

IN THE SUPREME COURT OF PENNSYLVANIA

No. 67 MAP 2017

Delaware County, Pennsylvania, Recorder of Deeds, By and Through Thomas J. Judge, Sr., in his official capacity as the Recorder of Deeds of Delaware County, Pennsylvania; Frederick C. Sheeler, in his official capacity as Recorder of Deeds in and for the County of Berks, Pennsylvania; The Office of the Recorder of Deeds in and for the County of Berks, Pennsylvania; The County of Berks, Pennsylvania; Joseph J. Szafran, in his official capacity as Recorder of Deeds in and for the County of Bucks, Pennsylvania; The Office of the Recorder of Deeds in and for the County of Bucks, Pennsylvania; The County of Bucks, Pennsylvania; Richard T. Loughery, in his official capacity as Recorder of Deeds in and for the County of Chester, Pennsylvania; The Office of the Recorder of Deeds in and for the County of Chester, Pennsylvania; and the County of Chester, Pennsylvania,
Plaintiffs-Appellants,

v.

MERSCORP, Inc., n/k/a MERSCORP Holdings, Inc.; Mortgage Electronic Registration Systems, Inc.; Bank of America, N.A.; CitiMortgage, Inc.; Citibank, N.A.; Credit Suisse Financial Corporation; Everhome Mortgage Company; JP Morgan Chase Bank, N.A.; State Farm Bank F.S.B.; Wells Fargo Bank, N.A.; Sovereign Bank; HSBC Bank USA, N.A.; HSBC Finance Corporation; Gateway Funding Diversified Mortgage Services, L.P. n/k/a Finance of America Mortgage LLC; Customers Bancorp, Inc.; Customers Bank; The Bank of New York Mellon; The Bank of New York Mellon Trust Company, N.A.; Deutsche Bank National Trust Company; Deutsche Bank Trust Company Americas; Santander Bank, N.A. f/k/a Sovereign Bank, N.A.; and Trident Mortgage Company, L.P.,
Defendants-Appellees.

**AMICI CURIAE BRIEF BY PENNSYLVANIA LEGAL AID NETWORK,
LEGAL AID OF SOUTHEASTERN PENNSYLVANIA, MIDPENN LEGAL
SERVICES, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES,
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I. STATEMENT OF IDENTITY AND INTEREST OF AMICI¹

The six Amici filing this brief are all organizations that work with and represent consumers and homeowners in Pennsylvania.

Pennsylvania Legal Aid Network

The Pennsylvania Legal Aid Network, Inc. (“PLAN”) is a client-centered organization that provides leadership, funding, and support to improve the availability and quality of civil legal aid and direct legal services for low-income people and victims of domestic violence in Pennsylvania. PLAN is the state’s coordinated system of organizations providing civil legal aid for those with nowhere else to turn. PLAN both provides funding to civil legal aid providers across the state and offers direct services itself.

The network of programs throughout the state that PLAN funds offers a continuum of critically needed legal information, legal advice, and legal services through direct representation for low-income individuals and families who face urgent civil legal problems, including mortgage foreclosure. This network provides direct representation to clients in every Pennsylvania county. The PLAN programs handle about 75,000 cases annually, with the largest share of their funding coming from PLAN.

¹ No one other than the Amici, their members, or their counsel paid for the preparation of this brief or authored this brief, in whole or in part.

PLAN administers state-appropriated funds and grants, including funds raised through the Pennsylvania Access to Justice Act and directed through the PA-IOLTA Board. PLAN then monitors performance, coordinates training and technology, and helps develop new resources and programs for the entire network. The funds collected through the Access to Justice Act include the fees for mortgage assignments collected by county recorders of deeds. The MERS system at issue in this case—which allows mortgagees to avoid fees for recording of mortgage assignments—significantly reduces the funds available to provide civil legal services to low-income Pennsylvanians, and it limits access to vital information that should be publicly accessible to clients of legal aid programs. Across Pennsylvania, the demand for legal representation for low-income homeowners facing mortgage foreclosure far outstrips the supply of legal services attorneys.

