No. 98,489

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LANDMARK NATIONAL BANK,

Plaintiff/Appellee,

v.

BOYD A. KESLER,

Appellee/Cross-Appellant,

MILLENNIA MORTGAGE CORP.,

Defendant,

MORTGAGE ELECTRONIC REGISTRATION

SYSTEMS, INC. AND SOVEREIGN BANK,

Appellants/Cross-Appellees,

and

DENNIS BRISTOW AND TONY WOYDZIAK,

Intervenors/Appellees.

SYLLABUS BY THE COURT

1. A party is not contingently necessary in a mortgage-foreclosure lawsuit when that party is called the mortgagee in a mortgage but is not the lender, has no right to the repayment of the underlying debt, and has no role in handling mortgage payments.

2. In a mortgage-foreclosure lawsuit, a district court does not abuse its discretion when it denies a motion to intervene that is filed by an unrecorded mortgage holder or its agent after the mortgage has been foreclosed and the property has been sold.

Appeal from Ford District Court; E. LEIGH HOOD, judge. Opinion filed September 12, 2008. Affirmed.

Tyson C. Langhofer and *Court T. Kennedy*, of Stinson Morrison Hecker, L.L.P., of Wichita, for appellants/cross-appellees.

Ted E. Knopp, of Ted E. Knopp, Chartered, of Wichita, for appellee/cross-appellant Boyd A. Kesler.

Ted E. Knopp, of Ted E. Knopp, Chartered, of Wichita, for intervenors/appellees Dennis Bristow and Tony Woydziak.

Before GREENE, P.J., MARQUARDT and LEBEN, JJ.

LEBEN, J.: Landmark National Bank brought a suit to foreclose its mortgage against Boyd Kesler and joined Millennia Mortgage Corp. as a defendant because a second mortgage had been filed of record for a loan between Kesler and Millennia. In a foreclosure suit, it is normal practice to name as defendants all parties who may claim a lien against the property. When neither Kesler nor Millennia responded to the suit, the district court gave Landmark a default judgment, entered a journal entry foreclosing Landmark's mortgage, and ordered the property sold so that sale proceeds could be applied to pay Landmark's mortgage.

But Millennia apparently had sold its mortgage to another party and no longer had interest in the property by this time. Sovereign Bank filed a motion to set aside the judgment and asserted that it now held the title to Kesler's obligation to pay the debt to Millennia. And another party, Mortgage Electronic Registration Systems, Inc. ("MERS"), also filed a motion to set aside the judgment and asserted that it held legal title to the mortgage, originally on behalf of Millennia and later on behalf of Sovereign. Both Sovereign and MERS claim that MERS was a necessary party to the foreclosure lawsuit and that the judgment must be set aside because MERS wasn't included on the foreclosure suit as a defendant.

The district court refused to set aside its judgment. The court found that MERS was not a necessary party and that Sovereign had not sufficiently demonstrated its interest in the property to justify setting aside the foreclosure.

I. *The District Court Properly Refused to Set Aside the Foreclosure Judgment Because MERS Was Not a Necessary Party.*

To resolve these claims, we will review some basic concepts of mortgages and foreclosure proceedings. We must pay close attention not only to the terms given to the parties in carefully crafted documents but also to the roles each party actually performed. No matter the nomenclature, the true role of a party shapes the application of legal principles in this case.

A mortgage grants a title or lien against a property as security for the payment of a debt or the performance of a duty. The "mortgagor" is the borrower who grants a mortgage in exchange for a loan; the "mortgagee" is the lender who gives the loan secured by the mortgage. See Black's Law Dictionary 1031, 1034 (8th ed. 2004). The mortgagee is so well understood as the lender that Black's Law Dictionary defines a "foreclosure" as an action brought by the lender/mortgagee: a foreclosure is a "legal proceeding to terminate a mortgagor's interest in property, instituted by the

lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." Black's Law Dictionary 674. Similarly, the tie between a mortgage and an underlying debt is so intrinsic that Kansas law provides that "[t]he assignment of any mortgage . . . shall carry with it the debt thereby secured." K.S.A. 58-2323. Indeed, an assignment of a mortgage without the debt transfers nothing. 55 Am. Jur. 2d, Mortgages § 1002. Thus, the mortgagee, who must have an interest in the debt, is the lender in a typical home mortgage.

But for reasons thought beneficial by a group of lenders who trade mortgages, the form of mortgage used in this case designates an entity that is *not* the lender as the mortgagee. See *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (MERS was established by large lenders to allow easy electronic trading and tracking of mortgages). Specifically, the mortgage says that the mortgagee is MERS, though "solely as nominee for Lender." Does this mean that MERS really *was* the mortgagee, even though it didn't lend money or have any rights to loan repayments? Assuming so, MERS argues that it was a necessary party to the foreclosure and that the foreclosure must be set aside. But the premise upon which MERS bases this argument is flawed.

