IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONTGOMERY COUNTY, PENNSYLVANIA, RECORDER OF DEEDS, by and through NANCY J. BECKER, in her official capacity as the Recorder of Deeds of Montgomery County, Pennsylvania, on its own behalf and on behalf of all others similarly situated, Plaintiff, vs. MERSCORP, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants.	**CIVIL ACTION NO. 11-6968**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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The MERS system was set up and operates for the explicit purpose of attempting to avoid the recording of mortgage assignments in public land record offices. MERS operates upon a series of legal fictions that courts and commentators have labeled as absurd, and which violate Pennsylvania law. In essence, MERS and its members seek to use these fictions to enjoy the *benefits* of the legal system—the right to have the mortgage assigned so they can use it in judicial foreclosure proceedings whenever they deem it needed—but to avoid the *burdens* of recording the assignments of these same mortgages, so that there will be a public record of the chain of title. The result is a now-you-see-it-now-you-don't crazy quilt that has played havoc with public land records. Because there is no dispute as to how MERS operates, nor that MERS' actions contravene Pennsylvania Statute 21 P.S. §351 and constitute unjust enrichment, Defendants' motion for summary judgment should be denied, and Plaintiff's cross motion for summary judgment should be granted.

I. THE SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co*., 676 F.3d 318, 323 (3d Cir. 2012), *quoting* Fed. R. Civ. P. 56(a).

Summary judgment is awarded to plaintiff where, as here, the material facts are not in dispute and plaintiff is entitled to prevail under the governing law. *See Genter v. Acme Scale & Supply Co*., 776 F.2d 1180, 1181 (3d Cir. 1985) ("We …grant summary judgment in plaintiff's favor."). *Accord Green Party of Connecticut v. Garfield*, 616 F.3d 189, 213 (2d Cir. 2010) ("we … instruct the Court to grant summary judgment to plaintiffs"); *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 606 (9th Cir. 2010) (remand with instructions to enter summary judgment for plaintiff).

As Judge Clary of this Court held, in granting summary judgment to plaintiff in an antitrust price fixing case: "With every document admitted as genuine, it would be futile for the defendants at this late date to attempt to explain away the contents of documents which so clearly express the actual business transactions of the respective defendants." *U.S. v. Krasnov*, 143 F. Supp. 184, 202 (E.D. Pa. 1956). The Supreme Court affirmed. *Krasnov v. U.S.*, 355 U.S. 5 (1957).[1]

II. MERS' ACTIONS CONTRAVENE 21 PA. STAT. §351

A. The Promissory Note And Mortgage Are Inseparable

When a lender, such as a bank, lends money for a homeowner to purchase a home, the homeowner executes a promissory note, agreeing to repay the principal and interest of the loan in monthly installments over time. The bank requires that the homeowner grant to the bank a mortgage as security for the loan, *i.e.* the legal right to foreclose and obtain the house and property in the event the homeowner does not repay the promissory note according to its terms. *Montgomery County, Pa. v. MERSCORP, Inc.*, 904 F.Supp.2d 436, 439-440 (E.D. Pa. 2012) (hereinafter, *Montgomery County*). The mortgage recites that it exists as security for the note, and the note recites the attendant mortgage.

An example of a typical note and mortgage from a mortgage loan file produced by a Montgomery County bank, which cross-reference each other, are attached a Exhibit 1 to the Declaration of Craig W. Hillwig ("Hillwig Decl.", Exh. A to this Memorandum). Paragraph 10 of the note provides that the mortgage, "protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note," and quotes at length from the mortgage's provisions for acceleration of payments. The mortgage in turn identifies the note,

[1] However, the fact that both parties have filed cross motions for summary judgment does not constitute an admission by plaintiff that defendants' motion could be granted. *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

and details at length the borrower's payment obligations under the note, the imposition of charges by the lender, and the provisions for subsequent sales of the note (at ¶¶ 1-2, 14, 20). Each instrument incorporates and complements the terms of the other. *See, e.g.*, *In re Sacko*, 394 B.R. 90, 101 (Bankr. E.D. Pa. 2008) ("[T]he Mortgage and the Note together constitute 'the underlying agreement'").

When the bank sells the note to another bank, the interest in the land created by the mortgage is transferred with the note as a matter of law. They are not legally decoupled. A promissory note without a mortgage is unsecured debt. Conversely, a mortgage decoupled from its promissory note is a nullity:

> The note and mortgage are inseparable; the former is essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

Carpenter v. Longan, 83 U.S. 271, 274 (1872).

The familiar maxim that "the mortgage follows the note," and that they are transferred together, is a bedrock of U.S. real property law, as *Carpenter* held. The note is a negotiable instrument under U.C.C. Article 3. When a note is transferred the attendant transfer of the mortgage is a conveyance of an interest in land, which is therefore recorded in the public land recording system, so that there is a transparent chain of title. As the Pennsylvania Supreme Court held:

> A mortgage is a charge upon the land; whatever will give the money, will carry the estate in the land along with it. *The estate in land is the same thing as the money due upon it ... the assignment of the debt, or forgiving it, will draw the land after it, as a consequence.*

McCall v. Lenox, 9 Serg. & Rawle 302, 305 (Pa. 1823) (emphasis added). As the first *Restatement of Property* stated:

> [T]he rule is that the security follows or accompanies the obligation it was given to secure…Thus a real estate mortgage given to secure the payment of a promissory note passes with the note by any form of transfer sufficient to produce a succession to the rights of the owner of the note.

Restatement (First) Property §553 ("Running of Benefit of Lien"). *See also* 13 P.S. § 9203(g), cmt. 9 ("Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien").

This has long been the law of Pennsylvania. *See,* in addition to *McCall, supra*: *Moore v. Cornell*, 68 Pa. 320, 322 (Pa. 1871) ("an assignment of the debt transfers the right to the mortgage itself; for whatever will give the money secured by the mortgage, *will carry the mortgaged premises with along with it*") (emphasis added); *Beaver Trust Co. v. Morgan*, 103 A. 367, 369 (Pa. 1918) ("When the Peoples National Bank purchased from the Monaca Bank the obligation of the Jacks, it acquired as well, by operation of law, whatever was pledged for its payment"); *Appeal of Brice*, 95 Pa. 145, 150 (Pa. 1880) ("When the note to secure which the mortgage was given was negotiated, the interest in the mortgage, which was given for no other purpose than to secure that note, passed of course").

B. An Assignment Of Mortgage Is A Recordable Conveyance Of Title In Land

The transfer of a mortgage is an assignment, and is a conveyance of an interest in real property. *Pines v. Farrell*, 848 A.2d 94, 100 (Pa. 2004). Because Pennsylvania is a "title theory" jurisdiction, a mortgage constitutes more than just a lien. It represents a conveyance of an interest in real property. Both a mortgage and every conveyance of that mortgage serve to convey conditional title to each successive owner of the note:

> The 'title theory' of mortgages deems a mortgage to be a conveyance …. It is well settled in Pennsylvania that a mortgage … in form [is] a conveyance of title.

> ……
>
> Petitioners suggest that it would be absurd not to regard a mortgage assignment as a transfer of property. In other words, if an assignment is not a transfer, then title of the mortgaged property theoretically remains with the original mortgagee even after assignment. This circumstance would be absurd since the very point of an assignment is to convey all of the original mortgagee's rights to the assignee….**Given our conclusion that a mortgage conditionally conveys the subject property, it logically follows that an assignment of the mortgagee's rights likewise effects a conditional transfer of the subject property to the assignee**.

848 A.2d at 99-100 (emphasis added). MERS pretends to the contrary: "When secured debt is transferred, legal title to the land securing the debt is not transferred." (Def. Br. p. 22).

In Pennsylvania, all conveyances of interests in land must be recorded with the applicable county recorder of deeds. 21 P.S. § 351. Earlier in this case, MERS argued that 21 P.S. § 351 was merely "permissive" and did not require the recording of mortgage assignments. (*See* Docket No. 6 [Motion to Dismiss] at pp. 8-14). This Court rejected that argument, holding the recording statute was mandatory. *Montgomery County*, 904 F.Supp.2d at 445-46:

> 21 Pa. Stat. § 351, which makes recording of certain types of documents compulsory, appears under the heading "NECESSITY OF RECORDING AND COMPULSORY RECORDING."
>
> Accordingly, we conclude that "all ... conveyances ... shall be recorded," 21 Pa. Stat. § 351, means that all conveyances shall be recorded.

This holding is the law of the case, and controls here. "The law of the case doctrine directs courts to refrain from re-deciding issues that were resolved earlier in the litigation." *Pub. Interest Research Grp. of N .J., Inc. v. Magnesium Elektron, Inc*., 123 F.3d 111, 116 (3d Cir. 1997).

The standard Pennsylvania mortgage assignment form specifically recites that the mortgage and the debt obligation are assigned together. Kenneth E. Gray, *Mortgages in Pennsylvania with Forms* §11:4 (3d Ed. West) (assigning the mortgage, and also "the bond—or obligation—in the said indenture—of mortgage recited, and all moneys, principal and interest,

due and to grow due thereon"). The Pennsylvania Housing Finance Agency's mortgage assignment form provides that the mortgage is assigned "together with the Note secured thereby."[2] *Ladner on Conveyancing in Pennsylvania*, §12.29(a) at 88 (4th ed. 1979 & Supp. 2003) states that a mortgage assignment is "a writing under seal, signed, witnessed, acknowledged and recorded, assigning the bond and mortgage to an assignee".

