GORDON SILVER
RONALD E. WARNICKE, ESQ./SBN 001791
E-mail: ronaldwarnicke@gordonsilver.com
One East Washington, Suite 400
Phoenix, Arizona 85004
Telephone: (602) 256-0400
Facsimile: (602) 256-0345
Attorneys for *KARL and FABIANA STAUFFER*

JOHNSON, FINDSEN & KINNEY PLLC
BETH K. FINDSEN ESQ./SBN 023205
E-mail: beth@findsenlaw.com
7279 East Adobe Drive, Suite D120
Scottsdale, Arizona 85255
Telephone: (480)584-6664
Facsimile: (866)702-9272
Attorneys for *MARIUSZ and JULITA BUCHNA*

SUPREME COURT OF ARIZONA

JULIA A. VASQUEZ, Plaintiff, v. SAXON MORTGAGE, INC.; SAXON MORTGAGE SERVICES, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for SAXON ASSET SECURITIES TRUST 2005-3, Defendants.	**CASE NO.: CV-11-0091-CQ** **AMICUS CURIAE BRIEF**

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I.
STATEMENT OF INTEREST

KARL and FABIANA STAUFFER (collectively referred to herein as the "Stauffers") are owners of real property located in Maricopa County, Arizona. On September 22, 2005, the Stauffers executed a promissory note payable to Premier Services Mortgage, Inc. The accompanying Deed of Trust names the Mortgage Electronic Registration System (MERS) as the "beneficiary" of the Deed of Trust, even though only Premier Services Mortgage, Inc. meets the statutory definition of a beneficiary under A.R.S. § 33-801(1). A true and correct copy of the Stauffers' Deed of Trust is attached as Exhibit 1. (All the Exhibits attached hereto are not part of the record of this appeal but only referenced for demonstrative purposes concerning MERS. Except for one demonstrative "chart", the documents are part of judicial files in Arizona's courts or filed publicly with the US Securities Exchange Commission.)

The Stauffers brought a Special Action Complaint and Order To Show Cause, CV2011-005567, pursuant to A.R.S. § 33-420, alleging recordation of falsely acknowledged instruments impairing title to their home. The Stauffers have a general interest in the Certified Questions and how they relate to loans in which MERS has been designated a beneficiary. Though the answers to the Certified Questions will not directly determine the merits of the Stauffers' pending case, which is pending on other grounds, this Court should be aware of the effects

any decision will have on MERS cases.

MARIUSZ BUCHNA and JULITA BUCHNA (collectively referred to herein as the "Buchnas") brought a complaint in state court that was removed to district court, and dismissed on the pleadings. The Buchnas' form language Deed of Trust and relevant documents relating to the transfers of their promissory note reveal their qualification to join in the attached brief. A true and correct copy of the Buchnas' Deed of Trust is attached as Exhibit 2. Like the Stauffers, the Buchnas do not seek to argue their own case here. Rather, their case also exemplifies the common MERS form Deed of Trust, the common function of MERS as described in the securitization documents like the Prospectus Supplement, and the consequential non-compliance with Arizona recording statutes.

This Court has accepted certification of two questions from the United States Bankruptcy Court for the District of Arizona pertaining to the rights of parties with unrecorded interests in a Deed of Trust. The facts of the underlying case, *Vasquez v. Saxon Mortgage, Inc*., et al., do not involve MERS as beneficiary, even though tens of thousands of Arizona homeowners have Deeds of Trust, in which MERS is named as such.

In particular, for loans in which MERS serves as the "nominee" for the owners of the beneficial interest in the deed of trust, Arizona law requires MERS

to record transfers of the notes and deed of trust. In the absence of such recording, the undisclosed beneficiary may only avail itself of the judicial foreclosure process in Arizona. Accordingly, this brief urges this Court to answer both of the certified questions in the affirmative.

