

2012 WL 361985 (N.Y.Sup.) (Trial Pleading)  
Supreme Court of New York.  
Kings County

THE PEOPLE OF THE STATE OF NEW YORK, by Eric T.  
Schneiderman, Attorney General of the State of New York, Plaintiffs,

v.

JPMORGAN CHASE BANK, N. A.; Chase Home Finance LLC; EMC Mortgage Corporation; Bank  
Of America, N.A.; BAC Home Loans Servicing, LP; Wells Fargo Bank, N.A.; Wells Fargo Home  
Mortgage, Inc.; Merscorp, Inc.; and Mortgage Electronic Registration Systems, Inc., Defendants.

No. 0002768-2012.  
February 3, 2012.

**Summons**

Eric T. Schneiderman, Attorney General of the State of New York, Attorney for Plaintiffs, [Jeffrey K. Powell](#), Deputy Bureau Chief, Bureau of Consumer Frauds & Protection, 120 Broadway, 3rd Floor, New York, New York 10271, Tel: (212)416-8309, Fax: (212)416-6003.

Plaintiffs Designate Kings County as Place of Trial

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with the summons, to serve a notice of appearance, on the Plaintiffs' attorney within twenty (20) days after the service of this summons, exclusive of the day of service. If this summons is not personally served upon you, or if this summons is served upon you outside of the State of New York, then your answer or notice of appearance must be served within thirty (30) days. In case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

The basis of venue is where Plaintiffs have a business address which is 55 Hanson Place, Brooklyn, New York 11217.

DATED: New York, New York

February 3, 2012

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York

*Attorney for Plaintiffs*

<<signature>>

Jeffrey K. Powell

Deputy Bureau Chief

Bureau of Consumer Frauds & Protection

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New York, New York 10271

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### SERVICE LIST

JPMorgan Chase Bank, N.A.

270 Park Avenue, 38th Floor

New York, New York 10017

Chase Home Finance LLC

c/o The Corporation Trust Company

Corporation Trust Center

1209 Orange Street

Wilmington, Delaware 19801

EMC Mortgage Corporation

2780 Lake Vista Drive

Lewisville, Texas 75019 Bank of America, N.A.

100 North Tryon Street

Charlotte, North Carolina 28255

BAC Home Loans Servicing, LP

6400 Legacy Drive

Piano, Texas 75024

Wells Fargo Bank, N.A.

101 North Phillips Street

Sioux Falls, South Dakota 57104

Wells Fargo Home Mortgage, Inc.

1 Home Campus

Des Moines, Iowa 50328

MERSCORP, Inc.

c/o C T Corporation System

111 Eighth Avenue

New York, New York, 10011

Mortgage Electronic Registration Systems, Inc.

c/o CT Corporation System

111 Eighth Avenue

New York, New York, 10011

The People of the State of New York, by their attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, allege, upon information and belief:

### **JURISDICTION AND PARTIES**

1. The People of the State of New York bring this action pursuant to [Executive Law § 63\(12\)](#) and General Business Law (“GBL”) Article 22-A.
2. This Court has jurisdiction pursuant to: (i) [Executive Law § 63\(12\)](#), under which the Attorney General is empowered to seek injunctive relief, restitution, and damages when a person or business entity engages in repeated fraudulent or illegal acts or persistent fraud or illegality in the carrying on, conducting, or transacting of business; and (ii) [GBL § 349\(b\)](#), which authorizes the Attorney General to seek injunctive relief, restitution, and civil penalties when a person or business engages in deceptive business acts and practices.
3. JPMorgan Chase Bank, N.A. is a national bank with its principal place of business located in New York, New York. JPMorgan Chase Bank, N.A. purchased the assets and assumed the liabilities of Washington Mutual Bank, F.S.B. after it failed in 2008.
4. Chase Home Finance LLC is a Delaware limited liability company and is a subsidiary of JPMorgan Chase Bank, N.A.
5. EMC Mortgage Corporation is a Delaware corporation with its principal place of business located in Lewisville, Texas. EMC Mortgage Corporation is an affiliate of JPMorgan Chase Bank, N.A. JPMorgan Chase Bank, N.A., Chase Home Finance LLC, and EMC Mortgage Corporation are referred to collectively herein as “Chase.”
6. Bank of America, N.A. is a national bank with its principal place of business located in Charlotte, North Carolina. In 2008, Bank of America Corporation, a global financial services company that is the parent of Bank of America, N.A, purchased Countrywide Financial Corporation.
7. BAC Home Loans Servicing, LP was a limited partnership and was organized under the laws of the State of Texas. BAC Home Loans Servicing, LP was a subsidiary of Bank of America, N.A. until it recently merged into Bank of America, N.A. Prior to April 2009, BAC Home Loans Servicing, LP did business under the name Countrywide Home Loan Servicing, LP. Bank of America, N.A. and BAC Home Loan Servicing, LP are referred to collectively herein as “Bank of America.”
8. Wells Fargo Bank, N.A. is a national bank with its corporate headquarters in San Francisco, California. In 2008, Wells Fargo & Company, a financial services company that is the parent of Wells Fargo Bank, N.A., purchased Wachovia Corporation.
9. Wells Fargo Home Mortgage, Inc. has a principal place of business in Des Moines, Iowa and is a division of Wells Fargo Bank, N.A. Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage, Inc. are referred to collectively herein as “Wells Fargo.”
10. JPMorgan Chase Bank, N.A., Chase Home Finance LLC, EMC Mortgage Corporation, Bank of America, N.A., BAC Home Loans Servicing, LP, Wells Fargo Bank, N.A., and Wells Fargo Home Mortgage, Inc., along with all their affiliated entities during or before the time they were affiliated, are referred to collectively herein as “Defendant Servicers.”

11. Defendant Servicers, either directly or through their agents, employees, and subsidiaries, have serviced tens of thousands of residential real estate loans in the State of New York. Defendant Servicers also have filed thousands of foreclosure-related proceedings in the State of New York, including foreclosure actions filed in New York state courts and proofs of claims and applications to lift stays filed in federal bankruptcy courts in New York (collectively, “New York Foreclosure Proceedings”).

12. Defendant MERSCORP, Inc. (“MERSCORP”) is a Delaware corporation with its principal place of business in Reston, Virginia. MERSCORP has been registered to do business in New York as a foreign business corporation since October 1997. MERSCORP is owned by many of the most significant stakeholders in the mortgage industry, including mortgage originating and servicing companies (*e.g.*, Bank of America, N.A., Chase Home Mortgage Corporation of the Southeast, Wells Fargo Bank, N.A., CitiMortgage, Inc., GMAC Residential Funding Corporation), government sponsored entities (*e.g.*, the Federal National Mortgage Association, known as “Fannie Mae,” and the Federal Home Loan Mortgage Corporation, known as “Freddie Mac”), mortgage insurance and title companies (*e.g.*, First American Title Insurance Corporation and PMI Mortgage Insurance Company), and the Mortgage Bankers Association. MERSCORP owns and operates an electronic registry system that purports to track the ownership and servicing rights of its members in residential mortgage loans (“the MERS System”). There are over 3,000 members of MERSCORP.

13. Defendant Mortgage Electronic Registration Systems, Inc. (“MERS Inc.”) is a wholly-owned subsidiary of MERSCORP. MERS Inc. is a Delaware corporation with its principal place of business located in Reston, Virginia. MERS Inc. has been registered to do business in New York as a foreign business corporation since May 4, 1999. MERS Inc. serves as the nominal mortgagee in the public land records for loans that are registered on the MERS System. Since 2001, MERS Inc. has served as the mortgagee of record for over 1.5 million mortgages secured by properties located in the State of New York.

14. MERSCORP, MERS Inc., and the MERS System are referred to collectively herein as “MERS.” MERS and Defendant Servicers are referred to collectively herein as “Defendants.”

15. On January 20, 2012, Plaintiffs sent Defendants pre-litigation notices, pursuant to GBL Article 22-a, by certified mail, return receipt requested. Plaintiffs also sent Defendants a courtesy copy of the pre-litigation notice by electronic mail on January 20, 2012.

#### PRELIMINARY STATEMENT

16. The mortgage industry created MERS to allow financial institutions to evade county recording fees, avoid the need to publicly record mortgage transfers, and facilitate the rapid sale and securitization of mortgages en masse. Under the MERS construct, MERS members purportedly log all of their mortgage transfers in a private electronic registry, instead of publicly recording the transfer in the local county clerk's office. Financial institutions avoided having to record these transactions by designating MERS Inc. - a shell company with no economic interest in any mortgage loan - as the nominal “mortgagee” of the loan in the public records. The basic theory behind MERS is that, because MERS Inc. serves as a “nominee” (or agent) for most major lenders, it remains the “mortgagee” in the public records regardless of how often the loan is sold or transferred among MERS members.

