

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| STATE OF DELAWARE, |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No. _____ |
| |) | |
| MERSCORP, Inc., a Delaware corporation, and |) | |
| Mortgage Electronic Registration Systems, Inc., |) | |
| a Delaware Corporation, |) | |
| Defendants. |) | |

VERIFIED COMPLAINT

I. INTRODUCTION

1. The Plaintiff, the State of Delaware, by and through its undersigned Attorney General and Deputy Attorneys General, brings this action against Defendants, who created the mortgage registration and foreclosure enterprise known as "MERS." MERS is at the center of the current unprecedented foreclosure crisis.

2. In contrast to its historic rate of roughly 2,000 foreclosures per year, Delaware's foreclosure rate has tripled to 6,000 foreclosure filings in each of 2009 and 2010, and will likely see a similar number in 2011. *See* Delaware State Housing Authority, 2011 State of Delaware Mortgage Complaints, <http://www.deforeclosurehelp.org/data.html> (last visited Oct. 26, 2011), attached as Exh. A. One out of every 753 Delaware homes received a foreclosure filing in September 2011. *See* RealtyTrac.com, September 2011 Foreclosure Rate Heat

Map, State of Delaware, <http://www.realtytrac.com/trendcenter/default.aspx?address=DE&parse...> (last visited Oct. 26, 2011), attached as Exh. B. This crisis has led to declining home prices, vacant properties, increasing police and service calls to foreclosed properties, and a decreasing tax base. The crisis has also disproportionately affected some of Delaware's most vulnerable ZIP codes, hollowing out communities such as Wilmington, which saw one in every 274 properties facing foreclosure as of September 2011, and New Castle, which saw one in every 420 houses facing foreclosure as of July 2011. *See* RealtyTrac.com, September 2011 Foreclosure Rate Heat Map, New Castle County Zip Codes <http://www.realtytrac.com/trendcenter/de/19801-trend.html> (last visited Oct. 26, 2011), attached as Exh. C, and RealtyTrac.com, September 2011 Foreclosure Rate Heat Map, 19720 Zip Code <http://www.realtytrac.com/trendcenter/default.aspx?address=19720&parsed=1&ct=new%20castle&cn=new%20castle%20county&zp=19720&stc=de&lat=39.67636&lon=-75.597496> (last visited Oct. 26, 2011), attached as Exh. D. While the subprime mortgage crisis began in the middle of the last decade due to the irresponsibility of many players, including banks, borrowers, brokers and regulators, today that crisis has merged with the broader economic downturn to create hardship across the entire social and economic spectrum of our State.

3. MERS engaged and continues to engage in a range of deceptive trade practices that sow confusion among consumers, investors, and other stakeholders in the mortgage finance system, damage the integrity of Delaware's land records, and lead to unlawful foreclosure practices. MERS' deceptive trade practices fall into three broad categories.

4. First, MERS, through its private mortgage registry, knowingly obscures important information from borrowers and the information that MERS does provide to borrowers is frequently inaccurate. The opacity of MERS' mortgage registration database (the "MERS System") makes it difficult for stakeholders, such as consumers, to know of or challenge inaccuracies in the MERS System. When MERS foreclosed in its own name, MERS thus impaired a borrower's ability to raise defenses. The opacity of MERS' registry also frustrates the ability of borrowers to seek out the owner of their loan to pursue loan modifications or other loss mitigation relief in settlement of the mortgage.

5. Second, MERS often acts as an agent without authority from its proper principal. Because the MERS System is both unreliable and frequently inaccurate, MERS often does not know the identity of its proper principal. Where the name of the owner of the mortgage loan recorded in the MERS System does not reflect the true owner, any action MERS takes on behalf of the purported owner is without authority. For example, this may occur where a securitization

vehicle is listed as the owner of mortgage loans in the MERS System, but the securitization vehicle does not in fact own the loans because the parties to the securitization transaction cut corners and failed to properly transfer the loans to the securitization vehicle.

6. Third, MERS is effectively a "front" organization that has created a systemically important mortgage registry but fails to properly oversee that registry or enforce its own rules on the members that participate in the registry. Rather than maintaining an adequate staff to provide MERS' services, MERS operates through a network of over 20,000 non-employee corporate officers who cause MERS to act without any meaningful oversight from anyone who works at MERS. Instead of meaningful internal controls, MERS relies on an "honor system" that fails to ensure the integrity of its registry. The lack of internal controls has resulted in MERS recording so-called "robotsigned" documents with county recorders of deeds, as well as MERS' failure to follow its own rules regarding proper institution of foreclosure proceedings.

7. Foreclosure cases filed in Superior Court demonstrate many of the ways in which MERS committed deceptive trade practices. In a Delaware Superior Court filing discussed below, at paragraph 128, MERS foreclosed on a loan in which it had no interest and without naming the real party in interest. In addition, the entity upon whose behalf MERS sought to foreclose had actually been

dissolved months prior. Moreover, MERS' own records indicate numerous transfers in and out of MERS that are not reflected in the county records, as required by MERS' own rules. The confusing path and inaccurate records associated with this mortgage are not an isolated instance of bad recordkeeping by MERS. Rather, this type of confusion is endemic to the entire MERS System.

8. As further explained below in paragraph 132, a comparison of the captions in a chronological sample of 100 foreclosures upon MERS mortgages in New Castle County against the publicly available information on MERS' website showed that the parties did not match in 21% percent of the cases. This mismatch between what MERS publicly discloses about the real mortgagees and what appears in Delaware's court records demonstrates the opacity of the system to consumers, and the risk of serious inconsistencies in MERS' registry that have led to improper foreclosure practices. Running a mortgage registry that lacks the internal controls to ensure accuracy, while holding itself out to the courts, investors, and the public as an authoritative source of mortgage title, is an inherently deceptive trade practice, and its harm has been compounded by MERS' role in the foreclosure process.

9. MERS was created in the mid-1990s, in response to the mortgage finance industry's desire to avoid county recording fees and to facilitate securitization by minimizing paperwork. *See* MERS Quick Facts, October 2011,

attached as Exh. E, and Transcript of MERS CEO, R.K. Arnold' Testimony before the Subcommittee on Housing and Community Opportunity, Nov. 18, 2010, at p.11 ("R.K. Arnold Tr."). attached as Exh. F. Defendants' alternate mortgage registry bypasses key functions of Delaware's county recorders of deeds offices for a substantial number of Delaware properties. Over one third of all mortgages recorded in Delaware between 2006 and 2010 were in MERS' name. *See* Table of Mortgages Recorded in Delaware, prepared by the Delaware DOJ, attached as Exh. G.

10. The financing arrangement colloquially known as a "mortgage loan" is in fact comprised of two distinct instruments: a promissory note, in which the borrower promises to repay the borrowed funds, and the mortgage, in which the borrower provides her real property as collateral to secure repayment of the note.

11. MERS purports to act as an agent for the banks and investors who registered their mortgage loans with MERS. These banks and investors are the real economic parties in interest in the mortgage loans. Yet, MERS represents to the public that it is the legal title owner to the mortgage (but not of the associated notes). The ownership of the notes (and the corresponding beneficial interest in the mortgages) are purportedly recorded in MERS' proprietary registry, to which the public had limited access. Thus, in Delaware county land records, MERS is listed as the mortgagee for thousands of mortgage loans, even though it

has no economic interest in the mortgage loan. The identity of the true mortgagee is only ascertainable through the MERS System, the massive database MERS created to track the ownership and servicing rights of its members in residential mortgage loans. That system lacks suitable controls to ensure its accuracy.

12. MERS created an unregulated shadow mortgage registry that allows its paying members to access and change their records without any oversight or transparency. MERS also allows its paying members to rely on those unverified private records to transfer mortgages and foreclose on Delaware homeowners. MERS failed to adequately audit these records or ensure compliance with its rules against members despite knowing borrowers, investors and other stakeholders looked to these records to determine the ownership and servicing rights with respect to mortgage loans.

13. The unreliability of the MERS System, when compounded by MERS' reliance on those records, is deceptive and harms consumers by permitting and encouraging foreclosures for which the authority has not been fully determined and may not be legitimate. MERS' inaccurate records lead its members to take action in the name of MERS when, in fact, MERS has no authority to so act. Moreover, despite being a rules-based membership organization with the ability to sanction and expel its members, MERS' lack of oversight and enforcement of its own rules encourages and furthers the misuse of MERS by its members. On

information and belief, MERS has never sanctioned nor expelled any of its members for violating MERS' rules about mortgage transfers and data integrity.

14. MERS also hid from homeowners the identity of the real party-in-interest that sought to foreclose. By encouraging its members to foreclose anonymously by using MERS as the nominal plaintiff, MERS impeded homeowners' ability to question the right of MERS' principals to foreclose and to raise defenses to foreclosure. Homeowners facing foreclosure were also unable to reach out to that entity to seek alternatives to foreclosure, such as a loan modification, or to discuss paperwork or payment history discrepancies. MERS also made it effectively impossible for homeowners and other entities (*e.g.*, courts, investors) to ascertain whether the foreclosing entity actually owned the note secured by the mortgage MERS sought to foreclose. Because Delaware foreclosure actions are typically pursued *in rem* and only require production of the mortgage (and not the promissory note, unless particular defenses are raised), in foreclosure actions brought in MERS' name, a defendant homeowner would not have necessarily known the identity of the real party in interest that was attempting to take away her home and thus could not properly evaluate what defenses could be raised against the foreclosure. MERS' structure and practices thus deprived homeowners of the practical ability to assert defenses to foreclosure, including the

ability to challenge the "holder-in-due-course" status of the proper party to a foreclosure action.

15. MERS functions as a façade or "front" company without the necessary structural support behind it. Despite its role as the mortgagee for approximately 30 million active mortgage loans nationwide, MERS has historically had only approximately 50 employees. *See* R.K. Arnold Tr. at p.11, attached as Exh. F. Despite purporting to track the transfers of loans and the related mortgage interests for roughly half of the outstanding mortgages in the country, (*See Id.* at p.44) MERS does not review the documents purportedly giving rise to such legal interests and rights. Indeed, MERS does not obtain or keep copies of the very mortgages for which it acts as mortgagee. MERS is essentially a software service provider; yet it sells services that go far beyond software, and encourages homeowners, investors, and other stakeholders in the mortgage finance system to rely on a system that it knew, or should have known, was unreliable and inaccurate.

16. MERS also constructed its façade via its corporate signing officers. MERS has approximately 20,000 such corporate officers, who are actually employees of MERS' members, rather than MERS. *See* R.K. Arnold Tr. at p.44, attached as Exh. F. MERS thus relies on its members' employees to perform MERS' acts as MERS corporate officers. In this manner, MERS operates

like a puppet whose strings are pulled by its members' employees. Member employees cause MERS to take various legally operative actions, such as assigning mortgages, signing checks, and foreclosing on homeowners. Members purchase corporate seals for their signing officers from MERS at a cost of \$25 each. *See* MERS Fee Schedule, p.2, attached as Exh. H. While MERS purports to act as agent for the holder or owner of a note, each act MERS performs on such entity's behalf is actually done by that entity's own employee, acting as a MERS signing officer. Moreover, MERS encourages the widespread use of its corporate authority and performs no meaningful oversight over the acts of these signing officers. This use of member employees again obfuscates the real entity dealing with consumers.

17. Since January 1, 2008, MERS has filed over 1,600 foreclosure actions in Delaware. Thousands more foreclosures on MERS-registered mortgages have been filed in Delaware after assignments out of the MERS System that were based on the unreliable data in MERS' records. Many more thousands of mortgages associated with outstanding loans remain recorded in the Delaware county land records in the name of MERS without appropriate indications or avenues to ascertain the identity of the true mortgagee in interest.

