IN THE CHANCERY COURT OF SHELBY COUNTY TENNESSEE
FOR THE 30TH JUDICAL DISTRICT AT MEMPHIS

DAVID G. MILLS &
JULIA MILLS,

Plaintiffs,

v. **No. CH-09-0662-2**

FIRST HORIZON HOME LOAN CORPORATION
D/B/A FIRST TENNESSEE HOME LOANS &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Defendants.

PLAINTIFFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT TO QUIET TITLE

TO THE HONORABLE CHANCELLOR OF SAID COURT:

COMES NOW, Plaintiffs, David G. Mills and Julia Mills, who file this their Response to Defendant First Horizon Home Loan Corporation, d/b/a First Tennessee Home Loans, (FHHLC) and Defendant Mortgage Electronic Registration Systems, Inc. (MERS) Motion to Dismiss Plaintiffs' First Amended Complaint to Quiet Title and would respectfully show unto this Honorable Court the following:

I. THE ARGUMENTS OF DEFENDANTS IN THEIR MOTION TO DISMISS

A. Defendants First Claim in Part B of their Law and Argument that Plaintiffs have waived the right to make a Claim under T.C.A. 47-3-501.

Defendants argue that Plaintiffs have waived the right to presentment under the first mortgage note and that this waiver also constitutes a waiver of (1) Plaintiffs' right to

demand Defendants "exhibit the note" and (2) Plaintiffs right to demand that a party demanding payment on behalf of the holder of the note "show authority" to make demand.

Plaintiffs will show: (1) in Section IV. B, *infra*, that Defendants cannot rely on a copy of a note, which has not been placed in evidence under proper procedural rules, to assert the defense of waiver contained therein; (2) in Section IV. C, *infra*, that Defendants do not have standing to assert the waiver defense; and (3) in Section IV. D, that a waiver of presentment would not waive the Plaintiff's right to have the note exhibited, nor would it waive the right to demand proof of authority to demand payment.

B. Secondly, Defendants Claim in Part C of their Law and Argument that Plaintiffs' Claims under T.C.A. 47-3-309 are inapplicable.

Defendants claim that with respect to the Plaintiffs' second mortgage note that FHHLC is not a party seeking to enforce the second note and therefore T.C.A. 47-3-309 does not apply to FHHLC. Plaintiffs will show why this section does apply to FHHLC in Section IV. D *infra.*

Defendants claim with respect to the first mortgage note, that because FHHLC is a "servicer" of the first mortgage note, T.C.A. 47-3-309 does not apply to FHHLC. Plaintiffs will show: (1) in Section IV. D, *infra*, that FHHLC's status as a "servicer is irrelevant to the question of whether a copy of a note needs to be proven to be enforceable; and (2) in Section IV. B, *infra*, that FHHLC, as a "servicer," did not have standing on its own to assert the note's enforceability without the authority of the note's holder.

C. Thirdly, Defendants claim in Part D of their Law and Argument that Plaintiffs' claims with regard to the first mortgage deed of trust are contrary to Tennessee Law.

Defendants claim, with respect to the Plaintiffs' first mortgage deed of trust, that under Tennessee law the deed of trust was assigned with the note when FHHLC sold it and that MERS can act on behalf of the present holder of the note.

Plaintiffs will show in Section IV. E, *infra,* that neither Defendant has standing to enforce the note. Thus neither Defendant has standing to prove the enforceability of the deed of Trust. Plaintiffs will further show in Section IV. E, *infra*, that the enforceability of the note is a predicate to the enforceability of the deed of trust and since neither have standing to enforce the note, neither has standing to assert the validity of the Deed of Trust. Plaintiffs will still further show in Section IV. E, *infra*, that even if the note is ultimately proven to be enforceable by a present holder of the note, MERS does not have the right to act on behalf of the present holder without the express approval of the present note holder.

D. Fourth, Defendants claim in Part E of their Law and Argument that Plaintiffs' have asserted an injunction is necessary, but failed to show the threat of actual irreparable injury.

Defendants allege that Plaintiffs have identified no actual imminent irreparable injury entitling them to the mandatory injunctive relief the Plaintiffs seek. Plaintiffs will show in Section IV. F, *infra,* that, since Defendants have no standing to claim the note is enforceable and have no standing to claim they are entitled to payment by the Plaintiffs, Plaintiffs are being presently harmed by these demands, because these demands for payment are made under threat of foreclosure for non-payment. Plaintiffs are harmed every time demand for payment is made without proof of the right to enforce payment or

without proof of standing to enforce payment. Plaintiffs are harmed every time demand for payment is made without proof of authority to demand payment.

E. Defendants claim in their Introduction to their Motion to Dismiss that Plaintiffs refused their offers to remedy Plaintiffs complaints.

In Defendants' Introduction, Defendants assert that Plaintiffs refused to accept a copy of Plaintiffs' second mortgage note stamped paid in full as a substitute for the original note. Defendants also assert that Plaintiffs are not satisfied with FHHLC's confirmation that the note has been assigned to Fannie Mae and that MetLife Home Loans, as subservicer for FHHLC, holds the original first mortgage note. As will be shown throughout this response, Plaintiffs maintain they have a genuine right not to be satisfied by these offers, especially by parties who have no legal standing in the case to assert rights of their own or to assert the rights of others.

Defendants also complain that the ultimate conclusion to the outcome of this case could be that Plaintiffs' mortgages are revoked and Defendants could be compelled to return all money paid by Plaintiffs to Defendants. Defendants claim this would encourage borrowers to stop making mortgage payments. If this turns out to be the case, it is of Defendants' own doing, and Defendants have no one to blame except themselves, for it is they who were instigators of and parties to the defective securitization process used in Plaintiffs mortgages.

II. BASIC ALLEGATIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT

A. Factual Background of Plaintiff's First Amended Complaint.

The Plaintiffs are husband and wife who have purchased a home in Cordova, Shelby County, Tennessee and who have financed that purchase. FHHLC held a first and second mortgage on said home. In late January or early February of 2008, the Plaintiffs paid off the second mortgage and later requested, both orally and in writing, that FHHLC surrender the second mortgage note to the Plaintiffs. FHHLC refused to surrender the paid second mortgage note to the Plaintiffs and claimed that the second mortgage note was not available to surrender. It also claimed that the release FHHLC gave Plaintiffs' for this payment of this second note was valid. Prior to the instigation of this suit, FHHLC rebuffed all attempts by Plaintiffs to determine whether FHHLC actually had the authority to give a release of this second note.

When the second mortgage note was not surrendered to the Plaintiffs, the Plaintiffs began inquiry of FHHLC as to the whereabouts of the first mortgage note and have asked both orally and in writing for proof that the original of the first mortgage note still exists, proof of who owns or holds it, and by what authority FHHLC keeps making demands for payment upon the Plaintiffs, if it does not hold or own the note. Prior to the instigation of this litigation, FHHLC rebuffed all attempts by Plaintiffs to discover the existence of the original of this note, the whereabouts of this note and by what authority FHHLC continues to demand payment. Subsequent to the filing of this suit, house counsel for FHHLC has confirmed that FHHLC sold the first mortgage note as Plaintiffs had suspected and had alleged. (Exhibit C of Plaintiffs' Amended Complaint).