What is MERS's interest? MERS claims that it holds the title to the second mortgage, not the real estate. So it does, but only as a nominee. In terms of the roles that we've discussed in the mortgage business, MERS holds the mortgage but without rights to the debt. The district court found that MERS was merely an agent for the principal player, Millennia. While MERS objects to its characterization as an agent, it's a fair one.

MERS had no right to the underlying debt repayment secured by the mortgage; MERS did not even act as the servicing agent to receive the payments and remit them to the lender. MERS's right to act to enforce the mortgage was strictly limited: if "necessary to comply with law or custom," MERS could foreclose the mortgage or enter a release of the mortgage. MERS certainly could not act at odds to its principal, the lender. Its role fits the classic definition of an agent: one "'authorized by another to act for him, or intrusted with another's business.'" *In re Tax Appeal of Scholastic Book Clubs, Inc.*, 260 Kan. 528, 534, 920 P.2d 947 (1996) (quoting Black's Law Dictionary 85 [4th ed. 1968]).

Only one Kansas case has discussed the meaning of nominee in any detail. In *Thompson v. Meyers*, 211 Kan. 26, 30, 505 P.2d 680 (1973), the court noted that the meaning of the term may vary from a pure straw man or limited agent to one who has broader authority.

But whatever authority the nominee may have comes from the delegation of that authority by the principal. In its ordinary meaning, a nominee represents the principal in only a "nominal capacity" and does not receive any property or ownership rights of the person represented. See, *e.g.*, *Cisco v. Van Lew*, 60 Cal. App. 2d 575, 583-84, 141 P.2d 433 (1943); see also *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 889 (Del. 2002) (referring to nominees "as agents of the beneficial owners"). The Millennia mortgage does not purport to give MERS any greater rights than normally given a nominee. The mortgage says that MERS acts "solely as nominee for Lender." There is no express grant of any right to MERS to transfer or sell the mortgage or even to assign

its duties as nominee. Nor does MERS obtain any right to the borrower's payments or even a role in receiving payments.

MERS and Sovereign correctly note that a foreclosure judgment may be set aside for failure to join a contingently necessary party. *E.g.*, *Wisconsin Finance v. Garlock*, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (1987). For the purposes of our case, a party is contingently necessary under K.S.A. 60-219 if the party claims an interest in the property at issue and the party is so situated that resolution of the lawsuit without that party may "as a practical matter substantially impair or impede [its] ability to protect that interest." The real issue is that of the lender, the true mortgagee, to protect its security interest against the property. Whether MERS may act as a nominee for the lender, either to bring a foreclosure suit or for some other purpose, is not at issue in Landmark's foreclosure lawsuit. Moreover, an agent for a disclosed principal is not a necessary party to a lawsuit adjudicating the substantive rights of the principal. *Hotel Constructors, Inc. v. Seagrave Corp.*, 99 F.R.D. 591, 592 (S.D.N.Y. 1983); *Liles v. Winters Independent School District*, 326 S.W.2d 182, 188 (Tex. App. 1959).

In support of the necessary-party argument, MERS and Sovereign cite *Dugan v. First Nat'l Bank in Wichita*, 227 Kan. 201, 606 P.2d 1009 (1980). In *Dugan*, a bank agreed to act as escrow agent for three parties who loaned money and obtained a mortgage as collateral. The bank was to receive all repayments made on the various loans and then remit them to the lenders in the appropriate percentages; the bank was also the named mortgagee, apparently due to the multiple lenders who were separate actors. The court held that the bank and the lenders were all necessary parties to the lawsuit, in which the borrower sought reformation or cancellation of the mortgages based on fraud and breach-of-fiduciary-duty claims. The bank was a necessary party even though it had no direct financial interest in the loans and would "be affected only tangentially in its position as designated mortgagee and escrow agent." 227 Kan. at 212.

In response, Kesler cites *Moore v. Petroleum Building, Inc.* 164 Kan. 102, 187 P.2d 371 (1947). In *Moore*, a plaintiff had intervened in a past foreclosure action and later filed suit to enjoin a bank and escrow holder from delivering deeds to another party. The bank was used only to hold deeds that would be delivered upon termination of the leases and was not a party to the original foreclosure. The court held that the plaintiff should have raised issues regarding his rights under the escrow agreement in the previous foreclosure case, noting that "there probably was no necessity that [the bank] should have been made a party, for it stood by only as a custodian of the deeds and for no other purpose." 164 Kan. at 108.