C. The MERS System Seeks To Circumvent Public Recording Of Mortgage Assignments

MERS is based on accepting the *benefits* of the legal system while trying to skirt the *burdens* of complying with that same system. By that, Plaintiff means the following. MERS believes that the note and mortgage are inseparable, and are transferred together from one owner of the note to another. As MERS stated to a federal court in New York:

> [N]egotiation or transfer of the note can be accomplished by mere delivery of the note to the transferee, therefore, **the mortgage will follow the note and pass as an inseparable incident to the note.** *Fryer v. Rockefeller*, 63 N.Y. 268, 276 (1875); *In Re Falls' Estate,* 31 Misc. 658, *aff'd* 67A.D. 619 (1st Dep't 1900); *Becker v. Wells*, 297 N.Y. 275 (1948); *Flyer v. Sullivan*, 284 A.D.(1st Dep't 1954).

Hillwig Decl. Exh. 8 at p.14. (emphasis added). And as MERS then-President testified to the U.S. Senate:

> A fundamental legal principle is that the mortgage follows the note, which means that as the note changes hands, the mortgage remains connected to it legally even though it is not physically attached.

Testimony of R.K. Arnold, President and CEO of MERSCORP, Inc., Before the Senate Committee on Banking, Housing and Urban Affairs, November 16, 2010.[3]

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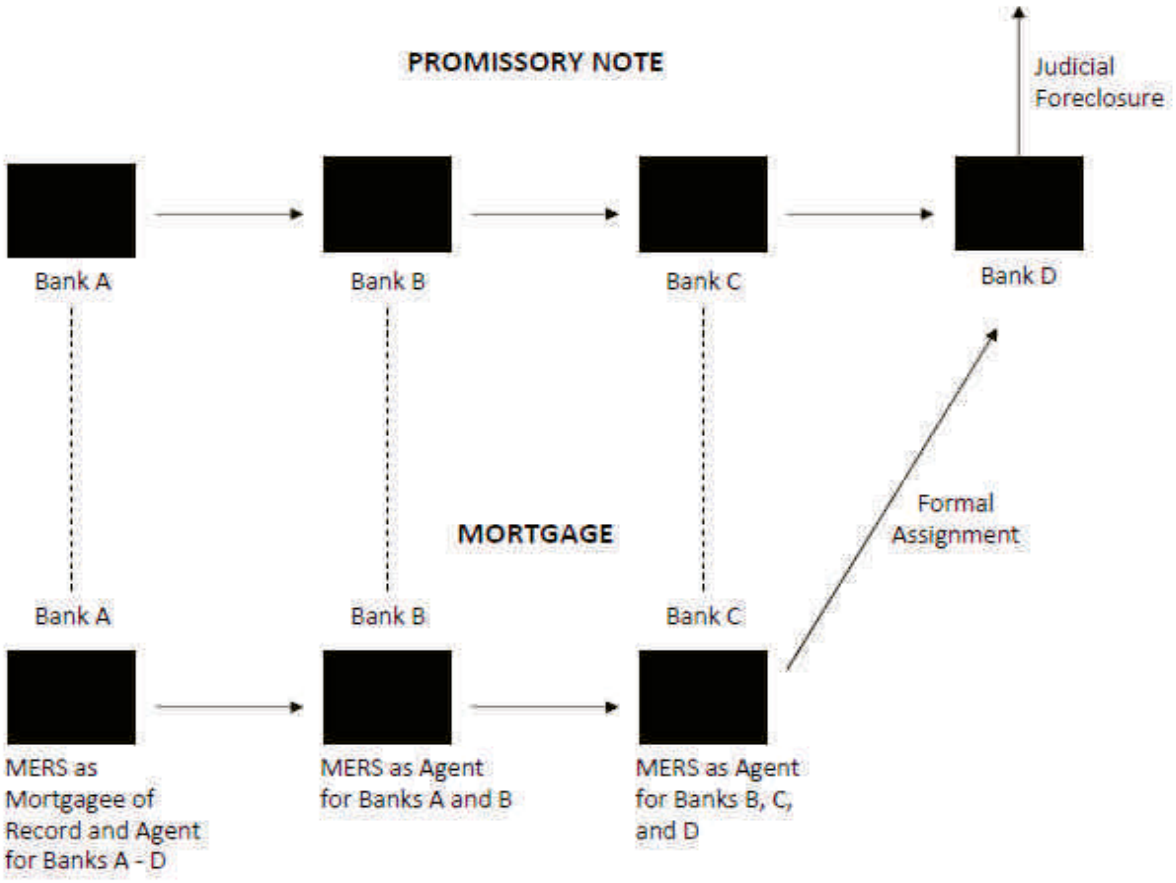
[2] Available at http://www.phfa.org/forms/sellersguide/forms/20.pdf

[3] Available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1a958f85-bd10-4ac7-b5e1-9ad0c43d97c6

However, MERS has set up what amounts to a private mortgage assignment system that seeks to circumvent public recording obligations. When a MERS' Member bank that has purchased the note needs to foreclose, then—mirabile dictu!—the mortgage that secures that note appears through the MERS system as formally assigned to that bank. The mortgage is suddenly magically "coupled" with the note, and the note and mortgage march off together to a judicial foreclosure proceeding in the bank's favor. MERS and its members *benefit* from the legal system, because judges enforce and administer foreclosure proceedings in those circumstances.

However, MERS believed it could concoct a system to avoid the *burdens* of recording mortgage assignments. While MERS' brief at p. 12 purports to show a diagram of the MERS system in operation, a simpler and more accurate diagram is as follows:



MERS is designated as the mortgagee of record in the mortgage documents—the legal owner to which property has been conditionally conveyed, *Pines v. Farrell, supra.* In that same document, MERS simultaneously designates itself as agent (the technical term is "nominee") for every bank that will ever acquire the promissory note. MERS' standard language for mortgages reads:

> MERS is Mortgage Electronic Registration Systems, Inc. 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.

Hillwig Decl. Exh. 2 (MERS Membership Brochure) at MERS-294.

As the note is sold from Bank A to B to C to D, MERS, as simultaneous "agent" for all of those banks, has the ability to transfer the mortgage to, and hold the mortgage on behalf of, whichever Bank holds the promissory note. It is undisputed that Defendants routinely fail to execute and record mortgage assignments to update the public land records to reflect the new owner of the mortgage, when the note secured by the mortgage is transferred between MERS members. Rather, if, in the above illustration, Bank D needs to foreclose, then MERS, as agent for all of the banks in the chain of title, formally assigns the mortgage to Bank D, and that assignment is recorded so that in a judicial foreclosure procedure Bank D can appear with both the note and the mortgage.

When a MERS member needs to foreclose (Bank D in the above chart), MERS executes and files of record an assignment treating the mortgage and note as inseparable. Examples from Montgomery County's records are:

- Cirino Assignment (2009) (Hillwig Decl. Exh. 3): The documents set forth that MERS assigns to BAC Home Loans Services, L.P. the Cirino Mortgage, "together with the Note and the indebtedness therein mentioned … also the Bond or Obligation in the said indenture of Mortgage recited, and all Moneys, Principal and Interest, due and to grow thereon";

- Farkas Assignment (2011) (Hillwig Decl. Exh. 4): The documents set forth that MERS assigns to The Bank of New York Mellon the Farkas Mortgage "together with the indebtedness secured thereby";

- Shin Assignment (2011) (Hillwig Decl. Exh. 5): The documents set forth that MERS assigns to a JP Morgan Chase Bank the Shin Mortgage, "and the indebtedness thereby secured … Together with the note or indebtedness described in said mortgage, endorsed to the Assignee this date and all money due and to become due thereon, with interest."

These are typical of recorded assignments from MERS. Declaration of Irv Ackelsberg ("Ackelsberg Decl.", Exh. B hereto) at ¶ 11. However, they only occur when MERS and its members seek to enjoy the *benefits* of the judicial system.

The heart of this lawsuit is MERS' argument that there are no mortgage transfers in the above diagram until Bank D requests such an assignment. As MERS posits:

> Because mortgages (as compared to the debt or promissory note) are not assigned or transferred [in the MERS system], mortgage assignments **are not created** and thus there is no mortgage assignment instrument to record in the local land records.

Def. Br. p. 11 (emphasis in original). This is MERS' basic argument, repeated thorough out its lengthy brief. *E.g.* Def. Br. at 18 ("there are no written mortgage assignments that the MERS defendants did not record….").

The argument is palpably false. MERS is the mortgagee of record. That means, under *Pines v. Farrell, supra,* that it takes title to the property. MERS claims it does so on behalf of the original lender—Bank A in the diagram. ("MERS' only role is and was to serve as the mortgagee on the mortgage—as the nominee (or in the stead) of the lender and the lender's successors and assigns, who are members of the MERS System." Def. Br. pp. 13-14). Therefore, Bank A, which owns the promissory note, initially has title to the property through its agent, MERS. Bank A later transfers the note to Bank B. The mortgage and its conditional title to the property therefore transfer to Bank B by operation of law, because the mortgage follows the note (pp. 2-5 above). B transfers the note to C. The mortgage and title to the property

transfer to C by operation of law. The note and the mortgage are legally inseparable and transfer together under Pennsylvania law, Section A above. And, at any point in the chain, any of the Banks B, C or D have the *right* to obtain through the MERS system a formal assignment of the mortgage, so they can use it in a judicial foreclosure proceeding. They could not have this right unless title transferred through the system by operation of law as the note changed hands. Because the mortgage and its attendant title have transferred, there has been a conveyance of an interest in land, pursuant to *Pines v. Ferrell, supra. Pines* requires that such a conveyance be recorded as a mortgage assignment.

