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FIFTH CIRCUIT
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No. 12-20559, Ashley Martins v. BAC Home Loans Servicing, L.P., et al
USDC No. 4:11-CV-2104

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No. 12-20559

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASHLEY MARTINS,

Plaintiff-Appellant,

v.

BAC HOME LOANS SERVICING, LP.; FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

BRIEF *AMICUS CURIAE* OF A PLACE LIKE HOME, CENTRAL TEXAS FORECLOSURE DEFENSE GROUP, AND H2O-RESTORE, SUPPORTING REHEARING *EN BANC*, VACATING THE PANEL OPINION, AND REVERSING THE DISTRICT COURT.

On Appeal from the United States District Court
for the Southern District of Texas
Cause No. 4:11-cv-2104

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, A Place Like Home, Central Texas Foreclosure Defense Group, and H2O-Restore have not issued shares to the public, and no Amicus has any parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Ashley Martins

BAC Home Loans Servicing, L.P. *f/k/a* Countrywide Home Loans Servicing, L.P.

Federal National Mortgage Association *a/k/a* Fannie Mae Mortgage, FSB

A Place Like Home

Central Texas Foreclosure Defense Group

H2O Restore

/s/ David Rogers
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1. Introduction .....

2. The panel opinion disregards more than 150 years of established law in Texas, recognized by the United States Supreme Court and this Court, firmly holding that a promissory note is a principal, while the deed of trust is merely incident to it. .....

3. The panel opinion wrongly makes a leap of logic from a premise that does not necessarily lead to its conclusion. The lower court states that MERS may be a mortgagee, which is a permissive status under the law. This does not necessarily mean that MERS, while named a beneficiary, is thus by definition a mortgagee on the Martins' note. This illogical conclusion, if left unaddressed, throws utter confusion into the scores of mortgage cases removed into federal court. .....

4. In the alternative, this Court should certify the foregoing issues presented as certified questions to the Texas Supreme Court, as said issues will impact over 150 years of well-established Texas jurisprudence.

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PRIOR AND RELATED APPEALS

Overlapping legal (but factually distinct) issues presented in this appeal are also pending in:

Hudson v JPMorgan Chase Bank, N.A., et. al., No. 13-50407, filed June 21, 2013 (5th Circ.)

Kramer v. Federal Nat'l Mortg. Assoc., No. 12-51171, filed Nov. 16, 2012 (5th Circ.), and

Wiley v. Deutsche Bank National Trust Company (12-51039) filed Jan. 28, 2013 (5th Circ.),

INTEREST OF *AMICI CURIAE*

A Place Like Home is a Texas non-profit organization dedicated to helping deserving homeowners with incomes below 80% of the median income in the relevant Metropolitan Statistical Area stay in their homes in the face of disputes with banks. A Place Like Home also assists in legal education, financial education, and housing placement. A Place Like Home arranges *pro bono* legal representation for homeowners. A Place Like Home's interest lies in the predictable and correct application of law to properly protect the rights of homeowners in distress.

Central Texas Foreclosure Defense Group (CenTexFD) is an association of dozens of consumer-advocate attorneys who represent homeowners and investors involved in the foreclosure process. Its interest lies in promoting understanding and proper application of Texas foreclosure law, and the regular and predictable application of statutes and rules governing the process.

H2O-Restore is a 501(c)(3) public charity that provides both help to distressed homeowners who find a negotiation and litigation asymmetry with mortgage banks. Given the well-document evidence of corruption within the housing foreclosure markets, H2O navigates homeowners through the foreclosure

process, providing legal support if necessary, in what is surely a stressful, often shameful time. Given the significance of a foreclosure, banks—as well as homeowners—should be required to follow basic common law principles regarding the nature of secured transactions. H2O-Restore believes the panel opinion disregards the plain law of Texas as it has been since before statehood.

Amici believe the current opinion, if not reversed upon rehearing, will introduce uncertainty into Texas real estate markets where, particularly during a time of widespread foreclosure and real estate litigation, consumers and banks need clarity of law in accordance with general principals of secured transaction law and well-established case law in Texas governing the primacy of a promissory note vis-à-vis the security instrument.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the Brief.

