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MERS is a recent creation of the mortgage industry primarily designed for the purpose of electronically tracking mortgage payments, not for enforcing them.' R.K. Arnold, Yes, There Is Life on MERS, Prob. & Prop., Aug. 1997; see also Phyllis K. Slesinger & Daniel McLaughlin, Mortgage Electronic Registration System, 31 Idaho L. Rev. 805, 806 (1995) (noting the mortgage industry sought to create its own private - central - electronic - registration system").

In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage. [Footnotes omitted.]

Fair v. Moody, No. 278906 (Mich. App. Dec. 23, 2008).

The defined term "Mortgagees" includes MERS for convenience only. "MERS is simply a company created to track ownership interests in residential mortgages . . . Mortgage lenders subscribe to MERS and agree to appoint MERS to act as their common agent on mortgages they register with the MERS system." Countrywide Home Loans, Inc. v. Wilkerson (In re O'Celley), 420 B.R. 18, 26 (D. Haw. 2009) (internal quotation marks omitted). See also Neighbors v. Mortgage Elec. Registration Sys., Inc., 2009 WL 192445 at fn.1 (N.D. Cal. Jan. 27, 2009) ("MERS is an electronic registration and tracking system that was formed to track both beneficial ownership interests in, and servicing rights to, mortgage loans as they change hands through the life of a loan.").

Scott v. Wells Fargo Bank, Case No. 07-57624, fn. 1 (Bankr. S.D. Ohio March 2, 2010).

As the nominee, MERS does not have the power to foreclose and therefore cannot assign such authority. A nominee is "a person designated to act on behalf of another, usu. in a very limited way." Black's Law Dictionary 1076 (9th ed. 2009). A nominee is also a "person who holds bare legal title for the benefit of others or who receives and distributes hinds for the benefit of others." Id. Nothing more.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust

Kesler v. Landmark National Bank, [216 P.3d 158](#), 167 ([Kan. 2009](#)), quoting Bellistri V. Ocwen Loan Servicing, LLC, [284 S.W.3d 619](#), 623 (Mo. App. 2009). Thus, MERS does not have the authority - either as mortgagee or as nominee - to execute the assignment of mortgage which Plaintiff has presented.

Even if the mortgage is interpreted as allowing MERS to assign its interest, the assignment was ineffective because MERS never acquired the debt. The language in the assignment filed in this action which purportedly transfers the debt is a nullity and has no effect. Sobel v. Mutual Development, Inc., 313 So. 2d 77 (Fla. 1st DCA 1975). An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. Carpenter v. Longan, [83 U.S. 271](#), 274 (U.S. 1873). "An assignment of the mortgage without an assignment of the debt creates no right in the assignee." Vance v. Fields, [172 So. 2d 613](#), 614 (Fla. 1st DCA 1965). Under its own rules, MERS never acquired any interest in the debt. Because MERS did not acquire the debt, it cannot assign a mortgage.

Thus MERS never acquires any right or interest in the underlying debt. MERS's complete lack of interest in the proceeds of the loans is corroborated by the decisions of other courts that have examined the function of MERS. For instance, the United States Court of Appeals for the Seventh Circuit has described MERS's complete lack of substantive involvement in the lending transaction:

MERS is not the lender. It is a membership organization that records, trades, and forecloses loans on behalf of many lenders, acting for their accounts rather than its own. . . . It is a nominee only, holding title to the mortgage but not the note. Each lender appears to be entitled not only to payment as the note's equitable (and legal) owner but also to control any litigation and settlement.

Mortgage Elec. Registration Sys. Inc. v. Estrella, [390 F.3d 522](#), 524-25 (7th Cir. 2004).

Similarly, the Nebraska Supreme Court concluded MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes. Mortgage Elec. Registration Sys., Inc. v. Neb. Dep 't of Banking & Fin., [704 N.W.2d 784](#), 788 (Neb. 2005). This conclusion relied upon MERS's arguments to that court that "it only holds legal title to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members." *Id.* at 787 (emphasis added). Most recently, the Arkansas Supreme Court "specifically reject[ed] the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act." Mortgage Elec. Registration Sys., Inc. v. S. W Homes of Ark, [301 S.W.3d 1](#), 3 (Ark. 2009). Based on that fact, Arkansas' highest court went on to hold that MERS is not the beneficiary, even though it is so designated in the deed of trust.

The most that can be argued is that MERS - as nominee - is the agent for the original lender. But this agency relationship terminated once the original lender delivered the promissory note to someone else. The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that

the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. [C.D. Cal. 2008](#)) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned. . . MERS purportedly assigned both the deed of trust and the promissory note. . . However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority. . . to assign the note.").

Kesler v. Landmark National Bank, [216 P.3d 158 \(Kan. 2009\)](#).

Plaintiff cannot foreclose on the mortgage because it has failed to "establish its relationship to MERS or how plaintiff became the holder of the mortgage." *Bank of NY v. Dell-Webster*, 2008 NY Slip Op 52678(U) (N.Y. Sup. Ct. 10/20/2008), 2008 NY Slip Op 52678 (N.Y. Sup. Ct., 2008). Recently, the Second District Court of Appeal, in a case very analogous to this one, reversed a summary judgment of foreclosure that was granted simply because the Plaintiff produced an assignment from MERS. See *Verizzo v. Bank of New York*, 35 Fla. L. Weekly D494 (Fla. 2d DCA March 3, 2010).

Where a plaintiff does not own a mortgage or have any interest in the mortgage at the time of filing foreclosure action, the case must be dismissed for failing to comply with statutory requirements of standing. See *Davenport v. HSBC Bank*, [275 Mich.App. 344](#), 347-348, [739 N.W.2d 383](#), 385 (Mich.App.,2007) (Where the defendant did not own the mortgage or an interest in the mortgage at the time in which they commenced foreclosure proceedings. Quite simply, defendant did not yet own the indebtedness that it sought to foreclose. Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void ab initio). See also *Fleet Nat. Bank v. Nazareth*, 75 Conn.App. 791, 794-795, [818 A.2d 69](#), 71 (Conn.App.,2003) (In ...

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