

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 523 C.D. 2016

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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-Appellants,*

v.

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-Appellees.*

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**BRIEF IN SUPPORT OF AFFIRMANCE OF AMICI CURIAE  
PENNSYLVANIA LEGAL AID NETWORK, LEGAL AID OF  
SOUTHEASTERN PENNSYLVANIA, MIDPENN LEGAL SERVICES,  
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, and THE  
CONSUMER CREDIT COUNSELING SERVICE OF DELAWARE  
VALLEY d/b/a CLARIFI**

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Dated: August 25, 2016

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. STATEMENT OF IDENTITY AND INTEREST OF AMICI..... 1

II. ARGUMENT ..... 9

    A. Under Pennsylvania Mortgage Law, a Mortgage and the Note It  
    Secures Cannot Be Transferred Separately ..... 11

    B. There Is No Public-Interest Justification for Allowing MERS to  
    Ignore the Pennsylvania Recording Statute ..... 14

III. CONCLUSION..... 23

CERTIFICATION OF WORD COUNT ..... 24

## TABLE OF AUTHORITIES

### CASES

<i>Bellistri v. Ocwen Loan Servicing, LLC</i> , 284 S.W.3d 619 (Mo. Ct. App. 2009) ....	21
<i>Culhane v. Aurora Loan Servs.</i> , 826 F. Supp. 2d 352 (D. Mass. 2011) .....	20
<i>Heicklen v. Pa. Bd. of Elections</i> , 751 A.2d 260 (Pa. Commw. Ct. 2000) .....	14
<i>In re Carrsow-Franklin</i> , 524 B.R. 33 (Bankr. S.D.N.Y. 2015).....	21
<i>In re Mitchell</i> , No. BK-S-07-16226, 2009 Bankr. LEXIS 876 (Bankr. D. Nev. Mar. 31, 2009) .....	21
<i>In re Schwartz</i> , 366 B.R. 265 (Bankr. D. Mass. 2007).....	15
<i>In re Vargas</i> , 396 B.R. 511 (Bankr. C.D. Cal. 2008) .....	21
<i>Johnson v. Melnikoff</i> , 873 N.Y.S.2d 234 (Sup. Ct. 2008) .....	15
<i>JP Chase Bank, N.A. v. Murray</i> , 63 A.3d 1258 (Pa. Super. 2013).....	13
<i>Landmark Nat’l Bank v. Kesler</i> , 216 P.3d 158 (Kan. 2009).....	15
<i>Montgomery Cnty. v. MERSCORP Inc.</i> , 795 F.3d 372 (3d Cir. 2015).....	14
<i>Mortgage Elec. Registration Sys. v. Ditto</i> , 488 S.W.3d 265 (Tenn. 2015) .....	16
<i>Nat’l Live Stock Bank of Chi. v. First Nat’l Bank of Geneseo</i> , 203 U.S. 296 (1906).....	12
<i>Pines v. Farrell</i> , 848 A.2d 94 (Pa. 2004).....	11, 14
<i>Wells Fargo Bank, Nat’l Ass’n v. Reyes</i> , 867 N.Y.S.2d 21 (Sup. Ct. 2008) .....	21

### STATUTES

13 Pa. C.S. § 9203.....	12
15 U.S.C. § 1641 (Truth in Lending Act).....	17
42 Pa. C.S. § 3733.....	22
42 Pa. C.S. § 3733.1.....	22
42 Pa. C.S. §§ 4901 <i>et seq.</i> (Access to Justice Act) .....	2, 5, 7, 22

### OTHER AUTHORITIES

R.K. Arnold, <i>Yes, There is Life on MERS</i> , 11 Prob. & Prop. 32 (1997) .....	14
Freddie Mac Form 3039, Pennsylvania Mortgage .....	12
<i>In re MERSCORP, Inc.</i> , Joint Docket No. 2011-044 (Apr. 13, 2011) .....	22
Andrew Martin, <i>Automated Debt-Collection Lawsuits Engulf Courts</i> , N.Y. Times, July 12, 2010, at B1 .....	20