17. In addition, since MERS Inc. has few or no employees (again to reduce costs) but serves as the mortgagee for tens of millions of mortgages throughout the county, it has indiscriminately designated over 20,000 MERS member employees as MERS “certifying officers” to act on the company's behalf, expressly authorizing these individuals to assign MERS mortgages, to execute paperwork necessary to foreclose on properties secured by MERS mortgages, and to submit proofs of claims and affidavits on behalf of MERS in bankruptcy proceedings. MERS has failed to adequately screen, train, or monitor the activities of these certifying officers, who have executed millions of important legal documents on MERS' behalf.

18. The MERS System effectively eliminated homeowners' and the public's ability to track the purchase and sale of properties through the traditional public records system. Instead, this information is now stored in a private database maintained by MERS. However, the MERS database is unreliable and inaccurate. Defendant Servicers, along with other MERS members, have failed

to consistently register loan transactions in the MERS System, including transfers of ownership interests and servicing rights. Moreover, MERS did not take basic steps to ensure the data's accuracy and integrity.

19. By creating this bizarre and complex end-around of the traditional public recording system, banks achieved their primary goal - over 70 million mortgage loans, including millions of subprime loans, have been registered in the MERS System and the industry has saved more than \$2 billion in recording fees. In addition, over the last several years, banks rapidly securitized and sold off millions of loans, often misrepresenting the quality and nature of the mortgages being transferred.

20. However, when the subprime mortgage crisis hit and the number of defaults and foreclosures skyrocketed around the country, the shortcomings of the MERS System and its impact on tracking a property's chain of title became readily apparent, sparking widespread litigation. The creation and use of the MERS System by Defendant Servicers and other financial institutions have resulted in a wide range of deceptive and illegal practices, particularly with respect to the filing of New York Foreclosure Proceedings in state courts and federal bankruptcy courts.

21. The use of the MERS System, coupled with faulty and sloppy document preparation and execution practices, have resulted in foreclosures being filed against New York homeowners where the foreclosing party lacked the authority or standing to sue. MERS members, including Defendant Servicers, have brought over 13,000 foreclosures against New York homeowners naming MERS as the plaintiff/foreclosing party. Indeed, for years MERS affirmatively encouraged its members to file foreclosures in MERS' name, again based on the rationale that doing so would save banks time and money. However, MERS often lacked standing to foreclose, and representations in court submissions that MERS owned and/or held the promissory note in such proceedings were often false and deceptive.

22. Even when foreclosures were not initiated in MERS' name, New York Foreclosure Proceedings involving MERS-registered loans often included deceptive submissions. Because MERS Inc. served as the mortgagee of record, the foreclosing party needed to be assigned the mortgage before filing the proceeding to have standing. In many instances, this assignment was not properly made. MERS certifying officers, including Defendant Servicers' employees and agents, have executed and submitted to court MERS mortgage assignments that contain many defects, including affirmative misrepresentations of fact, which render them false, deceptive, and/or invalid. These assignments were often automatically generated and "robotically signed" by individuals who did not review the underlying property ownership records, confirm the document's accuracy, or even read the document. These false and defective assignments have often masked gaps in the chain of title and the foreclosing party's inability to establish its authority to foreclose, and as a result have misled homeowners and the courts.

23. Although there are several New York court decisions finding that foreclosing parties lacked standing, the issue of standing is rarely raised and litigated because most homeowners lack counsel and are unfamiliar with MERS' precise role in their loan. Indeed, a significant percentage of foreclosure actions result in default judgments.

24. In addition, MERS' indiscriminate use of non-employee certifying officers has confused, misled, and deceived homeowners and the courts and made it even more difficult to ascertain whether a foreclosing party actually owns or holds the note and mortgage to have standing to foreclose. MERS certifying officers, including Defendant Servicers' employees and agents, have routinely executed and submitted in court mortgage assignments and other legal documents on behalf of MERS without disclosing that they are not MERS employees, but instead are employed by other entities, such as the mortgage servicer that filed the case or its counsel. As a further complication, the same MERS certifying officer might execute multiple documents on behalf of different parties in a single proceeding.

25. In short, MERS' conduct, as well as Defendants Servicers' use of the MERS System, have resulted in the filing of improper New York Foreclosure Proceedings, undermined the integrity of the judicial process, created confusion and uncertainty concerning property ownership interests, and potentially created clouds of title on properties throughout the State of New York.

## **BACKGROUND**

## New York Mortgage Loans and Public Recording System

26. A home mortgage loan in New York is accompanied by two crucial documents: a promissory note and the mortgage. In the promissory note, the borrower agrees to pay back the loan to the owner of the note. The mortgage permits the enforcement of the promissory note by establishing a security interest against the home that can be enforced through a foreclosure proceeding if the borrower defaults.

27. In New York, Real Property Law (“RPL”) Article 9 establishes a public recording system that was enacted to “furnish potential purchasers with actual or at least constructive notice of previous conveyances and encumbrances that might affect their interests and uses.” *Witter v. Taggart*, 78 N.Y.2d 234, 238 (1991). That system allows for public recording in the local county clerk’s office whenever “any estate or interest in real property is created, transferred, mortgaged or assigned,” or when “the title to any real property may be affected.” RPL § 290(3). Because the mortgage is an interest in real property, as a historical matter the creation and subsequent assignments of any mortgage were recorded in a single publicly available forum.

28. Traditionally, the original lender for a mortgage loan retained both the promissory note and the mortgage. By doing so, the original lender benefitted from the stream of income associated with the note, while at the same time protecting that income by retaining the option of foreclosing on the property under the mortgage in the event of default.

29. Beginning in the 1990s, however, mortgage loans began to be bought and sold with increasing frequency. In particular, major investment banks and other financial institutions began purchasing enormous numbers of mortgage loans and repackaging them into mortgage-backed securities that they then sold to investors. The securitization process typically required multiple, separate transfers or assignments of the notes and mortgages: at minimum, from the original lenders, to several intermediate special-purpose vehicles that pooled the mortgages, and finally to securitization trusts that were created specifically to hold mortgage documents.

30. In order to facilitate the assignments and transfers that were necessary to create these mortgage-backed securities, the mortgage finance industry sought to eliminate the cost and hassle of transferring mortgage interests under the well-established public recording system. To do so, the major stakeholders in the mortgage industry - including lenders, servicers, investors, government-sponsored enterprises, insurance companies, and an industry association - created MERS.

### Creation of MERS

31. MERSCORP was created in 1995 as a privately held stock company. Its shareholders include some of the major players in the mortgage industry: Bank of America, Wells Fargo Bank, N.A., Chase Home Mortgage Corporation of the Southeast, CitiMortgage, Inc., American Land Title Association, CCO Mortgage Corporation, Commercial Mortgage Securities Association, CoreLogic, Corinthian Mortgage Corporation, EverHome Mortgage Company, First American Title Insurance Corporation, GMAC Residential Funding Corporation, Guaranty Bank, HSBC Finance Corporation, MGIC Investor Services Corporation, Mortgage Bankers Association, PMI Mortgage Insurance Company, Stewart Title Guaranty Company, SunTrust Mortgage, Inc., United Guaranty Corporation, WMC Mortgage Corporation, Fannie Mae, and Freddie Mac. *See* MERS Shareholders, at <http://www.mersinc.org/about/shareholders.aspx> (last visited Jan. 23, 2012). Senior executives at each of the Defendant Servicers serve on the Board of Directors of MERSCORP. *See* MERS Board of Directors, at <http://www.mersinc.org/about/bod.aspx> (last visited Jan. 23, 2012).

32. MERS operates as a membership organization, with over 3,000 members. Many of the companies that participate in the mortgage industry - by originating loans, buying or investing in loans, or servicing loans - are members of MERS, including Defendant Servicers.

33. The express purpose of MERS is to “eliminate!] the need to prepare and record assignments when trading residential and commercial mortgage loans.” <http://www.mersinc.org> (last visited Jan. 23, 2012). In other words, MERS was created to allow members to bypass the long-established public recording system, replacing it with a private electronic registry of mortgage

loans for MERS members that purports to track the transfer of the beneficial interest in home mortgages, as well as changes in loan servicers.

34. Avoiding the county clerks' offices benefits MERS members, such as Defendant Servicers, in several ways. As MERS itself touts in its promotional and instructional materials, members can save fees of at least \$30 for each loan registered with MERS,<sup>1</sup> *see* [http://www.mersinc.org/why\\_mers/mom.aspx](http://www.mersinc.org/why_mers/mom.aspx) (last visited Jan. 23, 2012), for cost savings of “hundreds of millions of dollars each year” that otherwise would be paid to the government for recording fees. Indeed, the former MERSCORP President and CEO, R.K. Arnold, conceded during a 2009 deposition that avoiding recording fees resulted in an estimated savings to MERS members of more than \$2 billion.