B. Second Note Claims.

With respect to Plaintiffs' second mortgage note, Plaintiffs allege in their First Amended Complaint, that FHHLC's failed to surrender their second mortgage note when Plaintiffs paid in full as required by T.C.A. § 47-3-501. Plaintiffs allege that FHHLC's failure to surrender the second note upon payment in full creates a presumption that the second mortgage note was unenforceable. Plaintiffs further allege that the burden is on FHHLC to overcome this presumption and to prove the enforceability of this note under T.C.A. §47-3-309. Plaintiffs request that FHHLC be required to return their payments in the event that FHHLC cannot prove the note was enforceable under T.C.A. §47-3-309. Should FHHLC be able to prove the second note was enforceable under T.C.A. §47-3-309, Plaintiffs also ask for adequate protection under T.C.A. §47-3-309, against any party who may have acquired the note and who may seek to enforce the note against the Plaintiffs.

C. Second Lien Claims.

With respect to Plaintiffs' second mortgage lien, the Plaintiffs allege in their First Amended Complaint that the release of said lien by FHLLC is presumed to be defective, because FHLLC failed to surrender the second mortgage note upon full payment by the Plaintiffs. Plaintiffs allege that since the note was not surrendered as required by T.C.A. § 47-3-501, a presumption arises that FHHLC was not the holder of this second mortgage note as FHHLC claimed in said release. Had FHHLC surrendered the second mortgage note to Plaintiffs, as required by T.C.A. § 47-3-501, FHLLC would have given Plaintiffs

adequate assurance that the recitation in the release that FHHLC was the holder of the note was, in fact, true.

But since FHHLC did not surrender the second mortgage note, the recitation of FHHLC's holder status in the release cannot be presumed to be true, and therefore a cloud exists on Plaintiffs' title as to the second lien until such time as this recitation is actually proven to be true. Consequently, the Plaintiffs want proof that FHHLC had the right to make the claim it was the holder of Plaintiffs second note when FHHLC made the statement in the Plaintiffs' second lien release. If FHHLC is unable to supply to proof the law requires, Plaintiffs want a clearing of the cloud that this defective release creates on their title.

D. First Note Claims.

With regard to the Plaintiffs' first mortgage note, the Plaintiffs request several things. First they request that the court require FHHLC to show Plaintiffs and the court that the original first mortgage note still exists, as required by T.C.A. §47-3-501, or if lost or destroyed, prove, under proper rules of evidence – not incompetent exhibits, it is still enforceable under T.C.A. §47-3-309. If FHHLC can't prove that the first mortgage note exists or is still enforceable, Plaintiffs request, after an accounting, to have the court order FHHLC to return their payments on the first mortgage note. If FHHLC cannot show that the first mortgage note exists but can show that it is enforceable under T.C.A. §47-3-309, Plaintiffs ask for adequate protection under T.C.A. §47-3-309 against any party who may seek to enforce the first mortgage note against the Plaintiffs.

If FHLLC can show that the first mortgage note exists or is enforceable under T.C.A. §47-3-309, then Plaintiffs also request that FHHLC show it has the authority to

demand that Plaintiffs to continue to pay this note. FHHLC has admitted in a letter subsequent to the filing of this suit that it sold this first mortgage note to Fannie Mae. (See Exhibit C of Plaintiffs' First Amended Complaint. The sale of the note raises the questions of who owns the note now, and whether FHHLC has been given authority, by the present owner, to demand payment of Plaintiffs. Should FHHLC be unable to prove to the court who presently owns the note or that it has the authority from the present owner to demand payment of the first mortgage note, the Plaintiffs request the court to order FHHLC to decease and desist from making any further demands on the Plaintiffs for payment or to permit Plaintiffs from making payments, without dishonor, until such time as FHHLC proves who owns the note and proves that it has the authority to make demands for payment on the present owner's behalf.

E. First Lien Claims.

With respect to Plaintiffs' first mortgage lien, Plaintiffs allege that said lien is invalid, and is a cloud on their title and should be removed. There are only two identifiable parties in Plaintiffs' first mortgage lien Deed of Trust to whom Plaintiffs could have any obligation: FHHLC and MERS. There have been no recorded assignments of this document.

According to the first mortgage deed of trust FHHLC is identified solely as Lender. According to the first mortgage deed of trust, MERS is identified first as "a separate corporation that is acting solely as *nominee* (our italics) for Lender and Lender's successors and assigns." MERS is identified secondly as the sole beneficiary of the Deed of Trust (and not as nominee for the beneficiary as Defendants claim in their Motion to Dismiss).

Plaintiffs claim that FHHLC no longer possesses any rights as Lender because it has admitted selling the note to Fannie Mae and that the present note holder is unknown - leaving the Deed of Trust without an identifiable lender. Plaintiffs claim that MERS cannot be a nominee or agent of any future lender unless the identity of that lender is known and that lender has approved MERS as its agent - leaving MERS with no ability to substitute for the lender. Most importantly, Plaintiffs claim that MERS cannot be a beneficiary because it has no interest in the note and that only a party with an interest in the note can be a beneficiary. Plaintiffs claim that even if the first two defects concerning the identities and rights of a lender, can be cured by the Defendants, (which Plaintiffs seriously doubt), Plaintiffs claim that a trust without a beneficiary is fatally defective trust incapable of cure. Plaintiffs therefore claim the Deed of Trust is an improper cloud on their title and should be removed.

III. ADDITIONAL BACKGROUND ON NECESSITY OF LITIGATION

When Plaintiffs filed their Original Complaint, because FHHLC had been so recalcitrant in providing basic information concerning Plaintiff's mortgages, Plaintiffs did not know the answers to many of the questions they had. Some of those questions have now been answered by the Defendants, either through letters from counsel (which are now exhibits to pleadings) or from admissions within the pleadings themselves.

Plaintiffs were unsure when they initiated suit whether they owed money to either Defendant and whether FHHLC had legal standing to demand that Plaintiffs continue to pay FHHLC on Plaintiff's first mortgage note. Based on letters from FHHLC counsel to Plaintiffs, it is now clear that Plaintiffs do not owe either of the Defendants. Plaintiffs

realize they may owe someone else, but it is clear they do not owe these Defendants. It is also clear that without the right to demand payments, neither Defendant has legal standing on its own to demand payment of the first mortgage note.

Plaintiffs were not sure when they filed suit whether their second mortgage note still existed and could be surrendered or whether it was in fact destroyed. It seems that the answer now given by FHHLC is that it was destroyed, but the date of destruction, by whom it was destroyed, and where it was destroyed is not known, at least to Plaintiffs.

