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Federal Nat. Mortg. Ass'n v. Allen Appellant's Reply Brief Dckt. 37972

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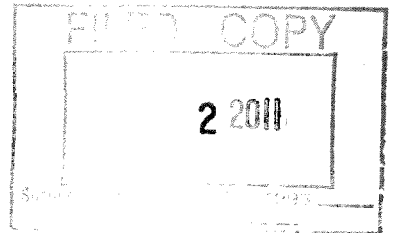
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Appearing at all times In Propria Persona

IN THE SUPREME COURT OF THE STATE OF IDAHO

Federal National Mortgage Assoc.,)	Sup.Ct. No. 37972-2010
a.k.a. FANNIE MAE, a corp.)	Bonner Case No. CV-2009-1865
created by Congress of the United)	
States)	REPLY BRIEF
)	
Plaintiff/Respondent,)	
)	
vs.)	
)	
David B. Allen, an individual; and)	
DOES I through X, unknown)	
occupants of the property commonly)	
knows as 1596 E. Shingle Mill)	
Road, Sandpoint, Bonner County,)	
Idaho.)	
)	
Defendants/Appellants.)	
_____)	



APPEAL FROM DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER
THE HONORABLE STEVEN VERBY PRESIDING

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I. What is not in Dispute.

With no response by Respondent by the only Attorney who might have standing in the above entitled case, Mr. Pierson, is silent by the record. Then, the first interloper on the case, Mr. O'Neill of O'Neill Law Firm trespasses on the case with acknowledged approval of two (2) District Court Judges.

It is a fact that Mr. O'Neill is not of the Law firm of Routh, Crabtree and Olson. It is a fact that Routh, Crabtree and Olson is not an Idaho Law Firm, nor are they registered with the Bar of this state. It is also a fact that Mr. O'Neill serves as the registered agent for Routh, Crabtree and Olson to exclusively accept service of process for them in this state. Appellant believes that a fraud upon the Court has been committed by Mr. O'Neill concerning his affiliation with Routh, Crabtree, and Olson, who has no standing in any Court in this State.

Over the objection of the Appellant, One judge who had no approval by Order of this Court to act as required by law to act in this case and the other, the assigned presiding judge, seemingly by the record did not want to perform his duties as required by law. Appellant use of the term "law" is as defined in the Code of Judicial Conduct.

All decisions made were devoid of being in compliance with the Idaho Rules of Civil Procedure Rule 11(b) and case law decisions by this Court on the subject matter of attorney substitution all requiring strict compliance with the Rules of Court. Such determinations were not acts of discretion and were erroneous upon its face in defiance with the rule of law in this state.

Further such acts were prejudicial and detrimental to the Appellant and in violation of Sections 1 and 18 of Article I of the Constitution of the State of Idaho and the due process and equal protections clauses of the Constitution of the United States of America.

Now it seems that Mr. O'Neill has enticed his fledgling, Mr. Langford, to continue in his stead without substitution being properly done either in accordance with Rule 11(b) of the I.R.C.P. and the Appellant objects to Mr. Langford taking any action in the above entitled case without proper substitution being in place. All of these acts and actions demonstrates the Appellant's veracity concerning the fact Appellant was not properly noticed in the first attempted substitution is more probable than a lawful and proper substitution of counsel occurred in this case.

Appellant now asks this Court to properly strike all filings of Mr. Langford sua sponte and to grant the relief in the pending Motion to Augment.

These facts as stated in the Statement of the Case in Appellant's Opening Brief as well as the argument therein are not in dispute and are acquiesced by Respondent's silence on the record concerning all issues on appeal including costs on appeal and also the challenge to the constitutionality of the Non-judicial Foreclosure Act in chapter 15 of Title 45 Idaho Code.

Appellant objects to Mr. Langford's Brief for lack of standing without IRCP Rule 11(B) procedures for substitution of counsel having being met and Mr. O'Neill does not have standing for the same reason.

Therefore, Langford's brief should be struck sua sponte.

II. Notice was NOT Served Upon Appellant as Required

Under chapter 15 of Title 45 Idaho Code - Non-judicial Foreclosure Act

But the most important point not addressed by Respondent and asserted by the Appellant throughout these proceedings was that Appellant did not get service of notice of the sale and for that matter most of the requirements of due process under chapter 15 of Title 45 - Non-judicial Foreclosure Act. This Court has determined in *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 (Idaho 2006)¹, that strict compliance with notice provisions is required in foreclosure of Deeds of trusts citing *Security Pacific Finance Corp v. Bishop*, 109 Idaho 25 at 28, 704 P.2d 357 at 360 (Idaho.App. 1985) in Note 1 of *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 at 143 Idaho 46, 137 P.3d 433 (Idaho 2006).

Further this Court has previously rejected the argument brought by Mr. O'Neill, even if he has standing, that even if Appellant did not receive the proper statutory requirements of notice under 15 of Title 45 - Non-judicial Foreclosure Act that the sale is final under the provisions of I.C. §§ 45-1508 and 45-1510. By raising this issue the Respondent admitted that they knew of the notice requirements in other provisions of 15 of Title 45 - Non-judicial Foreclosure Act. See *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 at

¹ That this case cite is the same cite as *Federal Home Loan Mortgage Corporation, Fannie Mae, v. Gary R. and Linda L. Appel, Idaho Supreme Court Docket No. 31760, 2006 Opinion No. 61*, in the Opening Brief by Appellant. It should also be noted that Bonner County is the only county in this State which does not allow litigants access of law library materials.