II.
MERS BACKGROUND

Approximately two-thirds of all newly originated residential mortgages in the United States are recorded in the name of Mortgage Electronic Registration Systems, Inc. (MERS), although MERS is not a mortgage lender, servicer, or investor. MERS is a corporation that administers an electronic registry system which tracks ownership interests and servicing rights in mortgages for its members, who are mortgage lenders and other members of the mortgage lending industry. MERS serves as the beneficiary of record and then internally tracks transfers of notes and deeds of trust within its system. Rather than recording such transfers in the public land records, MERS acts as a private recording system. Because MERS serves as the beneficiary of record for the deed of trust, it is the only entity with a publicly recorded interest. MERS does not provide consumers with access to information about the true owner of the mortgage loan. MERS will not even provide a homeowner with information about his own loan or the identity of persons succeeding to the lender's interest.

MERS has no legal or beneficial interest in the promissory note. While

MERS is specifically called the beneficiary in the deed of trust, even though not meeting the definition of a beneficiary in A.R.S. § 33-801(1), the accompanying promissory note refers only to the lender. The note does not identify MERS or grant MERS any interest whatsoever in the mortgage debt. MERS does not become the holder of the promissory notes that are secured by the deeds of trust. Similarly, MERS holds no beneficial interest in the mortgage itself. Despite the numerous limitations of MERS's role and authority, MERS claims that as the beneficiary of a deed of trust in Arizona, it has the right to assign beneficial interests in its own name and to direct foreclosure in its own name. In essence, MERS acts as trustee for the true owners of the beneficial interest in the deed of trust.

III.
UNDER ARIZONA LAW THE TRANSFER OF AN OWNERSHIP INTEREST IN A PROMISSORY NOTE AND DEED OF TRUST MUST BE PUBLICLY RECORDED BECAUSE:

In relevant part, Arizona Revised Statute § 33-404 provides that:

> A. Notwithstanding section 33-411, subsection D, every deed or conveyance of real property, or an interest in real property, located in this state which is executed after June 22, 1976 **in which the grantee is described as a trustee or acts as a trustee** shall disclose the names and addresses of the beneficiaries for whom the grantee holds title and shall identify the trust or other agreement under which the grantee is acting or refer by proper description to the document number or the docket and page of an instrument or other writing which is of public record in the county in which the property so conveyed is located in which such matters are disclosed. (Emphasis added.)
>
> B. Notwithstanding section 33-411, subsection D, every deed or

conveyance of real property, or an interest in real property, located in this state which is executed after June 22, 1976 **by a grantor who holds title to the property as a trustee, whether or not such capacity is identified on the document through which title was acquired,** shall also disclose the names and addresses of the beneficiaries for whom the grantor held title to the property and shall identify the trust or other agreement under which the grantor is acting or refer by proper description to the document number or the docket and page of an instrument or other writing which is of public record in the county in which the property so conveyed is located in which such matters are disclosed. (Emphasis added.)

C. Notwithstanding section 33-411, subsection D, **a grantee who holds title as a trustee under a trust or other agreement which is subject to the disclosure requirements of this section and who receives actual knowledge** after August 18, 1987 of a change in beneficiary, within thirty days **after receiving such actual knowledge, shall record with the county recorder** of the county in which the property is located a notice of the change. The recording and any subsequent recording of any change in any beneficiary shall identify the trust or other agreement under which the grantee holds title and shall include the legal description of the property and a list of the then current names and addresses of the beneficiaries. (Emphasis added.)

D. Notwithstanding subsections A, B and C of this section, a trustee is not required to record a change of beneficiary if, upon the death of a beneficiary of a real property trust, the interests of the deceased beneficiary vest in the beneficiary's estate or in other beneficiaries identified in a previous recording. If the interest of the deceased beneficiary vests in a beneficiary not identified in a previous recording, the trustee shall comply with the recording requirements of this chapter within thirty days of receipt of both knowledge of the death and the name and address of the successor beneficiary or beneficiaries or within thirty days of the first distribution of income or principal to a successor beneficiary or beneficiaries, whichever occurs first.