IV. IMPLICATIONS OF DISMISSAL

A mortgage is a long-term agreement, often lasting thirty years, between a real estate purchaser and the entity that finances the purchase of the real estate. Purchasers have the right, and sometimes the obligation, to inquire into the status of their mortgages, from time to time during the pendency of the mortgage, and to request necessary documentation concerning their mortgages from their lenders.

In this case, the real estate purchasers made numerous extra-judicial requests from their lender concerning basic documentation of their mortgages, which should have been provided without the necessity of suit, and were rebuked at every turn by their lender. This case is an action to quiet title. If there is no access to the courts for the refusal to provide basic mortgage documentation, real estate borrowers will have few, if any rights in the future.

More to the point in the instant case is that the Plaintiffs have sued to determine who the parties are that had and have a financial interest in their mortgages. It is clear that suit has shown that the Defendants are not the real parties in interest in Plaintiffs existing mortgage. Dismissal would prevent the Plaintiffs from ever determining who the

real parties in interest are and were at critical times and what the rights of the parties were and are.

V. LAW AND ARGUMENT

A. Overview of Issues Presented.

This case is an action to quiet title. It involves the rights of the parties pursuant to a first and second mortgage note, a first and second mortgage Deed of Trust and a release of the second mortgage Deed of Trust. FHHLC was the Plaintiffs' original lender on both notes. FHHLC was named as the lender and beneficiary of the second mortgage Deed of Trust. FHHLC was named as the lender only on the first mortgage Deed of Trust. MERS was named as a nominee for lender on the first mortgage Deed of Trust and named sole beneficiary of the first mortgage Deed of Trust.

Plaintiffs have paid their second mortgage note in full, and, thus, owe no money on it to FHHLC. FHHLC has acknowledged it has sold Plaintiffs' first mortgage note, so Plaintiffs do not owe FHHLC for it either. MERS was not Plaintiffs' lender and Plaintiffs never owed MERS under either note. Thus Plaintiffs owe Defendants nothing.

Nevertheless, both Defendants assert they still have a security interest in the first mortgage Deed of Trust and FHHLC asserts it has the right to continue to demand that Plaintiffs pay FHHLC on the first mortgage note.

FHHLC never surrendered Plaintiffs second mortgage note upon Plaintiffs' payment in full. Nevertheless, FHHLC claims it gave Plaintiffs a valid release of the second lien, though, without surrender of the note, Plaintiffs have no proof that FHHLC was the actual holder of Plaintiffs' second note.

Plaintiffs claim that both notes and both Deeds of Trust are unenforceable by these Defendants. Plaintiffs claim that these Defendants have the burden to prove their right to enforce these four documents. And with respect to the first mortgage documents, Plaintiffs claim Defendants don't even have standing to prove their right to enforce the documents. Plaintiffs also claim they are entitled to certain remedies should Defendants fail to prove the enforceability of these documents. Defendants apparently claim that Plaintiffs are not entitled to question the validity of or Defendants' right to enforce these four documents.

B. Defendants presume, without right, that a copy of the first mortgage note is sufficient to argue the note's enforceability.

Defendants claim that the standard of review for a Motion to Dismiss is that "the failure to state a claim is determined by an examination of the complaint alone," citing *Cook By and Through Uithoven v. Spinnaker's of Rivergate, Inc.* 878 S.W.2d 934, 938 (Tenn. 1994). As will be shown herein, Defendants straightaway go outside the Plaintiffs' First Amended Complaint to make their argument of waiver, in support of their Motion to Dismiss. Defendants claim they can use a copy of the first mortgage note to prove their defense a waiver, which is far outside the Plaintiffs' First Amended Complaint. Plaintiffs specifically allege numerous times that a copy of a note is not an acceptable substitute for the original, unless certain statutory and evidentiary conditions are met first.

Defendants have not produced nor filed with this court the actual first mortgage note. Instead they have relied upon a copy of said note to make their arguments in their Motion to Dismiss. Defendants claim is that they can use a copy of Plaintiffs' first mortgage note to prove the existence and enforceability of a waiver of presentment

contained within the first mortgage note. Such a claim by Defendants is clearly in violation of the rule regarding the standard of review for a Motion to Dismiss, which Defendants cite and rely upon. One of Plaintiffs' main claims is that a copy of a note is not enforceable unless statutory and evidentiary conditions are met to make it so; and, thus, no provision within the note would be enforceable either, until the conditions of overall enforceability are met.

Plaintiffs allege numerous times throughout their Amended Complaint that a copy of a note is not a substitute for an original note and that a copy of a lost, destroyed or stolen note is not enforceable unless it is proven to be enforceable under T.C.A. § 47-3-309, which states:

> **T.C.A. § 47-3-309. Enforcement of lost, destroyed or stolen instrument --**
>
> (a) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (1) The person seeking to enforce the instrument:
>
> (A)Was entitled to enforce the instrument when loss of possession occurred; or
>
> (B)Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (2)The loss of possession was not the result of a transfer by he person or a lawful seizure; and
>
> (3)The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person that cannot be found or is not amenable to service of process.
>
> (b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, § 47-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

Two other provisions of T.C.A. § 47-3 make it clear why a lost, destroyed or stolen note must be proven to be enforceable under T.C.A. § 47-3-309. One provision of T.C.A. § 47-3 makes it clear why a missing note must be proven to be enforceable because certain writing on the note can cancel or discharge the note and so can destruction or mutilation of the note itself:

> **47-3-604. Discharge by cancellation or renunciation. —(a)** A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

Another T.C.A. § 47-3 provision makes it clear that an endorsement can also change or modify a note:

> **47-3-204. Endorsement. — (a)** "Endorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring endorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement.

These two statutes clearly demonstrate the necessity for the requirement that a note, which is lost, destroyed or stolen, must be proven to be enforceable under T.C.A. § 47-3-309. These two provisions are also demonstrable of why the party seeking to enforce a lost or missing note, has the burden of proof to show the note is enforceable, as Plaintiffs have alleged.

First, these two statutes make it clear that a destroyed or mutilated note is presumed to be a cancelled one. Secondly, these two statutes make it clear that any writing on the original can cancel it or modify it. It is clear that a copy of a note may not contain subsequent endorsements or subsequent written cancellations or show mutilations or show intentional destruction consistent with cancellation. A written cancellation on an original would negate any of the provisions contained therein. Destruction or mutilation of the note would also indicate cancellation of the note and the provisions therein. A specific endorsement could also negate a provision as well.