II. JURISDICTION

18. The State of Delaware brings this action under the Uniform Deceptive Trade Practices Act, 6 *Del. C.* § 2531, *et seq.*

19. Standing of the Attorney General to commence and prosecute this action is conferred by 6 *Del. C.* § 2533(d), 29 *Del. C.* § 2520(a)(4), and 29 *Del. C.* § 2522(a).

20. Jurisdiction is proper in this Court under 10 *Del. C.* § 341, which gives the Court of Chancery jurisdiction to hear "all matters and causes in equity" and, in that at all times relevant hereto, all defendants individually and together, conducted business throughout the State of Delaware, and the unlawful conduct alleged in the complaint has been and continues to be committed throughout the State of Delaware.

21. Jurisdiction is proper in this Court because, unless enjoined from doing so, Defendants' violations will continue and the subsequent damages to Delaware citizens caused by those violations cannot be remedied by monetary compensation or other remedy at law.

III. **PARTIES**

22. Plaintiff, the State of Delaware, *ex rel.*, Attorney General Joseph R. Biden, III, brings this action through the Department of Justice for the State of Delaware ("Delaware DOJ"). The Attorney General has standing to bring this action under 6 *Del. C.* § 2533(d), and 29 *Del. C.* § 2522(a).

23. Defendant MERSCORP, Inc. ("MERSCORP") is a Delaware corporation with its principal place of business located in Vienna, Virginia.

MERSCORP'S registered agent is the Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. 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, CitiMortgage, Inc., GMAC Residential Funding Corporation, and Wells Fargo Bank, N.A.), government sponsored entities (*e.g.*, Fannie Mae and 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 the MERS System, which is a national registry that tracks the ownership and servicing rights of its members in residential mortgage loans. There are over 5,500 members of MERSCORP. *See* MERS Member List, <https://www.mersonline.org/mers/mbrsearch/validatembrsearch.jsp> (last visited Oct. 26, 2011), attached as Exh. I.

24. Defendant Mortgage Electronic Registration Systems, Inc. ("MERS Inc.") is a wholly-owned subsidiary of MERSCORP. MERS Inc. also is a Delaware corporation with its principal place of business located in Vienna, Virginia. MERS Inc.'s registered agent is the Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. MERS Inc. serves as mortgagee in the land records for loans that are registered on the MERS System. MERS Inc. serves as the mortgagee of record for over one third of the mortgages recorded in

the state of Delaware since 2006. *See* Table of Mortgages Recorded in Delaware, prepared by the Delaware DOJ, attached as Exh. G.

25. MERSCORP, the MERS System, and MERS Inc. are referred to collectively herein as "MERS."

IV. **FACTUAL ALLEGATIONS**

The creation of the MERS System.

26. When a homeowner takes out a mortgage loan, two documents are central to that transaction: the promissory note and the mortgage. The promissory note is an instrument by which the homeowner promises to pay the loan back. The mortgage is a security instrument that provides the lender with a lien on the home that can be enforced through foreclosure if the homeowner defaults on the loan. Both the note and the mortgage can be sold and transferred. While a note may change hands with few formalities, the land recording system has historically ensured the integrity and transparency of the related transfers of mortgage interests.

27. In Delaware, each of the three county recorders of deeds maintains indexes or records of ownership interests in the land in each of the respective counties. Historically, when a homeowner took out a loan secured by a mortgage on her home, the lender would put the world on notice of its mortgage interest by recording the mortgage with the recorder of deeds in the county where

the property is situated. If the lender subsequently sold its loan to another person, the transfer of the related mortgage typically would be recorded in a similar manner.

28. The indices and records kept by the county recording offices provided Delaware with a transparent record of interests in land ownership. This system provided clarity and transparency to a wide variety of stakeholders in the mortgage finance and land recording systems, including homeowners, potential purchasers, subsequent creditors, investors, and transferees of mortgage interests. Thus, a homeowner whose mortgage transfers have been recorded could query the county records to discover the owner of her mortgage. Similarly, if faced with foreclosure, she could ascertain whether the entity seeking to foreclose had actually recorded its interest in the mortgage and properly appeared at the end of the chain of title. The homeowner could use the recording system to identify and attempt to contact the mortgage holder to renegotiate the mortgage terms or otherwise work out any paperwork or payment history discrepancies.

29. After a borrower takes out a home loan, the original lender may sell its beneficial interest in the loan, as well as the rights to service the loan. The owner of the beneficial interest—often referred to as the "lender"—is entitled to repayment of the loan. The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the

loan. The servicer may also be responsible for initiating foreclosure on behalf of a loan owner.

30. Beginning in the 1990s, mortgage loans were bought and sold with increasing frequency. Often, loans were sold multiple times in rapid succession and were ultimately owned by securitization trusts that hired other entities to perform the administrative aspects of owning the loans. In connection with this development, the mortgage industry sought to speed up, and reduce the cost and amount of, paperwork involved with transferring mortgage interests. To do so, the major stakeholders in the mortgage banking industry—including lenders, servicers, investors, government-sponsored enterprises, insurance companies, and an industry association—created MERS.

31. In 1995, MERS' shareholders created MERS as a national registry to track ownership and servicing rights for residential mortgages and to serve as the mortgagee (or holder of the mortgage lien) in the public land records.

The MERS System.

32. MERS is a private electronic database that purports to track the transfer of the beneficial interest in home loans, as well as any changes in loan servicers.

33. Many of the companies that participate in the mortgage industry—by originating loans, buying or investing in the beneficial interest in

loans, or servicing loans—are members of MERS. For example, MERS lists Bank of America, N.A. as a member involved in the following lines of business: Originator, Servicer, Subservicer, Interim Funder, Investor, Document Custodian, and Trustee. *See* MERS BOA Member Record, https://www.mersonline.org/mers/mbrsearch/validatembrsearch.jsp?as_mbrsearch=1000157 (last visited Oct. 26, 2011), attached as Exh. J. Fannie Mae is listed as a member involved as a Servicer, Subservicer, Investor, and Document Custodian. *See* MERS Fannie Mae Member Record, https://www.mersonline.org/mers/mbrsearch/validatembrsearch.jsp?as_mbrsearch=1000130 (last visited Oct. 26, 2011), attached as Exh. K. LPS Field Services, Inc. is listed as a member involved as a Vendor/Service Provider. *See* MERS LPS Field Services Member Record, https://www.mersonline.org/mers/mbrsearch/validatembrsearch.jsp?as_mbrsearch=1008087 (last visited Oct. 26, 2011), attached as Exh. L. The Bank of New York Mellon, N.A. is listed as a member involved as an Investor and Document Custodian. *See* MERS BoNY Member Record, https://www.mersonline.org/mers/mbrsearch/validatembrsearch.jsp?as_mbrsearch=1000579 (last visited Oct. 26, 2011), attached as Exh. M.

34. MERS, whose trademarked motto is "Process Loans, Not Paperwork," states in its marketing material that it "saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans." *See* MERS Promotional Brochure, attached as Exh. N.

35. MERS allows its members to designate MERS Inc. as the member's nominee and as mortgagee on mortgages and assignments recorded with the county recorders of deeds. According to MERS, once MERS is so designated with respect to any given mortgage, subsequent transfers of the mortgage loan among MERS members need not be separately recorded with the recorder of deeds (and no recording fee need be paid to the recorder of deeds for these transfers). Rather, MERS purports to act as a "common agent" for whichever MERS member owns the mortgage loan at a given point in time. *See* R.K. Arnold Tr. at p.2, attached as Exh. F. In other words, if a lender sells or assigns the promissory note to another MERS member, the change in beneficial interest in the affiliated mortgage is recorded only in the MERS database, not in county records, because MERS purports to act as mortgagee on the new lender's behalf. Thus, a transfer of a mortgage loan from one MERS member to another MERS member causes a transfer of MERS' agency from one principal to another principal, and leaves no public trail by which anyone can identify the principals or verify the propriety of the transfer.

36. MERS members pay fees to MERS on both an annual and transactional basis for the electronic processing and tracking of ownership and transfers of mortgages. Each MERS member contractually agrees with MERS to

appoint MERS as the agent for the member on mortgages owned by that member that are registered in the MERS System.

37. MERS can become a mortgagee of record in one of two ways: it may be designated as the original mortgagee on the mortgage itself (a so-called MERS-as-Original-Mortgagee mortgage, or "MOM" mortgage), or a mortgage may be assigned to MERS after origination (a MERS-as-Assignee, or "MA" mortgage). Of the 113,051 mortgages registered in the name of MERS Inc. in Delaware since 2006 and identified in the database provided to the Delaware DOJ by MERS on September 14, 2011, 106,796 mortgages were MOM mortgages, 6,255 mortgages were MA mortgages.

38. In the case of a MOM mortgage, the mortgage signed by the borrower contains limited disclosure about the role MERS intends to play as mortgagee. One example of such language in a MOM mortgage reads: "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." In the case of a MA mortgage, no such disclosure is ever presented to the borrower. In both cases, MERS is designated as both the mortgagee and as the nominee of the lender and its successors and assigns.

A. *Defendants commit deceptive trade practices by hiding the true mortgage owner from homeowners, other stakeholders and the public.*

39. The minimal disclosure of MERS' role provided to borrowers in a MOM mortgage is inadequate. The disclosure is mixed in with the other terms of the mortgage contract and is styled as operative contractual language, rather than a statement informing the homeowner about the risks associated with designating MERS as the mortgagee. An example of a Delaware mortgage listing MERS as mortgagee, with MERS-related disclosure highlighted in boxes, is attached as Exh. O. MERS' CEO, responding to recent criticism of MERS' practice of encouraging foreclosures in MERS' name, rather than in the name of the principal, stated: "One of the key things has been eliminating foreclosures in MERS' name. That's been a lightning rod for a lot of people because it created customer confusion. The consumer doesn't understand who MERS is, *even though it's buried in their contract.*" *See Mortgage and Technology Article on MERS CEO Bill Beckman, Sept. 2011, at p.16 ("M&T Article, Sept. 2011"), attached as Exh. P. (Emphasis added.)* Indeed, the MERSCORP CEO does not view this as a problem; rather, in discussing the appropriateness of MERS's current practice, he stated: "We have two willing counterparties who are happy to have it done this way and it is part of the consumers' transaction that we're going to do it this way. It's not done in stealth, though I'd agree that it's a few words in a fairly

voluminous and complex document." *Id.*, at p.22. No disclosure language whatsoever appears in a MA mortgage.

40. A MERS mortgage is recorded in the appropriate county recorder of deeds office with "Mortgage Electronic Registration Systems, Inc." named as the mortgagee of record. When a mortgage has been recorded in the name of MERS, it is typically not possible to ascertain through the recorder of deeds office the identity of the actual beneficial owner of the mortgage, much less the chain of title and timing of any transfers of beneficial ownership that might have occurred within the MERS System. Instead, one can only determine that MERS Inc. is acting as mortgagee on behalf of an unnamed entity that is a successor or assignee of the original lender. This is because subsequent transfers of beneficial ownership interests in a mortgage recorded in MERS' name are not recorded. These procedures contrast with the practice for non-MERS mortgages, where the owner can be identified as the assignee in a recorded assignment of mortgage and a chain of title can be ascertained.