E. Any conveyance of real property or an interest in real property which does not include the disclosures required by this section with respect to the property so conveyed is voidable by the other party to

> the conveyance. Any action to void the conveyance shall be commenced within two years after the date of recordation of the document affecting the conveyance.
>
> F. If real property or any interest in real property, or any mortgage, deed of trust or other lien on real property, is acquired for value, the title, interest, mortgage, deed of trust or other lien is not impaired or in any way adversely affected by reason of the failure of any person to comply with the requirements of this Section G. As used in this section, "trustee" does not include an agent for a disclosed principal, a conservator, a guardian, a personal representative, an attorney-in-fact, a lessor or lessee under a lease, a trustee in a bankruptcy or receivership proceeding, a trustee under a deed of trust, a trustee under a business trust or a trustee under an indenture for security holders.

In construing a statute, Arizona courts have repeatedly stated that any analysis "begins and ends with its plain language if it is unambiguous." *State v. Streck*, 221 Ariz. 306, 207 (App. 2009); *see also Bentley v. Building Our Future*, 217 Ariz. 265 (App. 2007). When a statute is clear and unambiguous, the court applies the plain language and need not engage in any other means of statutory interpretation. *Kent K. v. Bobby M.*, 210 Ariz. 279, 283 (2005).

In this case, the plain language of A.R.S. § 33-404, unambiguously requires MERS, (i) whether as trustee for the beneficial owners in deeds of trust or as one, who is "described as" or "acts" as such a trustee, to disclose in the public records transfers of ownership interests in the note and deed of trust, and that this is required, (ii) "whether or not such capacity is identified on the document through which title was acquired" and, (iii) even if MERS only notes the change in

ownership in its data base without otherwise participating in the transfer.

A. MERS Acts As A Trustee For Owners Of The Beneficial Interest In Deeds Of Trust.

In both form and substance, MERS acts as a trustee of the beneficial interest in deeds of trust. This Court in *Matter of Naarden Trust*, thoroughly discussed what constituted a trust and who acted as a trustee. 195 Ariz. 526, 990 P.2d 1085 (1999). The court differentiated between a party who had obligations to a third party beneficiary and one who acted as a trustee. Relying heavily on the Restatement (Second) of Trusts, the Court explained:

> For example, the beneficiary of a trust gains a beneficial interest in the trust property while the beneficiary of a contract gains a personal claim against the promisor.

Id. at 530.

In the MERS form Deed of Trust, a person holding the Note and entitled to enforce the Note secured by a MERS trust deed, obtains only the right to the beneficial interest in the Deed of Trust by operation of law; this Note holder does not obtain a personal claim against MERS which holds title to the beneficial interest. MERS is not mentioned in the Note and has no claim to be paid in its own right.

Further, a trust arrangement between MERS and the owners of the beneficial interest in Deeds of Trust is evidenced by various documents describing the relationship between MERS and those owners.

First, the MERS form Deeds of Trust empower MERS, as "nominee", to act as trustee for the owner of the beneficial interest and successors thereto by holding title on its behalf. The typical MERS Deed of Trust misidentifies MERS by calling it the "beneficiary," even though A.R.S. § 33-801(1) defines the Lender (not MERS) as the Beneficiary for purposes of A.R.S. § 33-801, *et seq*.[1] Despite the misnomer, the Deed of Trust describes MERS' true role as being a nominee who holds bare legal title to the beneficial interest on behalf of the Note Holder. It says:

> The beneficiary of this Security Instrument is MERS **(solely as a nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.** (Emphasis added.)

See, e.g., Exhibits 1 and 2, (Stauffer and Buchna Deeds of Trust).