To try to circumvent its legal obligation to record mortgage assignments, MERS has constructed a house of cards that piles one fiction upon another. As several courts and commentators have observed, MERS' claim to be *both* a principal and agent as to the same property right is a legal impossibility.[4] The First Circuit introduced a recent decision by deeming MERS a riddle:

> At this juncture, we think it helpful to provide some background about the mysterious entity known as MERS. We introduce this subject with a riddle: What entity is not a bank but claims to hold

[4] Christopher L. Peterson, *Two Faces: Demystifying The Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111 (2011) ("Like Janus, MERS is two-faced: impenetrably claiming to both own mortgages and act as an agent for others who also claim ownership"); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1375 (2010) ("What is clear is that MERS cannot be both. It is axiomatic the same entity cannot simultaneously be both an agent and a principal with respect to the same property right."); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 165-65 (Kan. 2009) ("What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time"); *In re Agard*, 444 B.R. 231, 254 (E.D.N.Y. Bankr. 2011) ("MERS's position that it can be both the mortgagee and an agent of the mortgagee is absurd, at best."), *vacated on other grounds*, *Agard v. Select Portfolio Servicing, Inc.*, 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012); Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure*, 32 CARDOZO L. REV. 1621, 1643–44 (2011) ("Robinson") ("[A]n agent cannot augment the power of its principal, nor can a principal grant rights to an agent that the principal does not itself possess.").

> title to approximately half of all the mortgaged homes in the country? The answer is MERS. *See* Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. Times, Mar. 6, 2011, at BU1.

Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 287 (1st Cir. 2013).

The MERS system seeks to elevate form over substance. The "form" is that by being both the mortgagee of record as well as simultaneously the agent for every undisclosed bank that will ever hold the note and the beneficial interest along with it, MERS can pretend the mortgage title stays with MERS, and does not transfer with the note. The "substance" is that, as a matter of law, title to the property and the mortgage are conveyed from one lender to another each time the note changes hand. To paraphrase the Third Circuit's rejection of a comparable attempt to evade regulations: "It would elevate form over substance and weave a technical loophole into the fabric of the [Pennsylvania recording statute] big enough to devour all of the protections [the Pennsylvania Legislature] intended in enacting that legislation." *F.T.C. v. Check Investors, Inc.,* 502 F.3d 159, 172-173 (3d Cir. 2007).

MERS contends: "Thus, there are no instruments, including mortgage assignments, that this Court can order the MERS Defendants to record…." (Def. Br. pp. 3-4). This Court rejected that argument in denying MERS' motion for judgment on the pleadings, finding that "the pleadings adequately describe the conveyances the Plaintiff seeks to compel the Defendants to record…MERS is the named mortgagee on some 130,000 mortgages recorded in Montgomery County and that Defendants permit various third parties to convey the beneficial interests in these mortgages among themselves without recording such conveyances…[T]he pleadings adequately identify the disputed conveyances." (Docket No. 40, March 8, 2013).

As an analogy to what MERS does, consider the following hypothetical. Businessmen buy and sell items to and from each other, and pay sales tax on each transaction. They seek to avoid paying sales tax, and for this explicit purpose set up an elaborate "book entry" system

whereby they continue to regularly transfer the same items to and from each other, record each transaction and its exact value, record who owes what to whom, and share all of this information with each other. They agree not to generate any invoices or sales receipts. While they agree they can sue each other for unpaid balances, they also agree to refrain from doing so in most circumstances. When the taxing authorities come to them, asking for the unpaid taxes, they reply: "What sales taxes? We had no sales."

Courts routinely see through these types of schemes that try to elevate form over substance. *See, e.g., Gregory v. Helvering,* 293 U.S. 465, 470 (1935) ("[t]he whole undertaking ... was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else."); *In re CM Holdings, Inc,* 301 F.3d 96, 102 (3d Cir. 2002) ("courts should not elevate form over substance by rewarding taxpayers who have engaged in transactions that lack any purpose save that of tax savings."); *Long Term Capital Holdings v. U.S.,* 150 Fed. Appx. 40, 2005 WL 2365336 *2 (2d Cir. Sept. 7, 2005) ("the partnership at issue was a 'mere formalism,' created solely for the purpose of tax avoidance").

Indeed, this concept has been applied in Pennsylvania in the context of a real estate quiet title action. In *Pitti v. Pocono Business Furniture, Inc.,* 859 A.2d 523 (Pa. Commwlth 2004), the owners of dilapidated commercial property with delinquent taxes sought to record large mortgages ($400,000 and $30,000) to benefit themselves on the very day the property went up for sheriff's sale. The Court struck these as sham mortgages:

> In reviewing a suspected sham transaction, a court may examine not only the legal form of the transaction but the surrounding circumstances and events as well to ascertain the parties' intentions in concluding the transaction.

Id. at 525-26. The Court relied upon the Pennsylvania Supreme Court's decision in *Iscovitz v. Filderman,* 334 Pa. 585, 6 A.2d 270 (1939), where "a husband's conveyance of real property to a straw man and then back to himself and his wife as tenants by the entireties was a sham

transaction intended to defraud creditors." *Id.* at n. 2. The Court further cited *United States v. Klimek,* 952 F. Supp. 1100 (E.D. Pa. 1997), where "the court set aside a sham mortgage after finding that it was designed solely to avoid federal tax liens." *Id.* at n. 3.

Here, MERS and its members have set up a system to transfer mortgage interests freely among themselves, in order to avoid the recording statute and the payment of recording fees, through the fiction that MERS is the original mortgagee and agent for all. MERS then argues in essence, like the tax cheats in the above hypothetical: "What assignments to record? There are no mortgage transfers and no assignments." Here, as in the above cases, the Court should look at the substance, and declare that: (1) MERS has intentionally failed to prepare mortgage assignments through a series of fictions that violate Pennsylvania law; (2) for the purpose of avoiding recording fees; (3) while reaping the benefits of those assignments when needed.

D. The MERS System Was Created For The Explicit Purpose Of Circumventing Public Recording Of Mortgage Assignments

There is no dispute that the MERS system was set up for the express purpose of evading the requirements of public recording statutes such as 21 P.S. §351. The central premise of the MERS System is that the mortgage can be "immobilized" by making MERS the mortgagee of record. *Mortgage Elec. Reg . Sys, Inc. v. Nebraska Dept. of Banking*, 704 N.W. 2d 784, 787 (Neb. 2005). On its web-site, MERS claims it can "inoculate" against recording mortgage assignments, as though the public land records were a dread disease:

> MERS acts as mortgagee in the county land records for the lender and servicer. Any loan—where MERS is the mortgagee—registered on the MERS system is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded.

www.mersinc.org/about-us/about -us (last visited 11/1/13), see Hillwig Decl. Exh. 6. MERS solicits members by advertising that lenders can save "$35 on average" on each loan. Hillwig Decl. Exh. 2 at MERS-295.

A "White Paper" drafted in the early 1990s first delineated the purpose and concept of MERS. Hillwig Decl. Exh. 7. A Mortgage Banking Association[5] task force candidly admitted the central purpose was to avoid mortgage assignments – what it termed the "tyranny of forms, vestiges of seventeenth century real property law."

> The White Paper talks about something new – a central, electronic registry for tracking interests in mortgages. The Whole Loan Book Entry (WLBE) concept is being proposed with the initial purpose of **virtually eliminating mortgage assignments**. The tyranny of these forms, vestiges of seventeenth century real property law, should end now that the information they carry can be harnessed electronically.

Hillwig Decl. Exh. 7 at MERS-7657 (emphasis added). The White Paper acknowledged that recording was mandatory ("must be prepared"), but claimed to have devised a method to circumvent this requirement:

> Today, mortgage investors transfer mortgage ownership and servicing rights using the same process as required by seventeenth century real property law. Note endorsements, **mortgage assignments**, and satisfaction documents **must be** prepared, verified, and delivered, **and mortgage assignments and releases must be recorded**. This process is cumbersome and paper intensive, costing the mortgage industry hundreds of millions of dollars each year.

Id. at MERS-7659 (emphasis supplied).

The White Paper estimated that eliminating or bypassing the traditional system could save the mortgage industry "$164 million annually, or a cost savings of $65.15 per loan over the mortgage life cycle." *Id.* at MERS-7660. The overwhelming majority of those savings were attributable to an estimated $40.75 in costs for "assignment processing" over the life of a

[5] R.K. Arnold, the Defendants' former President and CEO, also has candidly testified that MERS never alleged that the system was created to benefit borrowers. Hillwig Decl. Exh. 20 (Arnold *Henderson* Dep.) at 137:7-9.

mortgage loan (*id.* at MERS-7662) based on the assumption that mortgage rights are transferred an average of 5 times over the life of the loan. *Id.* at MERS-7665.

Defendants contend that they modeled MERS after the Depository Trust Corporation ("DTC"), a private company established in 1973 to provide clearing and settlement services to the securities industry by using a "book entry" system to avoid the need to exchange paper stock certificates. *Id.* at MERS-7662. However, unlike the DTC model – which was facilitated by an Act of Congress[6] and amendments to Article 8 of the Uniform Commercial Code,[7] and is regulated by the Securities and Exchange Commission[8] – the MERS System was simply made up out of whole cloth. As the White Paper admits, there was no effort "to effect change through either the judicial or legislative process." *Id.* at MERS-7663.