41. Transfers of MERS mortgages are instead purportedly tracked electronically in the MERS System while MERS Inc. remains the legal title holder of the mortgage in its role as nominee. The electronic records of such transfers in

the MERS System are not generally accessible to non-MERS members, including members of the public.¹

42. Upon information and belief, many lenders (*i.e.*, owners of the loan) of MERS mortgages have the ultimate authority to negotiate the full range of loss mitigation options that may be available to a homeowner. The MERS System prevents homeowners from determining these lenders—even though the system has the capacity to share that information with consumers.² MERS maintains a website and a toll-free telephone number through which homeowners with MERS mortgages may find out the identity of their servicer. Upon information and belief, this telephone number does not typically enable residential mortgage holders to find out the identity of the owner of the loan. Instead, MERS tells homeowners: "If you are unable to make the payments on your mortgage and wish to negotiate the terms of your loan, you may only do so with your Servicer. Contrary to popular belief, it is your Servicer and not the lender that can negotiate the terms of the loan with you." *See* MERS for Homeowners, <http://www.mersinc.org/homeowners/> (last visited Oct. 26, 2011), attached as Exh. R. Yet, in reality, it is often the lender, not the servicer, who ultimately must agree to modifications and other crucial decisions with respect to the homeowner's loan.

¹ While in 2010 MERS began to allow certain homeowners some access to these records, such access was limited and not provided consistently for all mortgage loans. Moreover, MERS has recently restricted even this access.

² In MERS' Procedure Manual, investors are permitted to choose whether to disclose investor details in proprietary applications (MERS® OnLine, MERS® Link, XML Inquiry and Batch Inquiry) and public applications (MERS® ServicerID and the telephone Servicer Identification System). *See* MERS Procedure Manual, attached as Exh. Q.

43. A homeowner's inability to ascertain the true owner of a MERS loan is problematic where the owner of the loan has ultimate authority with respect to making decisions, such as whether to pursue a foreclosure or permit a loan modification. It is also problematic because a borrower will be unable to challenge a purported note holder's right to foreclose if she is precluded from identifying that entity. By hiding the true mortgage owner and removing that information from the public land records, MERS creates substantial confusion through the services it provides. This is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

44. Upon information and belief, over one third of residential mortgages in the State of Delaware are recorded in the name of MERS, rather than in the name of the bank, trust, or company that actually owns the mortgage debt.

B. Defendants commit deceptive trade practices by operating MERS through its members' employees, who MERS appoints as its corporate officers so that such employees may act on MERS' behalf.

45. MERS typically employs only about 50 people at any given time, despite its status as mortgagee on millions of mortgages across the country. In order to allow MERS to perform its function as mortgagee on loans registered in the MERS System, MERS permits its members to cause MERS to act on their behalf.

46. MERS accomplished this business model by permitting its members to designate their employees as corporate officers of MERS Inc. through purported MERS corporate resolutions.³ *See* Sample MERS Signing Officer Resolution, attached as Exh. S. Rule 3 of MERS Membership Rules provides:

Upon request from the Member, Mortgage Electronic Registration Systems, Inc. shall promptly furnish to the Member, in accordance with the Procedures, a corporate resolution designating one or more officers of such Member, selected by such Member, as "certifying officers" of Mortgage Electronic Registration Systems, Inc. to permit such Member (i) to release the lien of any mortgage loan registered on the MERS® System to such Member, (ii) assign the lien of any mortgage naming MERS as the mortgagee when the Member is also the current promissory note-holder, or if the mortgage is registered on the MERS® System, is shown to be registered to the Member, (iii) to foreclose upon the property securing any mortgage loan registered on the MERS® System to such Member . . .

See MERS Membership Rules, attached as Exh. T.

47. As part of the process for becoming a MERS member, a member sends MERS a list of employees it wishes to have appointed as certifying officers. On information and belief, MERS performed no background or other checks on the identities of these officer candidates, but rather issued corporate resolutions pursuant to Rule 3 as a matter of course. These member employees

³ There is some debate as to whether these corporate resolutions were in fact duly authorized by MERS Inc. and, as such, whether MERS signing officers had the authority MERS attempted to give to them.

then have purported authority to sign on behalf of MERS with respect to the members' mortgages registered on the MERS System.

48. MERS Rule 3 further provides:

Unless otherwise specifically stated herein, any action required or permitted to be taken by MERS or Mortgage Electronic Registration Systems, Inc. pursuant to these Rules shall be taken on behalf of MERS by such persons as may from time to time be designated by the respective Boards of Directors of MERS and Mortgage Electronic Registration Systems, Inc.

49. Member employees cause MERS to take various legally operative actions, such as assigning mortgages, signing checks, and foreclosing on homeowners. Because MERS historically has had only around 50 employees, it relies on its members' employees to perform MERS' acts as MERS corporate officers. As of November 2010, there were over 20,000 such MERS signing officers. MERS purports to act as agent for the holder or owner of a note, yet each act MERS performs on such entity's behalf is actually done by that entity's own employee acting as a MERS signing officer. MERS' use of signing officers to conduct the business of MERS creates confusion in the mortgage marketplace and constitutes a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

50. MERS' signing officers are not paid any compensation by MERS. Nor does MERS supervise or direct, nor have the right to supervise or

direct, any of the work performed by its signing officers. MERS signing officers do not seek, nor do they receive, any instruction, permission or approval from MERS to act on MERS' behalf, beyond the resolution appointing the individual as a signing officer. Other than the corporate resolution, there is no contract, agreement, or written undertaking of any sort between MERS and its signing officers relating to any actions taken or permitted to be taken by a signing officer on behalf of MERS. On information and belief, MERS' signing officers are not covered by any insurance policy for officers of MERSCORP or MERS Inc. MERS' use of signing officers to represent MERS in consumer real estate transactions and litigation over whom MERS exercised minimal to no oversight constitutes a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

The failure to ensure the proper transfer of mortgage loan documentation to the securitization trusts results in the failure of securitizations to own the loans upon which such securitizations purport to foreclose.

51. Many foreclosed-upon mortgage loans have previously been securitized and are purportedly owned at the time of foreclosure by a securitization trust. Under the law governing the creation of many securitization trusts, the contractual arrangements setting forth the manner and conditions under which mortgage loans were to be sold into a securitization is crucial to whether the securitization succeeded in owning the mortgages it purportedly bought.

52. For example, many securitizations are created as trusts under New York law. New York trust law provides that "[i]f the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized . . . is void." N.Y. E.P.T. L. § 7.2-4. Because the governing document in these securitizations—known as a Pooling and Servicing Agreement or "PSA"—both creates the securitization trust and purports to sell the loans into the trust, the conditions of such sale set forth in the PSA must be carefully adhered to and not be subject to any variance or exception outside the four corners of the contract. If those terms and conditions are not properly followed, the sale may be void. In such an event, the securitization would not own the loan it supposedly owns as a result of the securitization transaction.

53. The typical PSA provides a number of conditions for the effective transfer of the mortgage loan. For example, the seller typically must transfer certain documents to the purchaser, including: (1) the original loan note with an endorsement either in blank or to the order of the purchaser; (2) the original mortgage with evidence of recording on it; and (3) an assignment of the mortgage either in blank or filled out in the name of the purchaser. In addition, where the entity endorsing the note or assigning the mortgage in these documents

is not the original lender or mortgagee, the PSA further requires that evidence of a complete chain of endorsements or assignments are also transferred.

54. Despite the existence of such rules in PSAs, on information and belief, such conditions were frequently not complied with in connection with the securitization of Delaware mortgages recorded in MERS' name.

C. Defendants committed and continue to commit deceptive trade practices by assigning or foreclosing upon mortgages for which MERS did not possess authority to act because the mortgage loan was never properly transferred to the purported beneficial owner.

55. The MERS System is designed to reflect the intended transfer of the beneficial ownership of a mortgage loan, but does not have adequate safeguards to ensure that the transfer recorded in MERS System accurately reflects an actual transfer of ownership. Where MERS seeks to assign a mortgage or foreclose on a mortgage loan on behalf of a securitization trust that, despite being registered as the mortgage owner in the MERS System, does not own the loan, MERS acts without authority. This is a deceptive trade practice within the meaning of 6 Del. C. § 2532(a)(2), (3), (5) and (12).

56. For example, Section 2.01 of the PSA for the securitization known as Securitized Asset Backed Receivables LLC Trust 2007-BR5 ("SABR 2007-BR5") (an excerpt of which PSA is attached as Exh. U), set forth requirements that are typical of residential mortgage securitizations. In particular,

it required the entity selling the loans to the Trust (the "Depositor"), to deliver to the Trustee the following documents, among others:

(i) the original Mortgage Note bearing all intervening endorsements showing a complete chain of endorsement from the originator to the last endorsee, endorsed "Pay to the order of _____, without recourse" and signed (which may be by facsimile signature) in the name of the last endorsee by an authorized officer. . . ;

(iii) the original Mortgage with evidence of recording thereon or a certified true copy of such Mortgage submitted for recording. . . ; [and]

(vi) the originals of all intervening assignments of Mortgage (if any) evidencing a complete chain of assignment from the applicable originator to the last endorsee (or, in the case of a MERS Designated Loan, MERS) with evidence of recording thereon

57. With respect to the loan foreclosed upon in Superior Court Case N10L-05-215 PLA, filed in New Castle County on May 18, 2010, (attached as Exh. V) the foregoing requirements for an effective transfer to the SABR 2007-BR5 trust were not followed. Deutsche Bank National Trust Company acted as trustee under the PSA and purported to pursue foreclosure *in rem* as an assignee of MERS as the mortgagee. Deutsche Bank asserted as part of its complaint that the defendant borrower had delivered the promissory note to it upon origination in 2006.

58. In fact, the actual promissory note (attached as Exh. W) demonstrates that it was made out not to Deutsche Bank, but to an entity known as

New Century Mortgage Corporation. The promissory note does not bear any endorsement, whether on the face of the note or affixed as an allonge. The note was thus never delivered to Deutsche Bank in the manner required by the PSA.

59. As such, the requirement for effective transfer to the SABR 2007-BR5 trust—that the promissory note bear all intervening endorsements showing a complete chain of endorsement from the originator to the last endorsee, endorsed "Pay to the order of _____, without recourse"—was not met and the sale was ineffective. Yet MERS still purported to act on behalf of this trust when assigning the mortgage to Deutsche Bank prior to foreclosure. The entity purporting to foreclose was not acting on behalf of the true owner of the note. This was a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

60. Many securitizations of mortgage loans originated by Countrywide Home Loans, Inc. contained similar conditions regarding the endorsement and delivery of the promissory note at the time of securitization. Section 2.01 of the PSA for the Countrywide securitization known as CWABS, Inc., Asset-Backed Certificates, Series 2006-8 (an excerpt of which is attached as Exh. X) requires that in connection with the transfer of mortgage loans to the securitization trust, that the Depositor deliver and deposit with the Trustee "the original Mortgage Note, endorsed by manual or facsimile signature in blank in the

following form: 'Pay to the order of _____ without recourse', with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note . . .". See Exh. X at Section 2.01(g)(i). However, in a 2009 hearing for a consumer bankruptcy proceeding,⁴ an employee for the Bank of America entity responsible for servicing the securitized Countrywide mortgage loans testified under oath that Countrywide did not have a practice of delivering original documents such as the note to the Trustee. See *In re Kemp*, 440 B.R. 624, 626 (Bankr. D.N.J. 2010) (No. 08-18700) (Aug. 11, 2009), Tr. at pp.6-8, 16-17, attached as Exh. Y. In addition, the same employee further testified that allonges are typically prepared in anticipation of foreclosure litigation, rather than at the time the mortgage loans are purportedly securitized. Both of these facts are contrary to the requirements of the PSA that the note be endorsed in blank and delivered to the trustee at the time of securitization.