Under the statutory language, MERS is required to record if it is described as a trustee, "whether or not" the document uses the term "trustee." This Court need not struggle with whether or not MERS is a "real" trustee or whether there is

[1] This intentional and confusing mislabeling by MERS was discussed at length in *Weingartner v. Chase Home Finance, LLC*, 702 F.Supp.2d 1276 (2010). There the court said: "Another source of confusion is the fact that entities such as MERS are often not only named as a nominee, but as a beneficiary on deeds of trust." 702 F.Supp.2d at 1280. The court went on to conclude that "This is a fiction. MERS is not a beneficiary in any ordinary sense of the word." *Id*. It continued, holding that "MERS' 'beneficial interest is non-existent' unless MERS holds the underlying debt, and it does not." *Id*. at 1282. *Weingartner* is cited not to support an interpretation of A.R.S. § 33-801(1) and A.R.S. § 33-404, but merely so the court can better understand the ubiquitous nature of the MERS form and the confusion it creates. In fact, MERS fails to meet the definition of the Beneficiary of a Deed of Trust in A.R.S. § 33-801 without reference to MERS' legal status under the statutes of other states.

a "real" trust. The description is clear. MERS holds no ownership interest under the quoted language of the Deed of Trust and is merely a nominee, acting as a trustee, for the beneficiary of the Deed of Trust.

Secondly, several documents critical to the securitization of the loans, such as the Pooling and Servicing Agreement and the Prospectus, describe MERS as acting as trustee for the unidentified owners of the beneficial interest under the trust deeds. The operative language from one such Pooling and Servicing Agreement[2] defines MERS and its role as follows:

> MERS® System: The system of recording transfers of mortgages electronically maintained by MERS.
>
> MIN: The mortgage identification number for any MERS Mortgage Loan.
>
> MOM Loan: Any Mortgage Loan as to which MERS is acting as mortgagee, solely as nominee fro (sic) the originator of such Mortgage Loan and its successors and assigns.

See Exhibit 3 (Excerpt from Stauffer Pooling and Servicing Agreement).

Similarly, in a Prospectus for potential investors in the mortgage-backed securities, the role of MERS is described as:

> With respect to each mortgage loan subject to the MERS(R) System, Inc., in accordance with the rules of membership of Merscorp, Inc. and/or MERS, the assignment of the mortgage related to each such mortgage loan shall be registered electronically through the MERS(R) System and MERS **shall serve as mortgagee of record solely as nominee in an administrative capacity on behalf of the Trustee and shall not have any interest in such mortgage loans.** In

> addition, certain of the document delivery requirements set forth above may vary with respect to mortgage loans subject to the MERS(R) System. (emphasis added).

See Exhibit 4 at 149. (Excerpt from Buchna Prospectus Supplement, Structured Asset Mortgage Investments II Trust 2006-AR6, where the Buchnas' Note was allegedly securitized.)

Similarly, another Prospectus, Exhibit 5, reveals that the intent of the parties to the securitization transaction was to have MERS, as trustee, supplant the recording of instruments conveying interest in real property as legislatively required in individual states. For example:

> **THE RECORDING OF THE MORTGAGES IN THE NAME OF MERS MAY AFFECT THE YIELD ON THE CERTIFICATES.** The mortgages or assignments of mortgage for some of the mortgage loans have been recorded in the name of Mortgage Electronic Registration Systems, Inc., or MERS, solely as nominee for the originator and its successors and assigns, including the trust. Subsequent assignments of those mortgages are registered electronically through the MERS system**. However, if MERS discontinues the MERS system and it becomes necessary to record an assignment of mortgage to the trustee**, any related expenses will be paid by the trust . . . **The recording of mortgages in the name of MERS is a relatively new practice in the mortgage lending industry.** Public recording officers and others may have limited, if any, experience with lenders seeking to foreclose mortgages, assignments of which are registered with MERS. Accordingly, delays and additional costs in commencing, prosecuting and completing foreclosure proceedings and conducting foreclosure sales of the mortgaged properties could result.

FFMLT TRUST 2006-FF13, Prospectus Supplement 424B5, at S-30 (emphasis added).

These representations to investors and other documents remove any doubt that MERS' role is to hold bare legal title just as the MERS form Deed of Trust says. It also establishes the relationship that MERS itself describes on its Website whereby MERS acts as a trustee making compliance with state recording statutes, in MERS' opinion, unnecessary. See http://www.mersinc.org/

B. A Person Holding Legal title To A Beneficial Interest In Real Property, Such As MERS, Must Publicly Record Transfers Of Those Interests In Accordance With A.R.S. § 33-404.