E. The MERS System Plays Havoc With The Public Records

The MERS system plays havoc with the public land records system that has been the hallmark of the United States real property system for centuries. It deliberately undermines the public record of the chain of title. "For the first time in the nation's history, there is no longer an authoritative, public record of who owns land in each county." Peterson, *Two Faces, supra* n. 5, at 117.[9]

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[6] *See* 15 U.S.C. § 78q-1, which was enacted in 1975 to establish a "National system for clearance and settlement of securities transactions."

[7] *See* "UCC Article 8, Investment Securities (1994) Summary," available at http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%208,%20Investment%20Securities%20%281994%29. DTC is a "clearing corporation" under UCC § 8-102(a)(5) and a "securities intermediary" under UCC § 8-102(a)(14).

[8] http://www.sec.gov/rules/sro/dtc.shtml

[9] The MERS System "shields the true owner of a mortgage in public records," draws a veil across mortgage transactions like a "masked executioner," and prevents the homeowner from knowing who actually owns their mortgage and with whom they should negotiate. David E. Woolley & Lisa Herzog, *MERS: The Unreported Effects of Lost Chain of Title on Real Property*

(footnote continued)

The purpose of a having transparent public records of real estate transactions, documenting the complete chain of title, was explained by the Pennsylvania Supreme Court:

> The great object to be attained, by recording and indexing an instrument affecting the title to real estate, is to give notice of the incumbrance…**The object of the recording acts is to give notice to the world of that which is spread upon the record**. Therefore the record is constructive notice to all persons, without regard to the fact of actual notice. Under our system, the record is open to every one who desires to ascertain the condition of the title to any piece of real estate, in so far as its ownership is concerned, or as to incumbrances thereon, and every one is bound to take notice of what the record shows, and searchers may rely upon the record as it stands. If this were not so, no one would be safe in purchasing real estate, or in loaning upon the strength of it, as security.

Prouty v. Marshall, 74 A. 550, 551 (Pa. 1909) (emphasis added).

To illustrate concretely how Defendants have sabotaged this system, Plaintiff retained an expert who analyzed Montgomery County real property records. She analyzed a sample securitized mortgage for a residential property located in Montgomery County, Pennsylvania. The mortgage was recorded in Plaintiff's office (the Montgomery County Recorder of Deeds) with MERS as the original mortgagee of record. For her analysis, she compared three sets of data: (1) what was recorded for that property in the Montgomery County public land records; (2) what MERS' internal database reflected (which may not be completely accurate, because banks and other note holders that belong to MERS report transfers only voluntarily)[10]; and (3) what "securitization" databases and deal documents for those mortgages further showed (*i.e.* instances

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Owners, 8 Hastings Bus. L.J. 365, 366 (2012) ("Unreported Effects"); Alvin C. Harrell, *Teaching Consumer Law*, 12 J. Consumer & Com. L. 8, 14 (2008).

[10] MERS disclaims the reliability of its own database, stating: "The information does not constitute the official legal record and is for informational purposes only." Peterson, *Two Faces, supra* n. 5, at 127-28. "Financial institutions have been cavalier about informing MERSCORP of changes in servicing and ownership rights of mortgages, apparently because these institutions believe no legal penalties exist for neglecting to make this information available." *Id.* at 117.

where a mortgage and note are placed into a securitization trust, to enable selling of mortgage-backed securities to the public, *see Montgomery County,* 904 F. Supp. 2d at 439-440).

Her Analysis is attached to her Declaration, which is attached hereto as Exhibit G. Below is a summary of her conclusions, with the word "Missing" showing what was *not* reflected in the Montgomery County public record chain of title:

(1) Montgomery County Land Records (Recorded Documents)

Transaction	**Status**
07/13/05 Mortgage to MERS, as Nominee For Countrywide Home Loans, Inc. ("Countrywide");	**FILED**
11/14/11 MERS (as nominee for Countrywide) assigns to Bank of New York Mellon ("BNY Mellon");	**FILED**
05/09/13 Sheriff's Deed in foreclosure	**FILED**

(2) MERS Internal Records (Note Transfers Reported To MERS)[11]

Transaction	**Status**
REDACTED	**MISSING**
REDACTED	**MISSING**
REDACTED	**MISSING**

(3) Securitization Documents (Transfers Recited In SEC Filings)

Transaction	**Status**
08/30/05 Countrywide to CWABS, Inc.	**MISSING**
08/30/05 CWABS, Inc. to BNY Mellon	**MISSING**

Declaration of Marie T. McDonnell (Exhibit G), at Exh. 2, p. 11.

[11] This information is from Defendants' database. Defendants have designated this information "Confidential" under the Protective Order, and required it to be filed under seal. Therefore Plaintiff has redacted it in the publicly filed version of this brief.

MERS will not dispute that, at all times pertinent to the above transactions listed as "missing," MERS was the mortgagee of record, as "nominee" for the original lender and all of the entities listed in (2) and (3) above, and that the failure to record mortgage assignments was in accordance with MERS' procedures. Defendants state with great bravado: "Plaintiff has not and cannot show this Court one single written assignment of mortgage that has not been recorded as supposedly required by Section 351." (Def. Br. p. 1). The above chart contains five.

The MERS System has created massive gaps in the public chain of title by systematically concealing the owner of the mortgage in the official land records. This in turn has harmed homeowners directly, who have been deprived of the ability to know the identity of the entity that claims an interest in his or her property. Ackelsberg Decl. (Exh. B hereto) at ¶ 8.

A recent position paper by the National Association of Independent Land Title Agents stated:

> The desire to create a land title recording system and the importance of maintaining the integrity of those records has roots as far back as the Plymouth Bay Colony in the 17th century…. The MERS shareholders are all closely-related entities in the mortgage finance and title industries who have abandoned the benefits of maintaining the land record system in order to create a vehicle for short-term profiteering. Rather than simplify local county land titles, MERS has created more clouds on title and made it more difficult to accurately track "who owns" the title to the real estate…. MERS has allowed for fraudulent actors, and their supporters, to access the land recording system by permitting robo-signed mortgage assignments to permeate land title records, jeopardized the sanctity of the mortgage foreclosure process and inserted uncertainty into the mortgage finance process. All of this has hastened mortgage securitization and MERS profits, which in turn, helped to facilitate the current housing crisis.

National Association of Independent Land Title Agents, *Why Congress Should Examine H.R. 2425 and MERS Together*, at 4.[12]

[12] Available at http://nailta.org/2011/07/27/nailta-issues-position-paper-on-hr-2425-mers-bill/.

Plaintiff testified to the harm created by MERS at her deposition:

> Q. Do you consider it a problem that the land records are incomplete?
>
> A. I do consider it a problem. We have residents coming in every day that are either facing foreclosure or are concerned about who they are paying their mortgage to. And so I feel it's important that our records reflect everything that transpired as it relates to the properties in Montgomery County.
>
> Q. Would you consider this a serious problem?
>
> A. I absolutely think it's a serious problem. Otherwise, we wouldn't be here.

Deposition of Nancy J. Becker, 7/17/13 ("Becker Dep.", Hillwig Decl. Exh. 9) at 66:16-67:11. *See also Id.* at 68:4-10 ("I think anybody who has watched 60 Minutes or have seen any of the accounts with the multiplicity of articles about MERS would have concern that the Montgomery County land records are incomplete. Not because Montgomery County has done anything wrong, but because the other entities have not complied with the statutes of Pennsylvania.").[13]

A licensed title agent has explained in a Declaration the harm caused by the MERS system:

> 18. In summary, MERS is eroding our land records, failing to provide consumers and both title and mortgage professionals alike with critical information necessary to evaluate the marketability of title and credit worthiness of the consumer, while avoiding the payment of millions of dollars in fees due to county recorders. This scheme combined with securitization without regard for consumers and long established recording statute and procedures

[13] The harm has been experienced nationwide. The Kansas Supreme Court held: "In attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage." *Landmark National Bank v. Kesler*, 216 P.3d 158, 169 (Kan. 2009). The Arkansas Supreme Court has warned that, "Permitting an agent, such as MERS purports to be to step in and act without a recorded lender directing its action would wreak havoc on notice in this state." *Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark.*, Inc., 2009 Ark. 152, at 8, 301 S.W.3d 1, 5 (2009).

> has created more harm than just the aforementioned loss of recording revenue.

Declaration of Charles W. Proctor, III, Exhibit H hereto.

The MERS system inflicts collateral harm upon many other entities. More than 40% of Montgomery County's mortgage assignment fee ($23.50 out of $54.00) supports state judicial services, including civil legal services for low income Pennsylvanians administered through Pennsylvania's Access to Justice ("ATJ") Act, 42 P.S. § 4901, *et seq*. and the IOLTA Board. Deposition of Jocelyn Gallagher, 7/18/13 (Hillwig Decl. Exh. 22) at 23:12-21; Declaration of Samuel W. Milkes, Esq. (Exh. C hereto) at ¶ 4; Declaration of Catherine C. Carr, Esq. (Exh. D hereto) at ¶¶ 5-7 (citing Declaration of Joan T. Decker ("Decker Decl."), Exh. E hereto). And in Philadelphia, a portion of the recording fee goes to the Philadelphia Housing Trust Fund, which supports the development and repair of low income housing, emergency housing assistance, and homelessness initiatives. Declaration of Elizabeth G. Hersh (Exh. F hereto) at 2-7 (citing Decker Decl.). Thus, the MERS system and its avoidance of recording fees have harmed some of the most vulnerable and needy Pennsylvanians as well.