We find *Moore* closer to our facts than *Dugan*. Like the bank in *Moore*, MERS did not receive any funds on behalf of Millennia or Sovereign. The mortgage set out clearly that the borrower, Kesler, was to pay his monthly payments to the lender. The mortgage also suggests that the reputed mortgagee, MERS, was not interested in receiving notices of default. The Millennia mortgage, which was duly recorded in the public record, included a section titled "Request For Notice of Default and Foreclosure Under Superior Mortgages or Deeds of Trust." As the district court noted, that section provided that both "Borrower and Lender request" the holder of any mortgage with priority "give Notice to Lender, at Lender's address set forth on page one of this Mortgage, of any default . . . and of any sale or other foreclosure action." Millennia's address was

noted on page one of the mortgage; the mortgage did not list MERS as an entity to contact upon default or foreclosure.

Two older Kansas cases should also be noted, though the parties didn't cite them. In *Swenney v. Hill*, 65 Kan. 826, 70 P. 868 (1902), the court faced a situation somewhat different than today's typical residential-mortgage. As part of the same transaction, a couple borrowed money and then gave mortgage bonds to two individuals and a mortgage to an investment company. Repayment of the loan was made to the bondholders, but the mortgagee/investment company had "extensive rights and active powers over the relationship" between the borrowers and the bondholders. 65 Kan. at 828. While the court did not concern itself with why this structure had been chosen, it determined that the mortgagee/investment company was a necessary party because it had a right under the written agreements to advance additional funds, thus increasing the amount of the lien, as well as the right to declare the loan matured and bring suit. In addition, the mortgage could not be released by the bondholders alone; the mortgagee/investment company was also required to approve it. We do not know from the court's opinion whether the investment company organized the transaction initially or made any guarantee of repayment to the bondholders, but the court said that the investment company had "substantial rights and interests." 65 Kan. at 829.

A second relevant case is *Gibson v. Ledwitch*, 84 Kan. 505, 114 P. 851 (1911). It involved the converse of our case--a party sued to quiet title against a mortgage, which would clear the title from the encumbrance of that mortgage. But the plaintiff joined only a trustee who had no beneficial interest in that mortgage; the beneficial owner was not made a party. The court held that the judgment did not bind the beneficial holder of the mortgage since the trustee had no right to the payments, was not the party to declare default, and had no authority to transfer or foreclose the mortgage.

We also believe that the decisions in *Swenney* and *Gibson* are supportive of the result here. MERS does not have the sort of "substantial rights and interests" that the investment company had in *Swenney*. MERS points to its ability to foreclose or to release the mortgage, authority provided in the mortgage "if necessary to comply with law or custom." Kansas law does require through K.S.A. 58-2309a that a mortgage holder promptly release a mortgage when the debt has been paid; MERS could be required as a matter of law to file a mortgage release after a borrower proved that the debt had been paid. Other than that, however, it is hard to conceive of another act that MERS--instead of the lender--would be required to take by law or custom. And although *Gibson* involves the converse of our case, it suggests that a party with no beneficial interest is outside the realm of necessary parties.

In addition to the claim that MERS was a necessary party under K.S.A. 60-219, MERS and Sovereign also argue that the failure to include MERS violated its due process rights. But MERS had no direct property interests at stake; even its right to act on behalf of its principal was not at issue in Landmark's suit. Without a property interest at stake, there can be no due process violation. *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 265 Kan. 779, 809, 962 P.2d 543 (1998).

We do not attempt in this opinion to comprehensively determine all of the rights or duties of MERS as a nominee mortgagee. As the mortgage suggests may be done when "necessary to

comply with law or custom," courts elsewhere have found that MERS may in some cases bring foreclosure suits in its own name. *Mortgage Electronic Registration v. Azize*, 965 So. 2d 151 (Fla. Dist. App. 2007). On the other hand, some have suggested potential problems created by MERS's practices, *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 100-04, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (Kaye, C.J., dissenting), or with the handling of paperwork documenting who owns what in the residential-mortgage industry in general. *E.g., In re Nosek*, 386 B.R. 374, 385 (Bankr. D. Mass. 2008); *In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio 2007) (unpublished opinion). In this case, we are only required to address whether the failure to name and serve MERS as a defendant in a foreclosure action in which the lender of record has been served is such a fatal defect that the foreclosure judgment must be set aside. We hold that it is not.

II. *The District Court Did Not Abuse Its Discretion by Denying Motions of MERS and Sovereign to Intervene After the Judgment Had Been Entered.*

Neither MERS nor Sovereign argue that Landmark was required to join Sovereign. But both MERS and Sovereign argue that the district court wrongly denied their motions to intervene.

