Markle-Bullers Coal Co.*, 13 Pa. D. & C.3d 409, 414-15, 1980 WL 855, at *3-4 (Pa. Com. Pl. 1980), the Court of Common Pleas followed *Malamed* and wrote that "[t]he Pennsylvania recording statute of May 12, 1925, P.L. 613, as amended, 21 P.S. § 351 *et seq.*, primarily protects the grantee from subsequent sales by his grantor of the same land by allowing the grantee to record his title, thus giving public notice of his title and defeating the claim of any subsequent grantee. Secondarily, if the grantee fails to record his title, any subsequent bona fide purchaser, judgment creditor or mortgagee who takes from the same grantor without notice of the prior claim receives protection of his recorded title." *Id.* "'Recording[, therefore,] is not essential to the passage of title." *Id.* (quoting Ladner on Conveyancing in Pennsylvania § 11:04 (3d ed. 1961); citing *Malamed*). "Failure to record simply estops the title holder from asserting title" against subsequent purchasers, mortgagees, judgment creditors, or other persons covered by the second sentence of 21 P.S. § 351.

Recent cases considering the 1925 Act have confirmed that the act's "shall be recorded" language does not impose any duty on a grantee to record the grantee's deed, mortgage, or other written instrument. In *Penn Title Insurance Company v. Deshler,* 661 A.2d 481, 486 (Pa. Commw. Ct. 1995), the Commonwealth Court construed the 1925 Act and held that the Recorder of Deeds of Monroe County had a duty under the statute to record a deed or mortgage instrument *as the parties had prepared and executed it*. Quite recently, in *Chesapeake Appalachia, LLC v. Golden,* 35 A.3d 1277 (Pa. Commw. Ct. 2012), the Commonwealth Court quoted and emphasized the "'*shall be recorded*'" language of the 1925 Act and explained that this "mandatory and unambiguous language … requires the Recorder to record the subject documents as they are presented to her." *Id.* at 1280-81 (emphasis in original).

In sum, the district court's decision erroneously assumes that the 1925 Act imposes an unambiguous obligation *on grantees* to record all deeds, mortgages, and other written conveyances and encumbrances. But the text of the statute does not unambiguously command grantees to do anything; nor is there any Pennsylvania authority supporting such a specific duty. To the contrary, the weight of authority holds that the Pennsylvania Land Recording Acts establish neutral rules for a *voluntary* recording system administered by country recorders based solely on criteria for recording established by statute. Given that reality, the district court's order should be reversed.

B. Any Hypothetical Duty To Record A Mortgage Assignment Would Not Apply To The Transfer Of A Promissory Note And Would Not Obligate A Mortgagee To Create A Special Document Memorializing The Transfer Of A Promissory Note Between Other Parties.

The district court also erred when it construed the 1925 Act to require the recording of a "mortgage assignment" whenever a promissory note associated with a mortgage loan is transferred from one note holder to another. In many respects, this mistake was even more egregious than the court's misconstruction of the 1925 Act's "shall be recorded" language because the district court's order conflates the transfer of a promissory note with the transfer of a mortgage and disregards the fundamental principles upon which a mortgage loan transaction is predicated.

A residential mortgage loan transaction generally involves two instruments—a promissory note and a mortgage. A promissory note is a *negotiable instrument*—a specific type of *personal property* that obligates the promisor to pay a certain amount of money, either on demand or at a certain time. *Bank of America, N.A. v. Gibson*, 102 A.3d 462, 466 (Pa. Super. Ct. 2014); *JP Morgan Chase Bank, N.A. v. Murray*, 63 A.3d 1258, 1265 (Pa. Super. Ct. 2013). Under Article 3 of Pennsylvania's Uniform Commercial Code, 13 Pa. C.S. §§ 3101-3701, a promissory note may be transferred from one holder to another through a simple endorsement of the note in blank and a change of possession. This is a fundamental legal attribute of such an instrument. Furthermore, a promissory note need not (and generally does not) contain any description of real property or purport to convey, encumber, or affect the title to

real property. The note is simply a debt instrument, obliging the promisor to pay a certain sum of money to the note holder.