61. Such industry practices have likely led to the failure to properly transfer mortgage loans on a large scale, resulting in a substantial number of assignments and foreclosure filings on Delaware mortgages by MERS that constituted and continue to constitute deceptive trade practices within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

⁴ Transcript of Hearing at 6-8, *In re Kemp*, 440 B.R. 624, 626 (Bankr. D.N.J. 2010) (No. 08-18700) (Aug. 11, 2009).

The entry and management of data in the MERS System is not controlled by MERS, but rather by those MERS members who are identified as owners or servicers in the MERS System.

62. The mortgage records and related data in the MERS System are provided by MERS members who are granted access to software that permits the creation and editing of data on the MERS System. Under both MERS' Rules, and MERS' Terms and Conditions, the servicer of a mortgage loan—who the securitization trust or other purported loan owner typically hires to act as an administrative agent—is responsible for entering and editing data on the MERS System, unless the beneficial owner invokes its right to override the servicer. *See, e.g.,* Rule 9 of MERS' Rules (attached as Exh. T), and paragraph 3 of MERS' Terms and Conditions (attached as Exh. Z).

63. When the beneficial ownership of a given loan is transferred, the right to service the loan often also transfers to the new owner's agent. When the beneficial ownership of a loan is changed in the MERS System, the rights to edit information on the MERS System and to act in MERS' name with respect to that loan are transferred to the servicer acting on behalf of the new purported loan owner. The new servicer gains the ability to act on MERS' behalf even if the MERS System information is incorrect, or out of date, for example where a new loan owner and servicer was registered in the MERS System, but the attempt to transfer a mortgage loan to a securitization was unsuccessful. *See, e.g.,* MERS

Procedure Manual at pp.63-71, attached as Exh. Q. For the loan that was purportedly securitized as part of the SABR 2007-BR5 trust but did not comply with the PSA, MERS records indicate that Deutsche Bank National Trust Company owned the loans as trustee of the securitization, even though the transfer to the trust actually failed.

64. Transfers of beneficial ownership on the MERS System are typically initiated by the purchasing loan owner or its servicer. While some transfers require confirmation by the selling loan owner, others are automatically confirmed by the MERS System. MERS does not investigate or confirm whether the transfers recorded on its system have been actually caused through the execution of proper documentation and the satisfaction of necessary conditions to the transfer. For example, where an endorsement on a note is required by the loan purchase contract as a condition to the effectiveness of the purchase, no MERS' employees determine whether such conditions have in fact been met.

D. Defendants commit deceptive trade practices by purporting to act as an agent without knowing the identity of MERS' principal and therefore knowing whether MERS acted within the scope of its agency.

65. Because MERS does not appropriately test the accuracy of the information in its system, it allows its servicer members to cause MERS to act when, in fact, MERS does not have authority to so act. This is a deceptive trade practice within the meaning of 6 Del. C. § 2532(a)(2), (3), (5) and (12).

66. The deception inherent in such a system is compounded by MERS' inherent opacity as an agent. Even though MERS acts as the agent for any one of thousands of principals with respect to a given mortgage loan, MERS does not have any policy or practice of disclosing the identity of the principal on whose behalf it acts. Instead, when MERS takes action, it simply acts in its own name or, at best, discloses that it is acting on behalf of either the original lender or the original lender's unnamed assignee. This is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

E. Defendants committed deceptive trade practices by creating and failing to ensure the integrity of a systemically important, yet inherently unreliable, mortgage database that creates confusion and inappropriate assignments and allowed for improper foreclosures of mortgages.

67. Because MERS stands in the shoes of the traditional country recorders of deeds for nearly half of all American mortgages (*See* R.K. Arnold Tr. at p.10, attached as Exh. F.), MERS has an obligation to ensure that the MERS System accurately reflects the ownership status of these loans. MERS' failure to do so creates confusion and significant harm through the deceptive foreclosures that result from its inaccurate system. This failure to ensure the accuracy of the MERS System is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

68. The CEO of MERSCORP has confirmed the lack of data integrity in the MERS System. In a recent interview, he stated:

We 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. They're performing those transactions, so they're performing it that way.

See M&T Article, Sept. 2011, at p.15, attached as Exh. Q.

69. Discussing MERS' efforts to improve its system, MERS' CEO elaborated:

We've put in place a process now that we're going to make sure that since we run a database, that's what we do, it's going to be perfect. It's going to take a little while to get there, but that's the process we're going through. We're going to have a quality assurance function to make sure it stays that way and all the other processes supporting that are done well. That wasn't something we did robustly before"

See M&T Article, Sept. 2011, at p.15, attached as Exh. Q.

70. No MERS employees verify the facts behind ownership transfers on the MERS System. MERS employees do not obtain the loan transfer documents. MERS employees do not confirm that endorsements appear on either the notes or allonges. MERS employees do not review the requirements set forth in loan purchase contracts to confirm that the formalities required by those

documents have been met. Yet MERS warrants to its members in Membership Rule 12 that it shall render its services "with promptness and diligence in accordance with the practices and high professional standards used in well-managed operations performing services similar to the Services." See MERS' Rules, attached as Exh. T. This representation is false and is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

71. MERS does not perform to high professional standards; nor has MERS been held to such standards, either. In the same recent interview, the MERSCORP CEO stated:

[T]he organization grew up over a period of 15 years and it was never questioned, much in the same way I think that some of the robustness of servicing processes at servicers got questioned when they got put under stress. The process worked for a long time and when it was put under stress, people said, 'Look, that's just not good enough for the world we live in now. It has to stand up to a different level of scrutiny.' MERS had never had a regulatory visit before last year. When they came in, they didn't say, "What you did was terrible." If anything, the regulators got convinced that [*sic*] we do has value. But they said, "If it's going to have value and you're going to use it, it has to meet these criteria because you're a critically important back office function to banks." We've never been held to that standard before.

See M&T Article, Sept. 2011, at p.18, attached as Exh. Q.

72. Despite this lack of oversight, MERS membership rules and other documents governing members' use of the MERS System are replete with

representations of practices to ensure the integrity of data. On information and belief, these rules and procedures are ignored by MERS members and go unenforced by MERS. For example, Membership Rule 2-5(b) requires that a member registering a loan on the MERS System provide MERS with evidence that MERS Inc. has been properly recorded in the public records as the mortgagee of record. *See* MERS' Rules at p.12, attached as Exh. T. On information and belief, such evidence is not provided as a matter of course to any MERS employee. In Section 7 of Rule 2, MERS requires its members to "review for accuracy and completeness all information shown on the MERS® System with respect to mortgage loans and related transactions registered by such Member, and promptly update any incorrect information." *Id.* at p.13. On information and belief, MERS is aware or should be aware that information on the MERS System is routinely inaccurate and MERS does not take any meaningful actions to require members to comply with this rule. This is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

73. As another example, MERS historically has allowed its members to foreclose in the name of MERS.⁵ When this is done, MERS required that the MERS member physically possess the promissory note at the time it initiates foreclosure. *Id.* at p.25. On information and belief, MERS members failed

⁵ The details and deceptive nature of this unique use of MERS' agency status to initiate court actions against homeowners will be discussed in further detail, below.

to comply with this rule when foreclosing on homeowners; nor did MERS have any system in place for ascertaining whether its members complied with this rule. This was a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

74. MERS also represents a system of penalties and sanctions that it can impose on members who fail to comply with its rules. Section 1 of MERS Rule 7 provides:

MERS, in its sole reasonable discretion may sanction a Member for one or more violations of these Rules or the Procedures or for errors, delays or other conduct detrimental to the operation of MERS or Mortgage Electronic Registration Systems, Inc., the MERS® System or other Members, including, without limitation, a Member's failure to provide adequate training and supervision to its employees to enable proper use of the MERS® System, by imposing any of the following:

- (a) removal as a Member, but only if the notice requirements of Rule 7, Section 2 below have been met by MERS;
- (b) suspension, for a period and upon terms determined by MERS;
- (c) fines, in an amount determined by MERS;
- (d) censure; or
- (e) any other fitting requirements that may be determined by MERS.

Id. at p.23.

75. On information and belief, outside of a handful of isolated instances relating to foreclosures in Florida, no sanctions were ever imposed and no membership was ever revoked for a members' failure to properly enter data in MERS System or otherwise cause MERS to act without authority. No sanctions have ever been imposed on members with respect to mortgages on properties in Delaware, nor has MERS ever terminated the membership of any member for action taken with respect to mortgages on properties in Delaware.

76. MERS abandoned its role of overseeing the MERS System, despite the fact that MERS knows, or should know, that the integrity of the MERS System is unreliable and often inaccurate. The fact that the MERS System was created to replace county recording offices and was thus designed as systemically important—the MERS system is responsible for properly maintaining chain of title with respect to over a third of all Delaware mortgages—compounds the harm created by MERS' abandonment of this role. MERS abandoned this role notwithstanding representations and rules to the contrary, that indicate it would ensure the integrity of the MERS System. This representation that MERS is reliable when it was not is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

77. MERS should know that the MERS System is riddled with inaccuracies. With an average staff of approximately only 50 employees, MERS

does not enter mortgage data, does not update mortgage data, and is in no position to—and upon information and belief, prior to 2011 did not—perform audits of its data to test the accuracy of the transfer data entered by MERS members. Upon information and belief, nor does MERS ever conduct audits of loan transfers or other activities of its members.

78. However, on information and belief, many MERS members were not aware of MERS' small size and resulting inability to provide the support necessary for the MERS System. The current CEO of MERS, who was previously employed at Citibank, a major MERS member, recently stated:

MERS really is a small company. We're up to 65 people now, from 50 at the beginning of the year. For something so important, with 60% market share in the U.S. of a back office utility function for all the key players, it really is a small company. There is some very focused expertise, but it's just not that deep. Our core functions are done with outsourced vendors. The key knowledge base is very concentrated and that was certainly a big difference. I'm not sure I really understood that when I was a member.

See M&T Article, Sept. 2011, at p.14, attached as Exh. P.

79. By creating the MERS System without proper safeguards, oversight, and support, and by inducing its members and the public to rely on that system to replace the traditional system for transferring and recording interests in mortgages, MERS destroyed the integrity of the real property recording system and allows improper mortgage transfers and foreclosures to proceed unchecked. At the

same time, MERS' practice of hiding from public view the data in the MERS System compounds that irresponsibility by making it difficult or impossible for borrowers and other stakeholders to challenge the accuracy of the system. Through these practices, MERS commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5), (7) and (12).

MERS purports to act as the agent of the loan owner but instead acts on behalf of the entities identified on the MERS System.

80. MERS' membership documentation and procedures manuals set out various rules concerning what entity MERS may act as an agent for, and who may cause MERS to act. These rules are confusing and apparently contradict one another in places.

81. MERS represents that it only acts as agent on behalf of the beneficial owner of the loan secured by the mortgage. The MERS Membership Terms and Conditions provide: "MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time." *See* Exh. Z, para. 2. Thus, when a MERS member takes action in the name of MERS as the agent for such member, this rule appears to require that such member must be the owner of the loan with respect to which it is causing MERS to act (or its agent).

82. This rule applies even when data in the MERS System might indicate otherwise. As set forth in the MERS Membership Terms and Conditions,

MERS and the Member agree that: (i) the MERS® System is not a vehicle for creating or transferring beneficial interests in mortgage loans, (ii) transfers of servicing interests reflected on the MERS® System are subject to the consent of the beneficial owner of the mortgage loans, and (iii) membership in MERS or use of the MERS® System shall not modify or supersede any agreement between or among the Members having interests in mortgage loans registered on the MERS® System.