On this argument they face a major hurdle: the Kansas Supreme Court has held that there is no jurisdiction even to consider a motion to intervene made after the entry of judgment and the expiration of the 10-day period for filing new-trial motions. *Smith v. Russell*, 274 Kan. 1076, Syl. ¶ 4, 58 P.3d 698 (2002). Even so, timeliness is to be determined from the specific circumstances of each case. See *Mohr v. State Bank of Stanley*, 244 Kan. 555, 562, 770 P.2d 466 (1989). Although some caselaw allows intervention after judgment "where it is necessary to preserve some right which cannot otherwise be protected," these authorities generally have allowed intervention so that there would be appropriate representation in an appeal when a party that originally participated in the case is no longer adequately representing the intervenor's interest. *E.g.*, *Hukle v. City of Kansas City*, 212 Kan. 627, 631-32, 512 P.2d 457 (1973). Of course, that's not our situation.

The intervention argument faces another hurdle too: the decision whether to permit intervention may be reversed only when no reasonable person could agree with the district court's decision. See *Mohr*, 244 Kan. at 561-62; *Farmers Group, Inc. v. Lee*, 29 Kan. App. 2d 382, 385, 28 P.3d 413 (2001). Sovereign's motion to intervene was filed 76 days after foreclosure, 53 days after the court ordered the property sold, and 26 days after the property was sold. MERS's motion to intervene was filed 134 days after foreclosure, 111 days after the court ordered the property sold, and 84 days after the property was sold. Especially in light of *Smith*'s holding that a court lacked jurisdiction when the motion to intervene came after the 10-day period for filing new-trial motions, we believe it would be extremely difficult--even if the district court had jurisdiction to grant intervention--to reverse for an abuse of discretion on motions filed as far after judgment as those of Sovereign and MERS.

MERS and Sovereign argue that their intervention motions were timely because the time for filing an appeal had not yet run. They base this argument on a claim that the time to file an appeal doesn't begin until the sheriff's sale of the property is confirmed. But a judgment of foreclosure is a final judgment for appeal purposes when it determines the rights of the parties,

the amounts to be paid, and the priority of claims. *Stauth v. Brown*, 241 Kan. 1, 6, 734 P.2d 1063 (1987). The foreclosure judgment in this case did so. We find no abuse of discretion in denying intervention.

III. *Separate Claims by Kesler and Other Parties Are Not Properly Raised on Appeal.*

Dennis Bristow and Tony Woydziak, who together bought the property at a sheriff's sale, have sought to proceed with Kesler on a cross-appeal to challenge the district court's orders enjoining them from finalizing sale of the property while the appeal was heard. They also seek a ruling that Sovereign is bound by the district court's judgment.

Kesler, Bristow, and Woydziak raise issues that are not based on the same judgments on which MERS and Sovereign have filed their appeal. The joint notice of appeal from MERS and Sovereign noted an appeal from "(1) Journal Entry of Judgment filed September 6, 2006; (2) Order filed January 18, 2007; (3) Supplemental Order filed January 18, 2007; and (4) Order Denying Motions for Reconsideration filed March 22, 2007." But Kesler, Bristow, and Woydziak attempted to include a separate district court decision, entered May 2, 2007, which had denied their motions to dismiss for lack of jurisdiction the motions to intervene by MERS and Sovereign and also granted a stay pending appeal to MERS and Sovereign. A cross-appeal must involve the same judgment as the underlying appeal, but Kesler, Bristow, and Woydziak argue a separate issue from a different district court order.

Even if the same judgment were involved, notice of a cross-appeal must be filed within 20 days of the notice of appeal. MERS and Sovereign filed their joint notice of appeal on March 28, 2007; Kesler, Bristow, and Woydziak did not seek to file a cross-appeal within 20 days of that date.

This court is without jurisdiction to address the separate issues raised on appeal by Kesler, Bristow, and Woydziak.

Conclusion

The district court properly determined that MERS was not a contingently necessary party in Landmark's foreclosure action. The district court also was well within its discretion in denying motions from MERS and Sovereign to intervene after a foreclosure judgment had been entered and the foreclosed property had been sold. The judgment of the district court is affirmed.

END

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: **RAYMOND VARGAS,** Debtor.	Case No.: LA08-17036SB Chapter 7 **MERS RELIEF FROM STAY MOTION: FINDINGS OF FACT AND CONCLUSION OF LAW** Date: September 30, 2008 Time: 9:30 a.m. Ctrm: 1575 Floor: 15th

I. Introduction

Movant Mortgage Electronic Registration Systems, Inc. ("MERS") supports this relief from stay motion solely with evidence from a low level clerk whose only function is to compare the financial numbers on his evidentiary declaration with those on a computer screen. After trial, the court finds that the clerk is not competent to testify as to anything relevant to the motion, under the applicable evidentiary rules, and that MERS has presented no admissible evidence in support of its motion. In consequence, the court denies the motion. In addition, the court finds that sanctions should be imposed on the law firm under Rule 9011[1] for bringing the motion with no evidentiary support.