A.R.S. § 33-404(A) provides that ". . . every deed or conveyance of real property or an interest in real property . . . in which a grantee **is described as a trustee or acts as a trustee** shall record the names and addresses of the beneficiaries."

When MERS receives notice of a transfer of the Note, for which MERS acts as nominee under the deed of trust, MERS holds the bare legal title to the beneficial interest for this new owner not identified in the recorded Deed of Trust of the public records. However, whether or not MERS actually participates in documenting the transfer, MERS does note the "change in beneficiary" internally; still, nothing is then recorded in an Arizona County Recorder's office, depriving the County of revenue and the public of its right to information. Nothing of record shows any change in the actual beneficiary entitled to foreclose the Deed of Trust, even though MERS becomes aware of the change in ownership and thereafter

purports to hold the beneficial ownership for a new owner. In holding ownership for the new owner, MERS acts as a trustee whatever other aspects of MERS' activities may be. MERS has no interest in the Note and only holds bare legal title.

The transfer of beneficial ownership called to MERS' attention for input into its private data base triggers the recording requirement of A.R.S. § 33-404(D) that states:

> . . . a grantee who holds title as a trustee under a trust or ***other agreement*** which is subject to the disclosure requirements of this section and who receives actual knowledge . . . of a change in beneficiary . . . ***shall record with the county recorder of the county in which the property is located a notice of the change***. The recording and any subsequent recording of any change in any beneficiary shall identify the trust or other agreement under which the grantee holds title and shall include the legal description of the property and a list of the then current names and addresses of the beneficiaries. (Emphasis added).

MERS is a "grantee-nominee" in the recorded Deed of Trust who is said to hold title to the beneficial interest under both the Deed of Trust and the Mortgage-Backed Securities Trust on behalf of a successor, once the original lender transfers its interest.[3] MERS' website describes its role in obtaining information about such transfers. This is true even though the transfer of the Note constitutes a change in the beneficiary who is legally entitled to direct the trustee of the Deed of Trust to

[3] It seems questionable, at best, whether MERS actually has a legal right to act for a successor after the owner of the beneficial interest transfers the interest, files bankruptcy or is taken over by the FDIC, but MERS claims full powers under the Deed of Trust to which it is not a party and where it gave no consideration.

foreclose upon default. In any event, when MERS notes a transfer of the Note on its private data base (carrying with it the Deed of Trust under Arizona law) MERS remains as the owner of record for the beneficial interest on behalf of the new owner. As noted earlier, the highlighted language quoted, *supra.*, from A.R.S. § 33-404 (B) and (C) makes it clear that MERS need not hold title under a formal "trust agreement' that creates a real and more fulsome trust relationship to trigger the recording requirement. Indeed, the description of MERS' capacity is not important. There only need to be some sort of "agreement" under which MERS acts as a trustee holding bare legal title. If so, MERS must identify and record the new beneficiaries.

C. A.R.S. § 33-404 Applies To Anyone Who Is Acting As A Trustee, Whether Or Not Such Capacity Is Identified On The Document Through Which Title Was Acquired, And Even If It Is Not Acting As A Trustee And Only Receives Actual Knowledge Of The Transfer.

A.R.S. § 33-404(C) does not require that MERS actually make the transfer as a trustee to become bound to record the change in Arizona, but only that it be holding title for another and "receive actual knowledge . . . of a change in beneficiary." Thus, MERS has a duty to record, even though it is not a trustee, and not even "acting as a trustee". If it holds title, while others make the transfer and report it to MERS, MERS must still cause the change in beneficial ownership to be recorded.

Moreover, A.R.S. § 33-404(B) makes it clear that merely falsely describing

itself on its form Deed of trust as a "Beneficiary" and as a "nominee" does not mean that MERS escapes its duties to record. The relevant language of A.R.S. § 33-404(B) says that:

> . . . every deed of conveyance of real property, or an interest in real property . . . by a grantor who holds title to the property as a trustee, whether or not such capacity is identified on the document through which title was acquired, shall also disclose the names and addresses of the beneficiaries for whom the grantor held title to the property . . .

