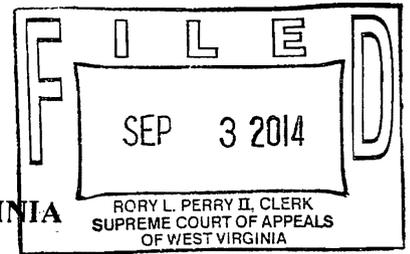


IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-0776

STATE OF WEST VIRGINIA ex rel.,
U.S. BANK NATIONAL ASSOCIATION,
et al.,

Petitioners,

HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA,
AND WYOMING COUNTY, WEST VIRGINIA

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Harry F. Bell (WV Bar #297)
Jonathan W. Price (WV Bar #10868)
The Bell Law Firm, PLLC
30 Capitol Street
Post Office Box 1723
Charleston, West Virginia 25326
(304) 345-1700

Debra Brewer Hayes
Charles Clinton Hunter
Reich and Binstock, LLP
4265 San Felipe, Ste. 1000
Houston, Texas 77027
(713) 622-7271
Pro Hac Vice

Attorneys for Respondent Wyoming County, West Virginia

TABLE OF AUTHORITIES

| CASES | PAGE(S) |
|---|---------|
| <i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wn.2d 83, 2012 Wash. LEXIS 578 (Wash. 2012) | 32 |
| <i>Bates v. Mortgage Elec. Registration Sys.</i> , 3:10-CV-00407-RCJ, 2011 WL 1304486 (D. Nev. Mar. 30, 2011) <i>reconsideration denied</i> , 3:10-CV-00407-RCJ, 2011 WL 1582945 (D. Nev. Apr. 25, 2011). | 29 |
| <i>Bevilacqua v. Rodriguez</i> , 460 Mass. 762, 763 (2011)..... | 35 |
| <i>Bowman v. Wilson</i> , 672 F.2d 1145, 1151 (3d Cir. 1982)..... | 18 |
| <i>County of Washington, PA v. U.S. Bank Nat’l Ass’n</i> - Memorandum and Order issued by U.S. District Court Judge James Curtis Joyner (E. Dist. Pa.)..... | 10 |
| <i>Danvers Motor Co., v. Ford Motor Co.</i> , 432 F.3d 286, 294 (3d Cir 2005) | 18 |
| <i>Dow Family LLC v. PHH Mortgage Corp.</i> , 2013 WI App 114 (Wis. Ct. App. 2013) (2014 WI 3, P1 (Wis. 2013) | 31 |
| <i>Estate of Fussell v. Fortney</i> , 2012 W. Va. LEXIS 303 (W. Va. June 12, 2012)..... | 16 |
| <i>Flanagan v. Stalnaker</i> , 216 W. Va. 436, 440 (W. Va. 2004), citing <i>Cox v. Amick</i> , 195 W.Va. 608, 612, 466 S.E.2d 459, 463 (1995)..... | 16 |
| <i>Forest Hills Early Learning Center, Inc. v. Grace Baptist Church</i> , 846 F.2d 260, 262 (4th Cir. Va. 1988) | 19 |
| <i>Franklin Twp. v. Com., Dept. of Env’tl. Res.</i> , 500 Pa. 1, 8-9 (1982) | 19 |
| <i>Gladstone, Realtors v. Bellwood</i> , 441 U.S. 91, 98, 99 S. Ct. 1601, 1607 (U.S. 1979) | 19 |
| <i>Harper v. Smith</i> , 2012 W. Va. LEXIS 165, *13 (W. Va. Mar. 26, 2012) | 17 |
| <i>Hogan v. Piggott</i> , 60 W. Va. 541, 56 S.E. 189, 193-94 (1906)..... | 29 |
| <i>In re Agard</i> , 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011)..... | 22 |
| <i>In re Agard</i> , 444 B.R. 231, 254 (Bankr. E.D.N.Y. 2011)..... | 31 |
| <i>In re Sheridan</i> , 2009 WL 631355 at 10 (Bankr.D. Idaho 2009) (App. 10)..... | 31 |

| | |
|--|-------|
| <i>In re Sheridan</i> , 2009 WL 631355 at 10 (Bankr. D. Idaho 2009)..... | 31 |
| <i>Interstate Traffic Control v. Beverage</i> , 101 F. Supp. 2d 445, 450 (S.D. W. Va. 2000)..... | 17 |
| <i>Jackson v. MERS, Inc.</i> , 770 N.W. 2d 487 (Minn. 2009)..... | 11 |
| <i>James v. ReconTrust Co., infra</i> at *12 (D. Or. Feb. 29, 2012)..... | 31 |
| <i>James v. Recontrust Co.</i> , Case 3:11-cv-00324-ST (D. Ore. February 29, 2012)..... | 31 |
| <i>Jones v. Wolfe</i> , 203 W.Va. 613, 509 S.E.2d 894 (1998) | 27 |
| <i>Landmark Nat’l Bank v. Kesler</i> , 216 P.3d 158 (Kan. 2009)..... | 31 |
| <i>Massachusetts v. EPA</i> , 549 U.S. 497, 522, 127 S. Ct. 1438, 1456 (U.S. 2007)..... | 18 |
| <i>Medigen of Kentucky, Inc. v. Public Service Com.</i> , 787 F. Supp. 602 (S.D. W. Va. 1992)... | 19 |
| <i>Montgomery County Recorder of Deeds v. MERSCORP</i> , -- F. Supp. 2d--, (E.D. Pa. Oct. 19, 2012)..... | 10 |
| <i>Mortgage Elec. Registration Sys. v. Ditto</i> , 2014 Tenn. App. LEXIS 1 (Tenn. Ct. App. Jan. 2, 2014) | 31 |
| <i>Mortg. Elec. Registration Sys., Inc. v. Saunders</i> , 2 A.3d 289, 295 (Me. 2010) | 31 |
| <i>Mortg. Elec. Registration Sys., Inc. v. Southwest Homes</i> , 301 S.W.3d 1, 6 (Ark. 2009) | 31 |
| <i>Niday v. GMAC Mortg., LLC</i> , 251 Ore. App. 278 (Or. Ct. App. 2012) | 35 |
| <i>Nueces County, Texas v. MERSCORP Holdings, Inc. et al</i> , 2:12-cv-00131, (SD TX 2013) | 10 |
| <i>Ohio Valley Envl. Coalition, Inc. v. Hobet Mining, LLC</i> , 702 F. Supp. 2d 644, 649 (S.D. W. Va. 2010) | 17 |
| <i>Realmark Devs., Inc. v. Ranson</i> , 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003)..... | 16 |
| <i>S. Fayette Twp. v. Com.</i> , 73 Pa. Cmwlt. 495, 501 (1983)..... | 20 |
| <i>School Bd. v. Baliles</i> , 829 F.2d 1308, 1311 (4th Cir. Va. 1987)..... | 20 |
| <i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12,483 S.E. 2d 12 (1996)..... | 14 |
| <i>State ex rel. Piper v. Sanders</i> , 228 W. Va. 792, 724 S.E. 2d 763 (W. Va. 2012)..... | 8, 15 |

| | |
|--|----|
| <i>State ex rel. Shelton v. Burnside</i> , 212 W. Va. 514, 519, 575 S.E. 2d 124, 129 (2002)..... | 15 |
| <i>State of Ohio ex rel. David P. Joyce, Prosecuting Attorney of Geauga County Ohio v. MERSCORP, Inc., et al.</i> , N.D. Ohio Case No. 1:11-cv-02474..... | 10 |
| Syl. Pt. 2, <i>State ex rel. Peacher v. Sencindiver</i> , 160 W. Va. 314, 233 S.E.2d 425 (1977)..... | 8 |
| <i>United States v. Students Challenging Regulatory Agency Procedures</i> , 412 U.S. 669, 689 n. 14 (1973)..... | 18 |
| <i>U.S. Bank Nat'l Ass'n v. Ibanez</i> , 458 Mass. 637, 941 N.E.2d 40 (2011)..... | 32 |
| <i>United States Fidelity & Guar. Co. v. Canady</i> , 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995)..... | 14 |
| <i>Walker County, Ala. v. U.S. Bank Nat'l Ass'n</i> , No. 2012-000046.00 (Cir. Ct. of Walker County, AL) (Aug. 27, 2012) | 10 |
| <i>Walker County, Ala. v. U.S. Bank Nat'l Ass'n, as Ex parte MERSCORP, Inc.</i> , 141 So.3d 984 (Ala., 2013) | 10 |
| <i>Walls v. Click</i> , 209 W. Va. 627, 633-34, 550 S.E.2d 605, 611-12 (2001) | 27 |
| <i>Warth v. Seldin</i> , 422 U.S. 490, 500 (1975)..... | 18 |
| <i>Woodall v. Clark</i> , 254 F. 526, 1918 U.S. App. LEXIS 1330 (4th Cir. W. Va. 1918) | 21 |