35. In addition, MERS represented to its members in promotional materials that use of the MERS System would enable members to “[s]ell loans faster,” “[s]treamline bulk acquisitions and mergers,” and “[s]horten foreclosure times.”

36. These benefits have proven irresistible to the mortgage industry. Nearly every major bank and servicer is a member of MERS. Over 70 million mortgage loans have been registered in the MERS System, including approximately 30 million currently active loans. MERS continues to be involved in the origination of approximately 60% of all mortgage loans in the United States. MERS has indicated that its goal is to increase this number to 100%, with all mortgage originators designating MERS Inc. as mortgagee of record.

37. MERS members pay fees to MERS on both an annual and transactional basis, in exchange for MERS' maintenance of a national electronic database of members' mortgage transactions. Depending on their size and level of membership, MERS members may pay up to approximately \$7,500 per year as a membership fee. In addition, MERS charges modest fees to register a new mortgage in the MERS System, and to register transactional changes associated with that mortgage.

### **MERS' Role and the MERS System**

38. In a traditional mortgage, the original lender is designated as the mortgagee and thus the holder of the security interest in the home that serves as collateral for the loan. Upon executing the mortgage, the original lender records its identity and interest in the county clerk's office. If the original lender assigns the mortgage to another entity, then that entity would be responsible for recording the assignment and its own identity in the local land records.

39. MERS becomes involved in a mortgage loan in one of two ways.

40. First, for the vast majority of loans registered in the MERS System, MERS Inc. is designated in the original mortgage document as the mortgagee of record, creating a so-called MERS-as-Original-Mortgagee (or “MOM”) mortgage. Typically, the mortgage will state that “MERS is the mortgagee under this Security Instrument” and that “MERS is a separate corporation that is acting solely as a nominee [*i.e.*, limited agent] for Lender and Lender's successors and assigns.” *See* MOM Loans, at [http://www.mersinc.org/why\\_mers/mom.aspx](http://www.mersinc.org/why_mers/mom.aspx) (last visited Jan. 23, 2012). MOM mortgages also usually state, “MERS holds only legal title to the rights granted by [borrower] in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: (A) to exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property, and (B) to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.”

41. Second, in the absence of a MOM mortgage, MERS Inc. may also become the mortgagee through an assignment after origination. These mortgages are referred to as a MERS-as-Assignee mortgage, or a “MA” mortgage. *See* MERS By Assignment, at [http://www.mersinc.org/why\\_mers/byassignment.aspx](http://www.mersinc.org/why_mers/byassignment.aspx) (last visited Jan. 23, 2012). Only a small percentage of New York loans registered in the MERS System are MA mortgages.

42. MERS Inc. is designated as the mortgagee for the subject property but only for the narrow purpose of being named in the public records as such. MERS has long disclaimed any other, more material interest in home loans: it does not own the underlying note or receive any payments from homeowners under the note, and - despite being the technical “mortgagee” - it

does not directly benefit from any of the substantive provisions of the mortgage. MERS also generally does not maintain any of the crucial loan records, such as the note, the mortgage, intermediate assignments, or payment records.

43. Designating MERS Inc. as the mortgagee of record purportedly excuses MERS members from publicly recording mortgage assignments between themselves and, thus, from paying recording fees. According to MERS, once MERS Inc. is designated as the mortgagee of record with respect to any given mortgage, subsequent transfers between MERS members of the beneficial interest in the mortgage loan or servicing rights need not be separately recorded with the county clerks' offices since MERS Inc., for purposes of recorded title, remains the mortgagee of record. Through this device, MERS members, including Defendant Servicers, have avoided publicly recording mortgage assignments between each other, under the rationale that the recorded title holder of the mortgage (*i.e.*, MERS Inc.) has not changed, even if the holder of the mortgage's beneficial interest has changed.

44. Rather than recording information in the county clerks' offices, MERS members, including Defendant Servicers, are instead supposed to register transactional and other information about MERS mortgages in the MERS System itself. Under MERS' Rules of Membership, members "shall promptly, or as soon as practicable, register on the MERS System" the following transactions, among other things: "the transfer of beneficial ownership of a mortgage loan;" the transfer, registration, or creation of servicing or sub-servicing rights; the initiation of foreclosures on registered mortgage loans; the release of a lien on a registered loan; and "any renewal, extension or modification of a mortgage loan ... that involves the recording of a new security instrument." MERSCORP itself does little more than maintain this database for its members.

45. Homeowners, as well as the general public and the courts, do not have access to the vast majority of information maintained on the MERS System, including records reflecting the sale of mortgage loans from one financial institution to another.

46. Thus, as a result of the creation of MERS, one can no longer look to the public recording system as a reliable source for tracking the chain of title for a loan or for identifying the current beneficial owner of the mortgage. Although financial institution members are supposed to update the MERS System to reflect this information, MERS relied on its members to voluntarily register transactions and did not take sufficient steps to ensure that its members did so or that MERS System data were current and accurate.

### **MERS Certifying Officers**

47. Although MERS Inc. is the mortgagee of record for tens of millions of mortgages in the United States, the company itself has few or no employees. Its parent, MERSCORP, historically employed only approximately 50 people, with a recent increase to approximately 70 employees. Yet, MERS Inc. "appears" in countless New York Foreclosure Proceedings and mortgage documents as a result of its indiscriminate use of a certification procedure through which MERS freely delegates its authority to take action to over 20,000 "certifying officers" (also referred to as "signing officers" or "limited signing officers"). Defendant Servicers alone have well over 1000 employees who serve as MERS certifying officers. These certifying officers are not MERS employees, are not compensated by MERS, do not participate in the governance or the day-to-day operations of MERS, and do not have any of the duties generally associated with a corporate officer. Instead, they are employees of MERS members, including Defendant Servicers, or third party vendors that contract with MERS members to perform loan servicing and foreclosure-related services.

48. MERS issues pro forma "corporate resolutions" designating these individuals as "certifying officers" of MERS. This designation occurs essentially upon the members' demand: MERS historically performed no background or other checks on the identities or qualifications of "certifying officer" candidates, and provided them with no formal training or oversight. Indeed, most certifying officers have little to no familiarity with MERS or its functions.

49. Nonetheless, MERS expressly authorizes its certifying officers to execute paperwork necessary to initiate foreclosure actions; to endorse checks made payable to MERS; and to execute mortgage assignments, lien releases, loan modification agreements, and proofs of claims or other bankruptcy-related documents.

50. In thousands of New York Foreclosure Proceedings, MERS certifying officers, including employees and agents of Defendant Servicers, have purported to act on behalf of MERS to, among other things, initiate foreclosures, execute mortgage assignments,



and sign sworn statements. In many of these proceedings, these same individuals also take action and execute documents on behalf of their employers - often Defendant Servicers - leading to the widespread confusion discussed below.

51. MERS does not manage or supervise the conduct of its certifying officers, notwithstanding that these officers act as MERS' agents. Nor do the certifying officers ever seek to obtain permission or approval from MERS prior to executing or filing legal documents, beyond the initial corporate resolution that allows them to act on MERS' behalf. Despite having procedures to discipline certifying officers and members who fail to comply with MERS' Rules of Membership or applicable law, upon information and belief, MERS has rarely if ever disciplined a certifying officer or member for abuses or violations of law involving a New York loan.

52. Indeed, the very structure of MERS gives it little incentive to be concerned about the actions of its certifying officers: MERS members agree to indemnify MERS "against all loss, liability and expenses which they may sustain as a result of any and all actions taken by" MERS certifying officers.

53. In essence, the certifying officers adopt the authority of MERS when it is expedient to do so, but otherwise act for the benefit of their immediate employers, including Defendant Servicers, wearing numerous corporate hats during any given foreclosure proceeding. This led one New York court to dub the MERS System the "mortgage twilight zone." *HSBC Bank USA, N.A. v. Yeasmin*, 2010 WL 2089273, at \*6 (N.Y. Sup. Ct. May 24, 2010).

### **Federal Regulatory Action**

54. In April 2011, MERS executed a Stipulation and Consent to the Issuance of a Consent Order with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Federal Housing Finance Agency (collectively, "Federal Regulators"), through which MERS agreed to the terms of a comprehensive Consent Cease and Desist Order ("Cease and Desist Order").

55. The Cease and Desist Order was based on the results of the Federal Regulators' examination of MERS, which "identified certain deficiencies and unsafe or unsound practices by MERS and MERSCORP that present financial, operational, compliance, legal and reputational risks to MERSCORP and MERS, and to the participating Members." With respect to tracking, registering, and foreclosing upon mortgages, the Federal Regulators specifically concluded that MERSCORP and MERS Inc.:

(a) have failed to exercise appropriate oversight, management supervision and corporate governance, and have failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services to Examined Members; and

(b) have failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration and delivery of services to Examined Members.