Legal Aid of Southeastern Pennsylvania

Legal Aid of Southeastern Pennsylvania (“LASP”) provides free, civil legal services to resolve legal problems that threaten clients’ access to basic necessities such as decent housing, medical care, food, income, personal safety, and family stability. LASP is the only agency providing a full range of free, civil legal services to residents of Bucks, Chester, Delaware, and Montgomery counties. LASP serves people living at or below 125% of the federal poverty level, victims

of domestic abuse and low-/moderate-income older adults. Designated funds allow LASP to help low-/moderate-income people facing the loss of a home to foreclosure. LASP has seven community offices and staffs outreach sites in five other communities in cooperation with partner agencies. A regional project provides access to a foreclosure expert for those who face losing their homes.

In FY2016-17, LASP advocates handled 8,279 cases. Major legal areas addressed by LASP advocates include:

- family law, including custody and protection from abuse;
- consumer law, including bankruptcy, harassment by creditors, and utility shut-offs;
- benefits law, including appeals;
- housing law, including landlord-tenant and foreclosure;
- employment law, including criminal record expungements; and
- elder law, including end-of-life issues.

Because many low-income families own homes in suburban Philadelphia, LASP's homeownership and mortgage foreclosure unit has spent significant resources supporting low-income homeowners in Bucks, Chester, Delaware, and Montgomery Counties, and the demand for those services has risen dramatically in recent years. In 2001 LASP created a full-time staff attorney position to address the need, yet still most residential mortgage foreclosure defendants in these counties are unrepresented. LASP provides direct representation to low-income homeowners facing mortgage foreclosure due to abusive and illegal lending practices. LASP also provides advice and referral services for homeowners at risk

of foreclosure. In 2016, LASP's foreclosure attorney assisted 360 homeowners with residential mortgage foreclosure matters in Bucks, Chester, and Delaware Counties.

The MERS system has a direct, negative influence on LASP and its clients. The incompleteness of public data sources forces LASP to expend extra time and resources in discovery to confirm the holders of its foreclosure clients' mortgages. Also, the services provided by LASP are funded, in significant part, by fees collected by county recorders of deeds for recordation of mortgage assignments. In the 2016-17 fiscal year, LASP received \$895,064, or approximately twenty percent of its budget, in Access to Justice Act funding. (Access to Justice Act funding includes other types of fees in addition to fees for mortgage assignments.)

MidPenn Legal Services

MidPenn Legal Services (MidPenn) was formed in 2001 through the merger of four multi-county legal services providers, each with a long history of providing legal services. MidPenn operates as integrated law firm that serves low-income residents in Berks and 17 other counties in Central Pennsylvania. MidPenn's mission is to provide equal access to justice and high-quality civil legal services to low-income residents and survivors of domestic violence/sexual assault and intimidation with civil legal problems in the areas of mortgage foreclosure, custody, protection from abuse, landlord/tenant, consumer, and employment law.

MidPenn advocates have always handled mortgage foreclosure cases, and in 2004 MidPenn established a specialized Consumer Unit, which began seeing issues involving credit card scams, payday lending, predatory lending, increased mortgage foreclosure, and subprime lending across the organization's region. The affected groups included communities with high populations of African-Americans, Latinos, and monolingual English-speaking individuals and families. This trend was particularly true for low-income clients in the region's more urbanized areas, such as Reading. From July 1, 2014 through June 30, 2016, MidPenn's advocates in Berks County handled 184 mortgage foreclosure cases.

The MERS system has a direct, negative influence on MidPenn and its clients. The incompleteness of public data sources forces MidPenn to expend extra time and resources in discovery to confirm the holders of its foreclosure clients' mortgages. Also, the services provided by MidPenn are funded, in significant part, by fees collected by county recorders of deeds for recordation of mortgage assignments. In the 2016-2017 fiscal year, MidPenn anticipates receiving \$1,757,919 in Access to Justice Act funding.

National Association of Consumer Advocates

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private- and public-sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the

protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. NACA's members, as representatives of homeowners across the nation, have witnessed firsthand the negative impact of unfair and abusive practices in the mortgage market, from the unscrupulous origination practices responsible for the 2008 financial collapse to the assembly-line practices of the mortgage-servicing industry, which deprive consumers of a meaningful opportunity to defend their homes from foreclosure. NACA has an active Pennsylvania membership chapter.