Exh. Z, para. 6.

83. Despite these principles and representations in MERS' rules, MERS' actual procedures and practices encourage and condone reliance by MERS and its members on the data in the MERS System, even where the data did not reflect the true owner of the note.

84. On information and belief, MERS (through its members' employees acting as signing officers) routinely relies on the MERS System to identify the principal on whose behalf it sought to act.

85. MERS' own procedures reflect this practice of reliance on the data in the MERS System. MERS has a separate rule stating that it will take instructions only from the loan holder. Both the MERS Membership Terms and Conditions and the MERS Membership Rules state: "MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes." *See* Exh. T at p.13 and Exh. Z at para. 3. On information and belief, this rule was designed to permit the servicer, which is typically the entity that held the note on

behalf of the purported loan owner, to cause MERS to act. This contradicts the foregoing representations as to MERS' ability to only act on behalf of the loan owner.

F. Defendants commit deceptive trade practices by taking instructions from entities who, despite being listed as note holders in the MERS system, were not the proper principals to cause MERS to act under MERS' rules.

86. Beyond the confusion engendered by the apparent conflict between MERS' role as nominee for the beneficial owner and MERS' policy of taking instructions from the note holder, this rule deferring to note holders is also problematic because the note holder may not in fact be the proper party to cause MERS to act where it was not the owner of the loan or its agent. For example, where a securitization trust failed to comply with the terms of the PSA and, as a result, was unsuccessful in gaining ownership of the mortgage loans, the trustee, custodian or servicer of the securitization may nonetheless still have acquired and held the physical note on behalf of the securitization trust, despite the fact that another entity was the beneficial owner of debt signified by such note. In such a situation, MERS' practice of taking instructions from the note holder is without authority and constitutes a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

87. Moreover, the conflict between MERS' representation to act on behalf of the loan owner and its practice of taking instructions from the note holder

leads to additional deceptive trade practices in light of an additional MERS rule that provides for a specific method of transferring the beneficial ownership of loans in the MERS System. In clarifying MERS' role as a registry and not as a loan transfer agent, the MERS Procedural Manual states:

Although MERS tracks changes in ownership of the beneficial rights for loans registered on the MERS® System, MERS cannot transfer the beneficial rights to the debt. The debt can only be transferred by properly endorsing the promissory note to the transferee.

See Exh. Q at p.63.

88. However, on information and belief, the promissory notes for a substantial number of loans registered in the MERS System do not contain proper endorsements. Where, pursuant to the rule deferring to note holders, MERS complies with the instructions of a holder of a note that is not properly endorsed, MERS acts in contravention of its rules, acts beyond its scope of agency, and commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

G. Defendants commit deceptive trade practices by encouraging and inducing reliance on the MERS System when MERS knows the system is unreliable and by allowing its members to cause MERS to act beyond the scope of its authority in reliance on such unreliable data.

89. Beyond these conflicting rules concerning on whose behalf MERS is authorized to act, the MERS System allows its members to rely on data

in the MERS System to identify the true owner of a mortgage loan. MERS' rules provide that instructions from the entity listed in the MERS System may be relied on in the absence of contrary instructions from the beneficial owner. The Terms and Conditions indicate: "In the absence of contrary instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS® System in accordance with the Rules and Procedures of MERS." *See* Exh. Z at para. 3. The Membership Rules provide:

In the absence of contrary instructions from the beneficial owner, MERS and Mortgage Electronic Registration Systems, Inc. may rely on instructions from the servicer shown on the MERS® System in accordance with these Rules and the Procedures with respect to transfers of beneficial ownership, transfers of servicing rights, and releases of security interests applicable to such mortgage loan.

See Exh. T pp.12-13.

90. On information and belief, for a substantial number of mortgages, the entities shown as servicer on the MERS System are not in fact the agent of the true owner of the loan. For example, on information and belief, MERS members fail to accurately reflect the correct ownership of loans in MERS' system. Similarly, on information and belief, widespread failures to follow the loan transfer formalities set forth in securitization documents led to the failure of many purported loan sales to effectively transfer ownership of the loans subject to the sale transaction. For example, many PSAs require as a condition to the

effective transfer and ownership that the promissory note evidencing the mortgage loan containing an endorsement either in blank or to the transferee be physically transferred to such transferee or its agent at the time of sale. On information and belief, many loans purportedly transferred to securitizations on the MERS System were never endorsed by the original payee. As such, those loan sales to securitizations were ineffective as a result of this failure to satisfy this condition. In such a situation, where MERS acts in reliance on data shown in the MERS System that inaccurately reflects the true owner of the loan and such owner's agent, MERS acts without authority and commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

91. To the extent that MERS' ability to act as mortgagee for the proper party depends on the accuracy of the MERS System with respect to the true owner of mortgage loans, MERS had a responsibility to ensure the accuracy of the data in the MERS System. As discussed above in paragraphs 62 through 79, MERS does not properly oversee the integrity of the MERS System. MERS' failure at oversight, in light of its assumed obligation to ensure the accuracy of the MERS System, is a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

92. On information and belief, MERS does not have a procedure for ascertaining the true owner of a mortgage loan other than through its reliance

on the entity shown in the MERS System as the investor or owner. MERS thus induces reliance on the MERS System for authorizing action taken in the name of MERS, even when the data in such system inaccurately reflects the proper parties with interests in the loan and verification is difficult to impossible. The confusion and deception that result from this misplaced reliance on data in the MERS System, particularly where the wrong entity caused MERS to initiate a foreclosure, has harmed homeowners and clouded the records in the public recording systems in Delaware. MERS' failure to properly oversee the use of the MERS System while encouraging reliance on the data it contains creates confusion and constitutes a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

93. In instances where the identity of the loan owner and its servicer are improperly shown on the MERS System, the MERS database is inaccurate with respect to that loan. On information and belief, there are a substantial number of such loans with respect to which the MERS System is inaccurate.

94. Where MERS, in reliance on such inaccuracies in its database, acts on behalf of a MERS member who was not actually the loan owner or its agent, it acts as an agent for an entity that was not its principal, misrepresents its

authority, and commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

H. Defendants commit deceptive trade practices by assigning mortgages without authority to do so where MERS purports to act for the wrong entity or where the requisite signature of a MERS signing officer is not actually executed by that officer.

95. MERS often assigns loans out of its name as a precursor to foreclosure or when one loan owner sells a mortgage loan to an entity that is not a MERS member.

96. An assignment of a mortgage in Delaware that is to be recorded with the County Recorder of Deeds must be executed by the assignor mortgagee. Where MERS is the mortgagee, assignments are typically executed for MERS by an employee of the MERS member who is the owner of the loan acting as a MERS signing officer. As set forth in Paragraph 46, above, MERS purportedly authorizes its signing officers to "assign the lien of any mortgage naming MERS as the mortgagee when the Member is also the current promissory note-holder, or if the mortgage is registered on the MERS® System, is shown to be registered to the Member."

97. MERS purports to accomplish this assignment via the original document appointing MERS—such as a MOM mortgage or an assignment of mortgage to MERS in the case of a MA mortgage—which names MERS as the nominee, not only for the registering lender, but also for such lender's successors

and assigns. As such, MERS purports to act on behalf of whichever successor happens to own the loan at the time an assignment takes place.

98. On information and belief, numerous assignments of mortgages in Delaware fail to indicate that MERS is acting on behalf of such successors and assigns. Where, in such instances, MERS purports to assign a mortgage as agent for an entity that is no longer the owner or holder of the mortgage loan, such assignments are without authority and constitute a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

99. On information and belief, many MERS members engaged in a practice commonly known as "robo signing," whereby assignments of mortgages purportedly executed by a MERS signing officer were in fact executed by another employee or agent of the MERS member. For example, two documents obtained from the New Castle County Recorder of Deeds (attached as Exh. AA) reveal two different signatures for Rita Knowles, who is listed in each document as an assistant vice president of MERS Inc. In such situations, the signatory was not authorized by a MERS corporate resolution to act on behalf of MERS. Where MERS purported to assign a mortgage through the use of an assignment executed by someone other than an officer of MERS, such assignments were without authority and constituted a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

The MERS foreclosure process.

100. MERS' Rules provided for foreclosure upon a mortgage registered in the name of MERS in either of two ways: the foreclosure could be conducted either in MERS Inc.'s name, or it could be assigned out of MERS to the owner of the loan or its servicer acting as the owner's agent and then foreclosed upon by that entity.⁶ See MERS' Rules, p.25, attached as Exh. T.

101. As set forth in paragraph 17, above, MERS filed over 1600 foreclosure actions in the State of Delaware since 2008. In addition, many more mortgages were assigned out of MERS for foreclosure by servicers.

102. According to MERS' procedures for foreclosing in Delaware, "[t]he same procedures and requirements that are followed when foreclosing in the name of the servicer are still followed when foreclosing in the name of Mortgage Electronic Registration Systems, Inc. The major difference is that the caption of the complaint should state Mortgage Electronic Registration Systems, Inc. as the plaintiff." See MERS State-by-State Foreclosure Procedures, attached as Exh. BB.

103. In Delaware, the owner of a mortgage debt can enforce that debt by either suing upon the mortgage *in rem* or by suing upon the note *in personam*. The vast majority of foreclosure actions are conducted *in rem* in Superior Court. In a typical *in rem* proceeding, the foreclosing party demonstrates

⁶ As of July 21, 2011, MERS only permits foreclosure after a mortgage is assigned out of MERS.

its authority to foreclose by asserting that the mortgage has been assigned to it and attaching a copy of the mortgage and such assignment to the foreclosure complaint.

104. Notwithstanding the fact that the mortgage is the only document needed to foreclose upon a mortgage loan in an *in rem* proceeding in Delaware, a foreclosing party nonetheless needs to either own the note or be the agent of the noteholder in order to rightfully foreclose upon the debt and claim the proceeds of the action. As set forth in Section 5.4(c) of the Restatement (Third) of Property (Mortgages): "A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." The mortgage and the note must be held together because the holder of the note is only entitled to repayment and not to satisfy such repayment out of the property; conversely the holder of the mortgage alone does not have a right to repayment and thus, does not have an interest in foreclosing on the property to satisfy repayment. If the mortgagee were allowed to proceed when another entity owned the note, the homeowner might be subject to multiple suits upon the debt from later claimants *in personam* based on the note.

105. When MERS foreclosed on a residential mortgage in its own name, MERS claimed standing because it purportedly was the holder of the note and the mortgage. As articulated on the MERS website, "[w]hen MERS forecloses, MERS is the mortgagee and it is the holder of the note because a

MERS officer will be in possession of the original note endorsed in blank, which makes MERS a holder of the bearer paper. MERS will not foreclose unless the note is endorsed in blank and held by MERS." *See* MERS-Foreclosures internet archive, July 19, 2010, <http://web.archive.org/web/20100719041410/http://mersinc.org/foreclosures/index.aspx> (last visited Oct. 26, 2011), attached as Exh. CC.

106. When a decision is made to foreclose on a MERS loan on behalf of a purported owner of that loan, MERS' Member Rule 8, Section 1(b), provides that "[t]he Member servicing a mortgage loan registered on the MERS System shall be responsible for processing foreclosures in accordance with the applicable agreements between such Member and the beneficial owner of such mortgage loan." *See* MERS' Rules, p.25, attached as Exh. T. As noted in paragraph 62, above, MERS does not provide for the possibility that the entity identified as the servicer on the MERS System is not the agent of the true note owner or does not have an agreement in place with the true note owner.