In addition, MERS purports to join as moving parties "its assignees and/or successors in interest." The court finds that this is an improper effort to obtain relief from stay for undisclosed parties, and that the motion must be denied also on these grounds.

II. Relevant Facts

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C.A. §§ 101-1532 (West 2008) and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Debtor Raymond Vargas is an 83-year old retired World War II veteran, whose monthly income consists of approximately $1,004 in social security payments and a union pension of $308. Debtor purchased a new home in 1971, and fully paid the mortgage thereon in approximately 1993. His wife became ill in approximately 2000, and suffered multiple ailments that led to her death in December 2004.

Debtor obtained a reverse mortgage from Wells Fargo Bank in December 2003 for approximately $320,000 to pay for his wife's medical care and expenses. In opposition to the motion, debtor also submitted loan documents for two other loans, in 2004 and in 2005, which appeared to bear his signature but which he did not recall making. He was physically debilitated and wheel-chair bound at the time these loans were purportedly made. None of these loans is at issue in this case.

There purport to be two loans in 2006. One was made on May 12 for $650,000 with Countrywide Bank. The other, which underlies this motion for relief from the automatic stay, was purportedly made with Freedom Home Mortgage ("FHM") on October 3 for $630,000. In addition, there is another October 3 loan for $150,500, also with FHM. Debtor asserts that none of these documents bears his signature and that each signature is invalid and forged.

The documents submitted with this motion include an adjustable rate promissory note, in which FHM is the promisee, in the amount of $630,000 with an initial interest rate of 1.75% per annum. The note is supported by a deed of trust, showing FHM as the lender. The deed of trust shows that MERS is the beneficiary under the deed of trust "acting solely as a nominee for lender and lender's successors and assigns."

No evidence is provided as to any adjustments in the interest rate, whether proper or improper, pursuant to the adjustment clause. Debtor denies having signed either the promissory note or the deed of trust and asserts that the signatures are forged.

The debtor filed this case originally under chapter 13 on May 21, 2008. On July 7, 2008, the case was converted to a case under chapter 7. MERS filed its motion for relief from the automatic stay on July 30, 2008. The movant, as stated in the motion, is "Mortgage Electronic Registrations System, Inc. (MERS), its assignees and/or successors in interest."

The motion includes a declaration by Robert Turner, an employee of Countrywide Home Loans, Inc. ("Countrywide"), "which is a duly authorized servicing agent of the Movant." The declaration states that Turner is a custodian of the books, records and files of "Movant," that he knows that these documents were prepared in the ordinary course of business of "Movant" and that he has a business duty to record accurately the events documented in those records. However, neither the declaration nor the testimony at trial gives any hint as to how Turner has custody of any books, records or files of MERS, or as to any connection between him and MERS.

Turner appeared and testified on September 30, 2008 on this motion. From his testimony the court finds that he is a low level clerk for Countrywide responsible for some 500 loan defaults per week in Southern California. His principal responsibility is to review draft motions for relief from stay, to make sure that the numbers in paragraphs 6[2] and 8[3] of his declaration agree with the numbers that appear on the Countrywide computer screen at his desk. He testified that

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[2] Paragraph 6 of the form declaration requires that the movant state the following information about the loan at issue: the amount of principal, accrued interest, late charges, costs, advances, and the total claim.

[3] Paragraph 8 requires that the movant state the current interest rate, the contractual maturity date, the amount of the current monthly payments, the number of unpaid prepetition and postpetition payments, the date of postpetition default, the date of the last payment received, the date of recording of a notice of default and a notice of sale, the date of the scheduled foreclosure, and the amounts of future payments coming due (including the late charge, if the payment is not timely).

he spends about five minutes on this task for each relief from stay motion. He further testified that, apart from checking these numbers, he gives no consideration to anything else contained in such a declaration, and that he gave no consideration to anything else but the numbers in paragraphs 6 and 8 of the declaration before the court.

III. Analysis

The motion for relief from stay must be denied on two separate grounds. First, it purports to include unidentified moving parties, who are intended to benefit from the relief from stay order. Second, Turner is altogether incompetent to give any testimony relevant to this motion.

A. Names of the Parties

MERS purports to join as moving parties "its assignees and/or successors in interest," which are otherwise unidentified. No such unidentified parties are permitted in a motion before the court.