STATUTES

| | |
|-----------------------------------|----|
| W.Va. Code Ann. § 11A-3-19..... | 25 |
| W.Va. Code Ann. § 11A-3-59..... | 25 |
| W. Va. Code Ann. § 11A-3-1 | 28 |
| W.Va. Code Ann. § 11A-3-1..... | 29 |
| W.Va. Code Ann. § 36-5-1..... | 26 |
| W.Va. Code Ann. § 36-5-2..... | 27 |
| W.Va. Code Ann. § 36-5-2..... | 27 |
| W. Va. Code §39-1-11..... | 21 |
| W. Va. Code Ann. § 39-1-2..... | 25 |
| W.Va. Code Ann. § 40-1-9..... | 24 |
| W.Va. Code Ann. § 40-1-9..... | 26 |
| W.Va. Code 53-1-1..... | 8 |
| W.Va. Code § 55-13-1, et seq..... | 16 |
| W.Va. Code Ann. § 59-1-10..... | 28 |

OTHER AUTHORITIES

| | |
|---|----|
| Christopher Peterson, Foreclosure, Subprime Lending, and the Mortgage Electronic Registration System, 78 Univ. of Cincinnati L. Rev. 1359, 1364-65 (2010) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469749) | 25 |
| W.Va. Const. §§ 9-11 and 9-12 | 27 |
| Restatement (Third) of Property (Mortgages) § 4.1 cmt. a (1997) | 33 |
| J. F. Dolan et al., Core Concepts of Commercial Law: Past, Present, and Future: Cases and Materials 2 (Thompson West, 2004) (“The First Rule of Conveyancing – Nemo Dat”) | 35 |
| William Warren, Cutting Off Claims of Ownership Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 469, 470 (1963) | 35 |

TABLE OF CONTENTS

RESPONSE TO THE QUESTIONS PRESENTED

STATEMENT OF THE CASE

SUMMARY OF THE ARGUMENT

- A. Nature of the Action
- B. The Mortgage Electronic Registration Systems, Inc.
- C. The Petitioners Did Not Record Assignments, Yet Claimed the Benefit of Doing So

STATEMENT REGARDING ORAL ARGUMENT

ARGUMENT

- I. THE WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE JUDGE MCGRAW APPROPRIATELY EXERCISED HIS DISCRETION AND HIS RULING WAS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW
 - A. Respondent Has Independent Causes of Action for Unjust Enrichment and Declaratory Judgment and Judge McGraw's Ruling Thereupon Is Supported by West Virginia Law
 - B. Respondent Has Standing to Bring a Private Cause of Action
 - 1. Respondent Has Suffered An Injury-In-Fact
 - 2. Respondent Has Standing Because it Alleges Financial Harm Traceable to Petitioners
 - 3. Petitioners' Conduct Has Impaired Wyoming County's Recording System and the County Has a Duty to Protect the Public From This Harm
 - 4. Respondent's Priority Rights as a Creditor Confer Standing to Challenge the Secured Status of Loans Involving MERS Mortgages
 - C. West Virginia Recording Statutes Require Mortgage Assignments to be Recorded and Judge McGraw Properly Applied the Statutes
 - 1. West Virginia's Recording Statutes Require Recordation

2. Public Policy Requires Recordation of Transfers of Real Property Interests

D. Contrary to Petitioners' Claims, MERS Has No Interest, Legal or Equitable, in any Deed of Trust and Therefore is Neither a Proper "Beneficiary" nor "Mortgagee" Under the Law

II. PETITIONER'S CONDUCT HAS NEGATIVELY IMPACTED RESIDENTIAL LENDING AND PROPERTY RIGHTS IN WEST VIRGINIA AND THIS LAWSUIT IS A FIRST STEP TOWARDS REPAIRING ITS EFFECTS; THIS COURT SHOULD DENY THE REQUEST FOR A PETITION AS THE RULING OF THE CIRCUIT COURT IS PROPER AND REQUIRES NO FURTHER REVIEW

CONCLUSION

RESPONSE TO THE QUESTIONS PRESENTED

Respondent, Wyoming County, respectfully submits that the question presented by the Petition is actually an appeal of a lower court ruling for abuse of discretion by Judge Warren McGraw in denying the Petitioners' motion to dismiss on the same issues reasserted hereunder: whether the Counties of West Virginia have a right to enforce the laws of West Virginia, where the Petitioners' circumvention of these laws has led to the Counties suffering extensive and affirmative harm. *See* Petition at 'Question Presented.' Respondent maintains that Judge McGraw did not abuse his discretion nor side-step the law in allowing Wyoming County to proceed in its pursuit of justice. Disagreement by the Petitioners with Judge McGraw's ruling does not render said ruling "clearly erroneous as a matter of law."

STATEMENT OF THE CASE

On March 27, 2012, Respondent, on behalf of itself and all other similarly situated West Virginia Counties, originally filed its putative class action complaint in the Circuit Court of Wyoming County, WV against the Petitioners. *See* Petitioners' App. at 282-3. On May 9, 2012, Petitioner U.S. Bank filed a Notice of Removal to the U.S. District Court. *Id.* In response, Respondent filed its June 8, 2012 Motion to Remand and Memorandum in support thereof, seeking to return the case back to the Circuit Court of Wyoming County. *Id.* On June 25, 2012, the Petitioners simultaneously filed their brief in opposition to the remand and their original motion to dismiss the case. *Id.* On February 19, 2013, the United States District Court for the Southern District of West Virginia, Beckley Division, issued a Memorandum Opinion and Order remanding the action back to the Circuit Court. *Id.* One year later, on February 18, 2014, the Petitioners filed the motion to dismiss underlying this Petition. *Id.* Wyoming County responded in opposition to the motion to dismiss on March 18, 2014 and on July 16, 2014, oral argument on

Petitioners' motion to dismiss was held. *Id.* On July 22, 2014, Judge McGraw, from the bench of the Circuit Court of Wyoming County, issued a ruling denying the Petitioners' motion to dismiss pursuant to the 12(b)(6) standard, acknowledging that Respondent's causes of action are legally supported under the Complaint. *Id.* at 4-7.

Notwithstanding Petitioners' attempt to complicate this matter, this case is very simple: Petitioners cannot legally avail themselves of the benefits of Wyoming County's recording system without paying for the privilege. Through the action underlying this Petition, Wyoming County seeks to recover the benefits the Petitioners received by relying on the County's real property recording system without compensating it for that benefit.

In connection with the creation of various residential mortgage backed security ("RMBS") trusts that purportedly held mortgage loans (used interchangeably with "deed(s) of trust" or "DOT") on properties located in Wyoming County, the Petitioners represented at the time these trusts were created that they possessed all the rights to certain DOT attached to these properties, free and clear of any encumbrance. On the basis of these representations, Petitioners attracted investors to their RMBS trusts claiming their mortgages had priority over other competing liens on the mortgaged properties, the right to foreclose on non-performing DOT, favorable tax treatment, insulation from the bankruptcy of other entities in the mortgage loans' chain of title, and other benefits. The Petitioners, however, did not record, or cause to be recorded, certain DOT assignments at the time the trusts were created, nor did it pay the accompanying fees, which are preconditions for enjoying the enumerated benefits.

Instead, Petitioners participated in a scheme by which notes were transferred to the trusts it administered and the change in note ownership was [allegedly] recorded only in the records of Mortgage Electronic Registration Systems, Inc. ("MERS"), a private corporation created for the

express purpose of circumventing the payment of DOT assignment fees to county governments. Transfers within the MERS system do not perfect the mortgage for the transferee and cannot satisfying the requirement that conveyances be recorded. Absent a recording of a mortgage's assignment with the County Recorder of Deeds, the mortgage is unperfected in the hands of the transferee.

Petitioners not only reaped benefits to which they were not entitled, but their conduct has caused affirmative harm to Wyoming County. They conducted wrongful foreclosures through MERS, a practice which has clouded title on property throughout the County, depressing home values and the County's real estate tax assessments. Further, use of MERS has obscured the County's priority rights as creditors and undermined the integrity of its deed records, which had for centuries provided a definitive, transparent public record that promoted open and vibrant commercial activity.

Once again, through this Writ, Petitioners are attempting to deflect all wrong-doing on their behalf by claiming the effects of this suit will be "devastating" on their multi-billion dollar bottom line, while ignoring the effects it has already had on the counties, by demeaning the function and importance of the Wyoming County Clerk as well as, now, eviscerating the judicial power of the Circuit Court Judge.