143 Idaho 46-7, 137 P.3d 433-4 (Idaho 2006).

Mr. O'Neill clearly admitted at the April 21st, 2011 hearing that the notice requirements were not met. See Transcript of the Hearing of April 21st, 2011 and is incorporated herein by its reference. In Appellant's Opening Brief Appellant the specific conversation that Judge Verby and Mr. O'Neill had pertaining to the lack of notice Appellant did not receive as required by 15 of Title 45 - Non-judicial Foreclosure Act.

It was a lack of discretion by Judge Verby after learning of the lack of notice to Appellant and that Appellant did not receive notice as required under 15 of Title 45 - Non-judicial Foreclosure Act coupled with Appellant giving Judge Verby notice of this Court's recent opinion of *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 (Idaho 2006) in providing adequate protections to Appellant's rights in property under Section 1 and 18 of Article 1 of the Constitution of the State of Idaho and the due process clauses under the State and National Constitutions.

III. Real Party in Interest.

It is pointed out in the case of *Security Pacific Finance Corp v. Bishop*, 109 Idaho 25 at 28, 704 P.2d 357 at 360 (Idaho.App. 1985) that "lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deed of Trust must be strictly construed in favor of of the borrower." citing *Patton v. First Federal Savings & Loan Ass'n of Phoenix*, 118 Ariz. 473, 578 P.2d 152, 156 (1978). See Note 1 in *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d

429 (Idaho 2006).

Recently across this nation courts are rejecting the notion that MERS can act as beneficiary and nominee at the same time, because MERS admits that they are nothing more than a national electronic registration and tracking system that tracks the beneficial ownership interests and serving rights in mortgage loans. See addendum 1 – In re Mitchell, Memorandum Opinion from the United States Bankruptcy Court District of Nevada on March 31st, 2009 and is incorporated herein by its reference.

Appellant requests this Court to TAKE JUDICIAL NOTICE of addendum 1 – In re Mitchell, Memorandum Opinion from the United States Bankruptcy Court District of Nevada on March 31st, 2009.

Appellant tried to explain to Judges Hosack and Verby that MERS could not pass beneficial interests to SunTrust Mortgage, which started the chain of lack of standing to the Respondent.

Coupled with the fact that the original promissory note had been already sold in the open market by Panhandle State Bank, the loan originator, MERS did not have possession of the Original Wet Ink Promissory Note, nor could each alleged successor in interest have a complete instrument to each subsequent supposed purchaser of the promissory note and Deed of Trust. See addendum 1 - In re Mitchell, Memorandum Opinion from the United States Bankruptcy Court District of Nevada on March 31st, 2009 page 8 which states to wit:

“For there to be a valid assignment for purposes of foreclosure both

the note and deed of trust must be assigned. A mortgage loan consists of a promissory note and a security instrument, typically a mortgage or a deed of trust. When the note is split from the deed of trust, 'the note becomes, as a practical matter, unsecured.' RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 99 cmt. a (1997). A person holding only a note lacks power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 99 cmt. e (1997). 'Where the mortgage has 'transferred' only the mortgage the transaction is a nullity and his 'assignee,' having received no interest in the underlying debt or obligation, has a worthless piece of paper.' 4 RICHARD R. POWELL, POWELL ON REAL PRPERTY, § 37.27[2] (2000)."

Also, constructive fraud and or fraud in the factum from the inception is also alleged by the Appellant, which Appellant has never been given an opportunity to present his case-in-chief, which is part of his meritorious defenses in answer to Plaintiff's complaint.

In this case Sun Trust Mortgage purchased an incomplete instrument from Panhandle State Bank or MERS, who could not pass title due to their lack of standing to convey, sell, or otherwise transfer title in the first instance and

secondly with the lack of the complete instrument comprising of the original promissory note and Deed of Trust being kept together.

Where real party-in-interest status has been made mandatory by statute or rule, as it has in Idaho, real-party-in-interest status must be demonstrated before a suit can proceed. *Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254 at 258, 230 P.3d 1073 at 1077 (Idaho 2009), which was another meritorious defense raised in answer to Plaintiff's complaint, as well as raised orally at each hearing. See transcripts of March 17th, 2011, pages 26 – 28, April 21st, 2011 pages 8 – 11 and 16 – 22, and 24 – 27, July 21st, 2011 pages 6 – 8.

All these meritorious defenses raised in answer to Plaintiff's complaint and under the doctrine of standing required the Court to decide the standing issue before moving forward which was not done at each stage of the case. This was not a discretionary act, it is required under rule of law and in error was not done.

Respondent having not alleged or demonstrated having the original wet-ink promissory note gives Respondent no standing in this case to foreclose on the property owned by the Appellant. This is also true for Suntrust Mortgage, Just Law, Inc., MERS or Panhandle State Bank. Appellant asserted to the trial court for Respondent to produce the original wet-ink promissory note and the court failed to order the Respondent to produce the original wet-ink promissory note to prove standing and was a denial of due process and was an abuse of discretion in violation of IRCP Rule 17(a) which requires a cause to be brought in the name of the real party-in-interest.

Any purported deed issued by and/or for Suntrust Mortgage is a forged and or fraudulent deed for the reasons as stated above and if they should provide it to the court would also be a fraud upon the court.

Any purported deed issued deed to Respondent, which is nothing more than a deed to Suntrust Mortgage is another forged and or fraudulent deed for the reasons as stated above, as well as, it was a deed which actually purports to deed title to the Respondent but uses Suntrust's address, and if they should provide it to the court would also be a fraud upon the court.