Therefore it is incumbent on the party seeking to enforce the note, to prove its enforceability. This is consistent with the general law in Tennessee that states that the party seeking to enforce a document has the burden of proving its enforceability. See *Kahlil v. Carcar Development, Inc.,* No. M2006-02422-COA-R3-CV (Tenn. Ct. App. December 21, 2007, slip opinion at 5, attached as Exhibit "A"), citing *McReynolds v. Am. Progressive Corp.,* No. 01-A-019008CH00300, 1991 WL 24891 (Tenn. Ct. App. March 1, 1991) and *Abni Joint Venture v. Kinnaird,* No. 86-292-II (Tenn. Ct. App. March 19, 1987) (perm. App. Denied June 8, 1987).

Because Plaintiffs have made allegations that a copy of a note is an unenforceable note until proven to be enforceable, a naked copy of a note, without proper evidentiary support, cannot be used in a Motion to Dismiss to argue that provisions within the note prevent a claim. Proof of the note's enforceability is a condition precedent to reliance upon a provision within the note.

Thus, where a Plaintiff claims in a complaint, as here, that a copy of his note is not enforceable until certain conditions are met with specific evidentiary proof, a copy of

a Plaintiff's note cannot be used to successfully argue, in a Motion to Dismiss, that a provision within the note prevents the Plaintiffs from making a claim for which relief can be granted. To do so would circumvent Plaintiffs' rights to have a note proven to be enforceable.

Because all of Defendants arguments concerning the two notes and two Deeds of Trust and release of the second mortgage Deed of Trust rest on the false presumption that a copy of a note can be used to assert their claims, all fail on this ground alone. They also fail for the reasons stated *infra*.

C. Defendant's Assertions that Plaintiffs' Waiver of Presentment within the first mortgage note also waives the right to demand proof of the note's existence and also waives the right to demand proof of authority are meritless.

1. The defense of waiver is predicated upon a provision within the first mortgage note, but the enforceability of the first mortgage note has not been shown and, thus, the provision is not shown to be enforceable either.

As shown in IV A, *supra*, a copy of the note is not presumed to be enforceable and will not be enforceable unless certain evidentiary conditions are met. The note itself has not proven to be enforceable. It follows that a provision within the note is not enforceable unless the note is enforceable.

2. Defendants lack standing to assert the enforceability of the first mortgage note or any defense of waiver of presentment contained therein.

As mentioned above, neither Defendant has any interest in the Plaintiffs' first mortgage note. MERS was never Plaintiffs' lender and therefore never had any interest in the Plaintiffs' first mortgage note or any right to assert defenses contained within the note. FHHLC was the Plaintiffs' initial lender, but has admitted that it sold the note to

Fannie Mae. When it sold the note to Fannie Mae, FHHLC lost all right, title and interest in the note and in so doing, lost any right to assert any defenses against the Plaintiffs contained within the provisions of the first mortgage note.

As will be shown in the discussion *infra* on the MERS cases, both Defendants, are at best agents of their respective undisclosed principal(s) who is (are) the present holder(s) of the note, and as agents, lack the right to pursue the principal's rights. Moreover, any claim concerning the enforceability of the Plaintiffs' first mortgage note must be brought in the name of the principal and not in the name of these Defendants.

The right to assert defenses or right to assert compliance with conditions contained within the note now belongs to the holder of the note and not to FHHLC. Without the express authority from the present holder of the note to enforce note, FHHLC lacks standing to enforce any waiver provisions in the note. FHHLC has shown no such authority from the present holder of the note (in fact, the present holder of the note has not even been identified) and proof of such authority would require evidence outside of Plaintiffs pleadings. So they both lack standing to pursue the issue of the note's enforceability and lack standing to pursue the issue of any waivers within the note.

And of course, as proved in V, B1**,** *supra*, even if the defendants had standing to enforce the note, the right to enforce any provision within in a note is dependent upon first proving the enforceability of the note, which neither Defendants nor their undisclosed principal, can do with a mere copy of the note.

3. Waiver of presentment does not include waiver of the right to exhibit the note or waiver of the right to demand that a party making demand for payment on behalf of another show authority to demand payment.

Notwithstanding the aforementioned outcome determinative deficiencies of asserting the defense of waiver, Defendants nevertheless argue that because Plaintiffs have waived the right to presentment of the first mortgage note, Plaintiffs have also (1), waived the right to be shown proof of the note's existence and (2), waived the right to show proof of authority to make demand for payment.

As will be shown, even in an enforceable note, a claim of waiver of presentment, by a party with standing, would not constitute a waiver the right of the obligor to have the note "exhibited" *once presentment is made.* Nor does waiving presentment waive the right to have a party demanding payment on behalf of another to show authority to make demand *once presentment is made.* Nor does waiving presentment waive the right of the obligor to have a note paid in full surrendered to such obligor.

T.C.A § 47-3-501. Presentment --, states in pertinent part:

> "Presentment " means a demand by or on behalf of a person entitled to enforce an instrument (1) to pay the instrument made to … a party obligated to pay the instrument….
>
> (2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.
>
> (3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary endorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

Nothing in that statute can be construed as forbidding presentment as a voluntary act of the person entitled to enforce an instrument, and Defendants have, in fact, made

voluntarily made presentment upon Plaintiffs. Attached to this response, as Exhibit (A), is the most recent example of FHHLC's presentment to Plaintiffs.

A waiver of presentment is a waiver by a borrower to have the lender make a formal demand for payment when payment is due. In this case, FHHLC claims that the note in question states that: "I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. 'Presentment' means the right to require the Note Holder to demand payments of amounts due."

Once presentment is made, whether voluntarily as in this case, or involuntarily where there is no waiver, the person to whom presentment is made is given certain rights under Tenn. Code Ann. § 47-3-501(b)(2). Thus, Tenn. Code Ann. § 47-3-501, and more specifically Tenn. Code Ann. § 47-3-501(b)(2), does have application in this case.

Presentment, as FHHLC claims it is defined in Plaintiffs' first note, does not include any mention of rights concerning the exhibition of a note or any mention of rights concerning showing authority. FHHLC, who drafted this note, did not specifically require Plaintiffs to waive exhibition of the note *if FHHLC made presentment* nor did it require Plaintiffs to waive proof of authority to make demand *if FHHLC made presentment.*

Moreover, as Defendants point out, T.C.A. § 47-3-504 permits waiver of presentment. However, there is no such statute that permits waiver of the obligation to exhibit the note *once presentment is made* nor is there any such statute that permits the waiver of the right to show authority to demand payment *once presentment is made.* Nor is there any statute that excuses the obligation to surrender the note once full payment is made.

In this case, FHHLC, on behalf of whomever it is making demand, (with or without authority) has clearly chosen to ignore the waiver of presentment provision of the note in question, and continues to send payment demands every month. Once FHHLC makes demand for payment, Plaintiffs have the right to demand that FHHLC exhibit the note and Plaintiffs also have the right to insist that FHHLC show it has the authority to demand payment under T.C.A. § 47-3-501.

The clear intent of T.C.A. § 47-3-501(2) is to permit the borrower to assure himself that when he is paying on a note, that he is paying (1), on a note that actually still exists, (2), that he is paying the right party, (3), that he will be given proper credit for his payments, and (4), that he will be assured that the note will be surrendered to him upon payment in full.