BRIEF OF *AMICUS CURIAE*

> Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed.

Fisher v. Univ. of Tex., 631 F.3d 213, 247 (5th Cir. Tex. 2011) (Garza, J. Circuit Judge, Specially concurring.)

QUESTIONS PRESENTED

1. Whether this Court erred in ruling that assignment of Deed of Trust automatically transfers the Note for the purposes of enforcement of the lien.

2. Whether a lender or mortgagee need not be the owner or holder of a Note to Proceed to Foreclosure Sale.

3. Whether this Court erred in ruling that MERS can transfer a Lien in its position as a nominee of lender in contravention to the rulings of this Court and other courts in sister states.

4. In the alternative, whether this Court should refer the foregoing issues presented as certified questions to the Texas Supreme Court, as said issues will impact over 150 years of well-established Texas jurisprudence.

SUMMARY OF THE ARGUMENT

1. In this case, the panel articulates fundamental principles of law, but does not follow them.

2. The panel articulates the principles set forth by the United States Supreme Court in *Carpenter v. Longan*[1] that a lien is incident to a debt, and that when a debt is transferred, the lien transfers with it, but an attempt to transfer the lien without the debt is a nullity, and transfers nothing. But the panel expressly repudiates the Supreme Court, and does not follow the articulated principle.

3. The panel articulates the principle, found in Texas Jurisprudence, 3d Deeds of Trust and Mortgages that "any attempt to assign or transfer [a mortgage] apart from the debt is a nullity," but expressly repudiates the authority of Texas Jurisprudence, and does not follow the articulated principle.

4. The panel articulates the principle of the Texas Property Code's definitions, but does not follow the articulated principles.

5. This Brief amplifies two points the Appellants make in their brief. First, this Brief argues that the panel opinion erred in its presentation of Texas law regarding the nature of promissory note and deed of trust transfers, overturning over a

[1] 83 U.S. 271, 274 21 L.Ed. 313 (1872)

century of unchanged Texas law and federal law both from this Court and the United States Supreme Court. The panel opinion, in effect, lets the "tail wag the dog" by suggesting that assignment of a deed of trust has any effect on a promissory note. Second, the Brief argues that MERS' role within the mortgage foreclosure process has been confused by a failure to follow basic legal definitions within the foreclosure context. MERS is allowed under statute to serve as a mortgagee, but such potential of action does not mean MERS, when listed as "beneficiary" on a deed of trust, is in fact necessarily designated as a mortgagee. The relevant statute is permissive, not mandatory, and has been misconstrued by the panel. Additionally, the panel has conflated the traditional common law definition of mortgagee, and the powers attendant thereon, with the new Texas statutory definition of mortgagee, which is both broader and more limited than the common law, traditional definition. In making these errors, the panel has disrupted the balance of interests, powers and rights painfully negotiated over more than a century and half between lenders and borrowers, homeowners, trustees, and third-party servicers and recording organizations. The error of the panel threatens the predictable flow of commerce and the certainty of contract and property rights for 22 million Texans.

ARGUMENT

A. The history and decisions of Texas Courts regarding the relationship between Notes and Liens does not support the panel opinion.

6. The panel opinion, in effect, lets the "tail wag the dog" by suggesting that assignment of a deed of trust has any effect on a promissory note. While there is some support for this notion in the Restatement (Third), there is no support at all for this in Texas jurisprudence. *See Reinagel v. Deutsch Bank National Trust Company*, 2013 U.S. App. LEXIS 14089 (5th Circuit (Tex.) July 11, 2013) (Graves, J., concurring "Texas courts have not "expressly adopted" the *Restatement's* note-follows-the-mortgage presumption precisely because longstanding United States Supreme Court and Texas precedent *requires* that a foreclosing party be the holder of the promissory note in order to foreclose. *Carpenter v. Longan, 83 U.S. 271, 274 (1872)* ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *accord Nat'l Live Stock Bank v. First Nat'l Bank, 203 U.S. 296, 306 (1906)*; *Baldwin v. State of Mo., 281 U.S. 586, 596 (1930)* (Stone, J., concurring); *see also Cadle Co. v. Regency Homes, Inc., 21 S.W.3d 670, 674 (Tex. App. 2000)* (holding that, in order to foreclose, the party

seeking to enforce the note must show it is the owner and holder of the note)." The honorable Judge Graves is entirely correct.