F. Defendants' Remaining Arguments Are Off-Point

Defendants' major argument—that the MERS system involves no transfer of any mortgage interest —has been addressed in Section C above. Defendants' subsidiary arguments are equally incorrect. Many of them are thinly-disguised efforts to relitigate arguments this Court rejected in denying Defendants' motion to dismiss, 904 F.Supp.2d at 436 *et seq.* and in denying Defendants' motion for judgment on the pleadings (Order at Docket No. 40, March 8, 2013).

(1) Plaintiff Does Not Contend That Promissory Notes Need To Be Recorded

MERS claims that Plaintiff really seeks the recording of "transfers of debt," *i.e.* recording of the promissory note. (Def. Br. pp. 2, 17, 19-20, 24). ("[T]he transfer of only debt (promissory note) is not a conveyance of land or an interest in land; it is a transfer of *personal property."* *Id.* at 20, emphasis by MERS). MERS spends pages explaining why promissory notes do not have to be recorded (*id.* pp. 24-27). This is just an effort at misdirection by Defendants designed to obfuscate the issue in this case, namely, that the law in Pennsylvania is that the mortgage is also assigned as a matter of law with the note.

(2) Defendants Seek To Relitigate The Scope Of §351 And Quiet Title

MERS argues that 21 P.S. §351 merely states "where" a document is to be recorded, but does not expressly require the creation of a written mortgage assignments and does not specify who has the obligation to record the assignment. (Def. Br. p. 1, 3-4, 30-31,). In their motion to dismiss, Defendants made essentially the same argument. Docket No. 6, pp. 2, 6, 8-10 (arguing that §351 supposedly only dictates "where" and "when" a mortgage should be recorded). This Court's rejection of that argument is law of this case. *Montgomery County,* 904 F. Supp. 2d at 443-446.[14]

These issues are governed by the quiet title rules that govern Plaintiff's claim. As the Court has already observed, a quiet title action is "brought ... to compel an adverse party to ... record ... any document, obligation, or deed affecting any right, lien, title, or interest in land." *Id.*

[14] Defendants also argue there is no private right of action under Section 351 and therefore no basis on which Plaintiff can proceed. (Def. Br. p. 5, 49-50). Plaintiff continues to maintain that Section 351 may be enforced directly by the Recorder of Deeds. This was an issue that the parties fully briefed on Defendants' motion to dismiss, but on which the Court reserved decision. 904 F. Supp. 2d at 445. But even if a direct action is not available, Plaintiff may still proceed under quiet title. Order of March 8, 2013 (Docket No. 40), denying Defendants' motion for judgment on the pleadings, and re-emphasizing the appropriateness of an action to quiet title.

at 445 (quoting Pa. R. Civ. P. 1061(b)(3)). Because Plaintiff can prevail on the merits of her quiet title claim by establishing that Defendants caused gaps in the chain of title, Pa. R. Civ. P.1066(b) provides that, "Upon granting relief to the plaintiff, the court:

> (3) shall enter a final judgment **ordering the defendant**, the prothonotary, or the recorder of deeds **to file, record,** cancel, surrender or satisfy of record, **as the case may be, any plan, document,** obligation or deed determined to be valid, invalid, satisfied or discharged, **and to execute and deliver any document, obligation or deed necessary to make the order effective**; or
>
> (4) **shall enter any other order necessary for the granting of proper relief**. (Emphasis added).

"The provisions of this subdivision of the rule are broad enough to encompass proceedings under the rule to compel a defendant to execute and deliver designated documents, obligations or deeds or to file, record, cancel, surrender, or satisfy the same." Goodrich Amram 2d § 1066(b):5 ("Order compelling production of document"). "Execute" means "'to bring (a legal document) into its final, legally enforceable form … 'to perform all necessary formalities, as to make or sign a contract, or to sign and deliver a note.'" *First Indem. of Am. Ins. Co. v. Tiedeken*, No. 99–1887, 2001 WL 34929102 * (E.D. Pa. Jul 19, 2001) (quoting Black's Law Dictionary) (holding that "FIA 'executed' the bonds by creating them, signing them, and delivering them to Muratone to be taken to the obligee").

Thus, Defendants are simply wrong when they argue that Plaintiff must identify unrecorded documents in their possession (Def. Br. at 29), because an order compelling Defendants to execute and record a document – or even to adopt a rule that requires MERS members to do so through their MERS "signing officer" employees – is part of the equitable relief available under the quiet title rules. Pa. R. Civ. P. 1066(b).

Defendants purport to express puzzlement over which documents they are supposed to record. (Def. Br. p. 14). The chart on pp. 14-15 above demonstrates what should be recorded for

the Farkas mortgage. And Defendants' argument is disingenuous because MERS and its members *do* prepare and record mortgage assignments. Hillwig Decl. Exh. at 4-15, 19-20. In its Order of March 8, 2013, this Court held that Plaintiff had adequately identified the missing recordings by referencing the 130,000 mortgages with MERS as the mortgagee in Montgomery County: "[T]he pleadings allege that MERS, one of the Defendants, is the named mortgagee on some 130,000 mortgages recorded in Montgomery County and that the Defendants permit various third parties to convey the beneficial interests in these mortgages among themselves without recording such conveyances…[W]e conclude the pleadings adequately identify the disputed conveyances."

Defendants next cite this Court's statement that Plaintiff "must still show an interest of some type in the land at issue or some pecuniary interest which is affected by the status of the relevant documents as recorded or unrecorded." (Def. Br. at 52, citing 904 F. Supp. 2d at 450). The Court held that Plaintiff met this requirement by alleging that the Recorder of Deeds was deprived of fees by the failure to record mortgage assignments:

> Accordingly, the Plaintiff has pleaded a pecuniary interest which is affected by whether the mortgage assignments which MERS tracks are recorded. The Plaintiff has therefore pleaded sufficient facts to establish herself as a party "in any manner interested" in the assignment—*i.e.* conveyance—of mortgages recorded in the name of MERS as nominee to proceed with a quiet title action to compel recordation of such assignments.

Montgomery County, 904 F. Supp. 2d at 451. Defendants make no effort to rebut the undisputed evidence that Plaintiff has been deprived of recording fees. Plaintiff so testified at her deposition. Becker Dep. (Hillwig Decl. Exh. 9) at 178:3-179:5 (Plaintiff estimates conservatively that the lost recording fees in Montgomery County from missing assignments on MERS mortgages exceed $15.7 million between 2004 and the filing of the complaint).

The Court has also rejected Defendants' arguments concerning "the Plaintiff's lack of interest in any land at issue and the absence of any conflict as to the title of any such land." The Court concluded that such factors were not necessary because Plaintiff's claims were asserted under Pa. R. Civ. P. 1061(b)(3). Order of March 8, 2013 (Docket No. 40) Defendants ignore this holding as well.

Defendants are also wrong in arguing that 21 P.S. §§731-738 are the only means to compel assignments of mortgages. (Def. Br. p. 33). Those sections address when assignments can be compelled subsequent to mortgage pay-offs, in order to protect land owners. MERS contends, correctly, that those provisions are not at issue here, but then argues, incorrectly, that 21 P.S. §351 is powerless to provide any remedy in the case at bar. This Court has already held that an action to quiet title, and injunctive relief, are appropriate remedies to enforce Section 351 in this case, which disposes of Defendants' argument. *Montgomery Co.,* 904 F. Supp. 2d at 445-452. Defendants' arguments to the contrary (Def. Br. pp. 49-51) contravene the doctrine of the law of the case.

(3) Both Legal And Equitable Interests Require Recording

MERS argues that the transfer of the mortgage debt merely "creates an equitable interest in the lien on the property" and therefore does not "convey any lands" within the meaning of the recording statute. (Def. Br. p. 21). This argument is squarely contrary to the Pennsylvania Supreme Court decision in *Pines v. Farrell*, 848 A.2d at 100, which explained that because Pennsylvania is a "title theory" state, the mortgage conveys legal title and transfer of it is a recordable conveyance of an interest in land.

Moreover, even if the interest in the land is characterized "equitable," the Pennsylvania Supreme Court has made clear that "every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land" for purposes of the recording statutes. *Appeal of*

Russell, 15 Pa. 319, 322 (1850) (holding that "articles of agreement" are recordable). Thus, it makes no absolutely no difference whether the mortgage interest in land being transferred is characterized as "legal" or "equitable":

> In the early history of Pennsylvania, improvement rights were considered as chattels. But that time has long passed, and preemption or inchoate interests are bound by judgments and sold, **because every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land**. Thousands of acres are held in this commonwealth by location and survey only. It would sound strangely to a lawyer of the interior to say that these interests were not real estate, and the transfer or incumbrance of them not subject to the recording laws. Such a doctrine would upset estates and change the accepted principles of the commonwealth. **They have from ancient time been dealt with by the people as interest in real estate, like other equitable interests in land; and, being the subject of contract and sale as such, there is the same reason for their being subject to the recording acts as the legal title.**

Id. at 322 (holding that an assignment of articles of agreement is in the nature of a mortgage, and thus recordable as transfer of an equitable interest in land).[15] *Accord Bellas v. McCarty*, 10 Watts 13, 25 (Pa. 1840) ("The [recording] Act of 18th March 1775, is not confined to deeds, but directs that every recorder of deeds, &c., shall keep a fair book, in which he shall immediately

[15] Under articles of agreement, as exemplified in *Appeal of Russell*, the buyer makes a down payment and obtains possession of the land, while the seller retains the deed (legal title) subject to the buyer's right to a conveyance upon full payment. The court in *Appeal of Russell*, held that (1) articles of agreement conferred an equitable estate in the land upon the buyer and (2) an assignment of that agreement as collateral was effectively a mortgage that, while equitable, was subject to the recording acts. 15 Pa. at 322-323. In light of this authority, Defendants' reliance on *Smith v. Messner*, 92 A.2d 417 (Pa. 1952) is misplaced. There, the court held that the equitable interest created by an land sales contract did not constitute a "conveyance" for purposes of the real estate transfer tax statute because such agreements were completely executory in nature and only involved mutual promissory obligations. *Id.* at 418-19. In so holding, the court reasoned that the operative statute must be construed strictly as a taxing statute with penal provisions and that this construction was necessary to avoid double taxation. *Id.* By contrast a transfer of a note is a completed transaction that carries with it the mortgage without any further undertaking by the transferor. *Appeal of Russell* makes clear that such equitable interests *are* subject to the recording acts, even if a different result may be required under tax provisions.

make an entry of every deed or writing brought into his office to be recorded. *The language of the act is sufficiently comprehensive to embrace equitable as well as legal titles, and the record of an equitable title is notice to all subsequent purchasers")* (emphasis added); *Commerce Bank v. Bello*, 9 Pa. D&C 4th 607, 609 n.1 (Dauphin County 1991) ("An assignment of an equitable interest in the property under the real estate purchase agreement constitutes a mortgage as a matter of law in Pennsylvania.") (citing *Appeal of Russell*).