A mortgage is fundamentally different. A mortgage is a "defeasible deed" that must have a complete description of real property and that conveys fee simple in that property to the grantee while requiring the grantee to reconvey the real property upon satisfaction of a debt. *See Pines v. Farrell*, 848 A.2d 94, 101 (Pa. 2004); *Stillwater Lakes Civic Ass'n, Inc. v. Krawitz*, 772 A.2d 118, 121 (Pa. Commw. Ct. 2001); *see also Commerce Bank v. Mountain View Vill., Inc.*, 5 F.3d 34, 38 (3d Cir. 1993) (noting that Pennsylvania follows the "title theory" under which the mortgage is considered a conveyance in fee simple to the mortgagee). In other words, a mortgage is a written instrument that conveys a specific type of legal interest in *real property* that has been pledged as collateral on a debt. Mortgages are regulated under title 21, chapter 2, of the Pennsylvania Statutes, 21 P.S. §§ 1-951.

A promissory note and a mortgage serve separate and distinct functions in a mortgage loan transaction. The note is a debtor's acknowledgement of a debt and his binding promise to repay it. The mortgage is a grant of an interest in real estate that provides collateral security for the debt in the event that the debtor *does not* fulfill the terms of the promissory note. *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.").

Of course, there is a relationship between a promissory note and a mortgage granted as part of a mortgage loan transaction. Thus, it often has been said that the mortgage follows the note such that a mortgagee always holds the mortgage for the benefit of the current note holder (because the mortgage is collateral security for debt acknowledged by the note) and the note holder has an interest in and right to direct the enforcement of the mortgage (for the same reason).

The district court believed that, because the note and the mortgage are related to one another, the transfer of a promissory note from one holder to another is the "same" as a conveyance or assignment of a mortgage as a matter of law. But that is simply not the law. The equitable and beneficial relationship between a promissory note and a mortgage does not alter the fact that the note and the mortgage are separate instruments, reflecting different types of interests in personal and real property, serving different functions in a mortgage loan transaction. Indeed, the equitable and beneficial relationship between a promissory note and a mortgage *depends* on the two instruments being separate and distinct as a matter of law. Otherwise, there would be no legal difference between the note and the mortgage and the note holder and the mortgagee and an agent, representative, or nominee of the note holder could never serve as mortgagee. *See Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1088 (R.I. 2013) ("the legal interest in a mortgage and the beneficial interest in the underlying debt …. are distinct interests, and they may be held by different parties").

Thus, when the district court held that the transfer of a promissory note from one holder to another conveys legal title to, or interest in, real property, it either

failed to grasp or chose to disregard the fundamental legal principles upon which a mortgage loan is predicated—legal building blocks that provide the foundation for modern mortgage lending and the financing of housing for individuals and families. The depth of the district court's error is revealed by its order, which commands the MERS Defendants to rectify the newly created "problem" of unrecorded promissory note transfers by creating, out of whole cloth, special documents memorializing past, pending, and future note transfers. No Pennsylvania law supports this order. Neither the text of the Pennsylvania Land Recording Acts, nor any Pennsylvania precedent, obliges any party to create a written instrument memorializing the transfer of a promissory note associated with a mortgage in a form that is capable of being recorded in county land records. To the contrary, promissory notes (as personal property governed by Article 3 of Pennsylvania's Uniform Commercial Code) may be transferred from one holder to another through a simple endorsement of the note in blank and a change of possession.

CONCLUSION

The district court's ruling is wrong as a matter of law and policy. If permitted to stand, it will substantially undermine Freddie Mac's ability to fulfill its Congressional mandate of promoting stability and liquidity in the secondary market for mortgage loans, and increasing the supply of affordable credit in primary housing markets. This Court should reverse.

/s/ Henry F. Reichner
Henry F. Reichner
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Phone: (215) 851-8100

David J. Bird
Paige H. Forster
REED SMITH LLP
Suite 1200
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288-3131

Counsel for Amicus Curiae Federal
Home Loan Mortgage Corporation

Dated: February 6, 2015

CERTIFICATES

Paige H. Forster, attorney for Appellant, hereby certifies that:

1. I caused a true and correct copy of the foregoing Brief of Amicus Curiae to be served upon all counsel of record via the Court's ECF system, in accordance with L.A.R. Misc. 113.4, on this 6th day of February, 2015.

2. The Brief of Amicus Curiae was filed with the Court via the Court's ECF system, and by UPS, postage prepaid, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 5,896 words, excluding the Cover Page, Table of Contents, Table of Authorities, Certifications.

5. The printed Reply Brief of Appellant filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Reply Brief of Appellant filed with the Court was virus checked using Trend Micro OfficeScan Client on February 6, 2015 and was found to have no viruses.

/s/ Henry F. Reichner
Counsel for Amicus Curiae