The Federal Regulators directed MERS to develop and implement a series of reforms.

### **The Creation and Use of MERS Have Resulted in a Myriad of Fraudulent, Deceptive, and Illegal Acts and Practices**

#### ***A. Defendants Have Improperly Brought New York Foreclosures Proceedings In MERS' Name.***

56. MERS, as a plaintiff, has filed over 13,000 foreclosure actions against New York homeowners. According to court records, since 2006 alone, over 1800 foreclosures have been filed in MERS' name in New York. Each of these suits identifies MERS as the "plaintiff in the caption.

57. Defendant Servicers have filed and litigated many foreclosure suits brought in the name of MERS. According to MERS and court records, since 2006, Bank of America has filed approximately 95 foreclosures in MERS' name, Chase has filed approximately 85 foreclosures in MERS' name, and Wells Fargo has filed approximately 110 foreclosures in MERS' name.

58. MERS affirmatively encouraged its members to file foreclosures in MERS' name and claimed that it would reduce the time and cost of foreclosing. MERS advised its members that taking the effort to assign the mortgage to the actual note owner prior to commencing a foreclosure was "a cumbersome, costly process and is not recommended." MERS also advised its members that foreclosing in MERS' name was perfectly legal. Its Procedures Manual stated: "Based on legal research conducted with foreclosure counsel in each state, foreclosures can be initiated in MERS' name when MERS is the mortgagee of record, thereby avoiding the cost to the Servicer of re-assigning the loan to the Servicer or other third party." Moreover, MERS issued specific recommended procedures for bringing such foreclosures in New York, stating that it was "clear that MERS stands in the same position to foreclose as the servicer" because MERS Inc. was the mortgagee of record.

59. However, foreclosures brought in MERS' own name in New York are faulty and deceptive in several respects.

60. Most prominently, upon information and belief, MERS often lacked standing to foreclose.

61. Under New York law, a party has standing to foreclose on a property only if it is the holder or assignee of both the note and the mortgage at the time the foreclosure action commences. See *U.S. Bank Nat'l Ass'n v. Madero*, 80 A.D.3d 751, 752-53, 915 N.Y.S.2d 612 (2d Dep't 2011); *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 709 (2d Dep't 2009). Mortgages may be assigned to the foreclosing party either in writing or by physical delivery. See *Lasalle Bank Nat'l Ass'n v. Ahearn*, 59 A.D.3d 911, 912 (3d Dep't 2009). A promissory note, which is a negotiable instrument, must be either endorsed to the foreclosing party on the note itself (or on a firmly affixed allonge), or endorsed in blank or to bearer and physically held by the foreclosing party. See N.Y. UCC §§ 3-204(1)-(2). The fact that a foreclosing party is the mortgagee of record does not by itself make the party the holder or assignee of the note as required to have standing to foreclose under New York law. See *United States Bank v. Sharif*, 89 A.D.3d 723, 725, 933 N.Y.S.2d 293, 296 (2d Dept. 2011). Nor can a plaintiff prove that it possessed the note at the time the action was filed solely by producing a copy of the note, with an undated endorsement, after the foreclosure action has been commenced. Evidence of the date the note was delivered to the plaintiff is required. See *United States Bank Nat'l v. Sarmiento*, Index No. 11124/09, Dec. 19, 2011 Order (N.Y. Sup. Ct.).

62. In recognition of these fundamental principles of foreclosure law, MERS' own rules required that, before a foreclosure was commenced in MERS' name, the note underlying the mortgage needed to be endorsed in blank and held by a MERS certifying officer. In the absence of a properly assigned or held mortgage, and a properly endorsed or held note, MERS lacks standing as a plaintiff in a foreclosure proceeding. As one New York court has noted, "this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such as Mortgage Electronic Registration Systems, Inc. (MERS), may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action." *LaSalle Bank Nat'l Ass'n v. Lamy*, 12 Misc.3d 1191(A), 824 N.Y.S.2d 769, 2006 WL 2251721, at \*1 (N.Y. Sup. Ct. 2006).

63. Upon information and belief, in many instances MERS members did not follow MERS' procedures. As a result, MERS did not hold the note prior to the commencement of foreclosure proceedings, and thus lacked standing. MERS failed to adequately oversee its members and certifying officers to ensure that its rules were followed and that foreclosures were not improperly brought in MERS' name. MERS rarely, if ever, took any remedial actions against members that disregarded MERS' own rules or a state's standing requirements.

64. The pleadings in foreclosure cases brought in MERS' name often assert that MERS held the note at the time of the foreclosure filing. These material statements were false in each case in which the note was not properly transferred to MERS, or endorsed in blank and held by MERS, prior to the commencement of the foreclosure. These misrepresentations to the court and homeowner made it appear that MERS had authority to proceed with the foreclosure when it did not. By falsely purporting that MERS had the authority to foreclose and representing to the court and homeowner that MERS held the note when it did not, MERS and its members engaged in a deceptive and fraudulent practice.

65. In numerous foreclosure actions filed in MERS' name in the State of New York, the note was either not submitted to the court, or the submitted note was not properly endorsed. Upon information and belief, MERS and its certifying officers routinely

failed to retrieve and examine the underlying note to verify that it was properly endorsed prior to filing foreclosure proceedings in MERS' name.

66. Moreover, MERS members filed foreclosure proceedings asserting MERS to be not just the note holder, but also the *owner* of the note, notwithstanding MERS' acknowledgement that it *never* owns the note and never has any beneficial interest in the mortgage that would afford it the right to collect payments from the borrower. For example, Bank of America filed a foreclosure complaint in *MERS v. Walters*, Index No. 382559-09 (N.Y. Sup. Ct.) which states, "Plaintiff became and still is the *owner* and holder of said Note and Mortgage." fl[ 8) (emphasis added). Such representations to the court and the homeowner were false and misleading.

67. Even when members did follow MERS' rules and endorsed the note in blank before filing a foreclosure proceeding, MERS still lacked standing to foreclose in its own name under New York law. Neither MERS nor its direct employees ever received or maintained the note. Instead, MERS claimed to "hold" the note only through its certifying officers, who were employees of member financial institutions or their third party vendors. But MERS' certifying officers are limited agents, and nothing in MERS' Rules of Membership, corporate resolutions, or membership agreements specifically authorized certifying officers to act on MERS' behalf as a custodian of legal documents, including promissory notes. Accordingly, while in certain cases MERS certifying officers may have physically possessed notes that had been properly endorsed in blank, they could not have held the note on behalf of MERS. One court has referred to MERS' position that it holds the note because it may be physically in the possession of a certifying officer who is an employee of another entity as a "charade."

68. Foreclosures brought in MERS' own name were also deceptive in at least two other respects.

69. First, MERS certifying officers regularly submitted affidavits, including Affidavits of Merit, in foreclosure proceedings attesting to the amount owed by the borrower. The signatories to such affidavits identify themselves as officers of MERS, and often fail to disclose that they are employees of other entities. These affidavits could give homeowners and the courts the impression that MERS - an entity that does not collect or track the homeowner's mortgage payments - is attesting to their default and the amount owed. However, MERS has openly acknowledged that it does not maintain and has never maintained records reflecting a homeowner's mortgage payment history or the homeowner's default status. Accordingly, MERS' assertions (through its certifying officers) of knowledge of the homeowner's default and the amount owed are deceptive. Moreover, as discussed below, these affidavits were often signed on behalf of MERS by well-known robo-signers who routinely signed the documents without reading them and made no effort to confirm their accuracy.

70. Second, MERS member servicers and investors hid behind the name of MERS to bring foreclosure actions, often without clearly disclosing the identity of the actual owner of the note or the details of MERS' role in the foreclosure process. On many occasions, neither the caption nor the complaint itself identified the real party in interest, instead listing only MERS as the plaintiff. In other instances, the summons or complaint indicated that MERS was bringing the lawsuit as a nominee for a lender that was defunct at the time of filing and thus had no authority to enforce the mortgage itself. This failure to disclose the real party in interest confused homeowners - most of whom are not represented by counsel - and impeded homeowners' ability to identify the actual party seeking to take their home, as well as homeowners' wherewithal to raise possible legal defenses. As the current MERSCORP CEO recently acknowledged, bringing foreclosures in the company's name has "been a lightning rod for people because it created consumer confusion. The consumer doesn't understand who MERS is ...."

71. In 2006, Fannie Mae implicitly acknowledged that filing judicial foreclosures in MERS' name was legally problematic and misleading by prohibiting the practice with respect to Fannie Mae loans. Indeed, in late 2005, MERS itself had ordered its members to stop bringing foreclosures in MERS' name in Florida. Elsewhere, however, MERS continued to encourage this legal "short cut" until finally banning it nationwide in early 2011. Despite this ban, many foreclosure actions filed in MERS' name against New York homeowners are still pending in New York courts.

