

SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19376

MERSCORP HOLDINGS, INC., ET AL.

Plaintiffs-Appellants,

DANNEL P. MALLOY, GOVERNOR,

STATE OF CONNECTICUT, ET AL.,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE*

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STATEMENT OF ISSUES

1. Did the trial court accurately characterize the origin of MERS and its operations and effects of MERS in Connecticut to support its decision that the challenged statutory amendments are constitutional?

STATEMENT OF INTEREST OF AMICI CURIAE

The Jerome N. Frank Legal Services Organization at the Yale Law School is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to individuals who cannot afford private counsel. The Mortgage Foreclosure Litigation Clinic (“MFL”), part of the Legal Services Organization, has represented homeowners fighting foreclosure in Connecticut since 2008. In that capacity, MFL has appeared in state and federal, trial and appellate court proceedings. MFL has also filed amicus briefs with appellate courts in other states, including Maine, Florida, North Carolina, and California. MFL and its clients have also testified on multiple occasions to the Connecticut General Assembly on foreclosure policy. MFL students are the primary authors of this brief. This brief does not reflect the views of the Yale Law School.

The Connecticut Fair Housing Center (“CFHC”) is a statewide nonprofit law office based in Hartford. Each year, CFHC represents dozens of homeowners in state and federal court; provides individualized advice and in-person foreclosure-related guidance to more than 1,800 homeowners; and trains and advises hundreds of attorneys, housing counselors, and government employees who work with homeowners facing foreclosure. In addition, CFHC works with Congress and the federal executive branch, along with all three branches of Connecticut’s government, to devise and implement policies that alleviate the foreclosure crisis and reduce problematic mortgage lending and servicing. CFHC receives funding from a range of sources, including private donations, attorneys’ fees realized through litigation, and federal and state grants and contracts. CFHC has been involved in Connecticut policymaking and advocacy regarding predatory lending since 2003.

MFL and CFHC have an interest in this case because they support the State's effort to raise revenue through increased recording fees for worthy housing and development-related initiatives such as the Judicial Branch's Foreclosure Mediation Program and the Community Investment Account. Based on interim collection figures (not finalized because of the instant litigation), the heightened recording fees on "nominee" documents represent a potential revenue stream for the State of several million dollars per year. Furthermore, per Public Act 13-247, a significant portion of that money – unofficially, more than \$2 million – is designated for the Foreclosure Mediation Program. MFL and CFHC are committed to defending the State's continued financial support of these programs, which have demonstrated tremendous success in helping our clients reach settlement, keep their homes, and receive loan modifications.

ARGUMENT¹

This Court should affirm the trial court decision, which correctly concluded that the State of Connecticut may impose a higher land recording fee on a “nominee of a mortgagee,” as defined in General Statutes § 7-34a (a) (2) (c). The health of a mortgage market can be measured in several ways, such as interest rates, the integrity of land records, and fees charged by certain investors. These depend on factors like market interest rates, the standards for recording in the land records, and the foreclosure process. The fees at issue will not weaken any of these measures. Instead, lenders will pass the fees on to borrowers, leaving MERS and its members unaffected. J.S. ¶ 25. Even if MERS members do pay some of the additional fee, there is no indication that any MERS members will withdraw from MERS or stop doing business here. J.S. ¶¶ 26-28. Nor will this legislation affect the standing requirements for a foreclosing plaintiff or the ability of MERS to act as a nominee for its members in land records.

Other states have taken more active steps to limit MERS’s role in the mortgage industry. Maine’s top appellate court recently held that an assignment of a mortgage from MERS does not establish that a foreclosing plaintiff owned the mortgage and had standing to foreclose. *Bank of Am., N.A. v. Greenleaf*, 96 A.3d 700 (Me. 2014). Oregon reached a similar conclusion. *Brandrup v. ReconTrust Co., N.A.*, 303 P.3d 301 (Or. 2013). Virginia and Rhode Island have debated legislation that would require all assignments of mortgages to be recorded in the land records in order for a bank to foreclose, essentially banning the MERS model. H.B. 1506, 2011 Gen. Assemb. (Va. 2011) (copy in Appendix); S. 0547,

¹ The amicus curiae themselves wrote this brief and they, not any of the parties, were solely responsible for the costs of preparing and submitting the brief.