Contrary to their assertions, Respondents are not seeking "extraordinary relief"- they are merely seeking what is due to them under the laws of West Virginia. *See* Petitioners' App. at 1, 'Statement of the Case.' Conversely, Petitioners are the ones now seeking, but due no extraordinary relief as they cannot legally avail themselves of the benefits of Wyoming County's recording system without paying for the privilege, despite the fact that this has already occurred. Armed with the parties' extensive briefing, the Circuit Court then conducted oral argument on

Petitioners' motion to dismiss. The Court later issued its 'Order Denying Motion to Dismiss' whereby validating Wyoming County's proper pursuit of justice under the laws of West Virginia. *See* Petitioners' App. at 4-7.

SUMMARY OF ARGUMENT

Prohibition is an extraordinary relief appropriate only where a lower court exceeds its legitimate powers. W.Va. Code 53-1-1. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). As a procedural matter, this Honorable Court should not issue a writ of prohibition to review Judge McGraw's ruling even if a simple abuse of discretion was found. This Court has made clear that the extraordinary writ of prohibition "will not issue to prevent a simple abuse of discretion by a trial court." *State ex rel. Piper v. Sanders*, 228 W. Va. 792, 797, 724 S.E. 2d 763, 768 (2012).

The central argument underlying Respondent's opposition to Petitioners' motion to dismiss, and now this Petition, is that MERS has no interest, legal or equitable, in any deed of trust and therefore is neither a "Beneficiary" nor the "Mortgagee," rendering Petitioners' filings fraudulent and their failure to file in violation of the West Virginia recording statutes. Judge McGraw recognized these factual and legal assertions as supported by the laws of West Virginia and precedent set elsewhere in the country in denying Petitioners' motion to dismiss.

A. Nature of the Action

Public recordation of mortgage interests in the United States dates back to at least 1698, when the colony that would one day become the State of South Carolina passed the first real property recording statute. Over the past three centuries the system of recording interests in real property has become woven into the fabric of virtually every real estate transaction involving a purchase-money loan evidenced by a trust deed or mortgage. To this day, all fifty states and the

District of Columbia retain recording statutes intended to keep the public land records accurate, open and reliable. However, in under a decade, MERS and its members have collapsed that system and rendered the public record of interests in real estate muddled and unreliable. This action is a first step towards halting and repairing the damage caused in all of West Virginia's counties.

West Virginia law requires that in order to be enforceable, mortgage assignments must be in writing and filed with the county recorder of deeds. *See* Petitioners' App. at 14. (Plaintiff/Respondent's Complaint ("Complaint"), ¶¶ 16-19). For each recorded assignment, Wyoming County is entitled to a payment of \$15.00. *Id.* These recording fees are used to maintain the county recorders' records as well as to fund other county services such as children and youth services, veterans' affairs, health centers, and housing assistance. *See Id.* at 19-20, (Complaint, ¶ 36).

Instead of recording mortgage assignments with the county recorders as required by law, Petitioners, acting as RMBS trustees, used the self-created MERS system, in which they were voluntarily permitted to track their transfers, although few, if any, actually did. Consequently, Petitioners did not record mortgage assignments at the time the RMBS trusts were created, nor did they pay the accompanying fees to Respondent, which are preconditions for enjoying the enumerated benefits of securitization.

Again, despite Petitioners' insistence to the contrary, other courts have found in favor of County Recording Clerks and the preservation of the traditional/legal system of recording security instruments. Numerous suits with causes of action nearly identical to those, herein, and

based upon state recording statutes not unlike those of West Virginia, have denied these same Petitioners' prior motions to dismiss and Writs for extraordinary relief.¹

B. The Mortgage Electronic Registration Systems, Inc.

MERS was created in the mid-1990s by the mortgage industry to facilitate the growing industry practice of selling residential mortgages for securitization in the complex investment vehicles previously defined as "RMBS" (residential mortgage backed securities). While RMBS have existed in their modern form since 1971, the financial institutions involved in securitization, including the Petitioners, found the legal/traditional process for recording security instruments to be too cumbersome and expensive. The industry's unilateral response was to create MERS, a subsidiary of MERSCORP, Inc. which is owned by various mortgage banks and title companies, including the Petitioners.

Through MERS, RMBS trusts, including those for which the Petitioners act as Trustee, circumvent county recording requirements. RMBS trusts do not make loans directly to consumers. Instead, they purchase loans that are originated by other financial institutions. RMBS trusts and originating lenders then use MERS to facilitate the transfer of the mortgage (but not the promissory note) to the trust through the following method: at the loan's origination, the originating lender takes possession of the note, becoming holder of the note, and the borrower

¹ See e.g., *County of Washington, PA v. U.S. Bank Nat'l Ass'n*- Memorandum and Order issued by U.S. District Court Judge James Curtis Joyner (E. Dist. Pa.) denying MTD on all counts similar to those sought hereunder. See also, *Montgomery County Recorder of Deeds v. MERSCORP*, -- F. Supp. 2d--, 2014 WL m2957494 (E.D. Pa. July 1, 2014) which was certified as a class action on Feb. 11, 2014, ruling that fact issue precluded summary judgment on county recorder's claims for unjust enrichment, quiet title and defendants' violations of recording statutes. See *Walker County, Ala. v. U.S. Bank Nat'l Ass'n*, No. 2012-000046.00 (Cir. Ct. of Walker County, AL) (Aug. 27, 2012). See also, *Walker County, Ala. v. U.S. Bank Nat'l Ass'n*, as *Ex parte MERSCORP, Inc.*, 141 So.3d 984 (Ala., 2013) (Supreme Court of Alabama denied Petitioners' request for mandamus review which was nearly identical in nature to the one sought hereunder). See *Nueces County, Texas v. MERSCORP Holdings, Inc. et al*, 2:12-cv-00131, (SD TX 2013)- MTD denied. See *State of Ohio ex rel. David P. Joyce, Prosecuting Attorney of Geauga County Ohio v. MERSCORP, Inc., et al.*, N.D. Ohio Case No. 1:11-cv-02474.

and lender designate MERS (as the lender's "nominee") to also serve as the "mortgagee" in the mortgage, which is publicly recorded. *Id.* The secured interest of the lender (and lender's successors and assigns) is, thus, allegedly held by MERS such that if the borrower were to default on the loan, MERS, as the mortgagee, is allegedly authorized to foreclose on the home. *Id.* The loan information from the mortgage is allegedly registered by the MERS member lender on the MERS system and when the note is sold, usually with an eye toward its eventual securitization, the note is transferred from the original lender by an endorsement and delivery and MERS members are allegedly required to update the MERS system to reflect the change in ownership. *Id.* It has never been shown that MERS records accurately reflect these changes in ownership. *See* Petitioners' App. at 21-3 (Complaint, ¶¶ 42-47). According to MERS, so long as the note has been transferred to a MERS member, the transaction does not need to be recorded because, under the terms of the mortgage, MERS remains the original mortgagee, as the nominee for the new "beneficial owner" of the note (the original lender's "successor and/or assign"). *Id.*

There is no statutory authorization for MERS in West Virginia. The mortgage finance industry, including Petitioners, has popularized use of MERS in the mortgage securitization process, even though the MERS' system has not been incorporated in state statutory schemes, with the exception of Minnesota.²

C. The Petitioners Did Not Record Assignments, Yet Claimed the Benefit of Doing So

The Wyoming County Clerk, whose primary responsibility is the recordation of deeds, provides a service of promulgating legally sufficient public notice of real property liens in exchange for a fee. This service is known as "perfecting." While an unperfected deed is enforceable by the mortgagee against the borrower, it is not enforceable against a subsequent

² The Petition, pgs. 16-7, cites to *Jackson v. MERS, Inc.*, 770 N.W. 2d 487 (Minn. 2009), which is inapplicable here because unlike West Virginia, use of MERS is authorized by statute in Minnesota.

good faith purchaser for value or other subsequently perfected liens. That is, with perfected loans, the mortgagee has priority over all other lien holders to seize the underlying collateral in the event of default to satisfy the debt it is owed. These loans, in turn, can be securitized by major investment banking trustees, such as Petitioners, who attract investors by marketing the securities on their ability to enjoy favorable tax treatment, insulation from the bankruptcy of other entities in the mortgage loans' chain of title, and other benefits. *See* Petitioners' App. at 14-6 (Complaint, ¶¶ 20-25). When Petitioners oversee mortgage-backed securities trusts as trustee, they are able to charge premium prices to investors for its services. *Id.* At the root of their profit from overseeing MBS trusts, then, are the services of the county recorder.