The National Consumer Law Center

The National Consumer Law Center ("NCLC") is a nonprofit organization, with its main office in Boston, Massachusetts, that is focused upon justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding in 1969, NCLC has provided resources for legal services offices, private law firms, and governmental entities in the area of consumer law. NCLC publishes a series of twenty nationally recognized consumer law manuals including *Foreclosures* (5th ed. 2014); *Mortgage Lending* (2nd. ed. 2014); and *Truth-in-Lending* (9th ed. 2015). Since the beginning of the current foreclosure crisis, NCLC staff have conducted numerous trainings for attorneys, housing

counselors, and mediators on foreclosure-related topics in more than 20 states. NCLC attorneys testify regularly before Congressional committees, federal agencies, and state legislative bodies on foreclosure- and mortgage-related topics. NCLC also frequently appears as *amicus curiae* in consumer law cases, including a number of mortgage-related cases before trial and appellate courts throughout the country.

Clarifi

The Consumer Credit Counseling Service of Delaware Valley, d/b/a Clarifi, is a 501(c)(3) nonprofit community service organization founded in 1966. Clarifi is certified by the United States Department of Housing and Urban Development as a comprehensive housing counseling agency and approved by the Pennsylvania Housing Finance Agency as a housing counseling agency. Clarifi provides counseling for all stages of homeownership, including foreclosure-prevention counseling that helps homeowners achieve loan modifications, repayment plans, forbearances, or other home retention solutions. In 2016, Clarifi provided 2,110 foreclosure-prevention counseling sessions to 1,516 clients in Pennsylvania. When the specific holder of a mortgage is obfuscated by a non-public database system, it limits the ability of counseling agencies such as Clarifi to provide high-quality housing counseling services to low-to-moderate-income homeowners. Clarifi has experienced difficulties helping clients to obtain a solution when the servicer

switches in the midst of the modification application process and the mortgagee is not recorded. In those instances, Clarifi's advocacy for the client is difficult or impossible because the counselor cannot identify the party to which the complaint should be directed.

II. ARGUMENT

The Commonwealth Court ruled that mortgage assignments do not have to be recorded, and suggested that the failure to record documents revealing interests in property “is of limited consequence.” Opinion at 8. This brief will explain why this view is erroneous. While the workings of the MERS system may be limited consequence in other states, in Pennsylvania, where law and tradition treat mortgage transfers as genuine real estate conveyances, the absence of recording is highly consequential. The scheme to circumvent that law and tradition by placing and maintaining title to a substantial portion of mortgage interests in this Commonwealth in the hands of a fictional “nominee” of present and future members of MERS—despite the actual transfer of those mortgage interests—is no small matter. This systematic undermining of the Commonwealth's mortgage records has resulted in a shift of information about current and historical mortgage ownership away from the public domain and to a proprietary, largely secret, registry. Consumers and the public at large are harmed by incomplete public land records and the evasion of filing fees that fund essential civil legal services and

affordable housing for low-income people. These harms fall heavily on low-income people served by Amici, as well as on Amici themselves.

In light of the errors underlying the Commonwealth Court’s opinion, the Court should reverse and remand this matter for a trial on the merits.

A. The Fiction of MERS as a Kind of Universal “Mortgagee” that Owns the Mortgage but Not the Debt Underlying the Mortgage Is Incompatible with Pennsylvania Law and with the Language in the Typical Pennsylvania Mortgage Instrument

The industry players behind MERS calculated that they could avoid the payment of filing fees for serial mortgage assignments by maintaining static, recorded title of a mortgage in the name of the MERS “nominee,” while the ownership of the actual debt underlying the mortgage passed from one entity to another. However, this ploy simply does not work under Pennsylvania law.²

The creation of a mortgage obligation requires the borrower-homeowner to execute two documents: (1) a note or bond that embodies the underlying loan and describes its terms, and (2) the mortgage instrument itself. The former is the obligation to repay the loan; the latter is a property interest that secures the repayment obligation. That is precisely what this Court meant in *Pines v. Farrell*, 848 A.2d 94 (Pa. 2004), when it described the “dual nature” of a mortgage transfer

² Although the Third Circuit, in a case of first impression, interpreted Pennsylvania law otherwise, *Montgomery Cty. v. MERSCORP Inc.*, 795 F.3d 372 (3d Cir. 2015), “it is axiomatic that [federal court] decisions [interpreting state law] are not binding and that this court is the final arbiter of state law.” *Hoy v. Angelone*, 720 A.2d 745, 750 (Pa. 1998).

as involving both the transfer of a debt and an actual conveyance of an interest in property.

The MERS system is premised on the notion that these two interdependent components of a mortgage obligation can be split between different owners—the note lying with the actual beneficial owner of the debt and the mortgage with a fictional “nominee” of all conceivable transferees within the MERS membership. But severing the debt from the property interest securing the debt is inconsistent with Pennsylvania law and the language of most mortgage instruments.