2014 Gen. Assemb. (R.I. 2013) (copy in Appendix). Some states have sued MERS itself for engaging in fraud and failing to pay recording fees. Complaint, *Delaware v. MERSCORP, Inc.*, No. 6987-CS (Del. Ch. Oct. 27, 2011); Complaint, *Kentucky v. MERSCORP Holdings, Inc.*, No. 13-CI-00060 (Franklin Cir. Ct. Jan. 23, 2013).

In contrast, Connecticut has long accommodated MERS and its members. Connecticut has never commenced litigation nor enacted legislation that would put MERS out of business and has repeatedly rejected challenges by homeowners to MERS's role in foreclosure actions.² General Statutes § 49-17, a relative anomaly in the country, allows a mortgagee to foreclose irrespective of whether it, or an entity like MERS, is the mortgagee of record. See *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224 (2011). At most, Connecticut has sought to recoup some of the savings MERS and its members will realize through their practices and has done so in a manner that adds only minimally to the closing costs on MERS-connected mortgages.

The amicus brief submitted by the Connecticut Bankers Association, Connecticut Mortgage Bankers Association, and American Land Title Association ("Industry Brief") alleges that the trial court mischaracterized the operation of MERS and predicts a parade of horrors if this Court affirms. These allegations are baseless. The trial court quoted extensively from the Joint Stipulation of Facts to describe MERS. It did not rely on any

² The one notable exception was the Superior Court decision in *MERS v. Miller*, judicial district of New Haven, docket no. CV04-4004804-S (*Crawford, J.*, Apr. 15, 2008), where the court declined to permit MERS to be a foreclosing plaintiff (as many other states have done), a practice that MERS since abandoned nationwide. MERSCORP Holdings, Inc., "Setting the Record Straight: MERSCORP's Response to Some of Attorney General Schneiderman's Claims," (February 3, 2012), available at <https://www.mersinc.org/media-room/press-releases/archives-2012/14-media-room/press-releases-archives/press-releases-2012/196-setting-the-record-straight-merscorp-s-response-to-some-of-attorney-general-schneiderman-s-claims> (last visited March 19, 2015) (copy in Appendix).

claims about the effect of MERS on the market or the motivation to create MERS. In urging this Court to disregard the Industry Brief, we will explain why the increased recording fee will not affect the Connecticut mortgage market and show that the Industry Brief's core arguments are inaccurate, unsupported, and inapplicable to the issues at hand.

1. This Legislation Will Not Adversely Affect Consumer Interest Rates

The fees at issue will not raise interest rates in Connecticut. The primary determinants of mortgage interest rates are the willingness of the secondary mortgage markets to purchase mortgages, Federal Reserve interest rate policies, and the likelihood that homeowners will prepay or default on their mortgages. See J. Stroebel & J.B. Taylor, "Estimated Impact of the Federal Reserve's Mortgage-Backed Securities Purchase Program," 8 *International J. Central Banking* 1, 7-8 (2012) (copy in Appendix). MERS stipulated at the trial court that the recording fee increase will be passed on directly to homebuyers. J.S. ¶ 25. Closing costs such as the fee at issue do not materially affect secondary mortgage markets, and no evidence exists to show how it could possibly affect mortgage interest rates.

The Industry Brief argues that "MERS and the MERS® System create an efficient secondary market, and thus allow financing to become more accessible and, more affordable, thereby helping to keep lending interest rates down." Industry Brief, 8. However, they present no facts to support this contention. Even if this is true, it does not follow that the recording fee increase will reduce participation in MERS or otherwise decrease participation in the supposedly efficient secondary market. MERS stipulated to the trial court that it could not identify any MERS members that had abandoned the MERS system

in response to the increased fees. J.S. ¶ 26. This result is predictable: The fees at issue are passed on to the consumer, J.S. ¶ 25, and so do not harm the lender.

Even if lenders paid the recording fee increase, lenders would have no reason to abandon MERS over the \$106 fee unless the MERS system provides less than \$106 in savings per mortgage to lenders. If the significant efficiency gains described in the Industry Brief are accurate, along with the savings in labor costs from avoiding recordation of multiple assignments in each of the 169 municipalities, lenders will stay with MERS.

