concerning *Dart* and *Zeigler*) that it is the note holder based on the fact that the note is in the owner's file. *See* August 18 Affidavit of Stacey Kranz ("Kranz Aff. (8/18/08)") at ¶4 (Appx. 647) ("Bank of America, who is listed as the current servicer on the Ziegler . . . loan registered on the MERS® System, had (and has) physical possession of the original Zeigler note in its files. MERS in turn has possession of the original Zeigler Note through a MERS Certifying Officer who is an employee of the member listed as servicer on the MERS® System."); August 15 Affidavit of Cynthia Mech ("Mech Aff. (8/15/08)") at ¶4 (Appx. 642) (same).

Such machinations do not make MERS the note holder when the note remains in the file of the loan owner and all the parties understand that all the rights under the note belong with the loan owner. Courts in numerous contexts have treated purported transfers as "shams" when control or other legal rights do not change hands. *See, e.g.*, *Neely v. United States*, 775 F.2d 1092, 1094 (9th Cir. 1985) ("[T]ransfer of the title of assets to a trust while retaining the use and enjoyment is a sham transaction that will not be recognized for tax purposes."); *Shaprio v. Matouck* (*In re Hayes*), 322 B.R. 644, 647-48 (Bankr. E.D. Mich 2005) (allowing the purported transferor "to keep possession and control . . . is strong evidence that the parties had no actual intent to transfer ownership" (citing cases)). Moreover, MERS's Terms and Conditions and Rules of Membership demonstrate the farce of court filings claiming MERS is the note holder, as both of those set of documents make clear that MERS is always acting on behalf of third-party note holders who have the real financial interest in the borrowers' payment, rather than on its own behalf. *See* MERS Terms and Conditions at ¶ 3 (Appx. 490) ("MERS shall at all times comply with the instructions of the *holder* of mortgage loan promissory notes." (emphasis added)); Rules of Membership, Rule 2, Section 6 (Appx. 456) (same). It is nonsensical for

MERS to agree to "*at all times* comply with the instructions of the holder" if it views itself as the true holder at any time.

D. MERS Cannot Proceed on Behalf of the Loan Owners Because It Has Presented No Evidence It Is the Current Loan Owners' Agent.

But even if MERS could properly prosecute lift stay motions in its own name on behalf of a third party, that right would not entitle MERS to relief in the cases before this Court because MERS has merely shown it was appointed as the original lenders' agent. This showing, however, does not prove it has been appointed an agent by the loans' current owners. *See In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("If [the original lender] 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.") Nothing in the record even indicates the identities of these current loan owners, let alone whether they have appointed MERS as their nominee. Moreover, in *Dart* and *Zeigler*—the only cases in which MERS on appeal claims to have presented sufficient evidence—the record conclusively proves that the original lender does *not* own the loan.

In *Dart*, Cynthia Mech's affidavit indicates that Centralbanc Mortgage Company, the original lender, sold its ownership interest. *See* June 2 Affidavit of Cynthia Mech at ¶6 (Appx. 263). There is nothing in the record indicating who currently owns the loan. Although her supplemental affidavit discloses that Bank of America now services the loan, *see* Mech Aff. (8/15/08) at ¶4 (Appx. 642), that addition provides no information about ownership, s*ee* 15 U.S.C. § 1641(f) (distinguishing servicers from owners of the obligation). Accordingly, the record contains no indication that MERS has been authorized by the current owner to serve as its nominee. Likewise, Stacey Kranz' affidavit in *Zeigler* indicates that Meridias Capital, Inc. has

transferred its ownership interest and that Bank of America now services the loan. *See* June 2 Affidavit of Stacey Kranz at ¶6 (Appx. 263); Kranz Aff. 8/18/08 at ¶4 (Appx. 647). Again, the record contains no indication of the current owner or that MERS has been appointed nominee by that actual owner. Under such circumstances, MERS is not entitled to prosecute relief stay motions. *See Vargas*, 396 B.R. at 517 ("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."); *see also In re Parrish*, 326 B.R. 708, 719 (Bankr. N.D. Ohio 2005) ("To have an allowed proof of claim, the claimant must prove an initial fact: that it is the creditor to whom the debt is owed or, alternatively, that it is the authorized agent of the creditor.").