It has long been understood that a mortgage cannot meaningfully exist without the underlying indebtedness it secures. *E.g.*, *Nat’l Live Stock Bank of Chi. v. First Nat’l Bank of Geneseo*, 203 U.S. 296, 306 (1906). As famously explained, “The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.” *Best Fertilizers of Ariz., Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App.), *rev’d on other grounds*, 570 P.2d 179 (Ariz. 1977); *see also* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205, 1237 (2013) (“If the note and mortgage are split between different parties, the assignee of only the mortgage ordinarily holds a worthless piece of paper.”). Thus, when a mortgagee negotiates the mortgage note, by that act the mortgagee effectively transfers ownership of the underlying debt. To complete the transfer of the entire mortgage obligation in

accordance with Pennsylvania law, including the security for that debt, however, there must be a separate conveyance of an actual, written mortgage assignment.

There are several reasons why this is so. First, because Pennsylvania is a mortgage “title theory” jurisdiction, *see Pines*, 848 A.2d at 100, the mortgage is not a mere accompaniment to the note, but rather is a recognized real property interest that must be transferred in accordance with the rules governing real property conveyancing. This Court has made clear that an assignment of mortgage is just as much a conveyance of an interest in real estate as is the original mortgage. *Id.* All such conveyances are governed by Pennsylvania’s Statute of Frauds, 33 P.S. § 1, meaning that there must be an actual written assignment executed in order for it to be treated as a legally recognized conveyance. *Bozzi v. Greater Del. Valley Sav. & Loan Ass’n*, 389 A.2d 122 (Pa. Super. 1978). At the preliminary objection stage, when there is not yet any factual record, it cannot be determined whether or not there is any writing satisfying the Statute of Frauds when one MERS member assigns the mortgage to some other member.

Moreover, in order to complete any conveyance, there must be an actual *delivery* of the instrument containing the conveyancing language. *Herr v. Bard*, 50 A.2d 280, 281-82 (Pa. 1947); *Kane v. Girard Tr. Co.*, 40 A.2d 466, 469 (Pa. 1945); 2 Ronald M. Friedman, LADNER PENNSYLVANIA REAL ESTATE LAW, § 16.15 (5th ed. 2006). Here, with regard to any transfer of the mortgage interest that occurs

between MERS members, it is hard to imagine what act constitutes delivery of the actual mortgage interest. In short, it appears that the MERS system is grounded on the assumption that mortgage interests can be conveyed without any conveyancing instrument executed by the assignor and nothing delivered to the supposed assignee.³

Far from being an outlandish suggestion that both the mortgage be assigned and the note negotiated in order to accomplish a transfer, the standard conveyancing language of a Pennsylvania mortgage assignment reflects precisely this expectation: “ALSO the Bond or Obligation in the said Indenture of Mortgage recited, and all Moneys, Principal and Interest, due and to grow due thereon.”⁴ Indeed, the Federal Home Loan Mortgage Corporation (“Freddie Mac”), which

³ The incompatibility between the MERS system and Pennsylvania property law is most pronounced when a mortgage is transferred to an entity that is not a MERS member. The MERS bylaws require MERS to convey an assignment out of the MERS system when this occurs, but, the Amici believe, once the record is developed the facts will show that such assignments do not happen—not surprising given that MERS is an entity with no employees that acts solely through the acts of its members. The absence of such an assignment creates confusion in the chain of title that can be difficult to resolve within the public recording system. The Supreme Court of Rhode Island recently had to confront an example of such confusion in *Dilibero v. MERS*, 108 A.3d 1013 (R.I. 2015). There, a lender filed a bankruptcy petition, and among the executory contracts it rejected as a bankruptcy debtor was its membership agreement with MERS. When, years later, a MERS member trying to foreclose filed an assignment of mortgage purporting to assign the mortgage from MERS to itself, the court was compelled to find that assignment void, thereby making it seemingly impossible for the current owner of the debt to foreclose.