Moreover, MERS activity in the Stauffer case establishes that MERS does more than accept information about transfers. In an Assignment of Deed of Trust recorded after commencement of a trustee's sale. MERS executed an instrument in which its operative language said:

> For Value Received, the undersigned corporation hereby grants, assigns and transfers to: US Bank National Association, as Trustee for CSMC Mortgage-Backed Pass Through Certificates, Series 2006-3, all beneficial interest under that certain Deed of trust dated 09/22/2005 . . . (Stauffer trust deed information) Dated 10/1/10, Mortgage Electronic Registration Systems, Inc., by First American title Insurance Company, Its Attorney-in-fact, as beneficiary, (signature) By: Robert Bourne, Certifying Officer.

Exhibit 6 (Stauffer Assignment of Deed of Trust).

MERS did not sign as the agent for anyone but in signed in some "imaginative" capacity claiming to be the actual "beneficiary" a defined term in Arizona's Deed of Trust statutes. One can only assume that MERS was attempting to place record title in the name of the last entity then in the chain of ownership according to its private data base. MERS did not act as an agent for anyone, nor

did MERS merely record transfers in its data base. It actively recorded an a Notice of Substitution of Trustee claiming to be acting for the beneficiary, Premier Services Mortgage, LLC, even though an Endorsement Allonge more than three years earlier revealed a transfer of the Note from Premier to Ohio Savings Bank, whose successor was later taken over by the FDIC more than a year before the MERS Assignment was executed. See Exhibits 7 and 8. One can only guess who really owns the Note being foreclosed, but the point is that MERS does sometimes act to transfer a recorded interest to a third party claiming to be a "beneficiary" apparently using whatever rights MERS claims to have under its form Deed of Trust.

MERS' true role can be difficult to ascertain because, as the Kansas Supreme Court put it, MERS, as a nominee, is described "the same way that the blind men of Indian legend described an elephant – their description depended on which part they were touching at any given time." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 538 (2009). No matter how you cut it, if one looks to MERS' actual function and not just its contradictory label, MERS' actions violate more than one provision of Arizona law, not just its recording statutes.

As a prime example, A.R.S. § 33-804(D) requires that ***all*** beneficiaries personally sign and acknowledge a Substitution of Trustee. In *Eardley v. Greenberg*, this court held that all beneficiaries under a deed of trust must execute

a Notice of Substitution of Trustee for it to be valid. 160 Ariz. 518 (1989). The requirement is codified at A.R.S. § 33-804(D), stating "a notice of substitution of trustee shall be sufficient if acknowledged by all beneficiaries under the trust deed or their agents as authorized in writing," and a form is proscribed. When MERS substitutes a trustee all by itself, it fails to disclose all beneficiaries as required by the Deed of Trust statutes and fails to provide written evidence of its authority to act. MERS routinely fails to comply with a statutory scheme that is to be strictly construed in favor of the borrower. *See Patton v. First Fed. Sav. & Loan Ass'n of Phoenix,* 118 Ariz. 473 (1978)(en banc).

The clear meaning of A.R.S. § 33-404 is that MERS cannot hold title to the beneficial interest in real property in its name and conceal the true ownership by failing to record the statutory information required by the recording laws; and, A.R.S. § 804(D) establishes rules to follow for one wishing to avail itself of special non-judicial deed of trust foreclosure remedies and MERS routinely fails to comply when it purports to be the "beneficiary" and, further, fails to obtain the required signature of the other beneficiaries who really own the beneficial interest.

D. MERS Is Not A "Trustee Of A Deed of Trust" Excluded From The Reporting Requirements Of A.R.S. § 33-404 by A.R.S. § 33-404(G) Because There Is Only One Such Trustee Of A Deed of Trust In Arizona.