MERS, which has neither a financial interest in the loans at issue nor a role recognized by traditional mortgage law, lacked standing and real-party-in-interest status to file the motions to lift the bankruptcy stay. Its creation of forms and legal fictions cannot avoid this conclusion. Moreover, its claim to be acting as a nominee of the loan owners is wholly unsubstantiated because it has provided no evidence of who currently owns the loans.

II. BORROWERS FACING FORECLOSURE NEED TO KNOW WHO OWNS THEIR LOAN.

The fact that MERS hides the name of the current loan owner by filing motions to lift the bankruptcy stay in its name and not providing any evidence of who currently owns the loan has real and troubling consequences for bankrupt homeowners. Borrowers typically have no idea that their loans have been securitized and sold to new owners. However, this fact can be critically important for borrowers who run into problems paying their loans, as their servicers' flexibility in offering loan modifications may be constrained by the contract between the servicer

and the loan owner. *See* U.S. Treasury, Making Home Affordable Program, Borrower: Frequently Asked Questions 12 (July 19, 2009), *available at* http://www.makinghomeaffordable.gov/docs/borrower_qa.pdf ("If the organization that services your loan does not own it, your servicer may need to get permission from the owner or investor before they can change any of the terms of your loan."). Moreover, borrowers need to know the owner's identity because they cannot rely on their servicers to relay the owner's policy on modifications. *See* Karen Weise, *Bundled Loans Stall Modification Plans* (Marketplace radio broadcast Aug. 6, 2009), *available at* http://marketplace.publicradio.org/display/web/2009/08/06/pm-loan-mods/ ("I've talked with lots of homeowners who'd . . . been told an investor won't allow their modification. But experts say that doesn't make sense.").

Borrowers who have been the victims of illegal lending practices also need to know the identity of the loan owner in order to vindicate their rights. For instance, the Truth in Lending Act provides under certain circumstances that the current owner of the loan is liable for damages related to the original lender's illegal conduct. *See* 15 U.S.C. § 1641(d), (e). It also requires the current loan owner to honor requests by homeowners who want to rescind their loans upon discovering that they did not receive accurate disclosures. *See id.* § 1641(c). But neither a damage nor a rescission claim can be raised against the servicer. *See id.* § 1641(f). Courts regularly dismiss Truth in Lending cases in which borrowers fail to name the current loan owner. *See, e.g.*, *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002) (dismissing a TILA rescission claim because the assignee was not named as a party although loan originator and servicer were named). Accordingly, the Minnesota Supreme Court has expressed "concern"

that MERS merely identifying itself as the party in filings related to foreclosure actions "may foreclose federal remedies that are otherwise available to homeowners." *Jackson v. Mortgage Elec. Registration Sys.*, __ N.W.2d ___, 2009 WL 2461257, at *13 (Minn. Aug. 13, 2009). Likewise, the common law provides a homeowner whose lender committed fraud with a claim against the current owner who had knowledge of the fraud when it bought the promissory note or was otherwise complicit. *See Hays v. Bankers Trust Co. of Calif.*, 46 F. Supp. 2d 490, 495-97 (S.D. W. Va. 1999).

Courts have also noted that MERS's role in keeping loan owners' identity out of the public record adversely affects public policy research. *See MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 85 (N.Y. 2006) (Ciparick, J., concurring) ("MERS's success will arguably detract from the amount of public data available concerning mortgage ownership that otherwise offers a wealth of statistics that are used to analyze trends in lending practices."). Similarly, keeping loan owners' name out of the bankruptcy courts' electronic dockets may thwart the usefulness of bankruptcy records in informing public policy related to lending. *See* Katherine Porter, *Misbehavior and Mistake in Mortgage Bankruptcy Claims*, 87 Tex. L. Rev. 121 (2008) (reporting on home lending research based on filings in 1,700 bankruptcy cases); *see also* 11 U.S.C. § 107 (providing public access to bankruptcy records).