⁴ See 2 Ronald M. Friedman, LADNER PENNSYLVANIA REAL ESTATE LAW, § 26.01(c) (5th ed. 2006).

filed an amicus brief in the Commonwealth Court in support of Defendants-Appellees, has long used a Pennsylvania mortgage form (Form 3039), *see* <http://www.freddiemac.com/uniform/unifsecurity.html>, that reflects the nonseverability of the mortgage and the note since many of the key terms of the mortgage obligation, such as the interest rate and charges for prepayment and late payment, appear only in the separate note, which is incorporated into the mortgage by reference.⁵

In short, notes are not interests in property and need not be filed; but an assignment of mortgage—which should accompany the transfer of the mortgage note in order for the entire interest in the mortgage loan to be transferred—must be reduced to writing and recorded. This has long been understood by Pennsylvania real estate practitioners, which is why the leading commentator on Pennsylvania conveyancing law has for years expressed skepticism about the legality of the MERS device as a proper substitute for a mortgagee’s recording obligations. 2 Ronald M. Friedman, *LADNER PENNSYLVANIA REAL ESTATE LAW*, § 26.01(a) (5th

⁵ While allowing for use of the “MERS as nominee” language in a special version of the first two pages of Form 3039, *see* <http://www.freddiemac.com/uniform/mers/doc/MERS3039PA.doc>, the remaining 14 pages of Form 3039 refer repeatedly to the rights and obligations of “the Lender,” with no further mention of MERS. In Maine, where the uniform mortgage instrument has similar language, that state’s highest court concluded that “MERS is not a mortgagee pursuant to the [Maine foreclosure statute] because it has no enforceable right in the debt obligation securing the mortgage.” *MERS v. Saunders*, 2 A.3d 289, 297 (Me. 2010).

ed. 2006) (characterizing the industry players behind the creation of MERS as “willing to assume the risks of not following [the] time-honored [recording] procedures”).

B. There Are Numerous Public Policy Reasons Why This Court Should Disapprove MERS’s Undermining of the Recording Requirement for Assignments of Mortgages

The Commonwealth Court, without the benefit of any evidentiary record, based its decision in part on “a body of case law interpreting Pennsylvania recording laws that specifically addresses the purpose of those statutes and the effect of a failure to record an interest in land.” Opinion at 6. Aside from the fact that much of that case law predates MERS’s displacement of public recordation, the Commonwealth Court’s interpretation of the purpose and effect of Pennsylvania statutes is grounded on faulty assumptions that would be readily contradicted by evidence were this case to proceed past preliminary objections. Contrary to the Commonwealth Court’s preconceptions, there are numerous public policy reasons why this challenge to the MERS circumvention of Pennsylvania law and tradition should be allowed to go forward.

First, homeowners have an obvious interest in knowing the identity of those who own mortgage interests in their homes, as do potential purchasers of or investors in real estate. The MERS system frequently interferes with homeowners’ access to this information. Courts around the country have recognized that “having

a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.” *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158, 168 (Kan. 2009) (citing *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007); *Johnson v. Melnikoff*, 873 N.Y.S.2d 234, 2008 N.Y. Misc. LEXIS 5353, at *14-15 (Sup. Ct. 2008), *aff’d*, 882 N.Y.S.2d 914 (App. Div. 2009)). Incomplete public land records sometimes even lead to forfeiture of a lender’s interest in a property. *E.g.*, *MERS v. Ditto*, 488 S.W.3d 265 (Tenn. 2015). It is hard to imagine *any* policy justification for hiding from homeowners the identity of the secondary mortgage entity that purchases their mortgage and on whose behalf their mortgage servicer will act.

For an illustration of the importance to homeowners of complete public land records, LASP often represents a delinquent homeowner who has been denied a loan modification on the grounds that the requested modification does not meet the guidelines of the owner of the mortgage; when this happens, the servicer seldom advises the homeowner of the entity that owns the mortgage, and it is therefore impossible to learn what the guidelines are, who is denying the loan modification, and whether the denial was honestly made under those guidelines.

For another illustration, LASP represented a 76-year-old mobile-home owner in Chester County. With only Social Security income, she was unable to afford her mortgage and lot rent when her daughter moved out. When she

purchased the home in 1999, she put down more than half the purchase amount and got a modest mortgage with Sovereign Bank to cover the remaining cost. The Pennsylvania Department of Transportation issued a certificate of origin for the mobile home, but never provided the homeowner with a title. In 2001, Sovereign Bank assigned the mortgage to MERS. When the homeowner tried to sell her home in 2011, Chase Bank identified itself as her lender, but there was no official documentation to prove it. After many written requests to Chase Bank and MERS, neither entity was ever able to provide her with official proof of contiguous chain of title that was acceptable to PennDOT. Even though she had several purchase offers for more than double what she owed on the mortgage, because she was unable to show contiguous chain of assignment from Sovereign Bank to Chase Bank, PennDOT refused to issue title, and she was thus unable to sell her home. The mobile home park evicted her, and Chase Bank eventually foreclosed.