Any purported deed issued by and for Suntruat Mortgage was done in derogation to 15 of Title 45 - Non-judicial Foreclosure Act as *Appellant emphasizes once again was not provided notice* as required under 15 of Title 45 - Non-judicial Foreclosure Act and as such all deeds issued after Appellant's Deed are null and void. See addendum 1 - In re Mitchell, Memorandum Opinion from the United States Bankruptcy Court District of Nevada on March 31st, 2009.

Based upon the record it is clearly, palpably and inherently false that Respondent is the "real-party-in-interest" in the above entitled case, unless they can demonstrate that they have possession of the original wet-ink promissory note and deed of trust. Notices of Demand were sent to each lending institution and requests were made to Just Law, Inc., and the Respondent to produce the original wet-ink promissory note to prove that they were the holder in due course and each party failed to do so and by their acquiescence of silence to even respond. Respondent does not have the original wet-ink promissory note and therefore has

no standing.

IV. Constitutionality of 15 of Title 45 - Non-judicial Foreclosure Act

If not for any other reason and as demonstrated across the nation many people being foreclosed such as in the case of the Appellant under chapter 15 of Title 45 - Non-judicial Foreclosure Act is unconstitutional because the act failed to provide adequate protection to the Appellant and others in the same position as Appellant from unscrupulous supposed lenders and banking institutions.

V. Conclusion

Mr. Pierson was the originator of the Complaint, who after receiving Notice of facts surrounding the loan with Panhandle State Bank who sold altered documents from its original state to Suntrust Mortgage, Mr. Pierson wanted out of the case. Without properly following the mandatory procedures in the rule on withdrawing counsel, in which only the Appellant has actual knowledge of facts did not receive a Notice signed by both Mr. Pierson and Mr. O'Neill. This Court has stated over-and-over that strict compliance is required. Again, we see non-compliance with this rule by Mr. O'Neill by his attempt to substitute himself with Mr. Langford a junior in his law firm without proper notice of substitution of counsel signed by both attorneys. Law firms are not members of the bar or attorneys and absent a General Power of Attorney from the Respondent has no standing in the above entitled case.

Looking at the record and the actual document mentioned in Respondent's complaint, Many of them were deficient to comply with the Non-judicial

Foreclosure Act in 45-1506, 45-1506A or B and in fact as admitted by Mr. O'Neill Appellant did not get served with Notice of Sale prior to the sale, which was done outside Bonner County, State of Idaho - another violation of the Act.

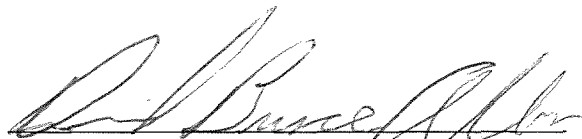
Other reasons more ominous shows that everybody whose deed is after the Appellant does not pass title in accordance with the law of the land. Thus being the case, Respondent, who is really Suntrust Mortgage does not have standing either.

At a critical strage of the proceeding on the Appellant's Motion to Dismiss, to be heard in February then being forced into a new hearing date without Notice and without authority. Then without Notice and without authority another judge who was not assigned to the case appears and determines the Motion without standing to do so, leaving the Motion undetermined.

No Adversary, No Counsel, No Judge - and the law, thus far seems to be non-existent at this point. Judge Verby decides to finally do the case he was assigned to and makes multiple procedure errors which affected the outcome of the case to the Appellant's detriment and prejudice, even though the law was provided and explained.

Appellant asserts that this Court should reverse adverse decisions made and the Appellant, accepts your promissory oath and the oaths of all of the officers of this court. The court is now open.

Dated: October 7th, 2011


David Bruce Allen, In Propria Persona.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 2011, I lodged for filing the original bound reply brief, six (6) true and correct bound copies, and one true and correct unbound, unstapled copy of the foregoing Reply Appellate Brief with the Clerk of the Idaho Supreme Court.

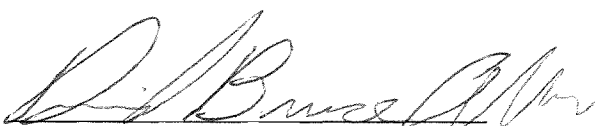
I FURTHER CERTIFY that on the same date, I caused two (2) each true and correct bound copies of the foregoing Reply Appellate Brief to be served to each as follows:

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By: 
David Bruce Allen

ADDENDUM 1



Entered on Docket
March 31, 2009

Hon. Linda B. Riegle
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re)
JOSHUA & STEPHANIE MITCHELL,)
Debtor(s).)

Case No. BK-S-07-16226-LBR
Chapter 7

DATE: August 19, 2008
TIME: 3:30 p.m.

MEMORANDUM OPINION

Mortgage Electronic Recording Systems, Inc. ("MERS") through various counsel has filed a number of motions to lift stay.¹ Some of the motions were filed in the name of MERS, while others have been filed in the name of MERS as the nominee for another entity. An order for joint briefing was entered because the substantially same issues were presented in the motions, and a joint hearing was held. *Mitchell* (#07-16226) has been designated as the lead case.² The trustee or counsel for the debtor in these cases has opposed the lift-stay motions on the

¹Motions have been filed in the following cases: #07-16226, #07-016333, #07-16645, #07-17577, #07-18851, #08-10427, 08-11007, #08-11860, #07-13593, #08-10108, #08-10778, #08-12255, #07-17468, #08-11245, #08-11608, #08-11668, #08-11725, #08-11819, #08-12206, #08-12242, #08-12317, #08-12319, #08-10052, #08-10072, #08-10718, #08-11499, #07-16519. Each of the judges will enter their own orders in the matters that are assigned to them.