Similarly, the current statute, 21 P.S. § 351 makes no distinction between "legal" and "equitable" interests in land. By its terms, it applies to "*[a]ll* deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intention of the parties executing the same to grant, bargain, sell and convey *any lands*, tenements, or hereditaments …." 21 P.S. § 351 (emphasis added). Nevertheless, MERS relies upon the words "bare legal title" (Def. Br. pp. 36-37, *citing Galford v. Burkhouse,* 478 A.2d 1328, 1334 (Pa. Super. 1984). 21 P.S. §351 contains no such distinction, and the Pennsylvania Supreme Court precedent makes clear that transfers of interests in land are recordable regardless of whether they are characterized as legal or equitable. *Appeal of Russell*, *supra.* There is simply no indication in the text or history of Section 351 that the legislature intended to limit its reach to transfers of "bare legal title," and the Court cannot insert such an unexpressed limitation at Defendants' behest. The interest in land that is transferred with the debt is a "mortgage" and therefore is subject to the recording act.

(4) Plaintiff Has Sued The Correct Parties

One of Defendants' more curious, and ironic arguments, is that Plaintiff has supposedly sued the wrong party because "the MERS defendants were not parties to, or otherwise involved in, the transactions that the Recorder now insists must be documented and recorded in the public land records." (Def. Br. p. 4). Defendants argue that MERS is not involved with promissory notes, that MERS is but a mere agent for its members who do the actual transferring, and that

MERS has no authority "on behalf of any transferors or transferees of debt to execute conveyances of land between those parties and record them in the county land records." (Def. Mem. at 44-49). This argument is yet another example of MERS seeking to wear multiple hats in the mortgage transaction, and then selectively and disingenuously donning whichever one that it believes better suits its litigation position. However, it is MERS' role as mortgagee of record and simultaneous agent for every institution that will ever acquire the promissory note that drives the entire MERS system and that is at issue in this lawsuit.

(i) MERS Is The Mortgagee With The Authority And Power To Assign The Mortgage

First, MERS' own rules provide that MERS is the named assignor of mortgages, and therefore is the correct party to be ordered to record assignments. The rules read: "whenever an assignment from MERS is otherwise required under the Governing Documents, the Member hereby represents and warrants to the Companies that an appropriate assignment of Security Instrument *as may be required under applicable state law, identifying MERS as the assignor*, has been or, as soon as practicable (in compliance with Rule 8), shall be properly prepared, executed, and delivered to the applicable public land records recording office by the Member or Member's designee for recording in compliance with the Governing Documents." MERS Rule 12, Section 11 (Hillwig Dec. Exh. 10 at MERS-271 to MERS-272).

In the foreclosure context in particular, MERS has stressed it is not merely an agent but that *it is the mortgagee*, and as such MERS has "broad powers" to take "any and all actions" with respect to such mortgages. As MERS argued to the United States Bankruptcy Court for the Eastern District of New York:

> Here, the language of the MERS Mortgage, both by itself and even more so when considered in light of the entire MERS® System, shows that **MERS was granted broad powers to take "any and all actions" with respect to the Mortgage**. The use of the phrase "including but not limited to" was designed to broaden the

> boundaries of MERS's authority, and was not intended to limit MERS' powers to only those "examples" listed in the Mortgage **including common and reasonable actions of mortgagees such as to assign mortgages**.

Hillwig Dec. Exh. 11 (MERS Memorandum of Law in Support of Motion to Partially Set Aside and Reconsider Order in *In re Agard*, No. 810-77338-reg (E.D.N.Y. Bankr.) at 12 (emphasis added). In the same litigation, MERS offered a declaration of William C. Hultman (also Defendants' declarant herein), who describes this authority even more starkly: "The MERS Mortgage expressly authorizes MERS to assign the Debtor's Mortgage in accordance with the terms of the Debtors Mortgage and security instrument on record in the County Recorder's Office." Hillwig Decl. Exh. 12 (Declaration of William C. Hultman, *In re Agard*, No. 810-77338-reg (S.D.N.Y. Bankr.) [hereinafter "Hultman Agard Decl."] at ¶ 21.

Accordingly, the Court can properly impose the obligation to create and record mortgage assignments on Defendants. MERS is the mortgagee of record. "The obligation of seeing that the record of an instrument is correct must properly rest upon its holder." *Prouty v. Marshall*, 225 Pa. at 577, 74 A. at 552. "It is an easy matter for a mortgagee ... either in person, or by a representative, to look at the record, and see that the instrument has been properly entered." *Id.* *Accord Antonis v. Liberati,* 821 A.2d 666, 670 (Pa. Cmwlth. 2003) (finding that the obligation of seeing that the record of an instrument is correct rests upon its holder). Further, as agent (nominee) for every institution holding the note, MERS claims it has the *power* to assign and record mortgages for its principals (the lender banks) whenever those lenders need the mortgage formally assigned. By the same logic, the Court can order MERS to now record mortgage assignments in all those situations where it should have, but did not do so, in contravention of 21 P.S. §351.

(ii) MERS Has Held Notes And Recorded Assignments Of Notes

Defendants also want the Court to think that they have been complete outsiders when it comes to the notes that are handled by their members (who number in the thousands). For example, they argue that the Court should not order them to record mortgage assignments because they "do not hold and never have held promissory notes or debt secured by mortgages in Montgomery County, Pennsylvania…." Def. Br. p. 45 (citing Hultman Decl. ¶¶ 5, 12). But Mr. Hultman's Declaration does not say that. Indeed, prior to July 2011, MERS allowed its members to foreclose in MERS' name, with MERS as holder of the note. *In re Marron*, 455 B.R. 1, 4 n.5 (Bankr. D. Mass. 2011) ("a MERS member may conduct a foreclosure in MERS' name, in which case MERS may be identified as the 'note-holder'"); *In re Martinez*, 444 B.R. 192, 204 (Bankr. D. Kan. 2011) (under MERS procedures, "Countrywide could assign the Note to MERS, and MERS (as the new holder of the Note) could bring the foreclosure action on Countrywide's behalf"). *See* Hillwig Decl. Exh. 15 (MERS Rule 8 Section 2(a), 2009 version) at MERS-669.

R.K. Arnold (the Defendants' former President and CEO) and Mr. Hultman (Defendants' declarant herein) have both testified in other cases that *MERS was the holder* of notes when foreclosures were conducted in MERS name. According to their testimony, notes were negotiated to MERS when foreclosures were conducted in MERS' name, and MERS became the holder of and possessed the notes. Hillwig Decl. Exh. 16 (R.K. Arnold 2006 Trent Dep. excerpt) at 67:12-17; 76:6-77:14; 78:3-6; (testifying concerning MERS' practice of becoming a holder of the note at the time of foreclosure); *Id.* at 81:11-21 ("ultimately during the foreclosure [MERS] become[s] the owner and holder of the note for purposes of the foreclosure."; MERS "gain[s] possession of [the note] for the purpose of foreclosure…."); *Id.* at 82:15-18 (MERS "ha[s] to have possession of the note so we can move forward with [foreclosure]."); *Id.* at 87:17-22 ("We

are actually the holder and owner of the mortgage and note proceeding forward with the litigation…."); *Id.* at 106:19-107:1; *Id.* at 110:6-8 ("We ultimately would [get physical possession of the note]…."); *Id.* at 113:4-10; Hillwig Decl. Exh. 17 (Hultman 2009 *Henderson* Dep. excerpt) at 63:1-16 (MERS became the "holder," had physical possession, and could enforce the note and be paid); *Id.* at 108:9-12; *Id.* at 109:19-110:1 (MERS Rules provide that MERS holds the promissory note with a blank endorsement when foreclosing); *Id.* at 112:1-6 (the note is "negotiated" to MERS for the purpose of conducting the foreclosure).

Indeed, MERS routinely asserts that it assigns the notes and beneficial rights along with MERS mortgages regarding property located in Montgomery County, Pennsylvania, including assignments from and to itself. *See supra*, p. 9 (quoting Hillwig Decl. Exh. 4-6). MERS will even record assignments of both the note and mortgage to itself as the nominee for a new member. Hillwig Decl. Exh. at 15, 19-20. MERS' actions in this regard speak far more persuasively than Defendants' conveniently shifting litigation positions in various courts.