I. Defendants committed and continue to commit deceptive trade practices by assigning mortgages for foreclosure and by foreclosing on mortgages, in each case at the behest of the entity shown in the MERS System, without authority to do so from the actual owner of the note.

107. MERS allows the servicer shown in the MERS System to cause MERS to assign the mortgage to such servicer in order to initiate foreclosure

proceedings on behalf of the purported note owner. However, that entity may not in fact be the true note owner because the note may never have been properly transferred. Because MERS simply holds the mortgage as the agent of the true owner of the note but does not verify who that entity is, MERS may not have the authority to effectuate such a transfer of a mortgage to the purported note owner without authority from the true note owner.⁷ Moreover, on information and belief, assignments of loans out of MERS are, and foreclosures conducted in the name of MERS were, done in reliance on the data in the MERS System, which data is frequently inaccurate and fails to reflect the actual owner of a mortgage loan when such loans have not been properly transferred. On information and belief, MERS transfers such mortgages to entities that are not the true loan owner or such owner's agent without instruction from such true owner. Because MERS knows that the servicer in each such situation intends to use the mortgage to foreclose on the Borrower, and because the servicer in such situation does not have any rights in the debt secured by the mortgage, MERS commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

108. Similarly, on information and belief, MERS foreclosed on mortgages on behalf of entities that were not the true loan owner or such owner's agent without instructions from such true owner. Because MERS is acting on

⁷ Such authority is unlikely to be given in most situations. Perhaps most compellingly, where the original and true noteholder has gone bankrupt and is now in receivership, the receiver is unlikely to permit an assignment to another entity.

behalf of an entity that does not have any rights in the debt secured by the mortgage in situations where MERS does not have instructions from the true owner or the true owner's agent, MERS committed a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

109. Each foreclosure initiated by MERS on behalf of an entity that was not the true owner of the mortgage was without authority and was a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

J. Defendants committed deceptive trade practices by initiating foreclosures in the name of MERS in contravention of MERS' rules and without appropriate controls to ensure the foreclosures were prosecuted by the actual note holder.

110. MERS' rules required that the foreclosing member be in possession of the note, and that the note be endorsed in blank, to foreclose in MERS' name. MERS represented that "MERS will not foreclose unless the note is endorsed in blank and held by MERS." *See* MERS Foreclosures internet archive, July 19, 2010, attached as Exh. CC.

111. Upon information and belief, MERS frequently foreclosed upon Delaware homeowners without possessing a note endorsed in blank at the time of foreclosure. Superior Court Case 09L-01-019 PLA (attached as Exh. DD), discussed in more detail below, at paragraph 128, is an example of such a case. There, MERS attached to its complaint a copy of the mortgage (attached as Exh. EE) and the promissory note (attached as Exh. FF), yet the promissory note bore

no endorsements. Thus, MERS pursued the foreclosure action despite its failure to have authorization to do so under MERS' own rules.

112. No MERS employee ever held the note at the time of foreclosure. Rather, MERS purported to hold the note by making an employee of the servicer a MERS "officer." That servicer employee was then purported to hold the note while donning the MERS hat.

113. This maneuver allowed servicers to hide behind the MERS façade to initiate foreclosures. By encouraging servicers to use MERS to initiate foreclosures and by purporting to hold the note as a condition to initiating such foreclosures when in fact MERS had no control over the note, MERS committed a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

114. A homeowner facing foreclosure by MERS had no way to determine whether MERS (as represented by the Servicer's certifying officer) possessed the note or whether the note was properly endorsed, both of which are required for MERS, as nominee or agent of the servicer, to foreclose. In addition to the fact that no MERS employee held the relevant note at the time of foreclosure, upon information and belief, MERS foreclosed upon many Delaware homeowners even when a MERS signing officer failed to be in possession of the relevant note. Upon information and belief, no employees of MERSCORP or

MERS Inc. were charged with enforcing, checking compliance with, or otherwise auditing whether members' signing officers possessed the relevant notes at the time foreclosure was initiated.

115. Because MERS' authority to foreclose as an agent of the note owner was predicated on MERS' possession of the note at the time of foreclosure, MERS' failure to possess the note resulted in MERS foreclosing on Delaware homeowners without authority to do so. Each such foreclosure was a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

K. Defendants committed deceptive trade practices by initiating foreclosure actions while hiding the real party in interest, thus preventing homeowners from ascertaining who such party was, from challenging whether such party had a right to pursue the foreclosure, and from raising potential defenses that may have otherwise been available.

116. In the integration handbook provided to its members, MERS discouraged its members from pursuing foreclosure in a name other than that of MERS:

If the foreclosure is to be performed in the name of the servicer or some other party, an assignment from MERS has to be prepared and recorded naming the new entity as the mortgagee of record, and the loan must be deactivated on the MERS System. This is a cumbersome, costly process and is not recommended.

See MERS Integration Handbook, p.17, attached as Exh. GG.

117. MERS instead recommended that servicers foreclose in MERS' name. MERS' recommended foreclosure procedures for Delaware explain: "The goal of the recommended procedures is to avoid adding any extra steps or incurring any additional taxes or costs by foreclosing in the name of MERS instead of the servicer." *See* MERS State-by-State Foreclosure Procedures, p.22, attached as Exh. BB.

118. Superior Court case number N10L-02-195 MJB (attached as Exh. HH) is an example of such a foreclosure action prosecuted in the name of MERS. It is not possible to determine from the foreclosure pleadings in this case the real plaintiff in interest. The February 2010 foreclosure complaint contains only two substantive allegations, namely the delivery of the mortgage to MERS and defendants' default thereon. The only possible indication of MERS' principal is the mortgage attached to the complaint (attached as Exh. II), which identifies the mortgagee as MERS and the lender as Delta Funding Corporation, an entity that filed for bankruptcy over two years prior to the foreclosure filing. *See* Delta Funding Corporation Form 8-K, dated Dec. 17, 2007, attached as Exh. JJ. However, a March 2011 letter to the court from plaintiff's counsel (attached as Exh. KK) actually reveals that such counsel's client—and the real party in interest in the foreclosure action—was Litton Loan Servicing, another entity entirely.

119. In addition, the use of MERS as a foreclosing party created significant hurdles to the ability of homeowners facing foreclosure to ascertain whether the real party in interest had standing to foreclose.

120. An important aspect of the judicial foreclosure process is the homeowner's ability to challenge a foreclosure by asserting that the foreclosing entity is not a proper party because it does not own the debt. Fundamental to the enforcement of contracts is that the party against whom a contract is sought to be enforced has a right to assert that the plaintiff, too, has failed to live up to its legal obligations and thus, that the defendant's obligation to make the plaintiff whole should be reduced or eliminated. The right of a defendant to assert defenses in a breach of contract action is central not only to ensuring our system of contract law works efficiently, but also to the fundamental fairness of that system. A party that sets out to create a system of enforcing consumer debt contracts that has the intended effect of making it difficult or impossible to raise such defenses commits a deceptive trade practice within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

121. Avoidance of the debt by virtue of the plaintiff's lack of ownership is a critical defense that every defendant borrower has a right to investigate and raise if appropriate. By creating a system that prevented mortgage borrowers from identifying the true owner of their mortgage, MERS confused,

misled, and thwarted borrowers from knowing of and raising defenses in foreclosure that they may have had against the true mortgage owner in whose interest foreclosure proceedings were instituted. In raising barriers to a homeowner's ability to challenge the ownership of the debt underlying the mortgage, MERS created widespread confusion among homeowners and filed deceptive foreclosure proceedings, which are deceptive trade practices within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

122. Without the ability to question standing and ensure that the foreclosing party has a proper claim to the proceeds of the debt, a homeowner may face multiple suits from different claimants on the debt. The risk of multiple claims is particularly acute in Delaware where the evidentiary requirements to initiate a foreclosure *in rem* are relatively low. A foreclosing party needs only to produce a mortgage in order to proceed with foreclosure *in rem*; it need not separately demonstrate as an evidentiary matter that it also possesses the note.⁸ MERS' creation of additional barriers to the ability of homeowners to contest foreclosure in a system that already provides foreclosure defendants with very minimal information caused real harm to homeowners and constituted deceptive trade practices within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

⁸ Note that the low evidentiary threshold required by the Superior Court as an evidentiary matter to initiate a foreclosure action *in rem* is separate and distinct from the legal requirement that the foreclosure plaintiff have a real interest in the debt secured by the mortgage upon which she seeks to foreclose.

123. There are a number of different types of borrower harm that result from these deceptive trade practices. Borrowers facing foreclosure have an interest in dealing with their actual lender. Where an anonymous foreclosure by MERS Inc. prevents a homeowner from dealing with her actual lender, she may be deprived of additional protections that might be available.

124. For instance, different lenders have different risk tolerances and thus may be more willing to negotiate with a delinquent borrower prior to instituting foreclosure proceedings. In addition, a borrower may have different types of defenses available against a foreclosing lender depending upon whether the lender is the "holder in due course" of a negotiable promissory note.

125. Holders in due course are holders of negotiable notes who took the note for value and without notice of a defect in the note, including default. They are provided special protections under the Delaware codification of the Uniform Commercial Code. Most importantly, a holder in due course can enforce a debt without being subject to a wide range of so-called "personal" defenses, such as claims of lender- or broker-fraud related to the origination of the loan. 6 *Del. C.* § 3-305. If, however, the ownership of the note was never actually transferred to the party seeking to foreclose, then not only does the borrower have a right to assert the mortgagee's lack of standing to foreclose because it is not the holder, but also the borrower can expect to be able to defend itself by asserting underlying

fraudulent origination practices or other defenses when the foreclosure proceeding is re-filed by the proper party. Similarly, even if the foreclosing party is a proper party, it may lack holder-in-due course status if it came in to possession of the note after default; in this situation the borrower may be able to assert additional defenses. It is thus critical for determining which defenses a borrower may raise in a foreclosure action to be able to identify whether the plaintiff is a holder in due course.

126. In the modern era of mortgage finance, mortgage loans are typically bought and sold frequently. Most holders at the end of a chain of successful loan sales tend to be holders in due course. Many securitization trusts are similarly presumed to be holders in due course with respect to the loans they purport to own. As such, when MERS initiated a foreclosure, the proceeding's anonymity may have caused the homeowner to remain idle in asserting defenses when she would otherwise have been able to identify the real party in interest as lacking holder in due course status. In the situation where MERS foreclosed on behalf of an entity who was not in fact the proper party to a foreclosure and where the proper party to such a foreclosure would not have been a holder in due course, MERS effectively deprived the homeowner of her full range of rights in contesting such foreclosure and committed a deceptive trade practice within the meaning of 6 *Del. C. § 2532(a)(2), (3), (5) and (12).*

127. As with the risk of multiple suits discussed in paragraph 122, above, the risk of MERS' depriving borrowers of available defenses is particularly problematic in Delaware. While the foreclosing parties' lack of ownership of the debt is an important defense available in a foreclosure action in Delaware, a homeowner facing an *in rem* foreclosure action may never know upon whose behalf MERS is foreclosing. The homeowner may never have an opportunity to examine the endorsements on the note to determine whether the foreclosing party is entitled to holder in due course status and thus know whether defenses, particularly relating to fraud in the inducement, may be raised. The denial of this opportunity for an effective defense constituted deceptive trade practices within the meaning of 6 *Del. C.* § 2532(a)(2), (3), (5) and (12).

Delaware foreclosure filings, records from the MERS System, and other documentation reveal MERS' deceptive trade practices.