²The docket numbers mentioned in this opinion are to the *Mitchell* case unless otherwise noted.

1 grounds of standing and that MERS is not the real party in interest.

2 The initial response filed by MERS contained no evidentiary support. Rather it described
3 the role of MERS and its members by relying on law review articles and the recitation of facts in
4 other cases in other districts involving MERS. Prior to the initial argument, MERS attempted to
5 withdraw the motions filed in all but four of the cases. MERS then filed a declaration at the
6 court's direction explaining why the motions were withdrawn. The declaration of William
7 Hultman was filed in *Dart*.³ The declaration, in addition to explaining MERS' rationale for
8 withdrawing the motions, also attached as exhibits copies of the MERS Membership
9 Application, the MERS Corp. Inc. Rules of Membership, the MERS Procedural Manual, and the
10 MERS Terms and Conditions of Membership.⁴ The court also requested appropriate evidentiary
11 support for the allegations concerning the relationship between MERS and the entities for whom
12 the motions were brought. A supplemental declaration was filed in *Mitchell*, the lead case.⁵

13 As noted, MERS has attempted to withdraw all but four of its original motions, leaving
14 only *Dart* (#08-11007), *Hawkins* (#07-13593), *Ramirez-Furiati* (#08-10427), and *Zeigler* (#08-
15 10718). MERS admits that it failed to follow its own procedures in the motions it wants to
16 withdraw.⁶ The debtor, the chapter 13 trustee, and MERS subsequently stipulated to a lift of stay
17 in *Ramirez-Furiati* which the court approved with the acknowledgment that the order contained
18 no finding about MERS' standing.⁷ This court will discuss the issues raised in the motions that

19
20 ³*Dart* (#08-11007).

21 ⁴Docket #47 in *Dart*.

22 ⁵Docket #74 in *Mitchell* ("Huntman Declaration"). The Declaration also incorporated the
23 prior declaration filed by Mr. Hultman in *Dart*. References in this memorandum to the
24 declaration filed in *Mitchell* include the incorporated declaration and the exhibits thereto.

25 ⁶Docket #74, Declaration of William Hultman ("Hultman Declaration"), Exhibit 1, pp. 4-
26 5. "The fact that MERS chose to not go forward on these . . . motions was not a determination by
27 MERS that it does not have standing to move for relief from stay." Exhibit D to that Declaration
sets forth the name of the motions withdrawn and the reason for withdrawal.

28 ⁷Docket #54 in #08-10427.

1 MERS attempts to withdraw,⁸ and by this order issues its ruling in *Dart* and *Hawkins*, which are
2 the two cases that are now pending before it.⁹

3 The court has advised the parties that it would consider any information contained on the
4 MERS website at <http://www.mersinc.org/> unless an objection was made. No objection has been
5 filed by either party. The court thus takes judicial notice of the contents of the MERS website.

6 ***WHAT IS MERS?***

7 MERS is a national electronic registration and tracking system that tracks the
8 beneficial ownership interests and servicing rights in mortgage loans.¹⁰ The MERS website says
9 this:

10 MERS is an innovative process that simplifies the
11 way mortgage ownership and servicing rights are
12 originated, sold and tracked. Created by the real
13 estate finance industry, MERS eliminates the need
14 to prepare and record assignments when trading
15 residential and commercial mortgage loans.

16 William Hultman, Secretary of MERS, has testified in his Declaration that loans are
17 registered to a “MERS Member” who has entered into the MERS Membership Agreement.
18 MERS Members enter into a contract with MERSCORP to electronically register and track
19 beneficial ownership interests and servicing rights in MERS registered mortgage loans.¹¹ MERS
20 Members agree to appoint MERS, which MERSCORP wholly owns, to act as their common
21 agent, or nominee, and to name MERS as the lienholder of record in a nominee capacity on all

22 ⁸FED. R. BANKR. P. 9014 makes FED. R. BANKR. P. 7041 applicable to contested matters,
23 which includes lift stay motions, and FED. R. BANKR. P. 7041 incorporates FED. R. CIV. P. 41.
24 Under these rules, a party can voluntarily dismiss a lift-stay motion without a court order only if
25 there is a stipulation to dismiss or the dismissal is filed *before* an opposition is filed, and neither
26 is true here.

27 ⁹Some cases were added to the argument calendar after the April 29, 2008 joint hearing
28 order. Separate orders will be entered in each of those cases, which counsel agreed to continue
pending a ruling in the “test case.” See Transcript (Docket # 83) pp. 9 and 76.

¹⁰MERS Response, Docket # 49, p. 3.

¹¹“MERS Members” are mortgage lenders and other entities. (“Membership in MERS
Overview,” filed with Hultman Declaration, Docket #74.)

1 recorded security instruments relating to the loans registered on the MERS System. When a
2 promissory note is sold by the original lender to others, the various sales of the notes are tracked
3 on the MERS System.¹²

4 Hultman goes on to say in his Declaration that once MERS becomes the beneficiary of
5 record as nominee, it remains the beneficiary when the beneficial ownership interests in the
6 promissory note or servicing rights are transferred by one MERS Member to another and that it
7 tracks the transfers electronically on the MERS System. So long as the sale of the note involves a
8 member of MERS, MERS remains the beneficiary of record on the deed of trust and continues to
9 act as nominee for the new beneficial owner.¹³

10 **STANDING**

11 MERS must have both constitutional and prudential standing,¹⁴ and be the real party in
12 interest under FED. R. CIV. P. 17,¹⁵ in order to be entitled to lift-stay relief.