Rule 10(a) of the Federal Rules of Civil Procedure provides in relevant part: "Caption; Names of Parties. Every pleading must have a caption . . . . The title of the complaint must name all of the parties."[4] While there is no comparable rule in the Federal Rules of Bankruptcy Procedure, Local Rule 1002-1(a)(8) fills in this gap by specifying what must be stated on the title (or first) page of all papers filed in this court. Rule 1002-1(a)(8)(D) states: "The names of the parties shall be placed below the title of the court and to the left of center . . . ."

For a relief from stay motion, the movant must use local form 4001-1M.RP. See Local Rule 1002-1(d)(9) ("Motions for relief from stay shall be made using those forms designated for mandatory use in the F 4001-1 series of the court-approved forms."). Like Rule 1002-1(d)(8), the form requires that the name of the movant be stated on the second line below the line stating, "Notice of Motion and Motion for Relief from the Automatic Stay." Thus, each movant in a motion for relief from stay must be named on the first page of the motion.

The identification of the movant serves several important functions. First, it links the motion to the Schedule A list of real property owned by the debtor. Second, this identification links the motion to the Schedule D list of creditors holding secured claims. Third, this identification permits the judge to determine whether the judge must recuse based on the Code of Conduct for United States Judges (requiring recusal in a variety of circumstances based on the judge's relationship, if any, to the moving party).[5]

The exclusion of these unidentified parties is particularly important in this proceeding. It is highly unlikely that FHM has kept the promissory note: most likely, it sold the note into the market for mortgage securitization.[6] In consequence, it is quite unlikely that MERS is an authorized agent of the holder of the note here at issue. By adding these unidentified movants, MERS is trying to obtain relief from the automatic stay for the current note holders without disclosing to the court their existence, identities or the source of MERS's authority to act on their behalf. This is improper.

A secured promissory note traded on the secondary mortgage market remains secured because the mortgage follows the note. CAL. CIV. CODE § 2936 ("The assignment of a debt secured by

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[4] This provision also prohibits the addition of a "John Doe" defendant (i.e., an unidentified defendant whose name may be provided at a later date).

[5] As of this date, I still do not know whether my recusal may be required in this case.

[6] *See, e.g.*, James R. Barth et al., *A Short History of the Subprime Mortgage Market Meltdown* 5 fig.2 (Milken Institute 2008), *available at* http://www.milkeninstitute.org/publications/publications.taf?function=detail&ID=38801038&cat=Papers (showing that approximately 85% of all home mortgages originated in 2006 and 2007 were securitized).

mortgage carries with it the security."). California codified this principle in 1872. Similarly, this has long been the law throughout the United States: when a note secured by a mortgage is transferred, "transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *Carpenter v. Longan*, 83 U.S. 271, 275 (1872). Clearly, the objective of this principle is "to keep the obligation and the mortgage in the same hands unless the parties wish to separate them." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997). The principle is justified, in turn, by reasoning that the "the debt is the principal thing and the mortgage an accessory." *Id.* Consequently, "[e]quity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both." *Id.* Given that "the debt is the principal thing and the mortgage an accessory," the Supreme Court reasoned that, as a corollary, "[t]he mortgage can have no separate existence." *Carpenter*, 83 U.S. at 274. For this reason, "an assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Id.* at 274. While the note is "essential," the mortgage is only "an incident" to the note. *Id.*

Thus, if FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner.

In consequence, because these purported movants are not identified, the motion must be denied on these grounds alone.

B. Competence of Witness

The purpose of the declaration submitted with the motion, which is a mandatory form in the Central District of California,[7] is to provide competent evidence supporting the motion for relief from the automatic stay. Competent evidence is required so that "the truth may be ascertained and proceedings justly determined." FED R. EVID. 102. Questions concerning the admissibility of evidence are determined by the court. *See id.* 104(a).

While the form of the declaration is mandatory, a moving party is required to modify and supplement it (and show the modifications) to present admissible evidence on every item covered by the declaration. It is manifest that, except for the numbers in paragraphs 6 and 8, Turner made no attempt whatever to assure the accuracy of the declaration.

The general rule is that a witness may only testify as to matters within the personal knowledge of the witness: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *Id.* 602. MERS has failed to introduce evidence of any kind sufficient to show that Turner has personal knowledge or is otherwise competent to testify as to any matter relevant to the motion before the court.

1. Payments and Amount Owing

Hearsay evidence is not admissible unless an exception to the hearsay rule applies: "Hearsay is not admissible except as provided by these rules . . . ." *Id.* 802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* 801(c). In his declaration, Turner presented the numbers in paragraphs 6 and 8 for their truth. This evidence was hearsay, and is not admissible unless an exception to the hearsay rule is applicable.