Christopher L. Peterson, <i>Predatory Structured Finance</i> , 28 <i>Cardozo L. Rev.</i> 2185 (2007) .....	16
Christopher L. Peterson, <i>Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory</i> , 53 <i>Wm. &amp; Mary L. Rev.</i> 111 (2011) .....	19, 20
Elizabeth Renuart, <i>Uneasy Intersections: The Right to Foreclose and the U.C.C.</i> , 48 <i>Wake Forest L. Rev.</i> 1205 (2013) .....	12
Alan M. White, <i>Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection</i> , 24 <i>Loy. Consumer L. Rev.</i> 468 (2012) .....	21
Dustin A. Zacks, <i>Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures</i> , 29 <i>Quinnipiac L. Rev.</i> 551 (2011) .....	20

**RULES**

Pa. R. Civ. P. 1147 .....	18
---------------------------	----

**TREATISES**

Restatement (Third) of Prop.: Mortgages .....	12
Ronald M. Friedman, <i>Ladner Pennsylvania Real Estate Law</i> (5th ed. 2006) .....	13

**REGULATIONS**

204 Pa. Code § 29.351 .....	22
-----------------------------	----

## **I. STATEMENT OF IDENTITY AND INTEREST OF AMICI<sup>1</sup>**

### 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. It conducts numerous statewide trainings for public interest lawyers, it administers and funds a Martin Luther King Jr. Internship and Fellowship Program, and it provides leadership and support for legal aid providers in their proper accounting for funds and contract compliance.

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 actions. This network provides direct representation to clients in every Pennsylvania county. The PLAN programs handle some 75,000 cases annually, with the majority of funding coming from PLAN.

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<sup>1</sup> 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. 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. 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 serves residents of Bucks, Chester, Delaware, and Montgomery counties and is the only agency providing a full range of free, civil legal services to residents of these 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 was formed in 2001 with the merger of four county legal services programs, each with a long history of providing high-quality services. As a regional organization, LASP benefits from administrative efficiencies. The agency's toll-free, regional Helpline/Central Intake Unit increases access to legal services for residents of its large service area. 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. A second regional project helps people remove barriers to employment by helping to clear their criminal records and educating both job-seekers and employers about when a record can, and cannot, be considered during a hiring process.

In FY2015-16, LASP advocates handled 8,104 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 when benefits are denied, terminated, or reduced and appeals for alleged overpayment of benefits such as Medicaid, Medicare, SNAP, TANF, Unemployment Compensation, SSI/SSDI, veterans' benefits, and other programs;
- housing law, including landlord-tenant, habitability, 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, while working with community groups to ensure programs are in place to protect homeowners from predatory lending and to assist those who have already been victimized. In 2015, LASP's foreclosure attorney assisted 197 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 Plaintiff and other class members for recordation of mortgage

assignments. As discussed more fully below, the Access to Justice Act requires Plaintiff and class members to collect such fees. In the 2015-2016 fiscal year, LASP anticipates receiving \$908,799, or 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's service area is larger than the state of Maryland and has mixed geography that is made up of rural, suburban, and urban areas.

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. To be eligible for services, MidPenn's clients must have incomes that are at or below 125% of poverty. However, given the nature of domestic violence, clients seeking civil protection orders are served without regard to income.

Given the size of MidPenn's service area, MidPenn operates a Coordinated Intake Unit and Telephone Advice Project to provide easy and convenient access to callers with consumer and housing issues, including mortgage foreclosure, across the organization's region. MidPenn's Telephone Advice Unit is staffed by seasoned attorneys who work to provide advice and counsel to individuals experiencing consumer, housing, and mortgage foreclosure issues. After assessing each individual's problem, the Telephone Advice attorney will either advise the client or schedule them for an in-person appointment with an attorney in one of the MidPenn offices. MidPenn advocates have always handled mortgage foreclosure cases; however, prior to the economic downturn in 2008/2009 MidPenn began to see an increase in this area, and for this reason in 2004 MidPenn established a specialized Consumer Unit. At that time, MidPenn 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, which is one of the poorest cities of its size in the nation and where there is also a high population of Latinos whose primary language is

Spanish. During the period 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 Plaintiff and other class members for recordation of mortgage assignments. As discussed more fully below, the Access to Justice Act requires Plaintiff and class members to collect such fees. In the 2016-2017 fiscal year, MidPenn anticipates receiving \$1,785,138 in Access to Justice Act funding. (Access to Justice Act funding includes other types of fees in addition to fees for mortgage assignments.)