Put simply, in claiming that MERS has no involvement in transactions on its system, MERS is trying to have it both ways. MERS wants to don its MERS hat when it wants to act in its own name, and doff it to put the blame on its members whenever it is convenient, relying on its nature as a pure legal fiction. This Court should not allow MERS to do so.[16]

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[16] Even assuming, arguendo, that MERS were merely an agent, it still could be held liable because it is only when an agent has disclosed the existence and identity of all of its principals that it cannot be held liable. *See Castle Cheese, Inc. v. MS Produce, Inc*., CIV.A 04-878, 2008 WL 4372856, at * 13 (W.D. Pa. Sept. 19, 2008); *Pa. R.R. v. Rothstein & Sons*, 165 A. 752, 755-56 (Pa. Super.1933). The note/mortgage transferee is never disclosed in the MERS system because the mortgage merely states that MERS acts as the agent for the "[originating] Lender and its successors and assigns." No list of MERS' members who could qualify as a successor or assign is attached to the mortgage – rather, it is concealed in a "MIN Number" that is unaccessible to the public. Two of MERS' purportedly contra authorities are actually consistent with this position. *Vernon D. Cox & Co. v. Giles*, 406 A.2d 1107, 1110 (Pa. Super. 1979) (stating that agents are only not liable for the conduct of disclosed principals); *Azarchi-Steinhauser v. Protective Life Ins. Co.*, 629 F. Supp. 2d 495, 500 n.7 (E.D. Pa. 2009) (same).

(footnote continued)

(iii) MERS Is The Correct Party And Can Be Compelled To Record Assignments Of The Mortgages As Required By Section 351.

As argued above, the quiet title rules empower the Court to order Defendants to prepare and record mortgage assignments to quiet the title on property in Montgomery County (and, if the class is certified, Pennsylvania properties) pursuant to Pa. R. Civ. P. 1066(b). *Supra,* p. 22-23 (discussing Rule 1066(3)-(4)). Moreover, both equity and logic dictate that it is Defendants who must undertake the creation and recording of the mortgage assignments.

First and foremost, Defendants are responsible creating gaps in the land records by developing the MERS system and marketing it to the mortgage industry under the erroneous premise that the members could thereby avoid the recording statutes. Second, Defendants control the database into which MERS members reported the transfers and set and enforce the MERS System rules concerning such reporting, and thus are in the best position to update the land records to reflect the changes in beneficial ownership that MERS is representing. Third, in the wake of the subprime mortgage crisis, many MERS members went out of business or were consolidated into other firms. The *only* thing consistent about all of these note/mortgage

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The other is wholly inapposite because it merely held that only the owner and operator of a property, and not a group trip sponsor, could be liable for a slip and fall. *Levin v. Temple Shalom*, CIV. A. 90-4302, 1990 WL 143639 at * 1-2 (E.D. Pa. Sept. 27, 1990). Further, Plaintiff is free to proceed against either an agent or a previously undisclosed principal. *Sharon Gen. Hosp. v. McLaughlin*, 3 Pa. D. & C.4th 582, 588-89 (Com. Pl. 1989) ("[T]hough entitled to only one satisfaction, a third party who deals with an agent of an undisclosed principal may upon discovery of the principal's identity proceed against either the agent or his principal.") (citing *Joseph Melnick Building & Loan Association v. Melnick*, 64 A.2d 773, 776 (Pa. 1949); and *Wedgewood Diner Inc. v. Good*, 534 A.2d 537, 539 (Pa. Super. 1987)). There is no conflict between the two recording recovery actions (this case and the one pending in Common Pleas Court in Washington County) as the Defendants will merely be entitled to an offset of damages in the event that recovery in one suit overlaps with recovery in another.

ownership transfers is the involvement of, facilitation by, and tracking function of, the MERS Defendants.[17]

(5) Defendants' Argument About Nominees Is Far-Fetched

Defendants argue that a ruling against MERS would be tantamount to a ruling that no agent could ever serve as the nominee for a principal with respect to a land transaction, and would "reverse the long-held and fundamental principle." (Def. Br. p. 3). This is nonsense. "straw purchasers"—someone purchasing land for the benefit of another—are permissible when used in a legitimate manner. In such a purchase, neither the nominee nor the principal for whom he or she acts is seeking to evade the recording statutes by thereafter making unrecorded mortgage transfers, which is the issue *sub judice.* Here, MERS seeks to become the official straw purchaser of the entire mortgage finance industry for the express purpose of evading recording fees. However, as *Iscovitz v. Filderman,* 334 Pa. 585, 6 A.2d 270 (1939) held, where straw purchasers are used for an illegitimate purpose (there to defraud creditors) they are declared part of an illegal scheme. The cases permitting straw purchasers in no way support MERS' efforts to stretch that doctrine beyond recognition.

MERS relies heavily upon *Craft v. Phillips,* 12 A. 331 (Pa. 1888). (Def. Br. at pp. 21, 23, 37, 35, 37-38). That case has no bearing on the issues in this case. The mortgagee (Craft)

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[17] Defendants can also be ordered to modify their rules and procedures to require MERS members to record the legally required, but currently unrecorded, mortgage assignments. MERS has changed its rules and procedures in the past. MERS members are required to abide by the MERS' rules and procedures, and any changes thereto. Deposition of William C. Hultman, October 10, 2013 (hereinafter "Hultman Dep.", Hillwig Decl. Exh. 13)) at 62:2-6, 16-22; 63:1-8, 22; 64:1-12; 68:5-15, 18-20; 72:5-17; 92:20-22; 93:1-9. MERS procedures, for example, currently require recording of mortgages. For example, under "Business Procedure – Initial Registration" the first item is "[c]lose the loan on a security instrument that names MERS as the original mortgagee and send it to the recorder's office. Or, close the loan on a standard security instrument, prepare an assignment to MERS, and send both to the recorder's office." Hillwig Decl. Exh. 21 at MERS-46 (emphasis added); Hultman Dep. (Hillwig Decl. Exh. 13) at 132:2-11, 16-20.

released a mortgage covering multiple notes, including notes he had already sold to others (apparently, without recording a mortgage assignment in connection with the sale). When the owners of the other notes obtained a judgment against the mortgaged property, a purchaser of the property who relied on Craft's release sued Craft for damages. The court reasoned that while Craft could transfer an equitable interest in the mortgage, a release of the entire mortgage when he did not own all of the notes would be fraudulent. *Id.* While the court did not address the *recordability* of such transfers (a matter resolved decades earlier in *Appeal of Russell* and *Bellas v. McCarty*, *supra*), the *Craft* case illustrates neatly the problems caused by the failure to record. Had the mortgage assignments been recorded, the world would have been on notice that Craft's mortgage release was a fraud.

Defendants' reliance on *Roberts v. Halstead*, 9 Pa. 32 (Pa. 1848) (Def. Br. at pp. 29, 37) is similarly misplaced. There, the court likewise held that a mortgagee who sold the note could not fraudulently release the mortgage to the new note owners' detriment, because the mortgage follows the note. *Id.* at 35 ("assignment or transfer of each of the 'obligations' mentioned in the mortgage is a purchase, for valuable consideration, of all of the securities of the assignor"). Again, while it appears that no mortgage assignment was recorded, the court noted the potential for mischief caused by the lack of notice: "Had there been a bona fide purchaser of the mortgaged premises, after the entry of the satisfaction, a countervailing equity would have spring up for the protection of the innocent purchaser." *Id.*

At most, these cases stand for the propositions that the mortgage follows the transfer of the note and that equity will step in, if necessary, to remedy a fraud upon innocent purchasers caused by a failure to record interim assignments and the resulting lack of notice. They do not, however, excuse Defendants' refusal to record mortgage assignments as required. To the contrary, they underscore the importance of having comprehensive, accurate land records.

(6) MERS Frustrates Rather Than Furthers The Purpose Of Land Records

MERS contends that its role and position in the land records is consistent with, and furthers, the purposes and goals of the public recording system. (Def. Br. pp. 40-44). To the contrary, as Section (E) above shows, the MERS' system plays havoc with those records. MERS suggests that the *sole* purpose of the public recording system is to put subsequent purchasers on notice of a lien. Def. Br. at p. 40. While this is a certainly *one* of the valid purposes, as the Pennsylvania Supreme Court held in *Prouty, supra*, it is not the only one.

The Recorder of Deeds plays an essential role in maintaining the public land records. Pursuant to the recording acts, the Recorder of Deeds is obligated to maintain the valuable public land records "to serve the future necessities of the law … protect the public ... and [preserve] the integrity of the official records in his [or her] office. 76 C.J.S. Registries of Deeds §10(b). Pennsylvania Recorders of Deeds are elected officials tasked with "preserving the integrity of the records in his or her county and promulgating reasonable rules that promote accuracy." Edward C. Sweeny, *The Duty and Function of Pennsylvania Recorders of Deeds Offices and Chesapeake Appalachia, LL v. Ginger Golden—The Final Piece of the Jigsaw Puzzle?*, 83 Pa. B.A. Q. 155, 157-158 (October 2012).