128. Superior Court Case 09L-01-019 PLA (attached as Exh. DD) is an example of case in which MERS instituted a foreclosure action when it had no authority to do so. On January 5, 2009, MERS filed a foreclosure complaint with the Court acting as the nominee for First NLC Financial Services, LLC., d/b/a The Lending Center ("First NLC"). Attached to the complaint were two documents: a mortgage listing MERS Inc. as the mortgagee and First NLC as the Lender dated June 21, 2007 and recorded with the New Castle County recorder of deeds on August 9, 2007 (attached as Exh. EE); and a promissory note listing First NLC as

the Lender dated June 21, 2007 (attached as Exh. FF). The promissory note bears no endorsements or allonges indicating that it has been transferred to another party. Nor does it contain an endorsement in blank, as required by MERS' rules where a foreclosure is conducted in the name of MERS Inc.

129. Despite the fact that MERS went forward with this foreclosure in 2009 in contravention of MERS' rules, an investigation indicated a number of additional problems with the ownership and transfer records related to the loan. First, on February 11, 2009, the attorney prosecuting the foreclosure action recorded an assignment of the mortgage (attached as Exh. LL) from MERS (again acting as the nominee for First NLC) to Beltway Capital, LLC, which assignment was executed on December 19, 2008. MERS thus relinquished its right to the mortgage over two weeks prior to the date when a complaint was filed by MERS on the same instrument with the Superior Court. In addition, despite language in the assignment that MERS was acting solely as nominee for First NLC (rather than for First NLC's successors and assigns), an examination of the mortgage assignment indicates that the MERS signing officer executing the document as nominee for First NLC appears to be an employee of the assignee, Beltway Capital, LLC.⁹

⁹ This is based on the fact that the signing officer signs a certification in the same document attesting to the true and correct address of Beltway Capital, LLC. Presumably such a certification would be made by an employee of that company.

130. Second, the mortgage indicates that First NLC is a limited liability company organized under the laws of the state of Florida. However, First NLC's status with the Florida Department of State's Division of Corporations has been "inactive" since September 26, 2008, after the entity was administratively dissolved. *See* FL Division of Corporations Record, http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=L99000007784&inq_came_from=NAMFWD&cor_web_names_seq_number=0001&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=FIRSTNLCFINANCIALSERVICES&names_filing_type= (last visited Oct. 26, 2011), attached as Exh. MM. Similarly, First NLC's status as a foreign entity registered to do business in Delaware has been cancelled and First NLC has not made a payment to the State since May 28, 2008. *See* DE Division of Corporations Record, attached as Exh. NN. Thus, it appears that in addition to pursuing foreclosure in the name of an entity that was no longer the owner of the mortgage, MERS also went forward with such an action on behalf of a dissolved entity.

131. Finally, a review of records in the MERS System (an extract of which is attached as Exh. OO) indicates that First NLC disposed of its interest in the mortgage many months before MERS instituted a foreclosure on its behalf. The beneficial ownership of the mortgage was transferred from First NLC to Credit Suisse First Boston LLC on February 14, 2008. Five days subsequent, on

February 19, 2008, First NLC transferred its right to service the loan (which includes the right to pursue foreclosure on the owner's behalf) to Select Portfolio Servicing Inc. On August 15, 2008, the mortgage was then transferred out of the MERS System to BSI Financial Services, Inc. At this point, MERS' rules would appear to require that an assignment from MERS to BSI Financial Services, Inc. be recorded with the New Castle County Recorder of Deeds, yet no such assignment appears in the public records. In addition, on August 30, 2008, the mortgage was transferred back in to the MERS System by Beltway Capital, LLC, who was then listed as both servicer and owner of the mortgage. No records appear in the county recorder of deeds evidencing the assignment back to MERS as nominee for Beltway Capital, LLC.¹⁰

132. Another example of an improper MERS foreclosure is Superior Court case number 09L-09-181 JRJ (attached as Exh. PP). On September 16, 2009, MERS filed foreclosure in its own name as nominee for Wilmington Finance, Inc. The complaint attached both the mortgage (attached as Exh. QQ) and the promissory note (attached as Exh. RR). The note bears no endorsements, in contravention of MERS' rules. This is problematic and indicates that MERS acted inappropriately when initiating the foreclosure.

¹⁰ Oddly, an earlier foreclosure action had been filed on April 9, 2008 with respect to the same mortgage by Beltway Capital LLC. That complaint appears to have mischaracterized Beltway's status as the original lender with respect to the mortgage. It also appears to assert Beltway's ownership of the mortgage over four months prior to the date it could have acquired such status according to MERS' database, which still indicated that Credit Suisse First Boston LLC was the owner of the mortgage in April 2008.

133. In addition, the foreclosure complaint alleges that the plaintiff owes MERS, as nominee for Wilmington Finance, Inc., the defaulted loan amount. However, MERS System records (an extract of which is attached as Exh. SS) indicate that as early as May 9, 2007, Wilmington Finance, Inc. had transferred both its ownership and servicing rights in the mortgage loan to CIT Group, Inc. On June 14, 2009, CIT Group, Inc. again transferred its rights in the loan to Vericrest Financial, Inc. Thus, according to the MERS System records, it was Vericrest Financial, Inc. that was owed the defaulted loan amount and was the real party in interest on behalf of which MERS was acting as nominee when the foreclosure complaint was filed three months after this last transfer.

134. As of September 14, 2011, the date the MERS System records were produced to the Delaware DOJ, the MERS System records continued to indicate that MERS was the mortgagee with respect to this loan. However, an examination of the New Castle County Recorder of Deeds demonstrates to the contrary that MERS ceased being the mortgagee on the loan just one month after foreclosure, when Vericrest Financial, Inc. completed an assignment from MERS to itself (attached as Exh. TT), and then from itself to The Bank of New York Mellon FKA The Bank of New York As Trustee on Behalf of CIT Mortgage Loan Trust 2007-1 (attached as Exh. UU).

135. One final example of improper foreclosure filing by MERS is shown by the example of Superior Court case number N10L-02-195 MJB, discussed above in paragraph 118. In that case, the foreclosure was filed with the Superior Court on February 18, 2010. *See* Exh. HH. However, a search of the New Castle County Recorder of Deeds office reveals that, on the day before MERS filed the case, MERS completed an assignment of the mortgage to Deutsche Bank National Trust Company, as trustee for a 2007 securitization (attached as Exh. VV). Thus, in addition to MERS not being the real party in interest to prosecute the foreclosure, MERS in fact had no interest in the mortgage whatsoever on the date it filed the action.

136. The confusing path and inaccurate records associated with these mortgages are not isolated instances of bad record keeping by MERS. This type of confusion is endemic to the entire MERS System. The Delaware DOJ reviewed a chronological sample of 100 mortgages registered on the MERS System after 2006 and foreclosed upon in New Castle County between April 27, 2010 and June 22, 2010 by a party other than MERS. *See* DOJ MERS Database Survey, attached as Exh. WW. This review revealed that the name of the plaintiff in the foreclosure action was different from the entities listed in the copy of MERS' own database provided to the Delaware DOJ in 22% of the cases. In addition, when comparing

the name of the plaintiff to the entity identified on MERS' publicly accessible ServicerID system, mismatches occurred in 21% of the cases.

MERS continues with business as usual, even as regulators seek to create stricter internal controls.

137. On April 12, 2011, MERSCORP and MERS Inc. signed a Stipulation and Consent to the Issuance of a Consent Order with Comptroller of the Currency of the United States of America, and 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, the "Agencies") (attached as Exh. XX), pursuant to which a Consent Order was issued to MERSCORP and MERS Inc. on April 13, 2011.

138. The Consent Order stated that the "Agencies have 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." In particular, the Agencies found that tracking, registering, and foreclosing upon mortgages, 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.

139. The Agencies concluded that such conduct by MERS constituted unsafe or unsound practices that expose MERS and its members to unacceptable operational, compliance, legal, and reputational risks.

140. In light of these findings, the Agencies ordered MERS to undertake efforts to improve its practices and procedures so as to reduce these risks. One new requirement for MERS is to "achieve and maintain effective residential mortgage and foreclosure-related services on behalf of Examined Members, as well as associated risk management, compliance, quality control, audit, training, staffing, and related functions."

141. Under the Consent Order, with respect to signing officers, MERS must implement:

(a) policies and processes to designate or certify individuals as authorized MERS certifying officers, and that only such individuals act in such capacity;

(b) policies, processes and resources to track the identity and activities of MERS certifying officers and to ensure their compliance with the Rules and related requirements, including the requirements of the CRMS;

(c) policies, processes and resources to register third-party MERS certifying officers who are acting for Examined Members;

(d) policies, processes and resources to ensure the adequacy and appropriateness of training for certifying officers;

(e) policies, processes, and resources to ensure that Examined Members comply with MERS Membership Rule 8 and MERS Announcement 2011-01; and

(f) policies, processes, and resources to ensure that Examined Members and third parties can quickly and accurately determine if specific individuals are designated to act as authorized MERS certifying officers.

142. Under the Consent Order, with respect to quality assurance and data integrity, MERS must implement:

. . . (b) policies, processes and resources to ensure the accuracy and reliability of data reported to MERSCORP, including but not limited to system-to-system reconciliations of all MERS mandatory reporting fields, frequent capture of all reject/warning reports associated with registrations, transfers, and status updates on open-item aging reports, and an accurate determination of foreclosures pending in MERS' name;

(c) adoption or revision of an adequate written quality assurance procedures manual and processes to ensure appropriate implementation of the quality assurance program described in the quality assurance procedures manual;

(d) policies, processes and resources to ensure that Examined Members comply with MERSCORP approved quality assurance plans submitted to MERSCORP by Examined Members and provide to MERSCORP an annual independent report demonstrating their adherence to their MERSCORP approved quality assurance program, including submission of all mandatory MERS

data reporting fields, and processes for system-to-system reconciliation and reject/warning error correction.

143. Upon information and belief, MERS is currently in the process of attempting to comply with these requirements set forth in the Consent Order.

144. Notwithstanding these efforts, MERS' business model remains largely unchanged. MERS continues to use signing officers. MERS continues to act as the nominal mortgagee in the county land records. MERS continues to make it difficult to ascertain the identity of the loan owner it acts on behalf of. And MERS has not expelled any members for failure to adhere to MERS' rules.

145. In a recent interview, the new CEO of MERS stated:

. . . if there's one thing that makes me really feel good about all the challenges that we've had and fixing the regulatory issues and these legal cases, is if you look at the business and the business model as it stands today, MERS has the same market share that it did a year ago. We're still operating in 50 states. We haven't lost any of our members. We haven't lost a nickel to an adverse judgment or award. So the business model that we have put in place here has really continued unfettered through the regulatory and legal challenges.

See M&T Article, Sept. 2011, at p.18, attached as Exh. P.

146. MERS does not view homeowners as stakeholders in the MERS System. The CEO, when asked about alternatives to MERS, stated:

You have something that works effectively for 60% of the market that's backed by the customers of that system. The customers of the system are not the individual homeowners and they're certainly not the county

recorders. The customers are the person who's got the lien and the person who's got the note, and they're both pretty darn happy right now.

See M&T Article, Sept. 2011, at p.19, attached as Exh. P.

147. Finally, discussing why MERS' separate eRegistry product—which is referred to in the following quotation as a "system of record"—is being built with greater controls and more system checks than the MERS System itself, the CEO commented:

. . . they're a little bit different. The standards and the focus on something that's a system of record for transactions is going to have a higher level of scrutiny, review and focus because there's commerce dependent on it. If something fails, you potentially put the principal at risk. That's going to have a different level of scrutiny than a registry that's basically a copy of a database.