Congress has recently recognized the problems created for borrowers when they do not know who owns their loan and the strong public interest in having this information disclosed. The Helping Families Save Their Homes Act of 2009 requires that loan owners notify borrowers about all future transfers in ownership. Section 404 of the act provides that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a

third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer." Pub. L. No. 111-22, 123 Stat. 1632, 1658 (codified at 15 U.S.C. § 1641(g)(1)). As Senator Boxer, the author of this provision, stated on the Senate floor:

> [I]f you are in trouble and you want to renegotiate your mortgage, you need to sit down with the company that holds your note. That is all we do in this amendment. . . . It seems like a no-brainer to me. Clearly, the law needs to be made explicit because, frankly, the people who hold the mortgages seem to go into hiding and you cannot find them when you want to find them.

155 Cong. Rec. S5173 (daily ed. May 6, 2009). MERS should not be allowed to use the bankruptcy courts to further what Congress has determined to be an unacceptable practice of hiding the identity of loan owners.[6]

MERS, however, seeks this Court's blessing to keep loan ownership information hidden from homeowners even when they face the imminent prospect of foreclosure. The disclosure of merely MERS's name in lift stay motions is an unsatisfactory substitute for knowing the loan owner (or even the servicer) because MERS lacks any authority to modify the loan. Indeed, consistent with MERS's own documents that recognize that it has no financial interest or rights in the loans, *see supra* Section I.B, MERS informs homeowners having trouble making payments that they need to contact their servicer rather than it, *see* Welcome to MERS for Homeowners, http://www.mersinc.org/homeowners/index.aspx (last visited Aug. 18, 2009) (identifying the servicer as "the company you call when you have questions about your loan"). Accordingly, as noted by the appellees' brief, this arrangement violates the bankruptcy court's local rule that requires a movant "to communicate in good faith regarding resolution of the motion before filing

---

[6] Because this law applies only to ownership transfers that occur after its enactment, it is unlikely to provide the identity of the loan owner to homeowners facing foreclosure (and lift stay motions) during the current economic crisis, because their loans were already transferred.

a motion for relief from stay." L.R. Bankr. P. 4001(a)(3). MERS has no such ability. Moreover, MERS is a particularly pernicious block to homeowners' attempt to assert legal defenses because "[w]hen MERS forecloses, it uniformly refuses to acknowledge or accept responsibility for consumer claims and defenses related to the origination or servicing of the loan." Peterson, *supra*, at 2280.

The Federal Rules of Civil Procedure's requirement of proceeding in the name of the real party in interest is intended to prevent just such a disconnect between the party prosecuting a motion and the decisionmaker with authority: "The purpose of the [real-party-in-interest] requirement is to protect individuals from the harassment of suits by persons who do not have the power to make final and binding decisions concerning prosecution, compromise and settlement. . . . [A] real party in interest must be in such command of the action as to be legally entitled to give a complete acquittal or discharge to the other party upon performance." *In re Tainan*, 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985), *cited with approval in Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002). Accordingly, this Court should affirm the bankruptcy court's holding that MERS lacks standing and is not a real party in interest that can file motions to lift the automatic bankruptcy stay.

III. SHODDY EVIDENCE IS INSUFFICIENT TO DENY BORROWERS THE FUNDAMENTAL PROTECTION OF THE BANKRUPTCY STAY.

Apart from the legal deficiencies the bankruptcy court held to exist in MERS's lift stay motions, it also found evidentiary deficiencies. These evidentiary findings must be reviewed for an abuse of discretion. *See Johnson v. Neilson* (*In re Slatkin*), 525 F.3d 805, 811 (9th Cir. 2008). Under that standard, this Court can reverse only if it finds the bankruptcy court made a "clearly

erroneous assessment of the evidence." *Heath v. Am. Express Travel Related Serv. Co.* (*In re Heath*), 331 B.R. 424, 429 (9th Cir. B.A.P. 2005).

Debtors have a fundamental right to avoid collection actions, including foreclosure, during the pendency of bankruptcy:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Dawson v. Wash. Mutual Bank, F.A. (*In re Dawson*), 390 F.3d 1139, 1147 (9th Cir. 2004) (quoting H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97). Although the foreclosure stay can be lifted when a homeowner is unable to make mortgage payments, it is critical that borrowers not be deprived of such a fundamental protection of bankruptcy without solid evidence that the creditor is entitled to proceed. As a New Jersey bankruptcy court held in reviewing problematic certifications filed as part of lift stay motions, "notwithstanding the volume, pace and electronic systemizing of stay relief motions and applications, this court must remain mindful of the serious stakes—most often it is the family homestead that is in jeopardy. . . . [B]oth the data supplied and the verification processes employed by those who would foreclose on residences must be above reproach." *In re Rivera*, 342 B.R. 435, 440 (Bankr. D.N.J. 2006) (emphasis omitted). This Court should apply the same standard.