13 Constitutional standing under Article III requires, at a minimum, that a party must have
14 suffered some actual or threatened injury as a result of the defendant's conduct, that the injury be
15 traced to the challenged action, and that it is likely to be redressed by a favorable decision. *Valley*
16 *Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464, 472
17 (1982)(citations and internal quotations omitted).

18 Beyond the Article III requirements of injury in fact, causation, and redressibility, MERS
19 must also have prudential standing, which is judicially-created set of principles that places limits
20 on the class of persons who may invoke the courts' powers. *See Warth v. Seldin*, 422 U.S. 490,

21
22 ¹²Docket #74, Hultman Declaration at ¶ 3.

23 ¹³Docket # 74, Hultman Declaration at ¶ 4.

24 ¹⁴The standing doctrine "involves both constitutional limitations on federal-court
25 jurisdiction and prudential limitations on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128-29
26 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

27 ¹⁵Stay-relief requests are governed by FED. R. BANKR. P. 4001(a)(1), to which FED. R.
28 BANKR. P. 9014 is applicable. Rule 9014, in turn, incorporates Rule 7017, which makes FED. R.
CIV. P. 17 applicable ("[a]n action must be prosecuted in the name of the real party in interest.").

1 499 (1975). As a prudential matter, a plaintiff must assert “his own legal interests as the real
2 party in interest,” *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), as found in
3 FED. R. CIV. P. 17, which provides “[a]n action must be prosecuted in the name of the real party
4 in interest.”

5 MERS’ primary contention is that it has standing by virtue of the fact that it was
6 named as the beneficiary under the deeds of trust and that the trustor (the maker of the note)
7 recognized MERS could take actions of the beneficiary or that it is the nominee of the
8 beneficiary. “In non-judicial foreclosure states, [MERS] must at least be the record beneficiary
9 under the Deed of Trust, with the powers expressly set forth therein, including the power of
10 foreclosure; in addition, as noted, it *may* become the holder on the note under some
11 circumstances. This procedure fully establishes standing under this court’s rules and Nevada
12 law.”¹⁶ MERS argues in its supplemental brief: “It would be reasonable to hold that a motion that
13 pleads MERS is the of-record beneficiary on the deed of trust is prima facie evidence of standing
14 to move for relief from stay and contains an implied certification that MERS is able to discharge
15 the responsibilities of a movant.”¹⁷ MERS states that the issue of standing focuses on who can
16 foreclose and that MERS can foreclose on the properties as a “person authorized to make the sale
17 under the terms of the trust deed.”¹⁸ (*See also*, Transcript, Docket # 83, pp. 14-15.)

18 MERS also argues that it has standing which follows principles set forth in the Uniform
19 Commercial Code that entitle a nominee holder of an instrument to sue to enforce the
20 instrument.¹⁹ It is unclear whether MERS is arguing that it has standing in its own right, or as the
21 agent of the entity entitled to enforce the note, or both. Compare the following arguments, all
22

23
24 ¹⁶MERS’ Response, Docket #49, p. 9 (emphasis added).

25 ¹⁷Supplemental Brief of MERS, Docket # 73, p. 10.

26 ¹⁸Docket #49, p. 10. However, it is not the beneficiary that is authorized to make the sale
27 under the trust deed, it is the trustee.

28 ¹⁹Docket #49, p. 10.

1 made in the same supplemental brief.²⁰ MERS argues at page 9 of the brief that “this evidence
2 demonstrates MERS right to enforce the note as the note’s ‘holder.’”²¹ In the same brief, at page
3 8, it argues “[t]his evidence further demonstrates MERS authority *to act for* the current beneficial
4 owner of the loan or its servicer.”²² And at page 1 of the brief MERS argues this: “In the motions
5 at issue, MERS is the agent of the original lender and its successors and assigns for defined
6 purposes (such a relationship is termed a ‘nominee.’)”²³

7 ***STANDING AS THE NAMED BENEFICIARY OR***
8 ***THE NOMINEE OF THE BENEFICIARY OR ITS ASSIGNEE***

9 MERS does not have standing merely because it is the alleged beneficiary under the
10 deed of trust. It is not a beneficiary and, in any event, the mere fact that an entity is a named
11 beneficiary of a deed of trust is insufficient to enforce the obligation.

12 The deed of trust attempts to name MERS as both a beneficiary and a nominee. The
13 document first says this:

14 MERS is a separate corporation that is acting solely as a nominee
15 for Lender and Lender’s successors and assigns. MERS is the
16 beneficiary under this Security Instrument.²⁴

17 And later it says this:

18 The beneficiary of this Security Instrument is MERS (solely as
19 nominee for Lender and Lenders successors and assigns) and the
20 successors and assigns of MERS.²⁵

21 ²⁰Docket #73.

22 ²¹Docket #73, p. 9.

23 ²²Docket # 73, p. 8. (Emphasis added.)

24 ²³Docket #73, p. 1.

25 ²⁴*In re Mitchell*, #07-16226, Motion to Lift Stay (Docket # 30), Exhibit B, p. 2, Subpart
26 (E).

27 ²⁵*In re Mitchell*, #07-16226, Motion to Lift Stay (Docket # 30), Exhibit B, p. 3.

1 MERS' "Terms and Conditions"²⁶ identifies MERS' interests. The Terms and Conditions
2 say this:

3 ***MERS shall serve as mortgagee of record with respect to all such***
4 ***mortgage loans solely as a nominee, in an administrative***
5 ***capacity, for the beneficial owner or owners thereof from time to***
6 ***time. MERS shall have no rights whatsoever to any payments***
7 ***made on account of such mortgage loans, to any servicing rights***
8 ***related to such mortgage loans, or to any mortgaged properties***
9 ***securing such mortgage loans.*** MERS agrees not to assert any
rights (other than rights specified in the Governing Documents)
with respect to such mortgage loans or mortgaged properties.
References herein to "mortgage(s)" and "mortgagee of record"
shall include deed(s) of trust and beneficiary under a deed of trust
and any other form of security instrument under applicable state
law.