In order for RMBS trusts to be properly formed and to enjoy the benefits of securitization, there must be two "true sales" of the mortgage loans, which means that all rights to the mortgage loans are transferred to the trust so that no upstream entity in the chain of title could claim control of the assets in the event of bankruptcy. *Id.* The first sale must be to an RMBS trust depositor and another from the trust depositor to the RMBS trustee. *Id.* To satisfy the requirement of two true sales, all mortgage assignments from the originating lender to the depositor to the trustee must be recorded. *See* Petitioners' App. at 17-8 (Complaint, ¶¶ 29-31). Here, Petitioners represented that all rights had been so transferred. *Id.* at 16-7 (Complaint, ¶ 26-28).

The contracts used by the Petitioners to create trusts, known as Pooling and Service Agreements ("PSAs") contain express language to ensure that all rights to the mortgage loans have been transferred to the trust, so that the transaction is considered a true sale and, accordingly, bankruptcy-remoteness is achieved and the trust maximizes its ratings. The express language also ensures that the mortgage loan is secured, so that REMIC tax status is achieved.

For example, the PSA for the trust that issued Petitioner Bank of America, N.A.'s Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-2 contains the standard definitions of "mortgage" and "mortgage loans:"

Mortgage: With respect to a Mortgage Loan, the mortgage, deed of trust or other instrument with all riders thereto creating a first lien or a first priority ownership interest in an estate in fee simple in real property securing a Mortgage Note.

Mortgage Loans: Such of the mortgage loans transferred and assigned to the Trustee pursuant to the provisions hereof as from time to time are held as a part of the Trust Fund (including any REO Property), the mortgage loans so held being identified in the Mortgage Loan Schedule, notwithstanding foreclosure or other acquisition of title of the related Mortgaged Property. Any mortgage loan that was intended by the parties hereto to be transferred to the Trust Fund as indicated by such Mortgage Loan Schedule which is in fact not so transferred for any reason shall continue to be a Mortgage Loan hereunder until the Purchase Price with respect thereto has been paid to the Trust Fund.

See Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-2, pp. 53-54 of 356 at Petitioners' App. at 16-8 (Complaint, ¶ 27-29).

The PSA for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-2, as a representation of all the PSAs mentioned herein, also contains boilerplate warranties made by the Depositor:

The Depositor, concurrently with the execution and delivery hereof, does **hereby sell, transfer, assign, set over and convey to the Trustee without recourse all the right, title and interest of the Depositor in and to the assets of the Trust Fund.**

and

The Depositor hereby represents and warrants to the Trustee with respect to each Mortgage Loan as of the Closing Date, and following the transfer of the Mortgage Loans to it by the Sponsor, **the Depositor had good title to the Mortgage Loans and the Mortgage Notes were subject to no offsets, claims, liens, mortgage, pledge, charge, security interest, defenses or counterclaims.**

Id. (emphasis added).

Despite their representations, Petitioners did not record all mortgage assignments and, without having done so, held only unperfected mortgages. Transfers recorded solely within the MERS system are ineffective to give the transferee perfection in the mortgage; perfection is obtainable only through a proper filing with the Wyoming County Clerk, the recorder of deeds, which is the sole and definitive set of property records for the County. Accordingly, Petitioners should not have received the benefits of a perfected mortgage, including the benefits that flow from securitization and Judge McGraw recognized this unjust enrichment in denying Petitioners' motion to dismiss.

STATEMENT REGARDING ORAL ARGUMENT

Respondents also request oral argument under Rule 20 of the Rules of Appellate Procedure as the issues raised by Petitioners are of fundamental public importance.

ARGUMENT

I. The Writ of Prohibition Should Not Issue Because Judge McGraw Appropriately Exercised His Discretion and His Ruling Was Not Clearly Erroneous as a Matter of Law

The writ of prohibition is a "drastic and extraordinary" measure which is "reserved for really extraordinary causes." *State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995) (*citations omitted*). Such relief is authorized when a circuit court, which enjoys jurisdiction, "exceeds its legitimate powers." W. Va. Code §53-1-1.

In *State ex rel. Hoover v. Berger*, 199 W. Va. 12,483 S.E. 2d 12 (1996), the Court set forth a five-part test for determining when a writ of prohibition should issue:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent

disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id. at 21. The *Hoover* test, therefore, focuses on whether the lower court clearly erred on an important legal issue. This approach insures the extraordinary writ of prohibition is used sparingly and only when there is a real concern that a circuit court has exceeded its legitimate authority.

Likewise, this Honorable Court has made clear that a writ of prohibition will not issue on discretionary, factual decisions handed down by the trial courts. *See State ex rel. Piper v. Sanders*, 228 W. Va. 792, 724 S.E. 2d 763 (W. Va. 2012) (finding no abuse of discretion on the merits of the case). Simply stated, "if the circuit court's ruling in the instant case is wrong, it amounts to a simple abuse of discretion which is not correctable by a writ of prohibition." *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 519, 575 S.E. 2d 124, 129 (2002). This approach honors the extraordinary nature of the writ of prohibition and avoids entangling the Court in factual decisions made in the discretion of the lower courts. For all of the following reasons, Judge McGraw made proper factual decisions, supported by the law and entrusted to his sound discretion.

A. Respondent Has Independent Causes of Action for Unjust Enrichment and Declaratory Judgment and Judge McGraw's Ruling Thereupon Is Supported by West Virginia Law

Respondent's first cause of action for unjust enrichment is an independent cause of action in West Virginia. Contrary to Petitioners' assertion that Respondent may only sue pursuant to a statutory right, which it alleges the legislature chose not to provide, well-established West

Virginia law makes clear that where “benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value.” *Realmark Devs., Inc. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003). To that end, a suit seeking monetary recovery under a theory of unjust enrichment is an action at law and therefore, can be tried before a jury. *Id.* at Syl. pt. 1 (Unjust enrichment, sometimes referred to as restitution, a contract implied in law, quasi-contract, or an action in assumpsit, is the product of a long tradition in law, and is an action at law. The statement concerning the action of quasi-contract being equitable has been repeated many times, but merely refers to the way in which a claim should be approached since it is clear that the action is at law and the relief given is a simple money judgment. A suit seeking monetary recovery under a theory of unjust enrichment is an action at law and therefore, can be tried before a jury.)

Likewise, Petitioners have no grounds to question Judge McGraw’s ruling because a request for declaratory judgment is also an independent cause of action in West Virginia. Pursuant to the West Virginia Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1, et seq.

the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

The purpose of a declaratory judgment action is to resolve legal questions, such as the ones presently before this Court. *See Estate of Fussell v. Fortney*, 2012 W. Va. LEXIS 303 (W. Va. June 12, 2012) (Declaratory judgment action resolving legal question over mortgage

payments due by an estate affirmed); *see also Flanagan v. Stalnaker*, 216 W. Va. 436, 440 (W. Va. 2004), *citing Cox v. Amick*, 195 W.Va. 608, 612, 466 S.E.2d 459, 463 (1995).

B. Respondent Has Standing to Bring a Private Cause of Action

Pursuant to long-standing West Virginia law, standing is defined as “a party's right to make a legal claim or seek judicial enforcement of a duty or right. Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact,” an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.” *Harper v. Smith*, 2012 W. Va. LEXIS 165, *13 (W. Va. Mar. 26, 2012). *See also, Interstate Traffic Control v. Beverage*, 101 F. Supp. 2d 445, 450 (S.D. W. Va. 2000) (defining same standard under U.S. Const. Art. III, § 2).

The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court and the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury. *Ohio Valley Envtl. Coalition, Inc. v. Hobet Mining, LLC*, 702 F. Supp. 2d 644, 649 (S.D. W. Va. 2010). In short, the standing requirements ensure that a party has alleged such a personal stake in the outcome of a controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Complaint underlying this appeal alleges facts capable of proving injury-in-fact, causation and

redressability, placing Respondent squarely among those parties injured in fact by the Petitioners' actions.

1. Respondent Has Suffered An Injury-In-Fact

"Injury-in-fact is not Mount Everest." *Danvers Motor Co., v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir 2005). Its contours are "very generous, requiring only that claimant 'allege [] some specific, identifiable trifle of injury.'" *Id.* (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982) (internal quotations omitted). See also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973) ("[A]n identifiable trifle is enough . . ."). Plaintiffs need only allege that they have suffered sufficient injury; likelihood of success on the merits is irrelevant to the standing inquiry. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Moreover, "[w]here a harm is concrete, though widely shared, the U.S. Supreme Court finds injury in fact for standing purposes." *Massachusetts v. EPA*, 549 U.S. 497, 522, 127 S. Ct. 1438, 1456 (U.S. 2007). In *Massachusetts v. EPA*, a case analogous to the one at bar, the United States Supreme Court found an injury-in-fact, and ultimately, standing, where the state of Massachusetts joined a suit against the United States Environmental Protection Agency ("EPA") challenging the EPA's denial of a petition to promulgate regulations for greenhouse gas emissions from new motor vehicles. The state of Massachusetts claimed that the EPA's failure to regulate motor vehicle emissions contributed to global warming which led to rising sea levels which contributed to further loss of Massachusetts' coastal land. The EPA argued that because the harm claimed was amorphous and wide-spread, the doctrine of standing prevented Massachusetts from a valid claim. In response, the Court stated, "We do not agree. At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination." *Id.* at 517, 1453.