#### 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.

### 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 2015, Clarifi provided 3,847 foreclosure-prevention counseling sessions to 2,807 clients. 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**

PLAN, LASP, MidPenn, NACA, and Clarifi (collectively, "Amici") submit this brief in support of the Appellees, who are Pennsylvania counties and county recording officials seeking to enforce Pennsylvania law in accordance with their legal duties and the public interest. The Court of Common Pleas correctly allowed the case to go forward, as in Pennsylvania, the transfer of a mortgage interest is supposed to be reduced to writing and recorded publicly, and as Appellant MERSCORP was created for the express purpose of circumventing this requirement and keeping secret the real owners of mortgage interests.

Contrary to the alarmist rhetoric of Appellants' amici, Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Pennsylvania Bankers Association ("PBA"), and the Pennsylvania Land Title Association ("PLTA"), requiring public disclosure of mortgage transfers in county title registries and requiring payment of filing fees will not "result in drastic changes to the current residential mortgage lending system," Freddie Mac's Brief at 5, impose "new and onerous obligations," PBA's Brief at 18, or force "a giant step backwards," PLTA's Brief at 6. By its

own admission, Freddie Mac—which owns close to 10% of the company that owns Appellant MERSCORP Holdings, Inc.—alone accounts for over 193,000 of the unrecorded mortgage interests in Pennsylvania homes. Freddie Mac’s Brief at 5 n.3, 11. The sky will not fall if the public records concerning these 193,000 mortgages, instead of being fictionally lodged in the name of “MERS,” were to disclose the fact of Freddie Mac’s ownership, and if a proper recordation fee were paid to the county offices at the time Freddie Mac purchases a mortgage.

Appellants’ amici cannot justify MERS’s deliberate circumvention of Pennsylvania law, nor its supposed policy rationales for devising a scheme to avoid paying recording fees and draping a veil of secrecy over the ownership of residential mortgage debt. Consequently, they instead attack the Appellees’ understanding—and, presumably, the trial court’s—of what a mortgage is under state law, arguing that Appellees “fail to grasp” or “choose to disregard . . . fundamental legal principles.” Freddie Mac’s Brief at 15. They also take the astonishing position that requiring them to pay the filing fees they have evaded will cause harm to “consumers and the recorder of deeds themselves.” PBA’s Brief at 2. As organizations that work with and represent consumers, Amici submit this brief to supplement Appellees’ arguments and to respond to Freddie Mac, PBA, and PLTA. Specifically, this brief will show that the ruling of the Court of Common Pleas was grounded in long-standing principles of the law of mortgages

in Pennsylvania, and that consumers and the public at large not only do not benefit from, but in fact 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.

**A. Under Pennsylvania Mortgage Law, a Mortgage and the Note It Secures Cannot Be Transferred Separately**

The legal principle that, according to Freddie Mac, Appellees and the lower court “fail to grasp or choose to disregard” is that a mortgage interest in real property and the indebtedness the mortgage secures are two separate legal instruments. Freddie Mac’s Brief at 15. It is certainly true that a mortgage obligation, when created, 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, which is governed by the law of negotiable instruments, while the latter is a property interest that secures the repayment obligation and is governed by Pennsylvania property law. That is precisely what our Supreme Court meant in *Pines v. Farrell*, 848 A.2d 94 (Pa. 2004), when it described the “dual nature” of a mortgage transfer, as involving both the transfer of a debt and an actual conveyance of an interest in property.

Yet while it true that a mortgage debt is composed of both of these components, that does not mean the law bestows any meaning or legitimacy to the



splitting of these two interdependent components between two different owners, as does the fiction of MERS's ownership of the mortgage without the note. On the contrary, it has long been understood in the common law 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." Restatement (Third) of Prop.: Mortgages § 5.4, Reporters' Notes (quoting the late Professor Chester Smith); *see also* 13 Pa.C.S. § 9203(g) (codifying the common law rule in the case of a bulk sale of notes, such that the bulk purchaser, by operation of law, also acquires ownership of any mortgages securing the purchased notes); 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."). Indeed, Freddie Mac's own Pennsylvania mortgage form reflects the nonseverability of the mortgage and the note, as 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. *See* Freddie Mac Form 3039, Pennsylvania Mortgage, *available at* <http://www.freddiemac.com/uniform/doc/3039-PennsylvaniaMortgage.doc>.