10 (Emphasis added.)

11 A "beneficiary" is defined as "one designated to benefit from an appointment,
12 disposition, or assignment . . . or to receive something as a result of a legal arrangement or
13 instrument." BLACK'S LAW DICTIONARY 165 (8th ed. 2004). But it is obvious from the MERS'
14 "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any
15 payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an
16 old adage, if it doesn't walk like a duck, talk like a duck, and quack like a duck, then it's not a
17 duck.²⁷

18 But more importantly, even if MERS is the nominee of the beneficiary, or the motion was
19 brought by the beneficiary, that mere allegation is not sufficient to confer standing.

20 Under Nevada law a negotiable promissory note²⁸ is enforceable by: (1) the holder²⁹ of the

21 _____
22 ²⁶"MERS Terms and Conditions" filed in *Dart* (#08-11007) at ¶ 2, Docket #47-7.
23 (Emphasis added.)

24 ²⁷The court is aware of at least one case in this district, *Elias v. Homeeq Serv.*, 2009 WL
25 481270 (D. Nev. 2009)(slip copy), in which MERS has been found to have standing to foreclose
26 as a nominee beneficiary of a deed of trust. While the court in *Elias* found the deeds of trust,
27 notices of foreclosure, and the trustee's deed upon sale established MERS' standing, there is
28 nothing in the opinion to suggest that MERS lacked possession of the notes.

²⁸The court assumes, without deciding, that the notes in question are negotiable
instruments. If they aren't, then custom and practice will treat them as if they are. For example,

1 note, or (2) a nonholder in possession of the note who has the rights of a holder.³⁰ Thus if MERS
2 is not the holder of the note, then to enforce it MERS must be a transferee in possession who is
3 entitled to the rights of a holder or have authority under state law to act for the holder. Simply
4 being a beneficiary or having an assignment of a deed of trust is not enough to be entitled to
5 foreclose on a deed of trust. For there to be a valid assignment for purposes of foreclosure both
6 the note and the deed of trust must be assigned. A mortgage loan consists of a promissory note
7 and a security instrument, typically a mortgage or a deed of trust.³¹ When the note is split from
8 the deed of trust, “the note becomes, as a practical matter, unsecured.” RESTATEMENT (THIRD) OF
9 PROPERTY (MORTGAGES) § 5.4 cmt. a (1997). A person holding only a note lacks the power to
10 foreclose because it lacks the security, and a person holding only a deed of trust suffers no
11 default because only the holder of the note is entitled to payment on it. *See* RESTATEMENT
12 (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. e (1997). “Where the mortgagee has
13 ‘transferred’ only the mortgage, the transaction is a nullity and his ‘assignee,’ having received no
14 interest in the underlying debt or obligation, has a worthless piece of paper.” 4 RICHARD R.
15 POWELL, POWELL ON REAL PROPERTY, § 37.27[2] (2000).

16 Given this, it is troubling that MERS apparently believes that in states such as Nevada
17

18 _____
19 under N.R.S. § 104.9012(tt), Nevada’s Article 9, an “instrument” is defined as a negotiable
20 instrument, “or any other writing that evidences a right to the payment of a monetary
21 obligation . . . and is of a type that in ordinary course of business is transferred by delivery with
22 any necessary endorsement or assignment.” “Instruments” are thus defined somewhat broadly
23 according to ordinary business practices.

24 ²⁹A “holder” is the person in possession of a negotiable instrument that is payable either
25 to a bearer or to an identified person who has possession. N.R.S. § 104.1201(u)

26 ³⁰N.R.S. § 104.3301. A negotiable promissory is also enforceable under N.R.S.
27 § 104.3301(c) by a nonholder of a note that has been stolen, destroyed, or paid by mistake. There
28 has been no allegation in this case making this provision relevant here.

³¹Nevada recognizes that parties may secure the performance of an obligation or the
payment of a debt by means of a deed of trust. N.R.S. § 107.020. The maker of the note is the
truster and the payee is the beneficiary.

1 possession of the note is not required if no deficiency is sought.³² Hultman says this in his
2 declaration:

3 In non-judicial foreclosure states, if the Member chooses to have
4 MERS foreclose under the power of sale provision in the security
5 instrument and is not seeking a deficiency judgment, then the note
6 does not need to be in the possession of the Member's MERS
7 Certifying Officer when commencing the foreclosure action;
8 provided, however, that under no circumstances may the Member
9 allege that the note is in MERS possession and seek enforcement
10 of the note unless MERS actually possesses the note.³³

11 This distinction between judicial and non-judicial foreclosure states, or deficiency and
12 non-deficiency ones, is one which MERS has designed out of whole cloth. In order to foreclose,
13 MERS must establish there has been a sufficient transfer of both the note and deed of trust, or
14 that it has authority under state law to act for the note's holder. *See* RESTATEMENT (THIRD) OF
15 PROPERTY (MORTGAGES) § 5.4 cmt. c (1997). *See also, In re Vargas*, 396 B.R. 511, 516-17
16 (Bankr. C.D. Calif. 2008).