Thus it also seems clear that this section permits the borrower to demand that the lender exhibit the note when the borrower wishes to pay on a day when payment is not due and that the borrower has a right to be shown that he is paying the proper party anytime he wishes to pay. Moreover, it seems clear that if a borrower wishes to pay in full before payment is due, this section would allow him to see the note before he pays in full, and allow him to ensure himself that he is paying the right party.

As an aside, Defendants' quotation from Professor Maggs (FN 2 of Defendants' Motion to Dismiss First Amended Complaint) is merely an attempt to urge the Court to ignore the law as set forth by the Tennessee legislature. This Court, as a judicial body, and not a legislative body, should not do so. Moreover, as has been shown, there is still good reason for the statute on presentment, despite the claims of Professor Maggs that it is seldom used.

4. Conclusion on the issue of whether Plaintiffs have waived their claims under T.C.A. § 47-3-501 regarding their first mortgage note.

For the reasons set forth in V. C. 1,2, and 3 *supra*, FHHLC's arguments that Plaintiffs have waived the right to have their notes exhibited and have waived the right to have FHHLC show authority to demand payment have no merit whatsoever. FHHLC cannot show that the first mortgage note is enforceable; it cannot show that it has standing to enforce the first mortgage note or a provision contained therein on its own; it cannot show that that the claimed provision defeats Plaintiffs claims; and, it cannot show authority to enforce the note on behalf of someone else and is not doing so under the name of a party that can enforce the note.

Moreover, since Plaintiffs have not waived anything, Plaintiffs have stated a claim for relief under T.C.A § 47-3-501, which also permits them to refuse to pay without dishonor if FHHLC violates "any applicable law." Refusal to exhibit a note when demanded would be one such instance of violating "any applicable law," refusing to prove the enforceability of a note when demanded would be such an instance, and refusal to show authority to demand payment when requested to do so would be another such instance.

D. Plaintiffs' have stated claims under T.C.A. 47 § 3-309.

1. FHHLC's assertion that it is not a party seeking to enforce the second mortgage note under T.C.A. § 47-3-309 is false.

FHHLC claims that because the second note is paid off, FHHLC is not a "party seeking to enforce the instrument." This is disingenuous. There still exists an issue as to whether Plaintiffs have paid the correct party they were obligated to pay. This issue was

created by FHHLC, and not by the Plaintiffs. FHHLC is the party who gave Plaintiffs a release claiming it was the holder of the second note and thus raised the issue of the note's enforceability when FHHLC failed to surrender the note upon Plaintiffs' payment in full.

FHHLC could have assigned Plaintiffs' second note just as FHHLC assigned Plaintiffs first note. Plaintiffs claim FHHLC's statement - that it was the holder of Plaintiff's second note - cannot be presumed to be true because FHHLC never surrendered the note with the release, which would have been *prima facia* proof of such a statement. In claiming that FHHLC was the holder of the note and that FHHLC was the party able to give Plaintiffs a release, FHHLC raised the issue of enforceability and now is the party claiming the note is enforceable.

As proved in V. A, *supra,* FHHLC has the burden of proving the lost or missing note was enforceable when it gave Plaintiffs the release. Plaintiffs claim that if the note is not enforceable they are entitled to have their money returned. Unless FHHLC is willing to return Plaintiffs second mortgage payments, (which it hasn't said it is willing to do) the question of this note's enforceability is before the court. Thus, FHHLC is the party who is seeking to enforce the lost or destroyed second note for the purposes of this statute.

Because FHHLC will not give Plaintiffs their money back when their actions raised the question of whether they should have been paid, they are still seeking to enforce the note.

2. FHHLC'S claims of being the "servicer" of Plaintiffs' first mortgage note is irrelevant with respect to T.C.A. § 47-3-309 which deals with enforceability

of the note rather than authority to demand payment of Plaintiffs which is under T.C.A. § 47-3-501.

T.C.A. § 47-3-309 concerns the question of how to prove the validity of a copy of a note. It does not concern the question of authority to demand payment, yet FHHLC claims that its status as "servicer" prevents Plaintiffs from asserting that a copy of a note must be proved. FHHLC's status as a servicer, does not help FHHLC defeat Plaintiffs' claims that a copy of a note's is unenforceable unless certain conditions regarding the note's status when it went missing are proven.

Moreover, FHHLC's status as a servicer does not defeat Plaintiffs claims under T.C.A § 47-3-501 if that is what FHHLC intended to allege. FHHLC's status as a servicer does note excuse Plaintiffs' right to require proof that the note still exists when Plaintiffs demand proof of its existence. FHHLC's status as servicer also does not excuse the requirement that FHHLC show the Plaintiffs it has the right to demand payment on behalf of another party. In fact, Plaintiffs allege that T.C.A § 47-3-501(2)(ii) specifically applies to servicers.

Moreover, when FHHLC claims to be the servicer of the note, the question becomes: For whom is FHHLC performing this service? Plaintiffs have never been told who the party is, that FHHLC is performing this service for, though they continue to ask. FHHLC has claimed it sold the note to Fannie Mae, but there is no proof that Fannie Mae owns the note now. In fact, Plaintiffs claim in their First Amended Complaint, that based upon their understanding of the securitization process, Fannie Mae, as an intermediary for investors, most likely, immediately sold the note to investors.

A "servicer" of a note is just an agent of its principal, the holder. FHHLC's status as "servicer" does not give it any right to advance the claims of its principal in litigation,

and again, as will be shown *infra* in the discussion of MERS cases, an agent must advance the rights of its principal in the principal's name and not in its own.

Ridiculously, Defendants also claims that because Plaintiffs filed an exhibit generated by FHHLC's counsel stating FHHLC was Plaintiff's "servicer,' Plaintiffs have admitted that FHHLC has the authority to receive payments under the note. If that were true, then it is equally true that when Defendants quote or cite any claim of Plaintiffs, they admit such claim to be true.

3. Conclusion: Plaintiffs have stated a claim under T.C. A. § 47-3-309.

It is clear that the failure to surrender a note, which is paid in full, creates a cause of action for the Plaintiffs against FHHLC. The missing note is presumed to have been unenforceable and thus requires proof of enforceability by FHHLC. It raises the question of whether money, which was paid, should have been returned. As such, FHHLC is still seeking to enforce the note.

It is also clear that FHHLC's claims that its status, as servicer, are irrelevant to T.C. A. § 47-3-309 and wouldn't even defeat claims under T.C. A. § 47-3-501.

E. Plaintiffs have clearly stated a claim that Defendants are unlawfully clouding Plaintiffs title with the continued existence of the first mortgage Deed of Trust.