Second, federal law now manifests the importance to homeowners of having this information. Under the Truth in Lending Act (“TILA”), a servicer must identify the beneficial owner of a mortgage upon the mortgagor’s written request, *see* 15 U.S.C. § 1641(f)(2), and, for mortgage assignments occurring after a 2009 TILA amendment, both the assignor and assignee must disclose the assignment to the homeowner within 30 days of the assignment, *id.* § 1641(g). Plainly, this

Court's interpretation of Pennsylvania law should, where possible, be interpreted in a manner consistent with this federal policy.

The Pennsylvania Bankers Association (“PBA”) suggested in an amicus brief before the Commonwealth Court that public recordation of mortgage assignments is now unnecessary because, thanks to TILA, borrowers have an alternative mechanism for locating the owner of their mortgage. But it is illogical to suggest that this relatively new federal right to know—which requires the homeowner to send a letter, hope for a response, and, if not forthcoming, obtain a lawyer to sue—silently reconfigured the fundamental requirements of a centuries-old Pennsylvania recording statute. In any event, a homeowner cannot use TILA to obtain her mortgage's complete chain of title, which would be available as a public record if all assignments were recorded, and which is crucial for a homeowner facing a foreclosure filed by a stranger to the original transaction. *See, e.g., JP Morgan Chase Bank, N.A. v. Murray*, 63 A.3d 1258 (Pa. Super. 2013) (Wecht, J.) (reversing summary judgment in foreclosure action where evidence regarding the transfer of the mortgage obligation was inconsistent). Nor can parties other than the homeowner, such as potential purchasers of or investors in real estate, use TILA to learn who owns a mortgage.

Third, for mortgages that are eventually foreclosed, mortgage assignments must be filed anyway, but the MERS system has diminished the quality and

meaningfulness of such assignments. In Pennsylvania, a foreclosure complaint, in its description of the plaintiff, must “set forth” all relevant assignments of the underlying mortgage. Pa.R.C.P. 1147(a)(1). When a mortgage is lodged in the name of MERS rather than the actual owner of the mortgage, a Pennsylvania foreclosure plaintiff will file a purported mortgage assignment from MERS to the plaintiff just before filing the foreclosure. Such an “assignment” does virtually nothing to reveal the chain of transfers from the original lender to the plaintiff.⁶

Fourth, even though MERS has now granted homeowners (but not interested third parties) permission to review certain information in its database, the incomplete information offered by MERS is no substitute for clear, comprehensive records of ownership, available publicly and officially in the county registries. As one commentator, who has written extensively on MERS, notes:

First, unlike the traditional public system, MERS does not reveal to consumers the chain of ownership linking the original lender to the current owner of the loan. MERS also does not provide copies of the documents that purport to transfer ownership interests in the land, making it difficult to spot forgery or errors.

Second . . . for securitized mortgages, MERS only reveals the name of the securitization trustee, rather than the trust it serves. . . . Learning the

⁶ The foreclosure treatise authored by one of the authors of this brief discusses why these purported assignments, executed and filed as part of the foreclosure process, are so problematic. *See* Irv Ackelsberg, RESIDENTIAL MORTGAGE FORECLOSURE: PENNSYLVANIA LAW AND PRACTICE, § 7.4.1 (Bisel Co., 2d ed. 2014). Since MERS has no actual beneficial interest in the mortgage, these supposed assignments—often executed by a mortgage servicer representative of MERS “assigning” the mortgage to itself—are not really conveying anything. *Id.*

name of a borrower's securitization trustee does not allow the borrower to research the pooling and servicing agreement that controls a servicer's or trustee's authority to negotiate loan modifications. It also does not identify the name of the trust that could be liable for purchasing loans that violate the Home Ownership and Equity Protection Act or other state predatory lending laws. Even when the borrower knows the name of a securitization trustee, this search result is still not a legally authoritative search upon which a searcher may rely in ruling out the possibility of other potential purchasers that could achieve priority in an ownership dispute.

Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 129-30 (2011) (footnotes omitted). MERS's circumvention of the public recordation system has, for some homeowners facing foreclosure, reduced mortgages to the level of consumer debt, which lacks any public recording system, and which has become notorious for aggressive dunning by debt-collection agencies that may have no proof they have been properly assigned a debt, *see, e.g.*, Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. Times, July 12, 2010, at B1.

Moreover, the records in the MERS system are notoriously incomplete and unreliable. The information in the database is entered not by public servants, or even by employees of MERS, but rather by employees of MERS's members, meaning the thousands of employees of lenders, mortgage servicers, law firms, or title companies throughout the country, a fact causing one court to describe MERS as a "Wikipedia" of mortgage ownership information. *Culhane v. Aurora Loan*

Servs., 826 F. Supp. 2d 352, 368 (D. Mass. 2011), *aff'd*, 708 F.3d 282 (1st Cir. 2013). These individuals have historically received little training or oversight from MERS, and they obtain permission to modify the database via “a boilerplate corporate resolution” that can be generated on the MERS web site. Peterson, *Two Faces*, *supra* at 144; *see also* Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 *Quinnipiac L. Rev.* 551, 589 (2011) (“MERS admits that its attitudes about accuracy in ownership transfer records are blasé: when asked how MERS verifies that certifying officers were signing accurate documentation, MERS’s President and CEO remarked, ‘Well, if nobody challenges it, then it’s probably true.’”).

The MERS system’s lack of oversight and its vulnerability to error or fraud are not merely speculative concerns. A survey of 396 foreclosure cases from six states, including Pennsylvania, “found that where MERS was mortgagee of record (fifty percent of cases), the plaintiff asserting the right to foreclose matched an identified ‘investor’ in the MERS public record only twenty percent of the time.” Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 *Loy. Consumer L. Rev.* 468, 486 & n.90 (2012). A Bankruptcy Court in Nevada, reviewing the status of twenty-seven motions to lift stays filed by MERS, found that in six of them MERS had erroneously filed “as nominee of an entity that no longer has any ownership interest in the note.” *In re*

Mitchell, No. BK-S-07-16226, 2009 Bankr. LEXIS 876, at *17-21 (Bankr. D. Nev. Mar. 31, 2009), *aff'd*, 423 B.R. 914 (D. Nev. 2009). Numerous other lawsuits have brought to light assignments within the MERS system that were documented improperly or not at all. *E.g.*, *In re Carrsow-Franklin*, 524 B.R. 33 (Bankr. S.D.N.Y. 2015), *aff'd in relevant part*, 213 F. Supp. 3d 577 (S.D.N.Y. 2016); *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009); *Wells Fargo Bank, Nat'l Ass'n v. Reyes*, 867 N.Y.S.2d 21, 2008 N.Y. Misc. LEXIS 3509, at *1-2 (Sup. Ct. 2008). A 2011 consent decree between MERS and five federal banking agencies included a finding that, among other things, MERS “failed to exercise appropriate oversight, management supervision and corporate governance, and . . . failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services” to its members.⁷

Fifth, by failing to record assignments in the county registries, the MERS system has not only denied revenues to Pennsylvania counties, it has also had the effect of denying funds to civil legal services organizations statewide. Under the Pennsylvania Access to Justice Act (“AJA”), 42 Pa.C.S. §§ 4901 *et seq.*, county recorders of deeds must remit \$6.00 of each mortgage-assignment fee to a state fund dedicated to organizations that provide civil legal assistance to poor and

⁷ *In re MERSCORP, Inc.*, Joint Docket No. 2011-044 (Apr. 13, 2011), *available at* <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf>.

disadvantaged persons in this Commonwealth. *See* 42 Pa.C.S. §§ 3733(a.1)(1)(v), 3733(a.1)(2)(iii), 3733.1(a)(3), 3733.1(c)(3); 72 P.S. § 1795.1-E(b)(2); 204 Pa. Code § 29.351(f)(iii). In short, and contrary to opinion of the Commonwealth Court, Defendants-Appellees' circumvention of the public recordation system for mortgage assignments is not only unlawful but of great consequence to the public interest as defined by the General Assembly.

III. CONCLUSION

The Commonwealth Court erred in dismissing the case, and this Court should reverse and allow the case to proceed in the Court of Common Pleas.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Per Pa.R.A.P. 531(b)(1)(i) and 531(b)(3), I hereby certify that this Brief contains 5,226 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Benjamin D. Geffen _____
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