See M&T Article, Sept. 2011, at p.23, attached as Exh. P.

148. Even as MERS' deceptive trade practices have come to light, MERS continues business as usual and shows no intention to operate its business in a transparent and non-deceptive manner.

V. VIOLATIONS

Count I

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Hiding the true mortgage owner from homeowners, other stakeholders, and the public)

149. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

150. By hiding the true mortgage owner from homeowners, other stakeholders, the public, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 Del.C. § 2532(a)(2), in that the source of actual ownership of the mortgage and MERS' sponsor as mortgagee is hidden and difficult or impossible to ascertain;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del.C.* § 2532(a)(3), in that MERS' affiliation, connection, or association with the true owner of the mortgage is obscured;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del.C.* § 2532(a)(5), in that MERS' business practice is to hold itself out as a mortgagee when in fact another entity is the true owner of the mortgage; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del.C.* § 2532(a)(12).

151. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count II

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Operating MERS through its members' employees, who MERS appoints as its corporate officers so that such employees may act on MERS' behalf)

152. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

153. By operating MERS through its members' employees, who MERS appoints as its corporate officers so that such employees may act on MERS' behalf, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del.C.* § 2532(a)(2), in that the fact that MERS' operates through the employees of its members, combined with the lack of disclosure of such fact, obscures the source of the entity with whom a consumer is dealing and the identity of the MERS member as the sponsor of the MERS corporate officer;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del.C.* § 2532(a)(3), in that the affiliation, connection, or association of MERS' signing officers with their employers is obscured;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del.C.* § 2532(a)(5), in that MERS holds out its signing officers as being affiliated with MERS when in fact they are employees of MERS' members and are not overseen by MERS and do not report to MERS; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del.C.* § 2532(a)(12).

154. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count III

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Assigning or foreclosing upon mortgages for which MERS did not possess authority to act)

155. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

156. By assigning or foreclosing upon mortgages for which MERS did not possess authority to act because the mortgage loan was never properly transferred to the purported beneficial owner, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del.C.* § 2532(a)(2), in that MERS held itself out as an agent with the approval to perform services from its principal when in fact that was not true and there was a likelihood of misunderstanding as to the identify of MERS' sponsor as mortgagee;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del.C.* § 2532(a)(3), in that MERS' affiliation, connection, or association with its purported principal was held out as an actual agency relationship;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del.C.* § 2532(a)(5), in that MERS held itself out as an agent for an entity that was not its principal; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del.C.* § 2532(a)(12).

157. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count IV

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Purporting to act as an agent without knowing the identity of MERS' principal)

158. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

159. By purporting to act as an agent without knowing the identity of MERS' principal and therefore knowing whether MERS acted within the scope of its agency, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del.C.* § 2532(a)(2), in that MERS allowed its

members to hold MERS out as their agent when in fact the source of MERS agency was another entity and there was a likelihood of misunderstanding as to the identify of MERS' sponsor as mortgagee;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del.C.* § 2532(a)(3), in that MERS allowed its members to hold MERS out as having an agency-based affiliation, connection, or association with such members with respect to a mortgage loan when in fact another entity was the true principal;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del.C.* § 2532(a)(5), in that MERS allowed its members to hold MERS out as an agent for an entity that was not its principal; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del.C.* § 2532(a)(12).

160. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count V

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Creating and failing to ensure the integrity of the MERS System)

161. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

162. By creating and failing to ensure the integrity of a systemically important, yet inherently unreliable, mortgage database that creates confusion and inappropriate assignments and allowed for improper foreclosures of mortgages, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del.C.* § 2532(a)(2), in that the MERS System purported to provide information on the ownership or servicing of mortgage loans, but the source and sponsor of that information was actually MERS' members who were not overseen in providing that information to MERS, and in that the MERS System was unreliable and frequently inaccurate as to such information;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del.C.* § 2532(a)(3), in that the MERS System is unreliable and often inaccurate as the identity of the owners and

servicers of mortgages and thus, MERS' affiliation, connection or association with such entities with respect to such mortgages;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del.C.* § 2532(a)(5), in that the MERS System represents certain entities act as owners or servicers of loans when in fact they are not;

d. represented and continue to represent that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another in violation of 6 *Del.C.* § 2532(a)(7), in that MERS held the MERS System out as reliable when in fact it was not reliable; or

e. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del.C.* § 2532(a)(12).

163. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count VI

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Taking instructions from entities who were not proper the principals to cause MERS to act)

164. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

165. By taking instructions from entities who, despite being listed as note holders in the MERS system, were not the proper principals to cause MERS to act under MERS' rules, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del. C. § 2532(a)(2)*, in that MERS allowed its members to cause MERS to act in contravention of MERS' rules and thus creating misunderstanding as to the source of authority for, and sponsor of, MERS to take such action;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C. § 2532(a)(3)*, in that MERS allowed its members to cause MERS to act in contravention of the MERS' rules that governed the relationship of MERS with such members and thus, without authority to take such action;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS allowed its members to hold MERS out as an agent for such member even when this was impermissible under MERS' rules; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

166. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count VII
(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Inducing reliance on the MERS System)

167. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

168. By encouraging and inducing reliance on the MERS System when MERS knows the system is unreliable and by allowing its members to cause MERS to act beyond the scope of its authority in reliance on such unreliable data, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del. C.* § 2532(a)(2), in that MERS held itself out as acting with authority from the source and sponsor of its agency status with respect to the actions performed when in fact it had no such authority;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C.* § 2532(a)(3), in that MERS allowed its members to cause MERS to act pursuant to a purported agency relationship with such members when, in fact, no such relationship existed with respect to the mortgage loans at issue;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS allowed its members to hold MERS out as an agent for such member even when this was not true; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

169. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count VIII

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Assigning mortgages without authority)

170. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

171. By assigning mortgages without authority to do so where MERS purports to act for the wrong entity or where the requisite signature of a MERS signing officer is not actually executed by that officer, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del. C.* § 2532(a)(2), in that MERS held itself out as acting on behalf of and with the approval of an entity that no longer has an interest in the mortgage, and in that MERS held itself as acting appropriately when in fact the certification of MERS' authority was not appropriately obtained;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C.* § 2532(a)(3), in that MERS held itself out as still having a relationship with an entity with respect to a given

mortgage when that entity no longer had any interest in the mortgage, and in that the certification of MERS' authority by employees of MERS' members were not appropriately obtained;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS held itself out as still having a relationship with an entity with respect to a given mortgage when that entity no longer had any interest in the mortgage, and in that MERS represented that the action taken by MERS was pursuant to an appropriately obtained signature when in fact it was not; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

172. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count IX

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Assigning mortgages for foreclosure and by foreclosing on mortgages without authority)

173. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

174. By assigning mortgages for foreclosure and by foreclosing on mortgages, in each case at the behest of the entity shown in the MERS System, without authority to do so from the actual owner of the note, the Defendants, in their course of business:

a. caused and continue to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del. C.* § 2532(a)(2), in that MERS held itself out as an agent with the approval to perform services from its principal when in fact that was not true and there was a likelihood of misunderstanding as to the identify of MERS' sponsor as mortgagee;

b. caused and continue to cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C.* § 2532(a)(3), in that MERS' affiliation, connection, or association with its purported principal was held out as an actual agency relationship;

c. represented and continue to represent that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS held itself out as an agent for an entity that was not its principal; or

d. engaged and continue to engage in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

175. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count X

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Initiating foreclosures in the name of MERS in contravention of MERS' rules)

176. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

177. By initiating foreclosures in the name of MERS in contravention of MERS' rules and without appropriate controls to ensure the foreclosures were prosecuted by the actual note holder, the Defendants, in their course of business:

a. caused likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in

violation of 6 *Del. C.* § 2532(a)(2), in that MERS allowed its members to cause MERS to act in contravention of MERS' rules and thus creating misunderstanding as to the source or sponsorship of authority for MERS to take such action;

b. caused likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C.* § 2532(a)(3), in that MERS allowed its members to cause MERS to act in contravention of the MERS' rules that governed the relationship of MERS with such members and thus, without authority to take such action;

c. represented that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS allowed its members to hold MERS out as an agent for such member even when this was impermissible under MERS' rules; or

d. engaged in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

178. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

Count XI

(Violation of the Deceptive Trade Practices Act, 6 Del. C. § 2532)

(Initiating foreclosure actions while hiding the real party in interest)

179. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

180. By initiating foreclosure actions while hiding the real party in interest, thus preventing homeowners from ascertaining who such party was, from challenging whether such party had a right to pursue the foreclosure, and from raising potential defenses that may have otherwise been available, the Defendants, in their course of business:

a. caused likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of 6 *Del. C.* § 2532(a)(2), in that the source of the real party in interest prosecuting, or MERS's sponsorship to prosecute, the foreclosure action was obscured;

b. caused likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another in violation of 6 *Del. C.* § 2532(a)(3), in that MERS' affiliation, connection, or association with the true owner of the mortgage was obscured;

c. represented that goods or services have sponsorship or characteristics that they do not have, or that a person has a sponsorship, approval,

status, affiliation, or connection that the person does not have in violation of 6 *Del. C.* § 2532(a)(5), in that MERS' business practice was to hold itself out as a plaintiff when in fact another entity was the real party in interest in the litigation; or

d. engaged in conduct which creates a likelihood of confusion or of misunderstanding in violation of 6 *Del. C.* § 2532(a)(12).

181. At all times relevant hereto, Defendants knew or should have known that their aforesaid acts were of the nature prohibited by 6 *Del. C.* § 2532.

VI. RELIEF

WHEREFORE, the State of Delaware respectfully requests that the Court grant the following relief:

182. Enjoin Defendants from initiating foreclosure actions in the State of Delaware in the name of MERS Inc.;

183. Enjoin Defendants from acting as the nominal mortgagee with respect to Delaware mortgages in which Defendants have no beneficial interest and enjoin Defendants from recording such mortgages in the State of Delaware in the name of MERS Inc.;

184. Enjoin Defendants from assigning any Delaware mortgages registered in the MERS System or taking other actions with respect to such mortgages until the MERS System has been audited and corrected to accurately

reflect the beneficial ownership of such mortgage loans registered in the MERS System;

185. Order Defendants to file appropriate documents in the courts of the State of Delaware in order to correct the pleadings in those cases where the pleadings referred to MERS Inc. as a plaintiff or otherwise were inaccurate with respect to the status of MERS Inc.;

186. Order Defendants to record appropriate documents with the appropriate county recorders of deeds offices in Delaware in order to correct the chain of title with respect to Delaware mortgages that are or were at any time recorded in such offices in the name of MERS Inc.;

187. Enjoin Defendants from taking any action on behalf of a purported beneficial owner of a Delaware mortgage loan with respect to such mortgage loan where such purported beneficial owner is not the actual owner of such mortgage loan;

188. Enjoin Defendants from assigning any Delaware mortgages registered in the MERS System or taking other actions with respect to such mortgages until access to the Delaware mortgage loan records in the MERS System is provided in at least as transparent a manner as would be provided if the mortgage transfers were recorded as assignments in the county recorder of deeds offices in Delaware;

189. Order Defendants to pay a civil penalty in the amount of \$10,000 for each willful violation of 6 *Del. C.* § 2532;

190. Order Defendants to pay restitution, including any legal interest owed, to all affected borrowers for any willful violation of 6 *Del. C.* § 2532, in an amount to be determined at trial;

191. Grant the State, pursuant to 29 *Del. C.* § 2522(d), its costs of investigation and attorney's fees;

192. Grant such other injunctive and equitable relief as the Court deems just and appropriate.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Date: October 27, 2011



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