1. An unenforceable first mortgage note voids the first mortgage Deed of Trust.

A Deed of Trust is security for the underlying lien and as such, all rights secured under a Deed of Trust are derivatives of the underlying note. If a note had been paid, all rights under a Deed of Trust securing the note are extinguished. It is axiomatic that a Deed of Trust must therefore secure an enforceable note. Failure to prove the

enforceability of a note would also negate and void any security interest in an accompanying Deed of Trust. Unless the holder of the note can prove its enforceability, the Deed of Trust cannot act as a security for it.

Should Defendants be unable to prove the enforceability of Plaintiff's second mortgage note, then any security interest in the Deed of Trust would be null and void.

2. Three very recent important MERS cases, construing numerous other cases involving MERS, have held that MERS has no standing to enforce deeds of trust.

In the last fourteen months, three important cases in three different jurisdictions of the United States have rendered decisions concluding that MERS has no interest in Deeds of Trust where the language in those Deeds of Trust contain language that is verbatim to the language contained in the Plaintiffs' First Mortgage Deed of Trust. All three cases have held that MERS has no standing to enforce any provisions of the Deed of Trust because MERS never acquires any legal interest in such Deeds of Trust.

If MERS has no legal interest in the Plaintiffs Deed of Trust, MERS should not be allowed to continue to cloud Plaintiffs' title and should be estopped from asserting that it does have legal interest. As Plaintiffs have already shown, Plaintiffs do not owe, nor have they ever owed MERS, so it is difficult to see how MERS could acquire a security interest in their property to secure payment of the underlying note. The three cases, mentioned *supra*, and discussed *infra*, will make clear that MERS cannot hold such a security interest.

Likewise, FHHLC, who no longer has any legal interest in Plaintiffs first mortgage note, also would appear to have lost any security interest it might have had in Plaintiffs property once it sold Plaintiffs note to Fannie Mae. FHHLC now takes the

position, in its Motion to Dismiss, that the first mortgage Deed of Trust was assigned to the purchaser of the note as a matter of Tennessee law, and that no formal assignment is necessary in Tennessee to affect a transfer of the Deed of Trust. If this is FHHLC's position, it is absolutely clear that FHHLC has no interest in the Deed of Trust as well as having no interest in the note.

If FHHLC has assigned away all of its right, title and interest in the first mortgage note and first mortgage Deed of Trust, it has no right to assert any position in this case regarding the validity of the note in question or the lien itself. It lacks standing to assert any rights under those documents. Only those persons who actually have rights under these documents can assert rights under these documents.

Yet FHHLC continues, without rights under the Deed of Trust, to claim to be a real party in interest pursuant to Plaintiffs' first mortgage Deed of Trust. But, for reasons previously stated, FHHLC is no longer a real party in interest to Plaintiffs first mortgage Deed of Trust. Since FHHLC has no real interest in Plaintiffs' first mortgage Deed of Trust, it too should be estopped from asserting any such interest and prevented from continuing to cloud Plaintiffs title. Because FHHLC also has no legal interest in Plaintiffs Deed of Trust these same aforementioned cases should apply to FHHLC as they do to MERS.

[Case 1] In the first such case, *In re Joshua & Stephanie Mitchell, Debtors,* No.BK-S-07-16226-LBR, Chapter 7, U.S. Bankruptcy Ct., Dist. of Nev. (Aug. 19, 2008) (slip opinion attached as Exhibit "B") the bankruptcy judge was faced with a question of whether to lift stay of foreclosure proceedings against the Debtors of numerous bankruptcy filings. The bankruptcy court concluded that MERS was not entitled to lift

stay of foreclosure proceedings because it was not a beneficiary under the Deed of Trust despite MERS' claims to be such and despite language in the Deed of Trust that stated it was (language identical to that in the instant case).

The Bankruptcy judge noted that William Hultman, Secretary of MERS noted in his testimony that "once MERS becomes the beneficiary of record as nominee, it remains the beneficiary when the beneficial ownership interests in the promissory note or servicing rights are transferred by one MERS member to another." (Id. at 4). MERS makes the same argument in Defendant's Motion to Dismiss in the instant case. The Bankruptcy judge dismissed that argument on several grounds.

Initially, the Bankruptcy judge noted that MERS must have constitutional and prudential standing and be the real party in interest in order to be entitled to lift-stay relief. (Id at 4). It noted that under Article III in order to have constitutional standing MERS must meet the requirements of injury in fact, causation and redressability. (Id at 4). It noted that to have prudential standing MERS must assert "[its] own legal interests as the real party in interest. (Id. at 5). The court also noted:

> "**As a general rule, a person who is** an attorney-in-fact or **an agent** solely for the purpose of bringing suit **is viewed as a nominal rather than a real party in interest and will be required to litigate in the name of his principal rather than his own name."** 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PARACTICE AND PROCEDURE § 1553 (2D ED. 1990). (Id. at 12) (emphasis added)

The Bankruptcy court then addressed the question of whether MERS had standing either as a beneficiary or as the nominee of the beneficiary or its assignee and immediately concluded that MERS was not a true beneficiary and did not have standing on its own as a beneficiary:

> MERS does not have standing merely because it is the alleged beneficiary under the deed of trust. ***It is not a beneficiary and, in any event, the mere fact that an entity is named beneficiary of a deed of trust is insufficient to support the obligation….*** (Id. at 6)(emphais added).
>
> A "beneficiary" is defined as "one designated to benefit from an appointment, disposition, or assignment…or to receive something as a result of a legal arrangement or instrument." BLACK'S LAW DICTIONARY 165 (8^{TH} ed. 2004). But it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans." (Id. at 7).

The bankruptcy judge then opined, "more importantly, even if MERS is the nominee for the beneficiary, or the motion was brought by the beneficiary, that mere allegation is not enough to confer standing." (Id. at 7). The court concluded, "MERS [as nominee] might be the real party in interest under FED. R. CIV. P. 17, if MERS is the actual nominee of the present [MERS] member who is entitled to enforce the note." (Id. at 9). But it concluded that since its members had sold the notes in question, MERS was not entitled to be their nominee and thus could not acquire standing to bring suit.

As an additional matter, the Bankruptcy judge addressed the question of whether separation of the note and the Deed of Trust causes an unsecured note:

> **When the note is split from the deed of trust, "the note becomes, as a practical matter, unsecured**." RESTATEMENT (THIRD) OF PORPERTY 9MORTGAGES) § 5.4 cmt. a. (1997). A person holding only a note lacks the power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. e. (1997). "**Where the mortgagee has 'transferred' only the mortgage, the transaction is a nullity and his 'assignee' having received no interest in the underlying debt or obligation, has a worthless piece of paper.**" 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 37.27 [2] (2000). (Id. at 8) (emphasis added)

In light of the evidence, the Bankruptcy judge concluded that MERS had no standing to lift stay, or to litigate, because it could not find that MERS had any identifiable legal interest in the debtors' mortgages.