7. The panel opinion not only ignores the Supreme Court's Carpenter opinion, it ignores more than a century and a half of Texas jurisprudence, beginning with *Duty v. Graham* 12 Tex. 427 (1854) (The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use."), and leading up to the Fort Worth Court of Appeals in January of 2012, *Robeson v. Mortgage Elec. Registration Sys*. 2012 Tex. App. LEXIS 137, slip op. at 15-16 (Tex. App. Fort Worth Jan. 5, 2012) ("A mortgage typically follows the note it secures. *Gilbreath v. White, 903 S.W.2d 851, 854 (Tex. App.--Texarkana 1995, no writ)*; *J.W.D., Inc. v. Federal Ins. Co., 806 S.W.2d 327, 329-30 (Tex. App.--Austin 1991, no writ)*; *Lawson v. Gibbs, 591 S.W.2d 292, 294 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.)*.")

8. Nor were the half-dozen cases cited so far isolated instances of finding for the proposition that under Texas law the lien follows the note – not the other way around, as the panel misperceives. The principle, apparently first enunciated by the Texas Supreme Court in 1854 has been consistently followed in Texas law. *Perkins v. Sterne* 23 Tex. 561, 563 (1859) ("The assignment of the interest of the

mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. 4 Kent. And the reason is, that the principal thing always draws to it that which is accessory or incidental; so that the principal thing cannot take one direction, and that which is incident to it, another direction.")

9. In *Pope v. Beauchamp,* 219 S.W. 447, 448 (1920), the Texas Supreme Court quoted with approval *Carpenter v. Longan*, 83 U.S. 271 (1872), which it again approvingly cited in *West v. First Baptist*, 71 S.W. 2d 1090, 1098-99 (Tex. 1934). And again in *University Savings v. Security Lumber,* 423 S.W.2d 287, 292 (1967), the high court affirmed the principle.

10. Meanwhile, of course, lower courts followed the Supreme Court's lead. *See J.W.D., Inc. v . Fed. Ins. Co*, 806 S.W.2d 327, 329-30 (Tex. App.--Austin 1991, no writ); *Nicholson* v. *Washington Mutual. F.A.,* 2001 WL 1002418, *4 (Tex. App.-Corpus Christi 2001) (not designated for publication); *Gilbreath v. White*, 903 S.W.2d 851, 854 (Tex. App.--Texarkana 1995, no writ) ("An assignment of the deed of trust is not in evidence, but the collateral follows the promissory note obligation. *Howard v. Stahl*, 211 S.W. 826, 828 (Tex. Civ. App.--Amarillo 1919, no writ)"); *Vackar v. Supreme Lodge of Slavonic Benev. Order of the State of Texas*, 52 SW.2d 655, 656 (Tex.Civ.App.--Austin 1932) ("A lien upon property

securing a debt is incident to and follows the debt; so that a renewal or extension of the debt automatically renews or extends the lien. *Slaughter v. Owens, 60 Tex. 668*; *Beck v. Tarrant, 61 Tex. 402*; *Wilcox v. Bank, 93 Tex. 322, 55 S.W. 317*; *First Nat. Bank v. Watson (Tex. Civ. App.) 271 S.W. 438*, affirmed (Tex. Com. App.) *285 S.W. 1050*; *Sparks v. Summers (Tex. Civ. App.) 289 S.W. 714*; *Power v. Westhoff (Tex. Civ. App.) 4 S.W.2d 274* (error dismissed); *T. A. Hill State Bank v. Schindler (Tex. Civ. App.) 33 S.W.2d 833* (error refused).")

11. Additionally, the panel overrules the opinions of several other panels of this Court. *Kiggundu v. Mortg. Elec. Registration Sys. Inc.*, 469 F. App'x 330, 332 (5th Cir. (Tex.) 2012) ("under Texas law, the mortgage follows the note."); *Goldberg v. R.J. Longo Constr. Co*., 54 F.3d 243 (5th Circ. (Tex.) 1995) ("Texas case law specifically holds that a lien is inseparable from the debt giving rise to it… where there is ... a debt secured by a lien, the lien is an incident of and inseparable from the debt.."); *United States v. Vahlco Corp.,* 720 F.2d 885, 891 (5th Cir. (Tex.) 1983); *see also Kirby Lumber Corp. v. Williams,* 230 F.2d 330, 336, 333 (5th Cir. (Tex.) 1956), (holding that *Carpenter* correctly stated Texas law, and stating "[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.")