Wyoming County, along with the other 54 counties of West Virginia, have been constitutionally and statutorily charged with the duties of creating and maintaining accurate and transparent real property records that facilitate private ownership and the use of land as collateral as well as preventing disputes over property rights. Much like the state of Massachusetts, *supra*, political subdivisions, such as counties, suffer an injury sufficient to confer standing when the challenged conduct harms its' territory, the citizens of its territory and when preventing this harm falls within a its' statutory mandate. *See, e.g., Franklin Twp. v. Com., Dept. of Env'tl. Res.*, 500 Pa. 1, 8-9 (1982) (finding that the statutory responsibilities of local government to protect and enhance the quality of life of its citizens conferred standing to challenge state agency's issuance of permit for solid waste disposal within local government's boundaries). Here, the County also alleges economic loss. Economic injury is one of the "paradigmatic forms" of an injury-in-fact. *See Gladstone and Medigen of Kentucky, infra.*

2. Respondent Has Standing Because it Alleges Financial Harm Traceable to Petitioners

Respondent alleges that the Petitioners' use of MERS in the securitization process deprived it mortgage assignment fees. Petitioners' App. at 29-31 (Complaint, ¶¶ 64-74). Economic injury that would have been avoided but for Petitioners' conduct is all that is required for standing. *See Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 98, 99 S. Ct. 1601, 1607 (U.S. 1979) (finding that an allegation of economic injury in the complaint was sufficient to meet the "Art. III minima for standing"); *see also, Medigen of Kentucky, Inc. v. Public Service Com.*, 787 F. Supp. 602 (S.D. W. Va. 1992) (alleged economic injury through loss of business opportunities provided Plaintiff with sufficient standing to bring the action); *Forest Hills Early Learning*

Center, Inc. v. Grace Baptist Church, 846 F.2d 260, 262 (4th Cir. Va. 1988) (finding of economic injury sufficient to demonstrate standing); *School Bd. v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. Va. 1987) (A plaintiff has standing to pursue claims that state action has caused or threatens to cause such economic injury). Here, but for Petitioners' use of MERS, Respondent would have received mortgage assignment fees in the securitization process and, thus, Respondent alleged a compensable financial injury that Judge McGraw relied upon in issuing his proper denial of Petitioners' motion to dismiss.

3. Petitioners' Conduct Has Impaired Wyoming County's Recording System and the County Has a Duty to Protect the Public From This Harm

Wyoming County has suffered an injury-in-fact traceable to Petitioners because it serves the public and its statutorily-designated duties embrace the harm suffered by the public as a result of Petitioners' conduct. Both the harm suffered, and Petitioners' argument on lack of standing, are similar to those presented in a Pennsylvania case, *S. Fayette Twp. v. Com.*, 73 Pa. Cmwlth. 495, 501 (1983). There, a township alleged that it had not received its share of a tax levied on foreign fire insurance companies and sought a mandamus order to compel state officials to insure the companies' compliance with the relevant statute and also requested an impoundment of foreign fire insurance premiums on funds to be paid to certain municipalities, until the reporting companies complied with the statute. *Id.* at 499-500. State officials argued that the statute indicated "that the municipality has no discretion in withholding the funds and is thus merely a conduit for the funds" and, further, that fireman's associations, not the municipality, were the only party who suffered an injury. *Id.* at 501. The Pennsylvania Commonwealth Court disagreed, finding that the township was not "representing itself as the fiduciary of the public interest with no express or implied mandate to do so." but rather, acting pursuant to its statutorily

prescribed responsibility to offer fire protection to its residents, which conferred standing. *Id.*

This

The County Clerks in West Virginia are obligated to protect the public by, among other duties, preserving the integrity of the official records of his or her office. The recorder of deeds in each of West Virginia's counties is and has been, since its beginning, an important county officer. His or her position is constitutionally created, he is elected by the people of the county, and the records kept are an invaluable history of the transactions of the people of the county affecting the titles to land. The recorder serves the public by recording deeds and similar instruments presented at his or her office in a "in a well-bound book, to be carefully preserved; and there shall be an index to such book as well in the name of the grantee as of the grantor. W. Va. Code §39-1-11. In fact, 39-1-11 was "intended to make provision for classification of documents required to be recorded, so that one engaged in abstracting titles to lands could, by inspecting the proper book, easily ascertain the complete history of the chain of title involved." *Woodall v. Clark*, 254 F. 526, 1918 U.S. App. LEXIS 1330 (4th Cir. W. Va. 1918).

Throughout this case, Petitioners have gone to great lengths to argue that the recording acts are intended to *only* benefit "subsequent *bona fide* mortgagees and purchasers." Respondents have steadfastly held that Petitioners are wrong: the recording acts are also intended to benefit potential mortgagees and other interested parties or, in other words, the public at-large. The public has been harmed by Petitioners' scheme of having false and misleading statements recorded about MERS in mortgages, especially when the central purpose of the scheme is to circumvent recording mortgage assignments, and paying the accompanying fees, when the loans are securitized. Prior to Petitioners' use of MERS, the recording indexes of the counties provided a transparent public record that promoted open and vibrant commercial activity by enabling

potential mortgage purchasers to know with certainty whether they could obtain clear title to land. This is no longer true. The recording of MERS as “mortgagee” in mortgages has caused the recorder to denominate MERS as the “grantee” in the recording index. The labeling of MERS as “mortgagee” has misled the public as to the true mortgagee and left the wrong impression that MERS holds perfected mortgages on property when, in fact, MERS has never, and could never, be the owner of any mortgage loan.

Further, in preparation for foreclosure, Petitioners routinely authorize fraudulent assignments from MERS to a Petitioner bank when, in fact, only MERS’ principal, the originating lender, could authorize and direct such an assignment. Petitioners’ App. at 25-6 (Complaint, ¶¶ 53-59). These assignments have significantly undermined the integrity of Wyoming County’s records and have created false chains of title.³ After all, consistent with the statements in each Petitioner’s PSA, assignments should have been made, at a minimum, from originating lenders to trust depositors to Petitioner and should have been made at the trust’s

³ Approximately 65 million mortgage loans nationwide name MERS as nominee of a lender and mortgagee or beneficiary. Compl., at ¶ 39. “MERS, as envisioned by its originators, operates as a replacement for our traditional system of public recordation of mortgages.” *In re Agard*, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011). The problem here, as pointed out by a New York bankruptcy court, is that:

In the most common residential lending scenario, there are two parties to a real property mortgage—a mortgagee, i.e., a lender, and a mortgagor, i.e., a borrower. With some nuances and allowances for the needs of modern finance this model has been followed for hundreds of years. The MERS business plan, as envisioned and implemented by lenders and others involved in what has become known as the mortgage finance industry, is based in large part on amending this traditional model and introducing a third party into the equation. MERS is, in fact, neither a borrower nor a lender, but rather purports to be both “mortgagee of record” and a “nominee” for the mortgagee. MERS was created to alleviate problems created by, what was determined by the financial community to be, slow and burdensome recording processes adopted by virtually every state and locality. In effect the MERS system was designed to circumvent these procedures. MERS, as envisioned by its originators, operates as a replacement for our traditional system of public recordation of mortgages.

Id.

creation, not on a piecemeal basis when it comes time to foreclose. Petitioners' conduct plainly obstructs Wyoming County's duty to serve the public by maintaining a "carefully preserved", "well-bound book" indexing the names of the grantees and grantors of all recordings and safeguarding the integrity of the recording system.

Respondent's suit seeks to effectuate the statutory mandate of the recording laws by demanding that Petitioners properly use the recording system by recording correctly and paying for the benefits it receives (unjust enrichment claim) and lose the benefits offered by the recording system when it fails to do so (declaratory judgment claim).

4. Respondent's Priority Rights as a Creditor Confer Standing to Challenge the Secured Status of Loans Involving MERS Mortgages

In its quest to prove that Respondent has no right of action under the law under which it may pursue this cause of action, Petitioners have also argued that Wyoming County needs to be a party to the mortgage loan or a third party beneficiary to challenge the secured status of loans held by them. This is, once again, incorrect. Petitioners' conduct has obscured Respondent's priority rights as a tax lien creditor and code violation creditor, thereby causing injury. Respondent has a sufficient stake in the outcome of this case because the declaration that the notes held by the Petitioners are unsecured will clarify the nature of its priority rights in relation to MERS mortgages held by Petitioners in which notes were transferred to the trust but the accompanying mortgage assignments were not recorded.