In addition to having no effect on interest rates, the \$106 fee increase is dwarfed by other closing costs. Lenders pass the recording fee on to consumers, who pay it as part of the closing costs at the time of purchase (or during a subsequent refinance). Total closing costs are typically 2-5% of the home purchase price, Zillow, "What Are Closing Costs and How Much Are They Typically?," available at <https://www.zillow.com/mortgage-rates/buying-a-home/closing-costs> (last visited March 13, 2015) (copy in Appendix), or \$4,000 to \$10,000 on a \$200,000 home. These costs vary considerably from state to state. See Bankrate.com, "Closing Costs: States Ranked," available at <http://www.bankrate.com/finance/mortgages/closing-costs/closing-costs-by-state.aspx> (last visited March 13, 2015) (copy in Appendix). An average homebuyer in Connecticut pays \$2,555 in non-tax, non-title related closing costs on a \$200,000 house. *Id.* By contrast, the same homebuyer pays \$3,046 in Texas, \$2,564 in Massachusetts, and \$2,892 in New York. *Id.* Due to large and variable closing costs, the modest recording fee increase will neither have a significant impact on total fees nor affect interest rates in any way.

2. This Legislation Will Not Lead to an Increase in the Guarantee Fee Charged by GSEs

An increased recording fee will not cause Government Sponsored Entities (GSEs), such as Fannie Mae and Freddie Mac, to increase the guarantee fee for Connecticut mortgages. The guarantee fee is the fee charged by GSEs in exchange for guaranteeing timely repayment by mortgagors. Federal Housing Finance Agency, “Results of Fannie Mae and Freddie Mac Guarantee Fee Review,” (April 17, 2015), p. 2, available at <http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFAGFEEFactSheet4-17-2015.pdf> (last visited April 28, 2015) (copy in Appendix). The GSEs charge guarantee fees, in theory, to recoup losses from a mortgage default. *Id.* On April 17, 2015, the Federal Housing Finance Agency (FHFA) announced it had abandoned plans to maintain higher guarantee fees in Connecticut and three other states with higher-than-average foreclosure costs (resulting from longer times to either dispose of the property through auction or obtain it free of junior encumbrances, based on state law and the legal system). *Id.*, 3. Instead, the FHFA will increase guarantee fees according to their risk profile and require lenders to purchase private mortgage insurance on the riskiest loans. *Id.*, 3-4.

The FHFA’s April 17, 2015 announcement extinguishes the Industry Brief’s concern that increased recording fees could lead to higher guarantee fees. By cancelling any plans to maintain higher guarantee fees in states with longer times to foreclosure and opting instead to set guarantee fees based on the riskiness of the loan, FHFA leaves it to servicers to choose whether they will service riskier loans.

In any case, increased recording fees will not prolong foreclosures or raise the costs of foreclosure in Connecticut. This is because Connecticut law and this Court’s prior rulings already provide a mortgagee with a straightforward path to foreclosure regardless of

whether it is also the mortgagee of record. Under General Statutes § 49-17, an entity can foreclose even if it does not hold title to the land. *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 230 (2011) (holding that § 49-17 “codifies the well established common-law principle that the mortgage follows the note,” thereby establishing a “statutory right for the rightful owner of a note to foreclose on real property regardless of whether the mortgage has been assigned to him”). Moreover, this Court has held that “the holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under § 49–17.” *Id.*, 231-32. In sum, MERS adds no extra value to foreclosing plaintiffs, and increases in recording fees on MERS-related mortgages do not jeopardize the ability of note holders to initiate and conclude foreclosures under the regime created by General Statutes § 49-17.

3. This Legislation Will Not Undermine the Integrity of Land Records

The additional charge to MERS will not affect the integrity of land records because (1) it does not prevent MERS from serving as the mortgagee of record and (2) MERS’s role in adding to the integrity of land records is overblown. Land records are fundamental to the mortgage market because they allow lenders, borrowers, and others to determine who owns a piece of property. Town clerks have long maintained Connecticut land records. Since the 1990s, much of this responsibility has shifted to MERS. Because this bill does not compromise the ability of both MERS and town clerks to accurately record land transfers, Connecticut land records will not be harmed by this legislation.