12. Additionally, the panel incorrectly states that "the mortgage" was assigned to MERS and then to BAC. No document in the record supports this claim. First of all, in Texas, there is no "mortgage." Texas is a lien theory, not a mortgage theory state.[2] Though the document presented in the record is titled "Assignment of Mortgage," it is unclear what effect such a document has. Assuming, *arguendo*, that such a document serves as an "Assignment of Deed of Trust", such an assignment is ineffective, as transfer of Note ownership requires indorsement and physical transfer.[3]

13. The "Assignment" produced by Defendant-Appellees is not, as the panel asserts, to MERS[4], nor is it to BAC Home Loans. It is to Countrywide Home Loans Servicing, LP[5]

14. Additionally, contrary to the panel's opinion, the assignment does not "explicitly include[] the power to foreclose."[6] The word "foreclose" does not even appear in the assignment.[7]

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[2] *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981)
[3] *Norwood v. Chase Home Fin. LLC*, 2011 U.S. Dist. LEXIS 5147 (W.D. Tex. 2011), slip op. 6-15, Texas Business and Commerce Code (UCC) §3.201(b), 3.204.
[4] Panel Opinion at 12.
[5] USCA5 169
[6] Panel Opinion at 12.
[7] USCA5 169

15. All the additional and further foreclosure documents assert that BAC Home Loans Servicing, LP is both mortgagee and mortgage servicer.[8]

16. Additionally, and perhaps most damningly, the copy of the Note produced by Defendants with their motion for summary judgment is unendorsed.[9] Defendant-Appellees presented an unendorsed Note made out specifically to another party as evidence of their right to foreclose under a Deed of Trust.[10] That Deed of Trust specifies that the power of sale may only be exercised by the "holder of the note entitled to receive payment."[11, 12] An unendorsed Note made to a

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[8] USCA5 174-188

[9] Additionally, the Note does not even mention MERS. The Note, unlike the Deed of Trust, is an entirely bi-lateral contract. The Deed of Trust, in contrast, is, unlike traditional Deeds of Trust, not Tri-lateral with a named Trustee as third party, but is Quadri-lateral, with certain traditional trustee powers granted to MERS. Though MERS is named as "beneficiary" in the contract, it is not in fact a beneficiary. *See Nueces County v. Merscorp Holdings, Inc., et al*., No. 2:12-CV-00131, "Order" at 11 (Dismissing Defendants Rule 12(b)(6) Motion to Dismiss, issued July 3, 2013),

[10] USCA 5 143-146

[11] USCA 5 158. "If default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums…" "If Lender invoked the power of sale…" For definition of "Lender," see USCA 5 147 BSM Financial, L.P. or "holder of the Note who is entitled to receive payments under the Note."

[12] The Court must enforce the "entitled to receive payment" language as well, not merely the "holder". *See Wolf v. Wells Fargo*, Cause No. 2011-36476, Order Granting Class Certification, filed May 1, 2013, attached to this Reply Brief as an exhibit.

specific party is order paper, not bearer paper.[13] Only the party to who order paper is made payable can qualify as the "holder" of such a Note.[14] The transfer by foreclosure sale is therefore utterly and completely without authority, and void *ab initio*.[15]

> Even if Wells Fargo physically holds the Note, it does not mean they have the right to enforce the Note, collect on the Note, or to enforce the Security Instrument. Paragraph one of the Note signed by the Wolfs states, "Lender, or anyone who takes this Note by transfer and who is entitled to receive payments under the Note, is called the 'Noteholder.'" It is the Noteholder who would have the right to enforce the Note. If Wells Fargo is in physical possession of the Note, it may have the right to negotiate the Note – that is, sell it to someone else – but it doesn't mean Wells Fargo has the right to enforce the Note. Wells Fargo must prove it had the right to receive payments under the Note, it paid consideration for the Note, and the Note was legally and properly transferred into the 2006-NC3 Trust.