Under Chapter 38 of the West Virginia Code, taxes on real property by counties are a first lien on such real property (though subordinate to the lien of taxes imposed by the state). Counties can make tax claims and recover unpaid taxes by conducting judicial sales on the underlying properties. Thus, if Respondent makes a tax claim and seeks to conduct a judicial sale on property in which a Petitioner has a note accompanying a mortgage on the same property,

then it is critical to know whether that Petitioner has a perfected mortgage in the property. If Petitioner does not have a perfected mortgage – because mortgage assignments were never recorded from an originating lender to depositor to a Petitioner– then Respondent’s sale will divest the mortgage. If, however, Petitioner does have a perfected mortgage, then the sale will not divest the mortgage and the sale conducted by Respondent will yield much less money. Moreover, debtors struggling to pay their taxes are likely to default on their loans as well, making it far from speculative that Respondent will compete for priority with RMBS trusts such as those overseen by the Petitioners. Respondent clearly has a concrete and particularized interest in clarifying the secured status of mortgage loans held by Petitioners and Judge McGraw recognized this interest in properly denying Petitioners’ motion to dismiss.

While Petitioners would like to lead this Honorable Court to believe that one particular, legislatively-granted, private right of action is the only ground upon which the Respondent could possibly sue, the lower Court recognized Respondent’s right of actions upon each of the foregoing grounds. The Petitioners have failed to show that Judge McGraw’s ruling was clearly erroneous and the writ, therefore, should not issue on these grounds.

C. West Virginia Recording Statutes Require Mortgage Assignments to be Recorded and Judge McGraw Properly Applied the Statutes

1. West Virginia’s Recording Statutes Require Recordation

West Virginia adopted its first recording act in the mid-nineteenth century and it remains in force today. *See* W.Va. Code Ann. § 40-1-9. The purpose of the recording statutes has always been, in the words of one commentator, “to prevent disputes over property rights and to facilitate

the use of land as collateral by creating a transparent public record that provides certainty in private bargains.”⁴

Specifically, mortgage lenders, when contemplating offering a loan secured by land, use recording indexes compiled by county recorders to ensure that debtors have not already sold the land or granted a mortgage on the property, or that a lien has not otherwise been placed on the property.

Transparency of ownership is provided by West Virginia laws that prescribe the recording of interests in real estate and conveyances of such interests, as follows:

“Whenever any certificate given by the sheriff for a tax lien on any land, or interest in the land sold for delinquent taxes, or any assignment of the lien is lost or wrongfully withheld from the rightful owner of the land and the land or interest has not been redeemed, the county commission may receive evidence of the loss or wrongful detention and, upon satisfactory proof of that fact, may cause a certificate of the proof and finding, properly attested by the State Auditor, to be delivered to the rightful claimant **and a record of the certificate shall be duly made by the county clerk in the recorded proceedings of the commission.**” W.Va. Code Ann. § 11A-3-19 (tax lien sale) (emphasis added).

“For the preparation and execution of the deed and for all the **recording required by this section**, a fee of fifty dollars and the recording expenses shall be charged, to be paid by the grantee upon delivery of the deed. The deed, when duly acknowledged or proven, **shall be recorded by the clerk of the county commission in the deed book in his office**, together with the assignment from the purchaser, if one was made, the notice to redeem, the return of service of such notice, the affidavit of publication, if the notice was served by publication, and any return receipts for notices sent by certified mail.” W.Va. Code Ann. § 11A-3-59 (tax lien sale) (emphasis added).

“The clerk of the county court of any county in which any deed, contract, power of attorney, or other writing **is to be, or may be, recorded, shall admit the same to record in his office**, as to any person whose name is signed thereto, when it shall have been acknowledged by him, or proved by two witnesses as to him, before such clerk of the county court.” W. Va. Code Ann. § 39-1-2 (conditions under which county clerk shall admit deeds, contracts, etc., to record) (emphasis added).

⁴ Christopher Peterson, Foreclosure, Subprime Lending, and the Mortgage Electronic Registration System, 78 Univ. of Cincinnati L. Rev. 1359, 1364-65 (2010). (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469749)

“Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, **until and except from the time that it is duly admitted to record** in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.” W.Va. Code Ann. § 40-1-9 (emphasis added).

Thus, recording is mandatory under the statutory scheme of West Virginia real estate laws. There is no statute providing that recording is permissive. Petitioners misapply the principle that ‘failure to record a deed does not invalidate it as between its parties,’ and incorrectly take it to mean that the deed is not required to be recorded. Moreover, the accuracy and transparency of real property records is so completely reliant on recordation that mandatory recordation may be implied where not explicit, as discussed in Section B.2., below.

More particularly, the repeated transfers of ownership by the Petitioners, as RMBS trustees, at the center of this case are specifically required to be recorded by West Virginia laws related to estates and property, as follows:

Any general power, whether exercisable by will, by deed, by will or deed, or otherwise, to appoint property, whether real or personal or both, may be released or disclaimed by the person or persons having such power, with or without consideration, wholly or partially. Any such power may be released or disclaimed with respect to the whole or any part of the property subject thereto; and any such power may also be released or disclaimed in such manner as to reduce, limit, or restrict the persons or objects, or classes of persons or objects, to or among any one or more of whom, but no others, the property subject to such power may be appointed by an exercise thereof, as fully as the creator of such power himself could have so reduced, limited or restricted the same and with like effect as if he had.

W.Va. Code Ann. § 36-5-1. And,

Any release or disclaimer mentioned in section one of this article [above] may be effected by a written instrument signed and acknowledged as a deed by the person or persons having the general power to appoint mentioned in that section; and such instrument **may be delivered by filing it for record in the office of the clerk of the county court of the county wherein the will, deed or other instrument creating such power is recorded.** Such clerk shall record such instrument of release or disclaimer as a deed is recorded, index it, and note a reference to the record thereof on the margin of the record of the will, deed or other instrument creating such power.

W.Va. Code Ann. § 36-5-2.

Established West Virginia precedent dictates that a deed takes effect from its actual or constructive delivery. *Jones v. Wolfe*, 203 W.Va. 613, 509 S.E.2d 894 (1998); *Walls v. Click*, 209 W. Va. 627, 633-34, 550 S.E.2d 605, 611-12 (2001). Thus, in order for a subsequent transfer or assignment of a mortgage interest to be effective it must be “delivered.” In order for the original lender to disclaim and release its appointment of MERS as its nominee and beneficiary and to transfer that power to another party, it must deliver a “written instrument” to that effect by recording it “in the office of the clerk of the county court of the county wherein the will, deed or other instrument creating such power is recorded.” W.Va. Code Ann. § 36-5-2.

In its Petition, the Petitioners continue to misplace reliance on the West Virginia recording statutes based on outdated cases and contested propositions that have little to do with the issues before the Court. Judge McGraw recognized the issues underlying Respondent’s causes of action and properly denied Petitioners’ motion thereupon.

2. Public Policy Requires Recordation of Transfers of Real Property Interests

Even assuming, *arguendo*, that recording an interest in real property in West Virginia were permissive, as Petitioners contend, West Virginia law has long favored the purpose of recording acts, which make land title information available to interested persons. This public policy should not be defeated by the profit motives of banks, but must be interpreted broadly and liberally to require acts necessary to the accomplishment of its goals.

So fundamental is the job of the County Clerk that the West Virginia Constitution creates and defines the main responsibilities of the position. W.Va. Const. §§ 9-11 and 9-12 provide for the election of a ‘Clerk of county commission’ for a term of six years during which time the

County Clerk is charged with the duties, among others, of recording, preserving and keeping custody of “all deeds and other papers presented for record in their counties.” The creation and maintenance of the Counties’ public records is then statutorily defined throughout the Code of West Virginia and the fees to be charged for these services proscribed in W.Va. Code Ann. § 59-1-10.

In addition to the main purpose of creating an accurate and transparent record of ownership of real property and other interests, the purpose of recordation laws also is to raise revenue for the county. *Cf.* W. Va. Code Ann. § 11A-3-1 (legislative purpose of real property tax sales statutes include the “paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes,” to have “private owners to bear a fair share of the costs of government,” and to provide “owners of real property ... adequate notice ... of their interests in real property ... or have their property entered on the land books....”).