A.R.S. § 33-404(G) excludes certain persons (one of which is the trustee under a Deed of Trust) from coming within the meaning of "trustee" as used in

A.R.S. § 33-404. MERS does not come within that exclusion because it is not such a statutory trustee under the Deed of Trust Act, A.R.S. § 33-801, *et seq.*[4]

Each MERS Deed of Trust names one person, usually a title insurance company as the "trustee". Such a person named as the "trustee under a deed of trust" is defined in, and has statutorily limited powers to transfer title under, the power of sale pursuant to A.R.S. § 33-801, *et seq*. A Trustee under a Deed of Trust, with limited statutory powers is logically excluded from the requirements of A.R.S. § 33-404 because it has no power over transfers made by the Trustor or the Beneficiary, the only other two statutorily defined parties to the Deed of Trust. Put differently, the Trustor (homeowner) is given the statutory power to make transfers of all but bare legal title and to do so without the Trustee's permission or knowledge. Likewise, the Lender and its successors can transfer the beneficial interest without the Trustee's knowledge or consent. The trustee under a deed of trust has nothing to do with the transfers of the beneficial interest by a trustor or by a beneficiary; the trustee under a deed of trust only holds bare legal title with statutory powers and duties that are strictly proscribed by A.R.S. § 33-801, *et seq.*

Moreover, MERS does not call itself a "trustee under a deed of trust" but calls itself a "beneficiary" holding bare title to the *beneficial interest* on behalf of a

[4] The attached Exhibit 9 shows the disconnection between MERS as a stranger to the transaction and the three statutorily defined parties, one of whom is the "trustee under a deed of trust."

lender's assignee; it also describes itself as a "nominee" but does not call itself a trustee. While MERS' self-description cannot allow it to escape its statutory duties under A.R.S. § 33-404, its self-description is nonetheless material to any claim to be a trustee exempted by A.R.S. § 33-404 because it demonstrates both MERS' intent and the intent of the statutory parties named in the Deed of Trust who actually created the agreement by execution and performance. They all intended there to be one "trustee" of the Deed of Trust and it was not MERS.

In fact, the MERS form deed of trust does not call MERS a trustee because the form actually names a statutory "trustee". It clearly describes the trustee as one who has bare legal title and who has the power to conduct a statutory sale after a default. MERS makes no claim to be "a trustee under a deed of trust" and the actual statutory parties thereto did not name MERS as a "trustee".

Further, a trustee under a deed of trust is defined in A.R.S. § 33-801(10) as someone "qualified pursuant to A.R.S. § 33-803, or the successor in interest thereto, to whom trust property is conveyed by trust deed." This means that MERS cannot be a "trustee under a deed of trust" because it is not so qualified, even were it to try to describe itself as having some or all of the powers of a statutory trustee in its form documents. It also does not have the powers or duties of trustee under a deed of trust imposed by A.R.S. § 33-801, *et seq.* MERS can only be someone "acting" as a trustee *for the beneficial interest* in the deed of trust, not the trustee

under a deed of trust who is defined by statute and who holds legal title to the property.

IV.
A BENEFICIARY UNDER AN ASSERTED UNRECORDED BENEFICIAL INTEREST IN A DEED OF TRUST SEEKING TO FORECLOSE IS REQUIRED TO FORECLOSE JUDICIALLY PURSUANT TO A.R.S. § 33-807 BECAUSE:

A. The Only Excuse For Failure To Record A Beneficial Interest In Real Property Requires A Judicial Showing That Value Was Given For Ownership Of The Beneficial Interest.

An examination of the case law under A.R.S § 33-404 establishes that a consequence of a failure to record the assignment of a beneficial interest is that the unrecorded interest can only be recognized if the one claiming the unrecorded interest became the owner giving value coming within the "safe harbor" of A.R.S. § 33-404(F). *Blalak v. Mid Valley Transp., Inc*., 175 Ariz. 538 (Ct. App. 1993). This is critical to answering Question Two, which asks if an unrecorded beneficial interest can be enforced and, the necessary corollary. This is "How can it be enforced?"