72. To the extent that foreclosure proceedings were filed in MERS' name and MERS lacked standing, the foreclosures and any resulting foreclosure judgment and sale may be invalid, creating a cloud on title for properties throughout the State of New York.

73. Upon information and belief, MERS also filed proofs of claims and motions to lift stays in its own name in bankruptcy proceedings. As is the case in state court foreclosure actions, in order to have standing, a party must be the holder or assignee of both the mortgage and the underlying note. See *In re Lippold*, 457 B.R. 293, 296-97 (Bkrcty. E.D.N.Y. 2011); *In re Escobar*, 457 B.R. 229, 241 (Bkrcty. E.D.N.Y. 2011); *In re Agard*, 444 B.R. 231, 245, 246-47, 254 (Bkrcty. E.D.N.Y. 2011); *In re Feinberg*, 442 B.R. 215, 223 (Bkrcty. S.D.N.Y. 2010); *In re Minbatiwalla*, 424 B.R. 104, 109-10 (Bankr. S.D.N.Y. 2010). Thus, a question of standing existed each time MERS filed a proof of claim or motion to lift a stay in its own name without attaching proof that it was the holder or assignee of the mortgage and the note.

**B. MERS' Certifying Officers, Including Defendant Servicers' Employees and Agents, Have Submitted False, Deceptive, and Often Legally Invalid Documents in New York Foreclosure Proceedings.**

74. As described below, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed and submitted to court misleading, deceptive, and false legal documents that purport to establish the foreclosing party's standing to bring a foreclosure action in state court or to seek relief in a bankruptcy proceeding. MERS certifying officers, including Defendant Servicers' employees and agents, often failed to verify the chain of title before New York Foreclosure Proceedings were filed. Instead, they waited until problems arose during the proceedings, and then executed questionable paperwork in an effort to cure the defects.

75. The most egregious abuses have occurred in assignment documents prepared and signed by certifying officers, including Defendant Servicers' employees and agents, on behalf of MERS. Through these documents, MERS claims to assign the mortgage (and in some instances the note as well) from itself to the third party who is bringing the New York Foreclosure Proceeding. New York courts have consistently recognized that financial industry plaintiffs lack standing to foreclose, or to file a proof of claim or motion to lift a stay in bankruptcy proceedings, when they rely on faulty transfers or assignments of notes or mortgages by MERS through its certifying officers. See, e.g., *Bank of New York v. Silverberg*, 86 A.D.3d 274, 281-82, 926 N.Y.S.2d 532, 538 (2d Dep't 2011); *Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 109 (2d Dep't 2011); *LaSalle Bank Nat'l Ass'n v. Lamy*, 12 Misc. 3d 1191(A), 824 N.Y.S.2d 769, 2006 WL 2251721, at \*\*2-3 (N.Y. Sup. Ct. 2006); *In re Agard*, 444 B.R. 231, 246 (Bkrcty. E.D.N.Y. 2011); *Bank of New York v. Mulligan*, No. 29399/07, 2010 WL 3339452, at \*7 (N.Y. Sup. Ct. Aug. 25, 2010); *Onewest Bank, F.S.B. v. Drayton*, 29 Misc. 3d 1021, 1038-40, 910 N.Y.S.2d 857, 870-71 (N.Y. Sup. Ct. 2010); *Bank of New York v. Alderazi*, 28 Misc. 3d 376, 379, 900 N.Y.S.2d 821, 823-24 (N.Y. Sup. Ct. 2010).

76. MERS assignments have numerous defects, including affirmative misrepresentations of fact, which render them false, deceptive, and/or invalid. This false and defective paperwork has often masked the foreclosing party's inability to establish its authority to foreclose, and as a result has misled homeowners and the court. Defendant Servicers and other MERS members often proffered to the court and relied on these faulty assignments as evidence of standing, and thereby created an illusion that standing existed when it in fact did not. In addition, Defendant Servicers made false and deceptive statements in pleadings and other court submissions each time they asserted that the foreclosing party held and/or owned the note and mortgage when, in fact, it did not.

77. First, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed and submitted in court legally invalid documents that purport to transfer the underlying note from MERS to the foreclosing party. However, because MERS never owns the note, has no beneficial interest in the note, is not a party to the note, and is not authorized by the actual note holder to transfer the note, MERS has no authority to effect this transfer. MERS concedes in its own Procedures Manual that it "cannot transfer the beneficial rights to the debt," and its terms of membership acknowledge that the MERS System is "not a vehicle for creating or transferring beneficial interests in mortgage loans." Thus, assignments executed by MERS certifying officers, including Defendant Servicers' employees and agents, often affirmatively misrepresented that MERS had transferred, or even had the authority to transfer, the note to the foreclosing party.

78. As one example of this false and deceptive practice, in *Bank of New York v. Silverberg*, 86 A.3d at 281-82, 926 N.Y.S.2d at 538, the Second Department specifically held that MERS lacked the authority to transfer the note or the authority to foreclose to the trustee plaintiff and that the foreclosing party thus lacked standing. Bank of America was the servicer of the loan in

that case and its employee executed the problematic mortgage assignment as a MERS certifying officer. In another foreclosure action where Wells Fargo was the loan servicer, the court denied summary judgment to the foreclosing party based in part on the lack of evidence establishing that MERS had the power to transfer the note to the foreclosing party. *See United States Bank Nat'l v. Sarmiento*, Index No. 11124/09, Dec. 19, 2011 Order (N.Y. Sup. Ct.). As one New York judge recently put it, "MERS cannot transfer something it never proved it possessed." *HSBC Bank USA v. Taker*, 2011 WL 2610525, at \*10 (N.Y. Sup. Ct. July 1, 2011).

79. Nonetheless, foreclosing parties, including Defendant Servicers' employees and agents, have affirmatively represented in court pleadings that they own and/or hold the note based on a MERS assignment of that note. Such representations are false and deceptive, and could deceive a homeowner or court into believing that the party filing the New York Foreclosure Proceeding has standing when it does not.

80. Second, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed and submitted in court mortgage assignments from MERS to the foreclosing party that were executed *after* the New York Foreclosure Proceeding was filed. These "retroactive" mortgage assignments are dated after the foreclosure filing, often improperly purporting to be effective as of an earlier date. Notwithstanding the failure to assign the mortgage before the filing of the proceeding, the pleadings still affirmatively represent that the foreclosing party held the mortgage at the time of the filing. These representations were often simply false.

81. For example, in *JP Morgan Chase Bank v. George*, 2010 WL 1780952 (N.Y. Sup. Ct. May 4, 2010), the court vacated a judgment of foreclosure and sale where a MERS certifying officer executed a retroactive mortgage assignment to JPMorgan Chase that purported to be effective three months prior to the date it was executed. Wells Fargo was the servicer that filed that foreclosure. There are numerous other New York decisions questioning this deceptive execution of MERS mortgage assignments. *See LaSalle Bank Nat'l Assoc v. Ahearn*<sup>2</sup>, 59 A.D.3d 911, 875 N.Y.S.2d 595 (3d Dept. 2009) (no standing where MERS executed assignment at least two months after foreclosure action filed); *Deutsche Bank National Trust Company v. Stevens*, 911 N.Y.S.2d 691, 2010 WL 2026038 (N.Y. Sup. Ct. May 18, 2010) (dismissing foreclosure action where MERS executed assignment nine days after commencement of proceeding); *Citigroup Global Markets Realty Corp., c/o GMAC Mortgage Corp. v. Bowling*, 906 N.Y.S.2d 778, 2009 WL 4893940 (N.Y. Sup. Ct. Dec. 18, 2009) (dismissing foreclosure action where MERS executed assignment six days after action filed); *New Century Mortgage Corp. v. Durden*, 880 N.Y.S.2d 874, 2009 WL 264134 (N.Y. Sup. Ct. Feb. 2, 2009) (MERS executed assignment more than two months after foreclosure action commenced); *U.S. Bank Nat'l Assoc. v. White*, 880 N.Y.S.2d 227, 2009 WL 159588 (N.Y. Sup. Ct. Jan. 23, 2009) (MERS executed assignment 202 days after commencement of proceeding); *Washington Mutual Bank v. Patterson*, 875 N.Y.S.2d 824, 2008 WL 5233195 (N.Y. Sup. Ct. Dec. 15, 2008) (MERS assignment executed 13 days after foreclosure action commenced).

82. This practice, along with the related representations to the court regarding standing, are false and deceptive. The date of the assignment document is controlling. Any representation to the contrary by MERS or Defendant Servicers is misleading, and could deceive a homeowner or court into believing the party filing the New York Foreclosure Proceeding has standing when it does not.