Contrary to the Industry Brief’s claim, MERS has damaged – not improved – the integrity of land records. A consent agreement between MERS and the Office of the Comptroller of the Currency found that MERS “failed to exercise appropriate oversight” and

“failed to establish and maintain adequate internal controls, policies, and procedures . . . with respect to the administration and delivery of services” Consent Order, *In re MERSCORP, Inc. and Mortg. Elect. Registration Sys., Inc.* (No. AA-EC-11-20, Office of the Comptroller of the Currency Apr. 13, 2011), p. 5, available as document no. 2011-044, at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf> (last visited March 21, 2015) (copy in Appendix).

MERS’s troubles arise partly from its reliance on its members’ “certifying officers” to report mortgage assignments and changes in servicing rights and its inability to directly supervise these officers. *HSBC Bank USA, N.A. v. Taher*, 962 N.Y.S.2d 301, 302 (2013). One court was “deeply troubled that, with little to no oversight, individuals without any tie to or knowledge of the company on whose behalf they are acting may assign mortgages—that is, they may transfer legal title to someone else's home.” *Culhane v. Aurora Loan Servs. of Nebraska*, 826 F. Supp. 2d 352, 374 (D. Mass. 2011) *aff’d*, 708 F.3d 282 (1st Cir. 2013). The New York Attorney General found that MERS was “consistently” failing to “register loan transactions in the MERS system, including transfers of ownership interests and servicing rights.” Complaint at 5, *New York v. JP Morgan Chase*, No. 0002768-2012, 2012 WL 361985 (February 3, 2012). As one commenter observed, given that

MERS 1) is not aware every time a certifying officer executes documents on behalf of MERS, 2) has no idea how many [documents] are done in its name, 3) has no employees to verify such documents, and 4) indemnifies MERS members for the faulty acts of its members, it is doubtful that MERS has any factual basis upon which to allege that its system of tracking ownership is any more accurate than the previous way of tracking note and mortgage transfers.

D.A. Zacks, "Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures," 29 Quinnipiac L. Rev. 551, 589 (2011).³ Citing Zacks, the Supreme Court of Washington has also expressed alarm at MERS's faulty recordkeeping: "MERS's officers often issue assignments without verifying the underlying information, which has resulted in incorrect or fraudulent transfers." *Bain v. Metro. Mortg. Group, Inc.*, 285 P.3d 34, 51 (Wash. 2012) (citing Zacks, *supra*, 580).

Empirical evidence corroborates this description of MERS records as containing is substantial inaccuracies. One study of 396 mortgages in six states found that the "owner" in MERS records frequently did not match either the foreclosing plaintiff or the owner identified by the servicer. A.M. White, "Losing the Paper - Mortgage Assignments, Note Transfers and Consumer Protection," 24 Loy. Consumer L. Rev. 468, 487 (2012). A report commissioned by the City of San Francisco found irregularities in 58 percent of MERS cases, a rate far higher than in non-MERS cases. Office of the Assessor-Recorder of San Francisco, "Foreclosure in California: A Crisis of Compliance," (February 2012), p. 13, available at http://aequitasaudit.com/images/aequitas_sf_report.pdf (last visited on March 13, 2015) (copy in Appendix). While the Industry Brief is correct – MERS informs borrowers

³ See also J.W. Singer, "Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them," 46 Conn. L. Rev. 497, 517 (2014) ("The banks did not think there was a reason to have a clear chain of title showing the written mortgage assignments from the first mortgagee to the current one that was seeking to foreclose. Nor were they sufficiently careful about endorsing and storing the underlying note so that it would be accessible if needed for foreclosure. The banks also securitized and transferred so many mortgages that they made mistakes in record keeping. Their records are incomplete in some cases and inaccurate in others. They failed to carefully document all the mortgage transfers and they lost or misplaced notes. They overly relied on the MERS mechanism." (footnotes omitted))

who their servicer is – this “service” is vestigial at best. Per federal law, servicers regularly identify themselves to borrowers through monthly mortgage statements.

These empirical studies call into question the flimsy evidence cited in the Industry Brief. For the claim that disentangling assignment errors before MERS could cost \$250,000 for a block of 2,500 loans, the Industry Brief cites the American Bankers Association Banking Journal, Industry Brief at 3, which attributes this statistic to an unnamed “industry estimate.” S. Cocheo, “Moving from Paper Blips (the proposed Mortgage Electronic Registration System),” 88 American Bankers Ass’n Banking J. 48 (Jan. 1996). The Industry Brief next cites, at 3, an article by R.K. Arnold to argue that pre-MERS error rates in note assignments could reach 33 percent. R.K. Arnold, “Yes, There Is Life on MERS,” Prob. & Prop., July/Aug 1997, at 32, 33. Yet the Industry Brief neglects to mention that at the time Arnold wrote that article, he was not a disinterested person but was the Senior Vice President, General Counsel, and Secretary of MERS, *id.* at 36, and that Arnold cites no source whatsoever for the 33 percent figure, *id.* at 34.