Courts are to construe statutory schemes that miss elements necessary for the accomplishment of their goals broadly and liberally. As this Court noted in a similar context over a century ago:

The crucial question is whether, in contemplation of law, city collectors' lists of delinquent real estate are parts of the proceedings of record in the clerk's office of the county court. **In other words, does the law require recordation of them in said office? There is no express direction in the statute to the city clerk, mayor, or council to certify copies thereof to the clerk of the county court, or to the clerk of the county court to record them,** but the Legislature may nevertheless have so intended and its intent may be made manifest by some language it has used when interpreted in the light of the spirit of the statutory system relating to taxation and land titles.

Giving due effect to the general policy of the law as just stated, we must ascertain from the very general and somewhat indefinite language of the clause quoted from section 36 of chapter 47 of the Code what the Legislature intended. It does not in terms direct or require the preparation or return of any delinquent list, but it assumes

that such returns will be made and such lists prepared, and authorizes sales based thereon. This necessarily gives, **by implication**, the power to so return real estate and make the lists. It does not define a delinquent list nor prescribe the requisites thereof. In order to determine what a delinquent list is within its meaning, it must be connected, in some way, with other statutes which do define delinquent lists, and prescribe the form thereof. **There is no express directions in it to the clerk of the county court or any other officer to make a deed, conveying real estate sold for such delinquency, and yet his authority to make such a deed cannot be doubted.** It must be found in this statute, taken in connection with the statutes relating generally to sales of delinquent lands. **The necessity of giving this provision a broad and liberal construction and reading into it, by implication, many of the provisions of the general statute, is thus clearly apparent.**

Hogan v. Piggott, 60 W. Va. 541, 56 S.E. 189, 193-94 (1906) (*emphasis added*). Thus, even if the recordation of mortgage assignments were not required (which it undoubtedly is) and even if the law does not invalidate an unrecorded deed as between its parties⁵, the purpose of the recording statutes can be fulfilled only if they are interpreted to require recordation of every transfer of interest in real estate. The Legislature could not have envisioned the utter chaos and disarray county clerks would be left to contend with following the creation of MERS and the resulting privatization of the county land records. Petitioners cannot continue to deny the necessity of recording as they created a private recordation system of their own.

Petitioners' MERS system cannot be allowed to circumvent the law. It defeats the public's interest in an accurate and transparent record, and it defeats the "paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes...." W.Va. Code Ann. § 11A-3-1. Moreover, even through this Petition, Petitioners advance no policy against recordation, other than their stated purpose of creating

⁵ See Petition at 14-15. In the Nevada MERS case again cited by Petitioners referencing "bar exam knowledge" of recording laws, the court was dealing with Nevada law, which has no binding authority in West Virginia. Moreover, it was a *qui tam* case under the Nevada False Claims act requiring the pleading of fraud allegations in federal court at a higher degree of particularity than the pleading of the unjust enrichment claim advanced by Plaintiff/Respondent in this matter. Finally, the Nevada court's ruling was made on a motion for remand apparently without the benefit of briefing on the merits by the parties. *Bates v. Mortgage Elec. Registration Sys.*, 3:10-CV-00407-RCJ, 2011 WL 1304486 (D. Nev. Mar. 30, 2011) *reconsideration denied*, 3:10-CV-00407-RCJ, 2011 WL 1582945 (D. Nev. Apr. 25, 2011).

MERS to avoid recordation fees and to defeat the public policy behind recordation laws in favor of private profits.

D. Contrary to Petitioners' Claims, MERS Has No Interest, Legal or Equitable, in any Deed of Trust and Therefore is Neither a Proper "Beneficiary" nor "Mortgagee" Under the Law

Reduced to its simplest terms, the problem confronting Petitioners' use of MERS in West Virginia is as follows: the public recording system does not contemplate that a mortgagee's agent will be indexed in the deed records as a "beneficiary" and, thus, as a "grantee." Unless MERS is indexed as a "grantee," however, the MERS system does not work for its owners because each successive assignee of an underlying promissory note would have to record its assignment. For this reason, although MERS' role is expressly limited in one sentence to acting solely as the "nominee" of the "lender," the subject mortgages recite in the very next sentence that MERS is "the beneficiary" without such limitation. In this way MERS is indexed in the deed records as itself being the grantee of a security interest, when in fact it has no interest to grant. In view of the purpose of the recording statutes—transparency and accuracy—it is no surprise that West Virginia counties seek to put an end to this conduct.

Denominating MERS itself as the beneficiary or mortgagee of a mortgage is clearly inconsistent with MERS acting as the agent of the lender—the actual mortgagee because the lender and borrower may not by contract agree that MERS is the "beneficiary" or "mortgagee" of a deed of trust. Judge Michael H. Simon of the U.S. District Court for the District of Oregon articulated the best and most succinct statement to date regarding Petitioners' claims that MERS is "the beneficiary" or "the mortgagee" of a mortgage executed to secure payment of a note for the benefit of the lender:

Plaintiffs' [mortgage] designates [Lender], rather than MERS, as the true or actual beneficiary. This is evident in three ways: First, the trust deed states that it "secures to

Lender . . . repayment of the Loan.” The benefit of the trust deed (*i.e.*, the security for performance of the obligation of the note) flows to the lender, not to MERS. Second, the trust deed provides that MERS is “solely” the nominee (or agent) of the lender. This provision shows that MERS is only an agent and does not, itself, enjoy the direct benefit of the [mortgage]; the direct benefit belongs to the agent’s principal, the noteholder. Finally, the trust deed names NWMG as the lender. Because the lender was the initial noteholder, NWMG was the initial beneficiary [or mortgagee].⁶

While this decision is predicated upon the definition of “beneficiary” under Oregon law, which provides, in part, that the “beneficiary” of a mortgage is “for whose benefit the trust deed is given,” West Virginia Code §39-1-2 provides an almost identical definition, requiring the deed to set forth the beneficial owner of the debt secured thereby⁷. Moreover, MERS’ lack of any beneficial interest in the security interest created by the deed of trust is demonstrated by the terms of the mortgage itself, which provides that, “[t]his Security Instrument secures to Lender:

(i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and

⁶ *James v. ReconTrust Co.*, *infra* at *12 (D. Or. Feb. 29, 2012); *see also Dow Family LLC v. PHH Mortgage Corp.*, 2013 WI App 114 (Wis. Ct. App. 2013) (2014 WI 3, P1 (Wis. 2013) (petition for review granted) (Company bought a condo but later faced a foreclosure action by an apparent assignee due to MERS involvement in earlier transferring the mortgage and failure to record its transactions.); *Mortgage Elec. Registration Sys. v. Ditto*, 2014 Tenn. App. LEXIS 1 (Tenn. Ct. App. Jan. 2, 2014) (Tennessee Court of Appeals affirmed a Chancery Court decision that MERS was not entitled to notice of a tax sale of a property on which it held a lien because the deed of trust did not grant MERS an independent property interest because MERS was only the nominee of another entity. It also found that MERS did not sustain an injury because it did not discover that the tax sale had taken place until 19 months after the sale, and an injury to MERS’ business model, “which is reliant upon the avoidance of county recording fees,” was not distinct and palpable.)

⁷ Several federal and state courts have concluded that MERS is not the actual beneficiary of mortgages or deeds of trust. *See James v. Recontrust Co.*, Case 3:11-cv-00324-ST (D. Ore. February 29, 2012) (MERS is not the “beneficiary” of a deed of trust under Oregon law because the “beneficiary” of a deed of trust is the person for whose benefit the deed of trust is given) (App. 11 at 23); *In re Agard*, 444 B.R. 231, 254 (Bankr. E.D.N.Y. 2011) (“MERS’s position that it can be both the mortgagee and an agent of the mortgagee is absurd, at best.”); *In re Sheridan*, 2009 WL 631355 at 10 (Bankr.D. Idaho 2009) (App. 10); *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289, 295 (Me. 2010) (MERS has no beneficial interest in the mortgage under Maine law); *Mortg. Elec. Registration Sys., Inc. v. Southwest Homes*, 301 S.W.3d 1, 6 (Ark. 2009) (“ . . . MERS is not the beneficiary.” The lender is the beneficiary because “[i]t receives the payments on the debt.”) (*emphasis added*); *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009) (“MERS is not an economic ‘beneficiary’ under the Deed of Trust”) (*quoting In re Sheridan*, 2009 WL 631355 at 10 (Bankr. D. Idaho 2009)).

(ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note."⁸

In a seminal ruling that dealt a major blow to MERS and the Petitioner banks, the Washington State Supreme Court illustrated the application of the aforementioned sample mortgage in ruling that MERS is not a proper "beneficiary" of a deed of trust. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 2012 Wash. LEXIS 578 (Wash. 2012). In coming to its decision, the Washington State Supreme Court succinctly framed the questions central to this litigation, "The question, to some extent, is whether MERS and its associated business partners and institutions can both replace the existing recording system established by Washington statutes and still take advantage of legal procedures established in those same statutes." *Id.* at 98, 19. The Washington Supreme Court responded to this question with a resounding NO.