83. Third, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed and submitted in court mortgage assignments where MERS purports to assign a mortgage to the foreclosing party without any authority to do so. In these instances, MERS had no ability to assign the mortgage because neither MERS nor the entity MERS was purporting to act on behalf of had any interest in the mortgage at the time of the assignment.

84. For example, MERS certifying officers have executed and submitted in court mortgage assignments where MERS purports to act "as a nominee for" a defunct lender that long ago ceased operating or went bankrupt and no longer had an interest in the mortgage. *See U.S. Nat'l Bank Assoc. v. Bressler*, 33 Misc.3d 1231(A), 2011 WL 6115849, at \*1 (N.Y. Sup. Ct. Dec. 7, 2011) (MERS assignment defective in part because MERS executed assignment as nominee for a lender that was no longer operating on date of assignment). In other cases, MERS lacked authority to assign the mortgage because MERS had earlier assigned the mortgage to a third party and thus no longer had an interest in the mortgage. *See New Century Corp. v. Burden*, 880 N.Y.S.2d 874, 2009 WL 264134, at \*3 (N.Y. Sup. Ct. Feb. 2, 2009) (MERS' assignment of mortgage to foreclosing party

was invalid because MERS “did not have a present interest in the Mortgage at the time of the assignment[.]”. Finally, MERS has purported to act “as a nominee for” lenders that long ago conveyed any interest they had in the mortgage, rendering the assignment by MERS a nullity.

85. Thus, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly misrepresented MERS' authority to assign mortgages. Such mortgage assignments are false, deceptive, and invalid, and could deceive a homeowner or court into believing the party filing the New York Foreclosure Proceeding has standing when it does not.

86. Fourth, mortgage assignments, as well as sworn statements such as Affidavits of Merit, have been executed on behalf of MERS by well-known robo-signers and then submitted in New York Foreclosure Proceedings. Robo-signer MERS certifying officers, including Defendant Servicers' employees and agents, executed these documents without bothering to read them, let alone examine the underlying records or confirm the documents' accuracy. Instead, the documents were automatically generated, and MERS certifying officers simply signed them in enormous volume. For instance, during a recent deposition taken by a representative of the United States Trustee's Office in the Southern District of New York, a Bank of America employee who worked out of New York admitted that she did not read the assignments that she executed on behalf of MERS.

87. Even more egregiously, robo-signer MERS certifying officers' signatures sometimes take different forms, suggesting that others were improperly signing the individual's name. For instance, in *HSBC Bank USA v. Taker*, 2011 WL 2610525, at \*2 (N.Y. Sup. Ct. July 1, 2011), one judge remarked that the mortgage assignment from MERS to HSBC was executed by “a known robo-signer ... whose signature is reported to have appeared in at least four different variations on mortgage assignments.”

88. In addition, in foreclosure actions brought in MERS' name, MERS certifying officers, including Defendant Servicers' employees and agents, have executed affidavits attesting that they have reviewed the records to verify the underlying assertions in the case, including the amount owed by the homeowner, when in fact they had not reviewed such records.

89. Fifth, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed “notarized” documents, such as mortgage assignments and affidavits, outside the presence of the notary. The notarizations state that the signatory personally appeared before the notary when in fact this was not the case. See *In re Mims*, 438 B.R. 52, 57 (S.D.N.Y. 2010) (in matter in which Bank of America was the servicer, court expressed reservations about the validity of the mortgage assignment from MERS to Wells Fargo because the MERS “Assistant Vice President” who executed the assignment had an address in Florida but his signature on the assignment was notarized in South Carolina). During sworn testimony taken recently by a representative of the United States Trustee's Office in the Southern District of New York, a Bank of America employee - who regularly notarized mortgage assignments executed on behalf of MERS in New York - admitted that it was her practice to notarize numerous assignments at a time outside the presence of the signatory.

90. Defendant Servicers filed or caused to be filed the kind of false, deceptive, and/or invalid mortgage assignments discussed above not only with courts, but also with local county clerk recording offices throughout New York State. As a result, the public records are replete with MERS mortgage assignments that contain false representations and inaccurate information, and that may have no legal force.

91. To the extent that foreclosing parties such as Defendant Servicers relied on false, deceptive, and/or invalid MERS assignments as a basis to file a foreclosure proceeding, or brought foreclosures as plaintiffs without standing due to a failure to have the mortgage properly assigned to them, the foreclosures and any resulting judgment and sale may be invalid. This could create a cloud on title for numerous properties throughout the State of New York, for which MERS and Defendants Servicers are to blame.

92. MERS is responsible for the fraudulent, deceptive, and illegal conduct of its certifying officers because they serve as MERS corporate officers. As outside counsel to MERS acknowledged during a court proceeding in Florida, although employed by other entities, MERS certifying officers “act and talk and speak and make representations as officer of MERS.”

93. MERS has failed to adequately screen and train its certifying officers, even though they are charged with executing - in MERS' name - vital legal documents in foreclosure proceedings throughout the country. MERS did not provide adequate

guidance to its more than 20,000 certifying officers on the legal import of these documents, the proper method of executing and verifying them, and the need to confirm the underlying information before submitting the documents to court. MERS certifying officers regularly executed mortgage assignments with no knowledge of their meaning or effect.

94. Moreover, MERS has historically exercised little to no oversight of the conduct of its certifying officers, allowing them to execute millions of legal documents without any review or accountability. MERS failed to ensure the quality, integrity, and accuracy of the millions of documents executed by its own “corporate officers.” MERS also had no system to track documents executed on its behalf, including mortgage assignments, affidavits filed in court, and promissory note endorsements. In addition, notwithstanding the widespread abuses by MERS certifying officers, MERS has not taken appropriate remedial action against certifying officers who have executed fraudulent and deceptive documentation in connection with New York Foreclosure Proceedings. This lack of oversight and accountability has undermined countless New York Foreclosure Proceedings.

95. Defendant Servicers also failed to adequately train, supervise, and monitor the document execution procedures used by their employees and agents who served as MERS certifying officers.

96. In addition, upon information and belief, as a result of Defendants' gross lack of oversight, there have been instances when individuals have purported to execute legal documents, such as mortgage assignments, on behalf of MERS in New York Foreclosure Proceedings without any authority to do so.

### ***C. The Use of MERS Certifying Officers by Defendants has Confused and Deceived Homeowners and the Courts.***

97. As described above, through corporate resolutions, MERS has given over 20,000 certifying officers authority to act on its behalf, including the authority to assign MERS mortgages, to execute paperwork necessary to foreclose on properties secured by MERS mortgages, and to submit proofs of claims and affidavits on behalf of MERS in bankruptcy proceedings. Defendant Servicers alone have over 1000 MERS certifying officers. In essence, MERS has created a system where all the actions it purportedly takes on behalf of its members are carried out, not by MERS employees, but by the member's own employees, or in many cases by employees of third party vendors that provide foreclosure-related services to members.

98. This complex and unusual structure - developed solely by the financial industry to reduce costs and paperwork - has confused, misled, and deceived courts and homeowners, who are left with the challenge of untangling a string of unrecorded transfers and assignments by a series of officers and employees of uncertain provenance in order to ascertain whether a party has standing in a New York Foreclosure Proceeding.

99. MERS certifying officers, including Defendant Servicers' employees and agents, often act on behalf of multiple, conflicting principals in a single transaction, and fail to disclose their competing and inconsistent sources of authority. For example, New York courts and local county clerks' offices regularly receive mortgage assignments purporting to assign a mortgage from MERS to the foreclosing party, where the certifying officer signing the mortgage assignment on behalf of MERS is actually an employee or agent of the foreclosing party (the assignee). The MERS certifying officer's execution of the assignment to his or her own employer under the guise of being a MERS officer is confusing to anyone trying to assess the validity of the assignment or to verify the chain of title. It also creates the appearance, if not the reality, of self-dealing.

100. Further, MERS certifying officers, including Defendant Servicers' employees and agents, have repeatedly executed and submitted in court mortgage assignments and other legal documents without disclosing to the court that they are not actually employed by MERS, but instead by a completely different entity. The signature line simply indicates that the signor is an “Assistant Secretary,” “Vice President,” or other officer of MERS.<sup>3</sup> The MERS certifying officer's failure to disclose his or her true employer (which is often the party bringing the foreclosure action or its agent), the nature of his or her limited affiliation with MERS, or the basis for his or her authority to execute the document is deceptive and misleading to the homeowner and the court.