[Case 2] The second recent significant case concerning MERS' right to assert legal standing is *Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas,* NO. 08-1299 (Sup. St. Ark 2009)(slip opinion attached as Exhibit "C") which was decided about a week before Plaintiffs filed their Original Complaint and which was attached as Exhibit – to Plaintiffs First Amended Complaint. In *Southwest,* Southwest Homes held a second mortgage Deed of Trust on the subject property and Pulaski Mortgage held a first mortgage Deed of Trust. When the homeowners, the Lindseys, failed to make payment on the second mortgage note, Southwest Homes brought a foreclosure action against them, Pulaski Mortgage and the first mortgage trustee.

MERS, who was designated as beneficiary under the first mortgage Deed of Trust, and who held legal title under the first mortgage Deed of Trust, was not sued by Southwest. Pulaski failed to answer. The trial court entered a decree of foreclosure and an order approving and confirming a commissioner's sale. MERS learned of the foreclosure and sued for relief arguing that it was a necessary party. The Supreme Court of Arkansas held that it was not, holding that at most it was a mere agent of Pulaski, who as its principal had been sued. (Id. at 1,2,3).

The *Southwest* court held that MERS was not a beneficiary under the Deed of Trust despite being designated as such under the Deed of Trust. (Id.at 6). MERS also argued that it could "act to preserve the rights of the lender regardless of who the lender

may be under the MERS electronic registration" and the court rejected this argument holding:

> We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act. "[A]n agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do ***in light of the principal's manifestation*** and the facts as he knows or should know them at the time he acts." *Hot Stuff, Inc. v. Kinko's Graphic Corp.*, 50 Ark. App. 56, 59, 901 S.W. 2d 854, 856 (1995) citing Restatement (Second) of Agency § 33 (1958) (emphasis added).

The Court went on to note:

> In the present case, MERS was at best the agent of the lender. The only recorded document provides notice that Pulaski Mortgage is the lender and therefore MERS' principal. Yet no other lender recorded its interest as an assignee of Pulaski Mortgage. ***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.*** (Id. at 8)(emphasis added)

So clearly MERS may not act as nominee without authority from its principal, and to do that, MERS must at least know who its principal is. But more importantly, that principal ought to be discoverable from the deed records in order to provide adequate notice to any party with an interest in the property.

[Case 3] In the third case, just recently written in August of 2009, *Landmark National Bank v. Millenia MortgageCorporation, et al,* No. 98,489 (Kan. Sup. Court, 2009)(Slip opinion attached as Exhibit "D"). MERS was again omitted as a party to a foreclosure action and filed a motion to intervene claiming MERS was a contingently necessary party. The *Landmark* court held once again that MERS was not entitled to intervene in a foreclosure action because it was not a real party in interest.

The *Landmark* court reviewed numerous cases from around the country concerning MERS' right to litigate cases involving Deeds of Trust. The *Landmark* began by noting the Nebraska Supreme Court case of *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005) wherein MERS was sued by the Nebraska Banking Commission for the purpose of regulating MERS as a lender and where MERS argued successfully that it was not one holding that:

> "MERS is a private corporation that administers the MERS system, a national electronic registry that tracks the transfer of ownership interests and servicing rights in support of mortgage loan citing *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005). (Id at 6)….
>
> MERS argued in another forum that it is *not* authorized to engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. In *Mortgage Elec. Reg .Sys, Inc. v. Nebraska Department of Banking*, 270 Neb. 529, 704 N.W. 2d 784 (2005). MERS challenged an administrative finding that it was a mortgage banker subject to license and registration requirements. The Nebraska Supreme Court found in favor of MERS, noting, "MERS has no independent right to collect on any debt because MERS itself has not extended any credit, and **none of the mortgage debtors owe MERS any money."** 270 Neb. at 535. (Id.at 10.)

Thus it is clear that when a state administrative agency has sought to regulate MERS as a lender, MERS has taken the position that it does not lend money nor does it engage in the enforcement of mortgages. Of course, in the instant case, MERS is taking the exact opposite position with respect to mortgage enforcement as it has done in a number of forums, including both the *Mitchell* and *Landmark* cases addressed *supra*, and took an opposite position in the *Landmark* case as well. When an agency attempts to regulate MERS, MERS' position is that it does not enforce mortgages, but when a buyer defaults on a mortgage, MERS apparently has no moral, ethical, or legal problem with attempting to enforce one. On the basis of inconsistent legal positions alone, courts

should hold MERS to the position that MERS made when governments or agencies first attempted to regulate it and MERS took the position it was not an entity subject to regulation.

The *Landmark* court then moved on to a discussion about the rights of MERS as a "nominee" and noted first that a nominee is an agent. The court cited Black's Law dictionary as defining a nominee as "[a] person designated to act in place of another, use[ually] in a very limited way". Black's Law Dictionary 1076 (8th ed. 2004) (Id. at 8). The *Landmark* court noted that depending upon the circumstances, other cases defining the rights held by a nominee range from that of a straw man, to that a buyer, but concluded that in this context MERS relationship to the lender was more akin to that of a straw man than that of a buyer. (Id. at 9). The *Landmark* court also cited as authority, *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal 2008) where the bankruptcy judge stated that: **[I]f FHM [the lender] had 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.** (emphasis added) (Id. at 9). Thus it is clear that MERS, as a straw man agent, with its limited rights, cannot act without the express approval of its present principal.

The *Landmark* court then wrestled with the problem of the Deed of Trust being separated from the note for lack or proper assignment. It noted, just as did the *Mitchell* judge, that "The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of a the holder of the note." (Id. at 9). It cited another case involving MERS, *Bellistri v. Ocwen Loan Servicing, LLC,* 284 S.W. 3d 619, 624 (Mo. App. 2009)

which held that "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen, separate from the note had no force." Thus in the instant case, should MERS ever find the holder of Plaintiffs' first mortgage note, an assignment by MERS of such deed of trust would be ineffectual.

The *Landmark* court also briefly addressed MERS' status as named beneficiary of the Deed of Trust. It noted that MERS had no financial interest because:

> "Neither Kesler [the real estate purchaser] nor anyone else involved in the case "was required by statute or by contract to pay MERS on the mortgage. See *Sheridan* __ B.R. at __ ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through the foreclosure of the Deed of Trust in the event the Note is not paid.") If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See *Vargas*, 396 B.R. 17 ('[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note [quoting *Carpenter v. Longan* 16 Wall. 271, 83 u.s. 271, 275, 21 L. Ed. 313 (1872)])." (Id. at 9-10).

Once again the court seized on the fact that MERS actually has no financial interest in a mortgage and thus really has no standing by itself to litigate an action.

3. Summary of points in MERS cases.

The first point is that MERS has, in one forum at least, in order to avoid banking regulation, taken the position that it does not ever hold notes or have any financial interests in the mortgages or enforces mortgages, but it has continued to attempt to enforce mortgages in other forums.