In the present matter, the Petitioners continue to stand by their claims that no harm has been caused to the land records of the Counties, but as the WA decision notes, that isn't true:

Critics of the MERS system point out that after bundling many loans together, it is difficult, if not impossible, to identify the current holder of any particular loan, or to negotiate with that holder. While not before us, we note that this is the nub of this and similar litigation and has caused great concern about possible errors in foreclosures, misrepresentation, and fraud. Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult.

Id. Citing "Lack of transparency causes other problems. *See generally* (noting difficulties in tracing ownership of the note)."

A final example of the Petitioners' disregard for long-settled West Virginia law is Petitioners' inclusion of the following language in the subject sample mortgage, *supra*:

⁸ See Respondent's Appendix at 1, Sample Deed of Trust filed with the Wyoming County Clerk, in which MERS is referred to as the "nominee," "beneficiary," and even the "lender" when necessary to illegally effectuate a transfer of the deed of trust (former Exhibit A to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss from the lower court).

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.⁹

The infirmity of this assertion is manifest. West Virginia is a title theory state.¹⁰ A mortgage transfers legal title to the mortgagee, but not to MERS, who in fact is merely a “nominee” and, as shown above, acquires no legal interest. Therefore, MERS holds no interest, beneficial or legal, in any interest created by the mortgage, and it improperly requests listing in Respondent’s deed records as “beneficiary” or “mortgagee” to perpetrate its scheme to avoid the recordation laws and their associated fees. Petitioners’ practice of using MERS to conceal the identity of the true mortgagee by claiming falsely that MERS is “the mortgagee” is against the law and against public policy as a practice that destroys transparency via an illegal fiction.

In short, the problem confronting Petitioners’ use of MERS in West Virginia is similar to the problem in Washington state: the public recording system does not contemplate that a mortgagee’s agent will be indexed in the deed records as a “beneficiary” and, thus, as a “grantee.” Unless MERS is indexed as a “grantee,” however, the MERS System does not work for its owners because each successive assignee of an underlying promissory note would have to record its assignment. For this reason, although MERS’ role is expressly limited in one sentence to acting solely as the “nominee” of the “lender,” the subject mortgages recite in the very next sentence that MERS is “the beneficiary” without such limitation. In this way MERS is indexed in

⁹ See Respondent’s Appendix at 3 (*emphasis added*).

¹⁰ “Under the title theory, legal ‘title’ to the mortgaged real estate remains in the mortgagee until the mortgage is satisfied or foreclosed; in lien theory jurisdictions, the mortgagee is regarded as owning a security interest only and both legal and equitable title remain in the mortgagor until foreclosure.” Restatement (Third) of Property (Mortgages) § 4.1 cmt. a (1997).

the deed records as itself being the grantee of a security interest, when in fact it has no interest to grant.

The Petitioners then circumvented the proper use of Wyoming County's recording services for the assignments necessary for the securitization, while representing to the public and to RMBS investors that the RMBS trusts had the benefit of perfected mortgages, a benefit that could only be obtained by using the County's services for recording assignment. The Petitioners have all greatly profited by falsely claiming they have obtained a benefit that only the County can provide. As Respondent explained to the Circuit Court, below, Wyoming County is willing to grant the Petitioners the benefits they already claim, but the Petitioners must pay for the County's services like any other citizen. Because they have not, the Petitioners have unjustly received a benefit that they should not be allowed to retain. In view of the purpose of the recording statutes- transparency and accuracy- it is no surprise that West Virginia counties also want to put an end to this conduct in the future. It is also clear, based on the facts as stated, above, that Judge McGraw's denial of Petitioners' motion to dismiss was discretionary, factual ruling based on the operative facts and statutes before him.

II. PETITIONER'S CONDUCT HAS NEGATIVELY IMPACTED RESIDENTIAL LENDING AND PROPERTY RIGHTS IN WEST VIRGINIA AND THIS LAWSUIT IS A FIRST STEP TOWARDS REPAIRING ITS EFFECTS; THIS COURT SHOULD DENY THE REQUEST FOR A PETITION AS THE RULING OF THE CIRCUIT COURT IS PROPER AND REQUIRES NO FURTHER REVIEW

As revealed by a plain reading of the Complaint (Petitioners' App. at 9-36), Respondent's request for relief, including declaratory and injunctive relief, and its challenge to MERS' standing in West Virginia, is not aimed at setting aside completed foreclosures, nor is it aimed at opening final judgments of foreclosure. Instead, through this litigation, Respondent will uncover those cases where Petitioners or MERS lacked authority to conduct the sales, and in which the

purchasers of the foreclosed property now lack clear title.¹¹ Lack of clear title follows as a consequence of the common law principle *nemo dat quod non habet*, which means “he who hath not cannot give.” This is the bedrock principle on which all commercial law is built.¹²

Here, then, as in *Bevilacqua*, those who took title to properties at foreclosure sales improperly obtained by the Petitioners likely have clouded title, thereby impacting both value and salability. *See* Petitioners’ App. at 26-7 (Complaint, ¶ 60). This in turn has spillover impacts on neighboring properties’ values- when properties sell for reduced prices because of clouded title, neighboring home values will also be depressed and county real estate tax assessments have, and will, continue to suffer. *Id.*

As a result of the Petitioners’ conduct, the Counties have devoted, and will continue to devote, substantial services, time, and expense to determining the ownership rights of parties laying claim to these properties. Respondent filed this suit in an effort to avoid further unnecessary costs, to begin to clear title, and to correct the chain of title in Wyoming County’s land records. Petitioners, on the other hand, have failed to meet the heavy burden of proving any of the elements dictated by the *Hoover* test, *supra*. Specifically, Petitioners failed to establish the third factor and made no showing that the fourth and fifth factors are satisfied here. Judge

¹¹ *See e.g., Bevilacqua v. Rodriguez*, 460 Mass. 762, 763 (2011) (finding that the purchaser of property following a foreclosure sale by U.S. Bank on MERS mortgage lacked standing to bring quiet title action because U.S. Bank lacked authority to convey title to purchaser in the first instance); *see also Niday v. GMAC Mortg., LLC*, 251 Ore. App. 278 (Or. Ct. App. 2012) (The Court struck a much needed blow to MERS and many of the Defendants in ruling that the MERS system could not be used to skirt state recording law in out-of-court foreclosures. Instead, a lender must ensure a complete ownership history of the mortgage is filed in county records before it can foreclose outside a courtroom. This is the same course of conduct sought in the Plaintiff/Respondent’s Complaint.)

¹² *See, e.g., J. F. Dolan et al., Core Concepts of Commercial Law: Past, Present, and Future: Cases and Materials 2* (Thompson West, 2004) (“The First Rule of Conveyancing – Nemo Dat”); *see also William Warren, Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 469, 470 (1963) (stating that it is well-established that a “good faith purchaser from a thief or a mere bailee took subject to claims of ownership.”)

McGraw's ruling does not exemplify an oft-repeated error by the lower courts, nor does it present a new or important legal issue for the Court's consideration.

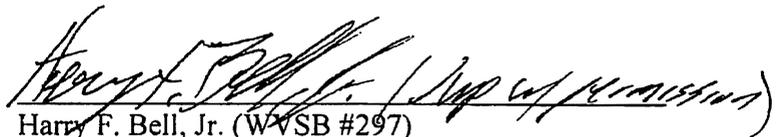
CONCLUSION

The facts central to this matter are not in dispute: the MERS system has caused a wholesale collapse of the public recording system in West Virginia and the rest of the country by denominating MERS something it is not- "beneficiary," "Grantor," "legal title holder," "Lender," etc. These representations have caused MERS to be indexed as "grantee" or "grantor" in the official and public land records of Wyoming County with the result of this scheme, as we've learned, being the privatization of what is rightfully the public domain.

Judge McGraw applied clear legal standards to a set of facts and did not abuse his discretion when he refused to dismiss this case. To the contrary, the underlying motion to dismiss was properly denied as the Respondent pleaded cognizable claims and had standing to do so. MERS is the privatization of a public function, without Legislative authority, and the usurping of what is rightfully and necessarily a governmental service. Respondent asks this Honorable Court to DENY issuing a Writ of Prohibition which is extraordinary relief not appropriate in this case.

Dated: September 03, 2014

Respectfully Submitted by:



Harry F. Bell, Jr. (WVSB #297)
THE BELL LAW FIRM, PLLC
P. O. Box 1723
30 Capitol Street
Charleston, West Virginia 25301
Telephone: 304*345*1700
Fax: 304-344-1956

Exhibits on File in Supreme Court Clerk's Office