17 ***DOES MERS HAVE STANDING AS THE AGENT OF***
18 ***THE MEMBER OR IN ITS OWN RIGHT?***

19 The mere statement that the movant is a member of MERS does nothing but lay the
20 groundwork for agency. In order to enforce rights as the agent of the holder, MERS must
21 establish that its principal is entitled to enforce the note. Motions brought by MERS as nominee
22 could meet the threshold test of standing, and MERS might be the "real party in interest" under
23 FED. R. CIV. P. 17, if MERS is the actual nominee of the present Member who is entitled to
24 enforce the note. Under Rule 17 a party in interest is any party to whom the relevant substantive
25 law grants a cause of action. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1038 (9th Cir.
26 1986). Counsel for MERS acknowledged during oral argument that MERS is the agent for its
27

28 ³²Despite MERS' contention that the mere status as a beneficiary or nominee of a
beneficiary is sufficient, MERS has tried to withdraw most of its motions because it could not
ascertain that its Member had possession of the note when the motion was filed. *See* Hultman
Declaration at p. 4, Docket #74; Docket #49 at p.11; and Docket #47, Exhibit D in *Dart*.

³³Hultman Declaration, Docket #74, ¶ 4.

1 members only.³⁴ If a note has been transferred to a non-member, then MERS cannot act as the
2 agent. One cannot assume that just because MERS was named as the initial nominee in the deed
3 of trust that it still retains that relationship with the holder of the note. Moreover, by virtue of the
4 fact that some of the motions were filed even after the note was transferred out of the MERS
5 system, it is apparent that MERS has not tracked (or been appropriately advised of) the
6 assignment of the note to a non-member. For example in *Moore*,³⁵ MERS brought a motion to
7 lift-stay in February 2008 as nominee for Quick Loan Funding.³⁶ Later, in July 2008, an amended
8 lift-stay motion was brought by GRP Loan in *Moore*.³⁷ Exhibit C to the amended motion shows
9 that an assignment of the deed of trust was made from MERS to GRP on February 27, 2007,
10 which pre-dates MERS' lift-stay motion.³⁸ Similarly, in *Mercado*,³⁹ a matter which was added to
11 the argument calendar after the order for joint briefing,⁴⁰ MERS brought a motion to lift-stay as
12 nominee for MILA.⁴¹ However, as seen in a later stipulation to sell the property,⁴² Homecomings
13 Financial Network was the entity who was entitled to enforce the note.

14 In the remaining cases, MERS has attempted to establish its standing through the
15 affidavits of "Certifying Officials." Under the Membership Agreement, MERS provides
16 Members a corporate resolution designating one or more employees of the Member a MERS
17 Certifying Officer. This resolution, among other things, appoints the individual as an assistant

18
19 ³⁴See also, Docket #74, Hultman Declaration at ¶ 4.

20 ³⁵*Moore* (#07-16333).

21 ³⁶Docket #37 in *Moore*.

22 ³⁷Docket #59 in *Moore*.

23 ³⁸Docket #59, Exhibit C.

24 ³⁹#07-17690.

25 ⁴⁰Docket #44 in *Mercado*.

26 ⁴¹Docket #28 in *Mercado*.

27 ⁴²Docket # 50, Exhibit 1 in *Mercado*.

1 secretary and vice president of MERS. They are given the power to “take any and all actions and
2 execute all documents necessary to protect the interest of the Member, the beneficial owner of
3 such mortgage loan, or MERS in any bankruptcy proceeding regarding a loan registered on the
4 MERS System that is shown to be registered to the Member.”⁴³ There appears to be absolutely no
5 requirement that these Certifying Officers have any knowledge of the loan in question. From the
6 MERS website it appears that the “Certifying Official” (the person who works for the holder of
7 the note) is not an employee of the servicer either.⁴⁴

8 In *Hawkins* the motion was brought by MERS “solely as nominee for Fremont Investment
9 & Loan, its successors and/or assigns.”⁴⁵ However, in his affidavit at ¶ 6, Victor Parisi⁴⁶ states
10 that the beneficial ownership interest in the *Hawkins* note was sold by Fremont Investment &
11 Loan and ownership was transferred by endorsement and delivery. While the affidavit goes on to
12 the say that MERS was a holder at the time the motion was filed, it is obvious that MERS has no
13 rights to bring the motion as nominee of Fremont given that Fremont no longer had any interest
14 in the note.

15 Similarly, in *Ziegler*⁴⁷ the motion was brought by MERS “solely as nominee for Meridias
16 Capital, Inc., its successors and/or assigns.”⁴⁸ Yet the affidavit of Stacey Kranz at ¶ 6 states that
17 “the beneficial ownership interest in the Zeigler Note was sold by Meridias and ownership was
18 transferred by endorsement and delivery. The Zeigler Note was subsequently endorsed in
19

20 ⁴³Form Corporate Resolution, attached to Exhibit C to the Hultman Declaration, filed in
21 *Dart*, #08-11007.

22 ⁴⁴The website says that “[a]fter your mortgage loan closed, your lender more than likely
23 outsourced the job of managing your loan to another company called a SERVICER. This is the
24 company you call when you have questions about your loan.”

25 ⁴⁵Docket #28 in #07-13593.

26 ⁴⁶Docket #49, Exhibit C, and Docket #56, Exhibit A in *Mitchell*.

27 ⁴⁷#08-10718.

28 ⁴⁸#08-10718, Docket #21.