4. The Trial Court Accurately Characterized MERS

The Industry Brief contends that the trial court mischaracterized the “origins” and “ongoing benefit” of MERS by finding that MERS was created to “bypass filing fees for recording assignments” Industry Brief, 2. However, the trial court relied extensively on the Joint Stipulation to describe MERS when it found “the crucial difference between members of MERS and non-members is that . . . the former can assign/transfer amongst themselves an indefinite amount of times, and never need to record or pay a filing fee, whereas the latter would need to record and pay a filing fee with each transaction.”

Merscorp et al. v. Malloy et al., Superior Court, judicial district of Hartford, 2014 WL

2854013 at *10 (*Sheridan, J.*, May 19, 2014). This is consistent with the Joint Stipulation of Facts. J.S. ¶ 10 (“When a Connecticut loan . . . is transferred among MERS System members, there is no need for a separate assignment of the mortgage because there is no change in the mortgagee; it remains MERS.”). This is also consistent with reality. See, e.g., C.L. Peterson, "Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System," 78 U. Cin. L. Rev, 1359, 1368-69 (2010) (describing how the Mortgage Bankers Association determined that “the finance industry could save a lot of money by deciding not to pay the fees that local governments require to record mortgage assignments”). The Industry Brief’s criticism of the Joint Stipulation to which MERS was party is especially peculiar given the close ties of the amici to MERS itself.⁴ Regardless, the trial court’s summary of the relevant facts was accurate.

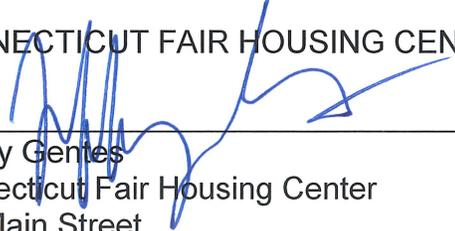
CONCLUSION

For the foregoing reasons, the Mortgage Foreclosure Litigation Clinic of the Jerome N. Frank Legal Services Organization and the Connecticut Fair Housing Center ask this Court to rule in favor of the defendants. The Industry Brief’s meritless arguments should not deter this Court from affirming the trial court’s decision.

⁴ Although the amici acknowledge that MERSCORP Holdings and MERS helped pay to prepare and submit the Industry Brief, the amici’s ties to MERS go deeper. Two amici, the Mortgage Bankers Association, of which the Connecticut Mortgage Bankers Association is a state-level constituent, Mortgage Bankers Association, “State and Local Associations,” available at <https://www.mba.org/who-we-are/state-and-local-associations> (last visited March 21, 2015), and the American Land Title Association, are two of the twenty-two shareholders in MERSCORP Holdings, the parent company of MERS, Inc. MERSCORP Holdings, Inc., “Shareholders,” available at <http://mersinc.org/about-us/shareholders> (last visited March 13, 2015). Representatives from both sit on the Boards of Directors of MERSCORP Holdings and MERS. MERSCORP Holdings, Inc., “Board of Directors,” available at <https://www.mersinc.org/about-us/board-of-directors> (last visited March 13, 2015) (copies of all in Appendix).

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CERTIFICATION

This is to certify that the foregoing brief complies with all provisions of Practice Book §§ 66-3 and 67-2, and that on this the 1st day of May, 2015, the foregoing brief and accompanying appendix were mailed and electronically transmitted to the following:

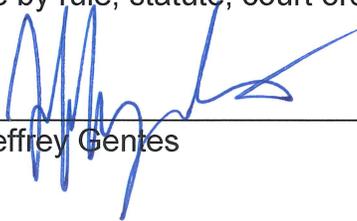
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This is further to certify pursuant to § 67-2 (i) that the foregoing brief is a true copy of the brief submitted electronically to the Court on this day, and that the brief does not contain any information prohibited from disclosure by rule, statute, court order, or case law.



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