(footnotes omitted.)

[13] Texas Business and Commerce Code 3.109(b)

Sec. 3.109. PAYABLE TO BEARER OR TO ORDER. (b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person, or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

[14] Texas Business and Commerce Code 3.203 (c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

[15] Action without authority is **void**.

B. MERS attempts to rewrite plain definitions of Texas law are in error.

17. Definitions matter. This case puts that fact on display. The parties involved within *Martins*, as involved in the thousands of foreclosures per year in Texas—and in nearly every deed of trust—are defined as follows:

18. Mortgagee – The mortgage creditor or lender. *See* BLACKS LAW DICTIONARY, EIGHTH EDITION 1034. This is the original lender.

19. Grantee – One to whom property is conveyed. *Id.* at 720.

20. Beneficiary-a party who receives a benefit (a financial interest) based on some legal arrangement; a fiduciary; or a person who is entitled to enforce a promise. *Id.* at 165.

> 'A clear distinction is recognized to exist between a sale without authority, and one where there is an authority not strictly pursued; in the former case the sale is void; in the latter the title will pass, and the party injured by the irregular acts of the officer will be left to his remedy against him.' And again: 'The distinction between acts done by an officer without authority, and those done or omitted, in its irregular exercise, has been previously stated. The former are nullities, and confer no right; the latter do not affect the titles acquired under the acts of the officer, unless the purchaser be implicated.'

Houston Oil Co. v. Randolph, 251 S.W. 794, 797 (Tex. 1923), citing to *Howard v. North*, 5 Tex. 290 (Tex. 1849)*; See also Town of Fairview v. City of McKinney*, 271 S.W.3d 461, 469 (Tex. App. Dallas 2008) (pet denied); *Sydnor v. Roberts*, 13 Tex. 598, 616-617 (Tex. 1855).

21. Owner-One who had the right to possess, use, and convey something; a person in whom one or more interests are vested. *Id.* at 1137.

22. Holder-A person who has legal possession of a negotiable instrument and is entitled to receive payment on it, in possession of a document of title or investment security, or who possesses or uses property. *See* BLACKS LAW DICTIONARY, EIGHTH EDITION 749.

23. These definitions are important; indeed, words matter, and the law has no place for Lewis Carroll.[16]

24. Texas is a lien theory state.[17] This means that full title is held by the mortgagor, who is the grantor of a deed of trust. Deeds of trust in Texas are strictly construed in favor of the grantor.[18] There is no way to alter or substitute that power.[19]

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[16] ""When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'" Lewis Carroll, *Through the Looking Glass*, 1871.

[17] *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981); *Humble Oil & Ref. Co.*, 244 S.W.2d 637, 640 (Tex. 1951) (discussing the development of Texas mortgage law); *Willis v. Moore*, 59 Tex. 628, 1883 Tex. LEXIS 240, at *5 (Tex. 1883).

[18] *Fuller v. O'Neal*, 69 Tex. 349, 6 S.W. 181 (1887) ("The course marked out for the trustee to pursue must be strictly followed by him for the method of enforcing the collection through such deeds is a harsh one. The grantor of the power is

25. MERS, and its business allies, ignore these well-settled definitions and principles, and illogically conflate two distinct ideas. A company, like MERS, *may* be a *permissible* mortgagee by statute; however, as Judge Gonzalez Ramos elucidated, that does not equate that MERS *is* the mortgagee or the beneficiary.[20]

26. Judge Gonzalez Ramos explained (internal footnote included in sequence):

> [J]ust because a beneficiary of a security instrument qualifies as a mortgagee under Section 51.0001(4)(A) and MERS qualifies as a mortgagee under Section 51.0001(4)(B), does not mean that MERS is a beneficiary of the security instrument. MERS may be a mortgagee of record for purposes of foreclosure, but not every mortgagee is a beneficiary.[2]
>
> Section 51.0001(4) does not redefine MERS as a grantee, beneficiary, owner, or holder of a security instrument as urged by Defendants; nor does it indicate an intent on the part of the Legislature to permit MERS to be indexed as a substitute grantee in the county property records on behalf of its members. Defendants' interpretation is