Land records are vital not just for the mortgage industry, but for homeowners and the public at large:

> The early colonial objective of these laws was, as it is today, to prevent disputes over property rights and to facilitate the use of land as collateral by creating a transparent public record that provides certainty in private bargains. Title recording acts preserve an accessible history of land ownership with "the same dignity and evidentiary value that attaches to public records" for the benefit of the entire community. Real property recording systems create an archive that protects communities from commercial chaos following floods, earthquakes, fire, hurricanes, financial panics, wars, and other disasters. Public land title records created a platform, or infrastructure, upon which private commerce could

> take place. Indeed, real property recording statutes are the earliest and most practical expression of the American commitment to the use of transparent rule of law in the preservation and orderly exchange of property rights.

Peterson (*Foreclosure*), *supra* note 5, at 1364-65 (2010).

Transparent land records exist to protect not only the narrow interests of lenders and investors, but also the homeowners and members of the general public who elect, and who are served by, the Recorders of Deeds. By obscuring the identity of mortgage and debt owners in the land records and replacing them with "MERS", Defendants have neutered the land records as a tool for protecting these rights. *See* Ackelsberg Decl. (Exh. B) at ¶ 8 ("The MERS system at issue in this lawsuit harms homeowners directly. The key, relevant interest of a homeowner is the interest in knowing the identity of the entity that holds an interest in his or her property."). Since a current owner of the mortgage appears nowhere in the land records, any one of MERS' thousands of "signing officers" can purport to assign a MERS mortgage as of record, without any chain of title to back up the right to make that assignment.

(7) Plaintiff Has Proved Unjust Enrichment

Plaintiff can assert a claim for unjust enrichment because it is a standalone cause of action with its own elements. *In re Actiq Sales and Marketing Prac. Litig.*, 790 F. Supp. 2d 313, 329 n.17 (E.D. Pa. 2011) ("The Court rejects Defendant's contention that unjust enrichment is a claim which must attach to a valid, independent statutory claim. To the contrary, the Court finds that unjust enrichment is its own cause of action, with its own required elements.") (citations omitted); *Piper v. Portnoff Law Assoc.*, 216 F.R.D. 325 (E.D. Pa. 2003) (holding that unjust

enrichment is a stand-alone claim with its own elements under Pennsylvania law). Defendants cite no cases dismissing an unjust enrichment claim on this basis.[18]

Defendants lodge one objection to Plaintiff's unjust enrichment claim – that Plaintiff did not confer a benefit on Defendants. (Def. Br. at pp. 56-58). It is clear, though, that Defendants reaped the full benefits of Plaintiff's recording system even though it did not pay the full costs of the system. Defendants pressed a nearly identical objection at the motion to dismiss stage and this Court explained why a claim is stated:

> [T]he Plaintiff has successfully pleaded that the **Defendants have enjoyed the full benefits of the recording system without paying the full value for these benefits** in the form of the fees properly due for each transfer of the beneficial interest of a mortgage. (*See* Compl. ¶¶ 26–29, 41–45.) She has further successfully alleged that the Defendants did so in violation of a statutory command to record such assignments. *See id.;* Section IV.A *supra.* Because a plaintiff may recover when "it would be inequitable for the defendant to retain the benefit without paying *full* value for it," *In re Lampe,* 665 F.3d 506, 520 (3d Cir.2011) (citing *Schenck v. K.E. David, Ltd.,* 446 Pa. Super. 94, 666 A.2d 327, 328 (1995)) (emphasis added), these allegations state a viable unjust enrichment claim.

Montgomery County, 904 F. Supp. 2d at 453.

Contrary to Defendants' argument, the very existence and economic viability of the MERS system and its business model is wholly dependent upon the benefits conferred and services performed by Plaintiff and other state recorders. As explained by Defendants' former President and CEO R.K. Arnold:

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[18] Each of Defendants' cases on this point is facially distinguishable. Def. Br. at pp. 50-51. They do not deal with statutory claims (quiet title) or standalone claims such as unjust enrichment. *See Umland v. PLANCO Fin. Servs.*, 542 F.3d 59 (3d Cir. 2008) (holding that plaintiff could not allege a breach of contract based on an implied obligation to comply with the tax code, but dismissing unjust enrichment claim as preempted); *Kurtz v. Am. Motorist Ins. Co.*, 95-1112, 1995 WL 420034, at *2 (E.D. Pa. July 13, 1995) (dismissing common law negligence claim based on an implied duty to comply with the a statute, but permitting fraud claim to proceed as a standalone claim); *Williams v. Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 281 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1491 (3d Cir. 1994) (declining to allow a claim for declaratory relief where "Congress has expressed its intention that the statute be enforced administratively").

Q. Is it your company's intention to supplement or assist the public land records of the several states with the MERS system to make it more clear about who owns what?

A. No.

Q. Is it your company's intent to supplant the mortgage land records of various states with its system?

A. No. We layer it on top is the way to think of it.

Q. When you say layer it on top, explain that, please.

A. **Well, the MERS system couldn't exist if the recording system didn't exist**.

Q. But the recording system can exist without MERS?

A. Certainly.

Deposition of R.K. Arnold., September 25, 2009, in *Henderson v. MERSCORP, Inc., et al.*, Civil Action No. CV-08-900805.00 (Circuit Court for Montgomery, Alabama) at 111:10-21 (excerpt attached hereto as Hillwig Decl. Exh. 20).

Defendants thus admit that they have benefitted *from the recording system*. "Unjust enrichment can occur when a defendant uses something belonging to the plaintiff in such a way as to effectuate some kind of savings that results in or amounts to a business profit." 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 3. MERS complies with the public recording system provided by Pennsylvania law when it finds it convenient, but chooses not to pay the full costs of that system by hiding in its own fictional recording system until it became necessary to reenter the public records system for foreclosure. Accordingly, MERS was unjustly enriched.

Defendants not only benefitted from the recording system – they built their entire business model on exploiting it without recording every assignment and paying the resulting fee. The

County was not fully compensated because only one recording was made and one fee paid.[19] *See Nueces Cnty., Tex. v. MERSCORP Holdings, Inc.*, 2:12-CV-00131, 2013 WL 3353948 at * 20 (S.D. Tex. July 3, 2013) ("[O]ne could plausibly infer that Defendants obtained a benefit from Plaintiff through fraud and/or by taking undue advantage of the County's policies regarding recording property liens; that in order to confer upon its members the benefits of perfected lien holder status, MERS was required to accurately record and update the security instruments with the proper grantor and grantee under Tex. Loc. Gov't Code § 192.007; that this would have required MERS to pay the County filing fees each time a mortgage was transferred; and that equity demands Defendants reimburse the County for the benefits they received.").

Defendants also argue that no benefit was conferred because the county recorder's duties are purely ministerial and any benefit conferred resulted from state law, rather than actions of the recorder. Not so. As stated above, an unjust enrichment claim can be stated when a party uses something belonging to another to effectuate cost savings without paying the full cost for this use. *See* 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 3. In addition, it is the county recorder's actions, and not simply the operation of state law, that confers the benefits of the recording system on those who use it.

The county recorder "is obligated to protect the public . . . in preserving the integrity of the official records of his [or her] office." *Schaeffer v. Frey*, 589 A.2d 752, 756 (Pa. Super. 1991) (quoting 76 C.J.S. Registers of Deeds § 10(b)); *see Custer v. Glessner*, 68 Pa. Super. 60, 61 (1917) ("The recorder of deeds in each of the several counties of the Commonwealth is and has been, almost since our beginning, an important county officer. [S]he is elected by the people of the county . . . [Her records] are the history of the transactions of the people of the county

[19] Defendants argue by "stating the obvious" that they have already paid the County for all fees due, namely the costs of original recordings. Def. Br. at 57. For the reasons articulated above, recordings should have been made, and fees paid, for all subsequent conveyances as well.

affecting the titles to land.") (gender modification added). The recorder serves the public by recording deeds and similar instruments presented at his or her office in a "fair book," noting the day in which the instrument was brought into the office, and indexing the records by the name of the grantor and the name of the grantee. 16 P.S. § 9731. In the absence of a system maintained by the recorder in which the public can take notice and rely, "no one would be safe in purchasing real estate, or in loaning upon the strength of it, as security." *Prouty v. Marshall*, 74 A. 550, 551 (Pa. 1909). *See* Becker Dep. (Hillwig Decl. Exh. 9) at 48 ("as the Recorder of Deeds, it is our obligation to make sure that the chain of title is in the public record in that county").

Further, the county recorders' role is not purely "ministerial." To the contrary, they have an affirmative duty to maintain clear, accessible, and permanent land records. As the Pennsylvania Supreme Court held more than 150 years ago:

> To limit, however, our present inquiry to the office of Recorder of Deeds and Mortgages, let us examine the object and design of the office. This office, though unknown to the English common law, has been coeval with our province and state; being part of the laws agreed upon in England between William Penn and the first purchasers in 1682, and reduced, after various efforts, to a regular system by the Act of 1715, which continues to be the foundation of our code on the subject; and this office may be said to form the pivot on which all our titles to real estate turn. The design of it has been to furnish a permanent record of all titles and muniments of real estate, and many of personal, to which parties may have recourse for exemplifications that have the same force and efficacy as the originals. But there is another equally, if not more, important design, which is, to enable all persons to obtain knowledge of the state of titles to real estate by deeds and conveyances, and also of charges and encumbrances existing on them by way of mortgage.

McCaraher v. Commw., 5 Watts & Serg. 21, 27 (Pa. 1842). The Plaintiff's maintenance of a recording system that has integrity on which the public can rely – and not the mere existence of the system or the rules of its operation as provided by state law – confers benefits on all those who use the recording system, Defendants included.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be denied, and Plaintiff's cross motion for summary judgment should be granted.

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Respectfully submitted,

/s/ Joseph C. Kohn

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