The declaration in a real property relief from stay motion is required to state in paragraph 6 the amount of movant's claim with respect to the property, including the

[7] *See* Local Rule 1002-1(d)(9).

principal owing on the loan, the amount of accrued interest, the amount of late charges, any advances such as for property taxes or insurance, and the total amount of the claim. The declarant must further attach a true and correct copy of the promissory note and the deed of trust, and the declarant must be competent to testify as to the authenticity of these documents. The form further requires that the declarant state in paragraph 8 the current rate of interest, the number and amount of unpaid prepetition payments, the number and amount of postpetition payments, the date of the recording of any notice of default or notice of sale, and further information on the foreclosure process. The declaration must also state the fair market value of the property and the basis for this determination. A number of other items relating to the promissory note, the lien and the status of debtor's payments are also required.

FHM apparently relies on Rule 803(6) for the admissibility of this hearsay evidence.[8]

"The basic elements for the introduction of business records under the hearsay exception for records of regularly conducted activity all apply to records maintained electronically." *In re Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005). *Vinhnee* also states the requirements for qualification as business records: "Such records must be: (1) made at or near the time by, or from information transmitted by, a person with knowledge; (2) made pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness." *Id.* (citing FED. R. EVID. 803(6); *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988)).

The admission of computer records requires that movant provides an 11-step foundation:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

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[8] Rule 803(6), providing for the admission of records of regularly conducted activity (formerly known as the "business records rule"), states:

> **Records of regularly conducted activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Vinhnee, 336 B.R. at 446 (citing EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 4.03[2] (5th ed. 2002)).

Under Ninth Circuit law, the fourth requirement subsumes details regarding the computer policy consisting of (a) control procedures including control of access to the database, (b) control of access to the program, (c) recording and logging of changes, (d) back-up practices, and (e) audit procedures to assure the continuing integrity of the records. *See id.* at 446-47.

Turner did present competent evidence as to items 1 and 6 through 8. The remaining seven requirements, however, were totally unmet, including *Vinhnee's* five-part gloss on the fourth element. The court finds that Turner was unable and failed to present any competent testimony as to these items.

2. Documents – Note and Deed of Trust

In addition to the data concerning payment on the loan, movant must provide evidence that the underlying debt is owing to it, and evidence of the security interest (if the obligation is secured).

A party offering an item of non-testimonial evidence, such as a document (not offered to prove the truth of its contents), must prove that the item is what the party claims it is. *See, e.g.*, 31 WRIGHT & GOULD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE ¶ 7101 (2000). Accordingly, authentication is a condition to the admissibility of such evidence. *See id.*

Thus, a person testifying in support of a motion for relief from stay (including a declarant making a declaration under penalty of perjury) must have personal knowledge of the authenticity of the promissory note and deed of trust, or the documents must be admissible under another evidentiary rule.

MERS attached to Turner's declaration a copy of the relevant promissory note and deed of trust. However, MERS declined to move the admission of any of these documents or any other documents attached to the moving papers. Thus, there is no evidence properly before the court as to the promissory note or the deed of trust.

Similarly, MERS declined to move the admission of the declaration itself. Indeed, the court finds that Turner is not competent to testify as to any relevant information underlying the relief from stay motion.

a. Promissory Note

There are two issues that MERS must address with respect to the promissory note. First, it must authenticate the note. Second, it must show that it is entitled to enforce the note.

i. Authentication of Note

For admission as evidence, a promissory note does not need to qualify as a record of regularly conducted activity (or for some other exception to the hearsay rule). The note itself is not hearsay, and thus is not subject to the hearsay rule. *See, e.g., Remington Invs., Inc. v. Hamedani*, 55 Cal. App. 4th 1033, 1042 (App. 1997) ("A promissory note document itself is not a business record as that term is used in the law of hearsay, but rather is an operative contractual document admissible merely upon adequate evidence of authenticity.").

A promissory note cannot be admitted into evidence unless it is authenticated.[9] Federal Rule of Evidence 901(a) provides: "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(b) illustrates how a document such as a promissory note may be authenticated. Turner gave no testimony as to the authenticity of the note here at issue, and

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[9] In fact, there is no rule of evidence that explicitly requires that a document be authenticated. However, this unstated requirement underlies the rules on authentication of documents. *See* 31 WRIGHT & GOLD, *supra*, ¶ 7012 (2000).

MERS has not presented any evidence on this subject.

Indeed, the debtor vigorously contests the authenticity of the note in this case. Given the lack of evidence on the part of MERS, authentication of the note is altogether missing from its evidence in this case.

ii. Right to Enforce the Note

In addition to authenticating the note, MERS must show that it is entitled to enforce the note. Only the holder of a negotiable promissory note (with minor exceptions not relevant in this case) is entitled to enforce the note. *See* CAL. COM. CODE § 3301. The holder enforces the note by making a demand for payment. *See id.* § 3501(a). The person making a demand shows its right to enforcement by showing the original of the promissory note. *See id.* § 3501(b)(2).