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entitled to have his directions obeyed; to have the proper notice of sale given to have it to take place at the time and place, and by the person appointed by him"); *see also Winters v. Slover*, 251 S.W. 2d 726 (Tex. 1952); *Slaughter v. Qualls*, 139 Tex. 340 (Tex. 1942); *Ford v. Emerich*, 343 S.W. 2d 527, 531 (Tex. App. – Hous. 1961, writ ref'd n.r.e); *Faine v. Wilson*, 192 S.W. 2d 456, 458 (Tex. App. – Galveston 1946); *Murchison v. Freeman*, 127 S.W. 2d 369, 372 (Tex. App. – El Paso 1939, writ ref'd) (the terms of a deed of trust are **strictly construed**). *University Savings Assoc. v. Springwood Shopping Center*, 644 S.W.2d 705 (Tex. 1982).

[19] *Michael v. Crawford*, 108 Tex. 352, 193 S.W. 1070 (1917).

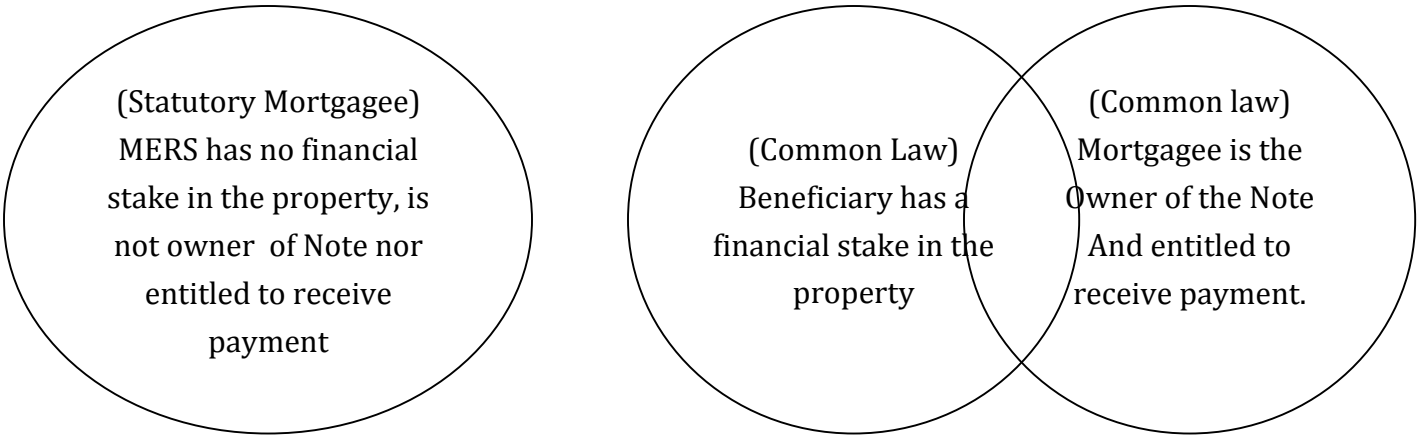
[20] *See Nueces County v. Merscorp Holdings, Inc., et al.*, No. 2:12-CV-00131, "Order" at 11 (Dismissing Defendants Rule 12(b)(6) Motion to Dismiss, issued July 3, 2013),

> inconsistent with the plain language of Section 51.0001(4); it is inconsistent with the Court's interpretation of Section 51.0001(4) in the larger context of Chapter 51; and it is inconsistent with the legislative history of the 2003 amendment to Chapter 51. ***This Court cannot simply bend the laws of Texas to fit the MERS system, no matter how ubiquitous it has become.*** *See Gov't Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952) ("the duty of courts [is] to construe a law as written . . . and not look for extraneous reasons to be used as a basis for reading into a law an intention not expressed nor intended to be expressed therein"); *In Re Agard*, 444 B.R. 231 (E.D.N.Y. 2011) ("This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law."). The Court concludes that, for purposes of Chapter 51 of the Texas Property Code, MERS is not a lender, grantee, beneficiary, owner, or holder of security instruments; it is merely the nominee of the MERS members who serve in those capacities.[21]
>
> FN 2 In the Terms and Conditions MERS provides to its members, MERS identifies itself as a "mortgagee of record," not an actual mortgagee. (D.E. 52-1 at 14.) Furthermore, MERS is careful to state that it is a nominee and serves only in an administrative capacity for the beneficial owner or owners of the mortgages. (*Id*. at 14.) Yet, in the attached sample deed of trust prepared by MERS for its members, MERS designates itself as the beneficiary of the security instrument. (*Id*. at 17.))