101. Moreover, the same MERS certifying officer often executes multiple documents on behalf of different parties in the same proceeding. For example, in [Bank of New York v. Myers](#), 880 N.Y.S.2d 871, 2009 WL 241771 (N.Y. Sup. Ct. Feb. 3, 2009),

the homeowner's mortgage designated MERS as the mortgagee of record, and a MERS certifying officer, Keri Selman, later executed an assignment of the mortgage from MERS, as nominee of Homebridge Mortgage Bankers Corp. (original lender), to Bank of New York. Ms. Selman signed the document as "Assistant Vice President" of MERS. Five days later, Ms. Selman executed an affidavit in support of a summary judgment motion in the proceeding, this time signing as "Assistant Vice President" of Bank of New York. This led the judge in the matter to refer to Ms. Selman as "a milliner's delight by virtue of the number of hats she wears." *Myers*, 2009 WL 241771, at \*1 Bank of America was the mortgage servicer who brought this foreclosing proceeding.

102. To compound the confusion, many designated MERS certifying officers are employees of third party vendors, such as Lenders Processing Service, Inc., which provide foreclosure-related support to multiple MERS member servicers. These vendors frequently act as agents for several MERS members. Thus, a single employee of a vendor may have the authority to sign assignments and other legal documents on behalf of MERS for loans registered in the MERS System to multiple member servicers, as well as the authority to sign documents as an officer of those member servicers. This results in the deceptive practice of a single vendor employee executing foreclosure-related documents under different titles for multiple entities.

103. Further conflating the role of the parties and the origin of documents submitted to courts and local county clerks' offices is the fact that MERS has designated attorneys at New York foreclosure firms as MERS certifying officers. For instance, through corporate resolutions, MERS appointed several attorneys at Steven J. Baum P.C. ("Baum Firm") as MERS "assistant secretaries and vice presidents." These corporate resolutions - executed by MERS, the Baum Firm, and the MERS members - authorized Baum attorneys to execute documents necessary to foreclose on mortgages registered in the MERS System to various servicer members, including each of the Defendant Servicers. Thus, in foreclosure proceedings filed by the Baum Firm as counsel for Defendant Servicers, Baum attorneys, wearing their hat as MERS certifying officers, regularly assigned mortgages from MERS to the foreclosing parties that the Baum Firm represented. These mortgage assignments - routinely presented to courts as evidence of the foreclosing party's standing - did not disclose that the signatory was actually a lawyer employed by the firm's client. MERS had similar arrangements with lawyers at several other New York law firms. See *U.S. Nat'l Bank Ass'n v. Kosak*, 2007 WL 2480127, at \*2 (N.Y. Sup. Ct. Sept. 4, 2007) (questioning retroactive mortgage assignment executed by an attorney at Druckman & Sinel, LLP that purportedly assigned mortgage from MERS to firm's client).

104. Although it created this bizarre framework, MERS failed to implement adequate policies, procedures, and systems to track and monitor the designation of MERS certifying officers, the basis of their authority to act, and the scope of their authority. Indeed, individuals have executed legal documents - including mortgage assignments, loan modification agreements, and affidavits - on behalf of MERS when they were either not designated as a certifying officer at the time, or were not authorized to execute documents on behalf of MERS with respect to the subject mortgage loan.

***D. MERS, and Defendant Servicers Through Their Use of MERS, Have Concealed Important Information From Homeowners About Their Property and the Role that MERS Plays with Respect to Their Mortgage.***

105. MERS, as well as Defendant Servicers through their use of the MERS System, have effectively eliminated the homeowner's and the public's ability to track property interest transfers through the traditional public records system. Prior to MERS, the common practice was to record mortgage assignments at the county clerk's office and the transactions were transparent. To cut costs and paperwork, MERS, Defendant Servicers, and other MERS members collaborated to create a system under which property interest transfers are no longer recorded in publicly available records, and loans are sold multiple times without any public recording of these transactions. Instead, this information (to the extent that it is registered at all) now resides only in a private database over which MERS and its members exercise sole control. As a result, homeowners and the public have been deprived of a reliable public record reflecting transfers in real property interests.

106. The deprivation of this information harms homeowners by preventing them from ascertaining the chain of title and the true owner of their mortgage. As the Second Department recently acknowledged, the MERS System "leaves borrowers and the local county or municipal recording offices unaware of the identity of the true owner of the note ...." *Silverberg*, 86 A.D.3d at 278, 926 N.Y.S.2d at 536.



107. It is important for homeowners to know who owns their loan because this may be the only entity with the authority to modify the terms or reduce the principal of their mortgage. Investor-specific restrictions may also impact the types of loan modification options available.

108. Moreover, in the absence of a public record, homeowners in foreclosure proceedings cannot reliably verify that the purported plaintiff is the successor to the original lender and thus a proper plaintiff. As one court noted when discussing the problems associated with MERS, “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*, 289 Kan. 528, 543, 216 P.3d 158, 168 (2009).

109. Furthermore, the failure to register property transfers in publicly available records deprives potential future purchasers and other lien holders of important chain of title information.

110. In addition to denying the public vital information about mortgage transfers, MERS and its members also deceive and mislead borrowers about the importance and ramifications of MERS' role with respect to their mortgage at the time the borrower obtains the loan.

111. When MERS is not the original mortgagee but becomes the mortgagee through a later assignment (MA mortgage), the borrower receives absolutely no disclosure regarding MERS' role because MERS is not even referenced in the mortgage executed by the borrower.

112. Even when the mortgage does designate MERS as the lender's nominee and mortgagee of record (MOM Mortgage), it contains only minimal disclosures. For instance, a common mortgage instrument designating MERS as the original mortgagee states: “MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.” This disclosure in the mortgage instrument is insufficient to inform borrowers of the real risks and consequences posed by allowing MERS to serve as mortgagee of record. Furthermore, the note itself has absolutely no reference to MERS. As the MERSCORP CEO recently conceded during an interview: “The consumer doesn't understand who MERS is, even though it is buried in their contract.”

113. The mortgage instrument used by MERS members fails to disclose that: (a) MERS serves as the mortgagee of record for millions of mortgages and acts as an agent for most major mortgage lending institutions in the country; (b) MERS has been designated as an agent so that the lender and subsequent assigns can avoid following standard recording protocols applicable to non-MERS loans, thereby depriving the borrower of access to important information relating to future transfers of his or her mortgage; and (c) MERS conducts all mortgage transactions on behalf of its members through certifying officers who are employed by third parties, an unusual structure that results in the myriad of deceptive and fraudulent practices described above.

#### ***E. Defendants Failed to Maintain an Accurate, Current, and Reliable Mortgage Database.***

114. In a company brochure available on its website, MERS claims that the MERS System is “a national database that tracks changes in mortgage servicing rights and beneficial ownership interests in loans secured by residential real estate.” According to an internal manual, “[a]ll related Members (for example, investors and warehouse lenders) are able to track changes in the loan information and ensure that their positions are properly maintained.” MERS warrants to its members that it will perform its services “with promptness and diligence in accordance with the practices and high professional standards used in well-managed operations” that deliver similar services. However, the MERS database is riddled with inaccuracies and errors. Defendant Servicers, along with other MERS members, have failed to timely and consistently register loan transactions in the MERS System, including transfers of ownership interests and servicing rights. Moreover, MERS failed to implement basic quality assurance measures to ensure data integrity.

115. Pursuant to MERS' rules and procedures, the servicer of the mortgage loan, or a contracted sub-servicer, is responsible for timely entering required data into the MERS System. Servicers are supposed to electronically log, among other things, transfers in servicing rights, transfers of the beneficial ownership interest in a mortgage, the commencement of a foreclosure proceeding,

the release of a lien, the creation of a subservicing relationship, and the modification of a loan that requires the recording of a new mortgage. The MERS System maintains other basic information on registered loans, including the borrower's name, the address of the property, the date the loan was originated, the amount of the note, and the investor's identity. MERS members have repeatedly expressed confusion about how to use the MERS System, and frustration about MERS' lack of support and the fact that certain information and reports were largely inaccessible to them.

116. MERS failed to employ adequate policies, procedures, and systems to verify the accuracy or timeliness of the loan information entered into the MERS System. MERS generally did not confirm that reported transfers between members had actually occurred, examine underlying transfer documents, or verify that the note had been properly endorsed or otherwise transferred when a member registered a change in ownership. Indeed, MERS usually did not require members to submit any supporting documentation when recording transfers of servicing rights or the beneficial interests in a loan to other members. As the number of MERS loans grew exponentially, MERS simply failed to devote the resources or implement the quality assurance mechanisms necessary to ensure the integrity of the information on its system - notwithstanding that its purported primary function is to serve as a national mortgage registry database.

117. MERS was well aware that its database was plagued with inaccuracies, but did not take appropriate remedial measures to ensure that these errors were promptly corrected. As a financial institution noted in response to a member survey conducted by MERS: "You'll note, we made no request in this survey for MERS to actually take responsibility for accuracy in their data and system. We have asked this question repeatedly in conference calls and help desk sessions. Since MERS has no competition and no regulation, we get the simple response, 'We just house data. The maintenance is your responsibility.' The lack of any real competitor for MERS' business has created an atmosphere of 'take it or leave it' when it comes to your policies. We do not appreciate this attitude."