The second point is that the courts have very narrowly construed the powers of MERS as "nominee" as that of a very limited agent, even that of a straw man and that as such MERS is required to have the present holder of the note, as its principal, authorize

whatever action it takes. Courts have shown no willingness to allow MERS to act on its own or claim it can act for unknown or future assignees of the original lender.

The third point is that MERS is not a beneficiary of the Deed of Trust, despite language in the Deed of Trust to the contrary. Since it never holds a financial interest in the mortgage it can't be a beneficiary of the mortgage.

The fourth point is that a separation of the note and Deed of Trust occurs when MERS holds the Deed of Trust for future successors and assigns of the lender without an assignment of the Deed of Trust when the note is sold. The Courts hold that as a practical matter the lien is nullified, making the note unsecured.

The fifth point is that never assigning the Deed of Trust when the note is sold creates notice problems and that other parties who have interests in the transaction may not know who actually has the right to enforce the Deed of Trust lien.

4. The MERS case cited by Defendant has no legal analysis.

Defendants cite *Mortgage Electronic Registration Systems, Inc. v. Ralich,* 2009 WL 2596091 (Pa. Super. Ct. Aug 25, 2009) for the proposition that MERS as nominee for the Lender and Lender's successors and assigns, had the authority to complete a sheriff's sale even though the mortgage had been assigned twice. What is missing from the court's decision is any analysis whatsoever regarding MERS right to litigate. Perhaps that is because the real question in the case was whether Plaintiffs had timely filed an action to set aside a sheriff's sale.

The *Ralich* court never addressed the question of whether MERS had an interest in the underlying note or whether it had standing to litigate without having such an interest. Despite all of the cases involving MERS in the last several years, it never cited a

single case. It was apparently unaware how aberrant its decision was. This court should not consider *Ralich* as authority for the issues in this case.

5. The authoritative cases clearly indicate that neither MERS nor FHHLC have any justiciable interest in Plaintiffs' first mortgage Deed of Trust.

FHHLC has sold Plaintiff's first mortgage note to Fannie Mae some time ago. When it did, it sold all right, title and interest in Plaintiff's Deed of Trust and in the Defendant's Motion to Dismiss even takes the position that its interest was assigned to the purchaser of the note as a matter of law. So it has no justiciable interest in Plaintiff's first mortgage note and as the Bankruptcy judge noted in *Mitchell,* a party without a justiciable interest does not have standing to litigate.

The same is true for MERS. It cannot act on its own either. At best it is an agent of an undisclosed principal and it can't represent the principal's interest in this case without express authority and even then must substitute its name for that of its principal.

6. Conclusion: Plaintiffs have stated a clear claim for removal of the cloud on their title caused by the first Mortgage Deed of Trust.

Despite the fact that these two Defendants have no discernible interest in Plaintiffs' first mortgage note or Deed of Trust, they appear as the only parties on the pertinent documents. As such, all they do is cloud Plaintiffs' title. Plaintiffs' have clearly stated a valid claim for the removal of that cloud.

F. An Injunction is necessary to prevent the harm to Plaintiffs.

Defendants claim that Plaintiffs have failed to state a claim for injunctive relief. Defendants claim that Plaintiffs have identified no actual threatened or imminent irreparable injury entitling them to the mandatory relief they seek.

For the proposition that Plaintiffs are not entitled to an injunction, Defendants cite *Wayne v. HomEq Servicing, Inc.,* No2:08-cv-00781-RCJ-LRL, 2008 WL 4642595 (D. Nev. Oct. 16, 2008), **a case brought *pro se* by homeowners** who were being foreclosed on by their lender. The *Wayne* court found that copies were sufficient evidence to support the lender's claims. However, the *pro se* Plaintiffs never raised the question of a copy's validity under 3-309 of the Uniform Commercial Code. In fact, the *Wayne* Plaintiffs admitted that a copy of the note could be offered as evidence of holder in due course status. Nor did the *pro se Wayne* Plaintiffs raise any issue under 3-501 of the Uniform Commercial Code. Moreover, the *pro se Wayne* Plaintiffs also did not raise the question of a lender's standing to foreclose when the lender no longer had a financial interest in the litigation. Consequently, this court should not consider *Wayne* to be persuasive authority, when so many critical issues, were not raised by *pro se* litigants.

As has been shown, FHHLC has no interest in Plaintiff's first mortgage note or in Plaintiff's deed of trust and no standing to assert any self-interest under these documents. It cannot assert the interest of another party in litigation. Any interests FHHLC had in these documents no longer exist, yet FHHLC continues to act as if it has an interest in them. It continues to demand payments of the Plaintiffs without any right to the payments itself and it has not shown, who has those rights, nor has it shown that it has the authority to make those demands on behalf of anyone who does.

As a consequence, Plaintiffs are clearly being harmed by FHHLC, who continues to make demands it has no right to make. Injunction is properly pled and is a proper remedy.

G. Plaintiffs' Claims not addressed by the Defendants.

Plaintiffs have made several claims that have not been addressed by the Defendants. Plaintiffs have claimed that Defendants have the burden of proof concerning the enforceability of the documents in question.

FHHLC never disputed Plaintiffs claims under T.C.A. § 47-3-501 regarding the second mortgage note. FHHLC had the obligation to surrender Plaintiffs second note when Plaintiffs paid in full. Nowhere in Defendants Motion to Dismiss is FHHLC's failure to surrender said note discussed.

VI. CONCLUSION

The Court should deny Defendant's Motion to Dismiss, as it is clear that Plaintiffs have stated claims for relief. Defendants have not alleged that Plaintiffs lack standing to bring suit. So it is indeed ironic that MERS, who would appear to have no justiciable interest in the case at all and no standing to assert any defense at all to Plaintiffs' claims should file a Motion to Dismiss. Likewise, FHHLC, who clearly has no justicable interest in Plaintiffs' first mortgage and no standing to assert any defense with respect to it, has also alleged that Plaintiffs have no claim. Call it gall, call it audacity, insolence or effrontery, but the Defendants do have something, in order to file a Motion to Dismiss under these circumstances.

The Court should require the Defendants to promptly answer this suit. The Court should promptly require Defendants to answer the discovery Plaintiffs filed simultaneously with their Original Complaint that they have succeeded in delaying for nearly six months.

Should Defendants fail to produce the notes in question within a reasonable time, or should FHHLC fail to show authority to demand payment within a reasonable time, the Court should set this matter for a show cause hearing requesting Defendants to show cause why the Court should not grant Plaintiffs the protection they request, for FHHLC to show cause why the Plaintiffs should continue to be required to make payments to the FHHLC, and for MERS to show cause as to why the deed of trust on Plaintiffs home should not be extinguished.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been hand delivered, or mailed regular mail to Kristine L. Roberts and Robert F. Tom, at their offices on 165 Madison Avenue, Suite 2000, Memphis, TN, 38103 on this 23rd day of October, 2009.

_____
David G. Mills