MERS has not brought to court the note here at issue, and makes no pretense that it holds the note. Indeed, MERS is not in the business of holding promissory notes.[10] Its business is only to hold deeds of trust as an agent for the holder of the note. This status for MERS is disclosed in the deed of trust here at issue, which states that MERS is "acting solely as a nominee [a type of agent] for lender and lender's successors and assigns."

In addition, there is no evidence before the court as to who is the holder of the promissory note and is entitled to enforce it. MERS contends that Countrywide acts as agent for MERS. However, MERS does not purport to be the holder of the promissory note. Under California law, only the holder of a note is entitled to enforce it (with minor exceptions not relevant herein). *See* CAL. COM. CODE § 3301.

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[10] MERS, Inc. is an entity whose sole purpose is to act as mortgagee of record for mortgage loans that are registered on the MERS System. This system is a national electronic registry of mortgage loans, itself owned and operated by MERS, Inc.'s parent company, MERSCORP, Inc.

The court finds that MERS has altogether failed to show that it is entitled to enforce the note here at issue in this case.

b. Deed of Trust

A deed of trust is normally authenticated by showing that it is a public record under Rule 901(b)(7).[11] Extrinsic evidence of authenticity is not required as a condition precedent to admissibility with respect to a certified copy of a public record such as a deed of trust.[12]

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[11] Rule 901(b) provides in relevant part:

> **(b) Illustrations.**
>
> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

[12] Rule 902 provides in relevant part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . . .
>
> (4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of

The deed of trust in this case gives the appearance of being a certified copy of the original recorded deed. However, the purported certification is defective. It states only: "I HEREBY CERTIFY THAT THIS IS A TRUE AND EXACT COPY OF THE ORIGINAL", followed by the signature of Martha J. Urquijo.

A certified copy of a public record must be made "by the custodian or other person authorized to make the certification . . . ." FED. R. EVID. 902(4). In addition, the certification of a domestic document must comply with paragraph (1) (for documents under seal) or (2) (for documents not under seal) of Rule 902. If the document is not under seal (as appears in this case), the signature must be "in the official capacity of an officer or employee" of a governmental entity qualifying under paragraph (1). Finally, the certification must include a certification under seal, made by "a public officer having a seal and having official duties in the district or political subdivision of the [certifying] officer or employee" that the signer "has the official capacity and that the signature is genuine." All of this is missing from the purported certification. Thus, the court must assume that Ms. Urquijo has no authority whatever to certify the deed of trust.

Here, the authenticity of the deed of trust is disputed by the debtor. Presumably in consequence thereof, MERS has declined to move its admission into evidence.[13]

Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

[13] The declarant's total lack of competence to testify on this motion raises a serious question as to the good faith of counsel for MERS under Rule 9011. Counsel should have known that Turner was incompetent to testify as to anything relevant to this motion. Thus, counsel should not have filed with the court the declaration in which he stated falsely, under penalty of perjury: "I have personal knowledge of the matters set forth in this declaration and, if called upon to testify [as he was], I could and would competently testify thereto."

C. Fraudulent Character of Note and Deed of Trust

The debtor contends that the note and deed of trust involved in this motion are fraudulent. The court makes no findings on this issue. Such a determination requires an adversary proceeding which is not before the court. However, the court can deny a motion for relief from stay pending the determination of such an adversary proceeding where the debtor presents serious evidence that the note and deed of trust are fraudulent. On these grounds, also, the court denies the motion.

D. Other Defects in Motion

There appear to be other defects in the motion, that the court does not address because of lack of appropriate admissible evidence. For example, Freedom Home Mortgage is the payee on the note. There is no evidence before the court as to who is the present holder is entitled to enforce the note. The holder must join in the motion for relief from stay. *See In re Hwang*, __ B.R. __ (Bankr. C.D. Cal. 2008).

IV. Conclusion

The court concludes that this motion for relief from stay must be denied on two separate grounds. First, the motion improperly attempts to obtain relief for unidentified parties, in violation of the rule requiring the disclosure of parties appearing before the court. Second, the only evidence supporting the motion is provided by a witness who is incompetent to provide any relevant evidence.

Dated: October 21, 2008

Hon. Samuel L. Bufford
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I certify that a true copy of this **MERS RELIEF FROM STAY MOTION: FINDINGS OF FACT AND CONCLUSION OF LAW** was mailed on OCT 22 2008 to the parties listed below:

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