118. Indeed, in a recent interview, the current MERSCORP CEO openly acknowledged that the company "did not have a robust process to make sure that all the data on our system was accurate, timely and reliable. Our view was that is the servicer's data and they're relying on it for their own transactions, they're using their own systems, so we don't have to double check." MERS' actions match its words. Although its rules permit MERS to fine, suspend, or terminate members that fail to timely and accurately report loan transactions, upon information and belief, MERS rarely if ever sanctioned its members for failure to comply with reporting requirements for New York loans.

119. MERS has claimed that it provides a valuable service to its financial institution members, including title companies, by providing a readily available place to identify the current servicer and owner of a loan. Indeed, MERSCORP's former President and CEO, R.K. Arnold, stated that the MERS System's capacity to track servicing is "critical to the efficient and reliable operation" of the secondary market where notes and mortgages are repeatedly transferred. However, to the extent the information in the MERS System was inaccurate, this created confusion among stakeholders who relied on the information to act.

120. For instance, to the extent the MERS System misidentified the note owner, and servicers (or their agents) relied on this misinformation to identify the foreclosing party or the appropriate mortgage assignee in a New York Foreclosure Proceeding, the inaccuracies in the MERS System resulted in foreclosure proceedings brought by the wrong party.

121. Additionally, since the MERS System has effectively replaced the county clerks' offices as the repository of records reflecting transfers of beneficial interests in MERS registered loans, the failure to ensure the accuracy of the database makes it difficult to verify the chain of title for a loan.

122. Further, as a result of its poor record-keeping, MERS has filed mortgage satisfactions in New York against the wrong property. After realizing the error, MERS often files an action to void the satisfaction and reinstate the mortgage. These actions sometimes involve filing a lis pendens on the property, even though the homeowner is current on the mortgage payments. Filing a lis pendens in order to correct an error made by MERS is deceptive because it erroneously and publicly signifies a mortgage default or some other arrears by the homeowner (*e.g.*, unpaid property tax or common charges). This deceptive practice harms the homeowner, who may be forced to go to court to lift the lis pendens and who in the meantime is prevented from being able to sell the home, or refinance, consolidate, or modify the loan until the lis pendens is resolved.

123. In addition, MERS has repeatedly represented to homeowners and the public at large that it provides homeowners, by telephone or through its website, with the name of the entity that currently services their mortgage loan and the name of the current note owner. MERS advertises this free consumer service on its website. According to R.K. Arnold's congressional testimony, "[t]he MERS database is important to individual borrowers because it provides a free and accessible resource where borrowers can locate their servicers, and in many cases, learn who their note-owner is as they change over time." To the extent that MERS has provided New York homeowners with this information based on erroneous data, MERS has misinformed homeowners about the identity of their mortgage servicing company and note owner.

**The Creation and Use of MERS Have Harmed New York Homeowners and the Public, and Undermined the Integrity of the Judicial Foreclosure Process**

124. The misconduct set forth above harmed, and continues to harm, New York homeowners and the public at large and undermines the integrity of the judicial foreclosure process in several ways, including but not limited to:

- By bringing New York Foreclosure Proceedings without proper standing, Defendants have subjected New York homeowners to improper foreclosures.
- By preparing and submitting in court deceptive and legally invalid assignments purporting to confer standing on parties in New York Foreclosure Proceedings, Defendants have obtained foreclosure judgments against New York homeowners through fraudulent and illegal means.
- By making misrepresentations in New York Foreclosure Proceedings regarding, *inter alia*, the identity of the entity that owned and/or held the mortgage and/or note, and failing to disclose material information in these proceedings, Defendants have undermined the integrity of the court system and impeded homeowners' ability to present potential legal defenses.
- By creating and participating in a system that resulted in foreclosure judgments to entities that sometimes did not own or hold the note, Defendants have created clouds on title and invalid liens, and have subjected foreclosure victims to the risk of subsequent proceedings to obtain monetary judgments by the actual note owner.
- By submitting in court MERS mortgage assignments and other legal documents executed on behalf of MERS by over 20,000 certifying officers - who were not employed, trained, or overseen by MERS and who sometimes executed documents in the same proceeding on behalf of other parties - Defendants have confused, misled, and deceived homeowners and the courts.
- By obscuring the identity of those who own beneficial interests in mortgages as well as the chain of title for hundreds of thousands of New York properties, Defendants have deprived the public and homeowners of the ability to track real property ownership interests through publicly available records.

**FIRST CAUSE OF ACTION**

***Pursuant to Executive Law § 63(12) - Repeated and Persistent Fraud and Illegal Acts***

125. Paragraphs 1 through 124 are incorporated and re-alleged as if fully set forth herein.

126. Pursuant to Executive Law § 63(12), it is unlawful for a business to engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business.

127. By reason of the acts and practices alleged herein, Defendants have engaged and continue to engage in fraudulent and illegal acts and to otherwise demonstrate persistent fraud and illegality in the conduct of their business, in violation of Executive Law § 63(12).

**SECOND CAUSE OF ACTION**

*Pursuant to GBL § 349 - Deceptive Acts or Practices*

128. Paragraphs 1 through 124 are incorporated and re-alleged as if fully set forth herein.

129. [General Business Law § 349](#) prohibits deceptive acts and practices in the conduct of any business, trade, or commerce.

130. By reason of the acts and practices alleged herein, Defendants have engaged and continue to engage in deceptive acts and practices in violation of [General Business Law § 349](#).

**RELIEF**

WHEREFORE, Plaintiffs respectfully request that a judgment and order be issued providing the following:

A. Declaring, pursuant to [CPLR § 3001](#), that Defendants' practices and conduct have violated [Executive Law § 63\(12\)](#) and [General Business Law § 349](#);

B. Enjoining Defendants, and their agents and employees, from engaging in the fraudulent and deceptive acts and practices alleged herein, or otherwise violating [Executive Law § 63\(12\)](#) and [General Business Law § 349](#), including but not limited to:

- (1) filing foreclosure actions, proofs of claims, or motions to lift a stay in MERS' name;
- (2) executing false, deceptive, or legally invalid or defective mortgage assignments and other legal documents that are submitted in New York Foreclosure Proceedings;
- (3) executing foreclosure-related documents purportedly based on personal knowledge without such knowledge;
- (4) using non-employee MERS "certifying officers" to execute foreclosure-related documents on behalf of MERS;
- (5) failing to adequately disclose to homeowners the role that MERS plays with respect to their mortgage; and
- (6) failing to maintain an accurate, current, and reliable MERS database.

C. Directing Defendants to take all actions necessary to cure any title defects and clear any improper liens resulting from the fraudulent and deceptive acts and practices alleged herein, including but not limited to the initiation of New York Foreclosure Proceedings without proper standing;

D. Directing Defendants to make available to courts, upon request, any records in the MERS System reflecting the transfer of the beneficial interest in a mortgage loan that is the subject of a New York Foreclosure Proceeding, to the extent that such records are not available in the local county clerk's office;

E. Directing Defendants to disgorge all profits obtained, including fees collected, indirectly or directly by the fraudulent and deceptive acts and practices alleged herein;

F. Directing Defendants to pay all damages caused by the fraudulent and deceptive acts and practices alleged herein to all injured persons or entities, including those not identified at the time of the order;

G. Directing Defendants to pay a civil penalty of \$5,000 to the State of New York for each violation of [General Business Law § 349](#), pursuant to [GBL § 350-d](#); H. Awarding Plaintiffs costs of \$2,000 against each Defendant pursuant to [CPLR § 8303\(a\)\(6\)](#);

I. Directing such other equitable relief as may be necessary to redress Defendants' violation of New York law; and

J. Granting such other and further relief as the Court deems just and proper.

DATED: New York, New York

February 3, 2012

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York

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<<signature>>

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#### Footnotes

- 1 Recording fees saved in New York are considerably higher. To record a mortgage or assignment is \$45, plus \$5 per page (so \$50 to record a one-page mortgage). At least one county additionally requires a “per block fee” of \$75, bringing the total to \$125.
- 2 Upon information and belief, Chase was the servicer in this case.
- 3 MERS corporate resolutions “appointing” individuals as certifying officers often instruct the individuals to “use the title of Assistant Secretary of Mortgage Electronic Registration Systems, Inc.” when executing documents, but to “use the title of Vice President of Mortgage Electronic Registration Systems, Inc.” in states where there is “a legal requirement that the document be executed by an individual that holds the office of vice president or above[.]” This further demonstrates the meaningless and misleading nature of the certifying officer designations.

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