The bankruptcy court found that various affidavits filed in these cases could not be considered pursuant to Federal Rule of Evidence 602 because the affiants lacked adequate personal knowledge. On appeal, MERS disputes this finding only as to the affidavits of Cynthia

Mech (submitted in *Dart*) and Stacey Kranz (submitted in *Zeigler*). Yet even these affidavits are deficient. In addition to the bankruptcy court's finding that their "bald assertion[s]" about "review[ing] the loan file" was inadequate, Opinion and Order at 14 (Appx. 753), neither affidavit provide any support for their claim that "[*a*]*t the time* MERS filed the Motion for Relief" the notes were found in Bank of America's possession, Kranz Aff. (8/18/08) at ¶4 (Appx. 647) (emphasis added); Mech Aff. (8/15/08) at ¶4 (Appx. 642) (emphasis added). Even if such a review may have uncovered that the notes were in the files at the time the affidavits were made—more than six months after MERS filed the motions to lift stay—there is no indication how Ms. Mech or Ms. Kranz, in reviewing the loan file, learned when the notes entered into the files or whether the notes were present when MERS filed its motions. MERS's brief admits that it was necessary for it to prove the "physical possession of the notes *at the time* the motions for relief from stay were filed," MERS Br. 31 (emphasis added), so this deficiency is fatal.[7]

This case is just one of a recent plethora of cases in which bankruptcy courts have found patent inadequacies or misstatements in affidavits accompanying lift stay motions seeking home foreclosures. *See, e.g.*, *In re Fitch*, No. 04-16905, 2009 WL 1514501 (Bankr. N.D. Ohio May 28, 2009) (affidavit that falsely represented that the servicer was acting on behalf of MERS); *In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007) (affidavit filed in lift stay proceeding stating personal knowledge of a borrower's default when the borrower had not defaulted); *Rivera*, 342 B.R. 435 (certifications filed with relief stay motions were presigned with details filled in later by other individuals). This is just one aspect of the systematic problems currently being

[7] Moreover, the affidavits' deficiencies are compounded by their legally erroneous position that Bank of America's loan files became MERS's property merely by declaring Bank of America employees to be Assistant Secretaries and Certifying Officers of MERS. *See supra* Section I.C. Only through that legal fiction do they claim to know what is in MERS's possession.

witnessed in bankruptcy courts across the nation with lenders' cavalier treatment of homeowners. *See, e.g.*, *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008) (observing systematic problems in bankruptcy filings by Wells Fargo concerning home loans).

The bankruptcy court did not abuse its discretion in refusing to accept such problematic filings.

CONCLUSION

In creating MERS, the industry decided that settled mortgage law did not matter, and it could create its own private system of mortgage law. The mortgage industry's unilateral actions in creating MERS do not entitle them to have the judiciary alter the settled doctrines of standing and real-party-in-interest status to accommodate its machinations. But that is exactly what MERS is asking here in claiming that it can file motions to lift the bankruptcy stay without naming any party who will actually receive foreclosure proceeds. Moreover, by filing these motions in its name, MERS deprives homeowners facing foreclosure of essential, otherwise-unavailable information concerning who owns their loan. This Court should refuse to authorize MERS's subterfuge and affirm the decision of the bankruptcy court.

Respectfully Submitted,

/s/

CHRISTOPHER P. BURKE, ESQ.
Nevada Bar I.D. No. 4093
218 S. Maryland Pkwy
Las Vegas, NV 89101
Tel: 702-385-7987
Email: atty@cburke.lvcoxmail.com
Attorney for Amicus Curiae National Association of Consumer Bankruptcy Attorneys

DANIEL MOSTELLER
CENTER FOR RESPONSIBLE LENDING
910 17th Street, NW, Suite 500
Washington, DC 20006
Tel: 202-349-1860
Email: daniel.mosteller@responsiblelending.org
Attorney for Amicus Curiae Center for Responsible Lending

August 20, 2009