Because the mortgage cannot be meaningfully severed from the underlying debt obligation it secures, a transfer of the mortgage obligation requires that the separate rules governing the transfer of the note and the mortgage both be followed. Far from being an outlandish notion that both the mortgage be assigned and the note negotiated<sup>2</sup> in order to accomplish a transfer, the traditional wording of a mortgage assignment reflects precisely this expectation in that the standard conveyancing language references “ALSO the Bond or Obligation in the said Indenture of Mortgage recited, and all Moneys, Principal and Interest, due and to grow due thereon.”<sup>3</sup> Thus, when a mortgagee negotiates the mortgage note, and by that act effectively transfers ownership of the underlying debt, it must also execute an assignment of mortgage in order to complete the transfer.

This has long been understood by Pennsylvania real estate practitioners, which is why, many years ago, the leading commentator on Pennsylvania conveyancing law 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 ed. 2006) (characterizing

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<sup>2</sup> The legal rules governing the transfer of the note—referred to as a “negotiation”—are in Article 3 of the Uniform Commercial Code. *See JP Chase Bank, N.A. v. Murray*, 63 A.3d 1258, 1265-66 (Pa. Super. 2013).

<sup>3</sup> *See* 2 Ronald M. Friedman, *Ladner Pennsylvania Real Estate Law*, § 26.01(c) (5th ed. 2006).

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

Appellee is not advocating that promissory notes must be recorded in the public’s real property registries. Rather, in Pennsylvania, a mortgage “title theory” jurisdiction, *see Pines*, 848 A.2d at 100, the mortgage is not considered a mere accompaniment to the note, but rather a recognized real property interest that must be reflected in the public real estate records. What the industry players behind MERS apparently assumed would work in other states—maintaining static, recorded title in the name of the fictional MERS “nominee” while ownership in the mortgage notes is transferred from one entity to another—simply does not work in Pennsylvania.<sup>4</sup>

**B. There Is No Public-Interest Justification for Allowing MERS to Ignore the Pennsylvania Recording Statute**

A founding executive of MERS, whom PBA cites as an authority, once candidly described the system as “by and for the mortgage industry.” R.K. Arnold, *Yes, There is Life on MERS*, 11 Prob. & Prop. 32, 36 (1997). Appellants’ amici now urge that the MERS system is for the people, and that evasion of recordation fees must not perish from the Commonwealth. *See* PBA’s Brief at 3 (asserting that

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<sup>4</sup> Although the Third Circuit has interpreted Pennsylvania law to the contrary, *Montgomery Cnty. v. MERSCORP Inc.*, 795 F.3d 372 (3d Cir. 2015), “[o]pinions of a federal court on issues of state law are, of course, not binding on this Court,” *Heicklen v. Pa. Bd. of Elections*, 751 A.2d 260, 262 (Pa. Commw. Ct. 2000).

“the MERS System also helps consumers”); Freddie Mac’s Brief at 10 (the MERS system “allow[s] more mortgage loans to be made to homeowners and at lower costs”). There is no factual basis supporting those representations, particularly not at the preliminary objection stage of this litigation where the Appellees’ allegations, not MERS’s assertions, should take precedence. Indeed, there are ample reasons to believe that MERS benefits no one but large players in the mortgage and title industries, and that homeowners and the general public will not suffer any harm, and indeed will benefit, from requiring mortgagees to comply with Pennsylvania’s recording laws.

First, individual homeowners and the public at large benefit from comprehensive public land records. Homeowners plainly have an interest in knowing the identity of those who own mortgage interests in their homes, as do potential purchasers of or investors in real estate. 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., Mortgage Elec. Registration Sys. v. Ditto*, 488 S.W.3d 265 (Tenn. 2015).

Indeed, it is hard to imagine any policy justification whatsoever for hiding from homeowners the identity of the secondary mortgage entity that purchases their mortgage and on whose behalf their mortgage servicer will be acting.