1 blank.”⁴⁹ An additional affidavit was filed by German Florez, the president of Meridias, who
2 disavowed “any interest in the Note and Deed of Trust regarding the Subject Property.”⁵⁰

3 A slightly different defect exists *Dart*. That motion was brought by MERS “solely as
4 nominee for Centralbanc Mortgage, its successors and/or assigns.”⁵¹ However, Ms. Mech, as
5 Certifying Officer, testifies that the note is held by Bank of America, who is listed as the current
6 servicer, and who “had (or has) physical possession of the note in its files.”⁵² In a previous
7 affidavit, Ms. Mech testified that “the beneficial ownership interest in the Dart Note was sold by
8 Centralbanc and ownership was transferred by endorsement and delivery. The Dart Note was
9 subsequently endorsed in blank.”⁵³

10 So while in each of these cases MERS may really be contending that is it entitled to
11 enforce the note in its own right through possession, or as the nominee of the transferee, the
12 motion was brought instead as nominee of an entity that no longer has any ownership interest in
13 the note.

14 Additionally, each motion has been brought in the name of the lender and “its successors
15 and/or assigns.” Under FED. R. CIV. P. 17 an action must be prosecuted in the name of the real
16 party in interest. “As a general rule, a person who is an attorney-in-fact or an agent solely for the
17 purpose of bringing suit is viewed as a nominal rather than a real party in interest and will be
18 required to litigate in the name of his principal rather than in his own name.” 6A CHARLES ALAN
19 WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1553 (2d ed. 1990). An
20 agent with ownership interest in the subject matter of the suit is a real party in interest. *Id.* There
21 is no evidence, however, of an agency relationship here or that MERS has any ownership interest
22

23 ⁴⁹Docket #56, Exhibit C-1 in *Mitchell*.

24 ⁵⁰Docket #56, Exhibit C-3 in *Mitchell*.

25 ⁵¹Docket #25 in *Dart* (#08-11007).

26 ⁵²Docket #81-1 at ¶ 4 in *Mitchell*.

27 ⁵³Docket #49-1 at ¶ 6 in *Mitchell*.

1 making it the real party in interest under Rule 17.

2 **OTHER EVIDENCE PROBLEMS**

3 Even if the defects were ones of pure pleading,⁵⁴ the testimony in these cases is neither
4 competent nor admissible. Each of the affiants in the remaining cases testify as follows:

5 I have been appointed as Assistant Secretary of Mortgage
6 Electronic Registration Systems, Inc. ("MERS") under a
7 Corporate Resolution that was executed on [date]. I make this
8 affidavit in support of Movant. I have reviewed the loan file
relating to the above-referenced matter, and if called upon to testify
as to the facts set forth in this Affidavit, I could and would testify
competently based upon my review.

9 The affiant then purports to set forth the history of the negotiation and transfer of the note
10 and who now has possession.⁵⁵

11 First, this testimony is not admissible because there is no evidence that the affiants are
12 competent witnesses. The Federal Rules of Evidence apply in bankruptcy⁵⁶ yet there is no
13 evidence that these Certifying Officers have adequate personal knowledge of the facts under FED.
14 R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to
15 support a finding that the witness has personal knowledge of the matter.").⁵⁷

16 _____
17 ⁵⁴For example, Mr. Hultman has stated that a number of motions were withdrawn because
18 they identified MERS as the payee under the note. Hultman Declaration, Docket #74 in *Mitchell*.

19 ⁵⁵For example Ms. Mech testifies in her affidavit (Docket # 81-1) that at the time MERS
20 filed the motion to lift stay in *Dart*:

21 Bank or America, who is listed as the current servicer on the Dart
22 (MIN: 100233602006080675) loan registered on the MERS System,
had (and has) physical possession of the original notes in its files.
23 MERS in turn has possession of those documents through a
MERS Certifying Officer who is an employee of the member
24 listed as servicer on the MERS System.

25 ⁵⁶FED. R. BANKR. P. 9017.

26 ⁵⁷Stacey Kranz, "an Assistant Secretary of [MERS] under a Corporate Resolution"
27 testifies in *Zeigler* (#08-10718) that "MERS was in physical possession of the Zeigler Note at the
28 time MERS filed the motion . . ." (Docket #73 in *Zeigler* #08-10718). Mr. Victor Parsi, similarly
appointed, testifies in *Hawkins* that "MERS was a holder of the Hawkins Note at the time the

1 Ms. Mech's bald assertion that she has "reviewed the loan file" is inadequate to show that
2 she is personally knowledgeable of the facts. Neither are the purported notes and deeds
3 admissible. For business records to be admissible as an exception from the hearsay rule under
4 FED. R. EVID. 803(6) there must be a showing that the records were:

- 5 (1) made at or near the time by, or from information transmitted by, a person with
6 knowledge;
7 (2) made pursuant to a regular practice of the business activity;
8 (3) kept in the course of regularly conducted business activity; and
9 (4) the source, method, or circumstances of preparation must not indicate lack of
10 trustworthiness.

11 These elements must be established either by the testimony of the custodian or other
12 qualified witness or must meet certification requirements. *See In re Vee Vinhnee*, 336 B.R. 437,
13 444 (B.A.P. 9th Cir. 2005).

14 **CONCLUSION**

15 The lift-stay motions in *Dart* and *Hawkins* are denied. MERS may not enforce the
16 notes as the alleged beneficiary. While MERS may have standing to prosecute the motion in the
17 name of its Member as a nominee, there is no evidence that the named nominee is entitled to
18 enforce the note or that MERS is the agent of the note's holder. Indeed, the evidence is to the
19 contrary, the note has been sold, and the named nominee no longer has any interest in the note.

20 **IT IS SO ORDERED.**

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28 _____
Motion for Relief was filed in MERS name. . . ."(Docket #56-2 filed in *Mitchell*.)

1 Copies noticed through ECF to:

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