27. MERS, thus, is not a beneficiary, and the known definition of beneficiary is what this Court should enforce. Judge Gonzalez Ramos noted that MERS "'has no rights whatsoever to any payments made on account of such mortgage loans, to

[21] Id. at 11-12.

any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.'"[22] A plain Venn diagram illustrates the point.



28. (MERS does not qualify as a common law mortgagee as it is not the Owner nor is it entitled to receive payment of the Note)

29. This convergence of common law beneficiary and common law mortgagee is where MERS pretends it stands, despite more than a hundred and fifty years of Texas law to the contrary. MERS (1) in no case may ever collect money due on the Note; (2) is not a secured party to the transaction; (3) has no right to enforce the promissory note; (4) has no right to seek judgments against borrowers in default; (5) is not the Lender; (6) is not a grantee; (7) is not a grantor; (8) is not a holder or owner of notes or liens; (9) is not the loan servicer; (10) has

[22] *Id*. (quoting MERS' own terms and conditions).

no right to foreclose beyond the powers listed in the deed of trust; and (11) has no financial stake in whether the loans are repaid.

30. Simply put, MERS wrongly attempts to define its role as someone holding "legal title." USCA5 149. This flies in the face of Texas law, as Texas is a lien theory state, and MERS is merely the "nominee" for a party that possesses a beneficial interest. A beneficial interest is "[a] right or expectancy in some thing (such as a trust or an estate), as opposed to legal title to that thing.[23]

31. Neither MERS nor the lender nor lender's successors or assigns hold legal title to the property, as nominee can be defined as such.[24] The homeowner holds legal title and merely grants a deed of trust, a security instrument, to the party indicated within the deed of trust with power to foreclose, conditional on the fulfillment of certain actions. This is not a transfer of legal title. MERS claim to hold legal title is false.

32. A belief is not true simply because it is convenient.[25] As convenient as it may be for banks and MERS to attempt "rewriting" standard property law

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[23] BLACK'S LAW DICTIONARY, EIGHTH EDITION 828

[24] *Id.* at 1076 ("A party who holds bare legal title for the benefit of others . . . ").

[25] *See* Christopher Peterson*, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 146 (decrying the "disingenuous" designation of random bank employees as MERS 'vice-

definitions as they have existed for centuries, citizens need stability in the law and predictability, not a legal system that gyrates and engages in sophistic gymnastics to accommodate a company's pecuniary desires for efficiency.

33. "***This Court [should] not simply bend the laws of Texas to fit the MERS system, no matter how ubiquitous it has become.*** *See Gov't Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952) ("the duty of courts [is] to construe a law as written . . . and not look for extraneous reasons to be used as a basis for reading into a law an intention not expressed nor intended to be expressed therein")" *Nueces County*, at 11.

CONCLUSION

34. This case, and another like it recently identified on appeal to this Court, *see Kramer v. Federal Nat'l Mortg. Assoc.*, No. 12-51171, filed Nov. 16, 2012 (5th Cir.), present an opportunity for clarity in federal court, particularly in Texas, but between conflicts across the Texas districts and even within the same districts. Especially when suits come to federal court with assymetrical disparites between a corporate plaintiff who holds (or could be hiding) most of the documents in the

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presidents' and "absurd" the designation of random bank employees as MERS 'secretaries' when they have no direct connection to MERS.).

national housing collapse, Rule 12 motions should not be permitted under Texas law given the clear Texas law to the contrary. Martins should be able to proceed to discovery and the lower court should be REVERSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amici Curae has been served upon all parties counsel via the ECF system on Thursday, August 8, 13.

/s/ Stephen Casey

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b). Exclusive of the exempted portions in 5TH CIR. R. 32.2.7(b)(3), the brief contains (select one):

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/s/ David Rogers