For an illustration of the importance to homeowners of complete public land records, LASP often represents a delinquent homeowner who has applied for a loan modification but has been denied on the grounds that the requested modification does not meet the modification guidelines of the owner of the mortgage; when this happens, the servicer seldom advises the homeowner of the entity who 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 correct under those guidelines. *See generally* Christopher L. Peterson, *Predatory Structured Finance*, 28 *Cardozo L. Rev.* 2185, 2268 (2007) (“[E]ven marginal increases in the cost of dispute resolution can have a dramatic impact on subprime mortgage borrowers.”).

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 amendment to TILA, both the assignor and assignee must disclose the assignment to the homeowner within 30 days of the assignment, 15 U.S.C. § 1641(g).

PBA suggests that, because of this federal law, public recordation of mortgage assignments is no longer necessary since borrowers now have an alternative mechanism for locating the owner of their mortgage. PBA’s Brief at 20-

21. There is a certain irony in this argument, given that Congress would likely not have seen the need to establish this homeowner right-to-know had not the mortgage industry abandoned its use of the public mortgage registries through its use of the MERS system. In any event, a homeowner cannot use a request for information under 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 information when for a homeowner facing a foreclosure filed by a stranger to the original mortgage transaction. 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 have to be filed anyway, but the MERS system has diminished the quality and meaningfulness of such assignments. The Pennsylvania Rules of Civil Procedure require a foreclosure complaint, in its description of the plaintiff, to "set forth" all relevant assignments of the underlying mortgage. Pa. R. Civ. P. 1147(a)(1). In order to comply with this rule, when a mortgage is lodged in the name of MERS rather than the actual owner of the mortgage, foreclosure plaintiffs will file a purported mortgage assignment from MERS to the foreclosure plaintiff in advance of filing the foreclosure. Such an "assignment" does virtually nothing to reveal the actual chain of transfers from the original lender to the entity seeking to foreclose.

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 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. Rather, the search is simply a query to see whether any companies happened to have used an optional electronic handshake to enter assignment information on a private database.

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).<sup>5</sup>

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<sup>5</sup> MERS's circumvention of the public recordation system has, as a practical matter for some homeowners facing foreclosure, reduced mortgages to the level of



Moreover, contrary to the representations of Freddie Mac, *see* Freddie Mac’s Brief at 9 (contrasting the MERS system to the “error-prone” public recordation systems), the records in the MERS system are notoriously incomplete and unreliable. The information in the MERS database is entered not by public servants, or even by employees of MERS, but rather by employees of MERS’s members, meaning the tens of thousands of employees of lenders, 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 often receive no training or oversight from MERS, and they obtain permission to write to 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

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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 that 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.

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 vulnerability to error or fraud is not merely a matter of academic speculation. 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 United States 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 improperly documented, or not documented at all. *E.g.*, *In re Carrsow-Franklin*, 524 B.R. 33 (Bankr. S.D.N.Y. 2015), *appeal pending*, Case No. 15-cv-1701 (S.D.N.Y.); *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). All of these concerns culminated in an April 2011 consent decree between MERS and the five federal banking agencies that 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. *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>.

Finally, 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. Pursuant to the Pennsylvania Access to Justice Act (“AJA”), 42 Pa.C.S. §§ 4901 *et seq.*, county recorders of deeds must remit \$4.00 of each mortgage-assignment fee, as well as other types of fees that they collect, to a state fund dedicated to organizations that provide civil legal assistance to poor and 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); 204 Pa. Code § 29.351(f)(iii). There are, in short, numerous reasons why the MERS system is not only unlawful but harmful to the public interest as defined by the General Assembly.

### III. CONCLUSION

Pennsylvania law and policy require public recordation of all mortgage transfers. The Court of Common Pleas was correct in overruling Appellants' preliminary objections and allowing the litigation to proceed, and this Court should affirm.

Respectfully submitted,

*/s/ Benjamin D. Geffen* \_\_\_\_\_

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**CERTIFICATION OF WORD COUNT**

I hereby certify that this Brief contains 5,208 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

*/s/ Benjamin D. Geffen*

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Benjamin D. Geffen

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