While recognizing that a failure to record under A.R.S. § 33-404 is not necessarily fatal to enforcement of an unrecorded beneficial interest, *Blalak* reached such a conclusion only where there had been a judicial review establishing that *Blalak* owned such an unrecorded interest by giving value for it. In the case of an unrecorded beneficial interest in a deed of trust, there can be no such legal

excuse demonstrated when the supposed owner of the beneficial interest attempts to foreclose non-judicially. Without a foreclosure lawsuit there is simply no way for an unrecorded beneficial interest to show that he is an owner, much less that he gave value to become the owner as did Mr. Blalak.

Blalak examined the priority of claims against real property between an unrecorded equitable interest and a creditor of the legal title holder. The Court in *Blalak* began with the legal proposition that an equitable interest had to be recorded in compliance with A.R.S. § 33-404. However, the majority opinion went on to hold that the failure to record the particular equitable interest in that case was excused by A.R.S. § 33-404(F)

Specifically, the court said: "The sole basis upon which *Blalak* acquired a beneficial interest in this property was the result of his paying the entire purchase price for the property." *Id.* This means that anyone seeking to avoid the application of A.R.S. § 33-404 must establish that he gave value to acquire that ownership in order to come within the saving protections of A.R.S. § 33-404(F).

In answering the Question Two, one should appreciate that *Blalak* was a judicial appellate decision reviewing the facts in an underlying lawsuit where the holder of the equitable interest, (Mr. Blalak,) provided evidence that value was given for the unrecorded beneficial ownership interest he claimed. However, both the majority and dissenting opinions recognized that the "safe harbor" (that the

majority said protected Mr. Blalak from the consequences of failing to record) was premised upon a fact that appeared in the record of the lower court, not on anything available in the public record. *Blalak*, 175 Ariz. 542-543. Specifically, the judicial determination of a factual issue - that Mr. Blalak gave value - was key to the majority decision. *Id.* at 542.

Several cases criticize *Blalak* and use other statutes to distinguish what the *Blalak* dissent called a decision that failed to recognize the "crystal clear legislative intent" of A.R.S. § 33-404. The dissent further asserted that the majority in *Blalak* failed to recognize that: "The law does not condone secretive arrangements used to deceive others." *Id*. at 544. The cases citing and distinguishing *Blalak* all have outcomes that give greater support and effect than *Blalak* to the legal principle that recordation is an important element of Arizona law. They all appear to support the reasoning of the dissent in *Blalak* and distinguish or criticize *Blalak* while limiting the apparently broad protections that *Blalak* accords to an unrecorded beneficial interest in real property.

In *Kaufman v. M & S Unlimited, L.L.C.*, 211 Ariz. 314, 317, 121 P.3d 181, 184 (Ct. App. 2005), the Court referenced what it called *Blalak's* "anomalous interpretation of Title 33 and said in a footnote that "Although the *Blalak* court's conclusions may be questionable, . . . we need not address the soundness of *Blalak's* reasoning or result . . ." *Id.* at 317, footnote 6. *Kaufman* also rejected an

argument based on an expansive interpretation of *Blalak* and quoted from *Boone v. Grier*, 142 Ariz. 178, 182 (Ct. App 1984), cert. denied (1984) saying "There is a rebuttable presumption that record title accurately reflects the ownership interest in real property." *Kaufman*, 211 Ariz. at 317.

Kaufman appears to criticize and distinguish *Blalak* for being **overly protective of an unrecorded beneficial interest**, not that the requirement of proving value is too burdensome or unnecessary. While *Blalak's* unfriendly and questionably restrictive view of A.R.S. § 33-404 seems to stand as the most definitive statement of Arizona law on that issue, even *Blalak* requires that the holder of an unrecorded beneficial interest in real property cannot enforce that ownership without first judicially establishing a right to do so. In terms of enforcing such an unrecorded beneficial interest in a Deed of Trust, there is no judicial forum to recognize the required giving of value if, the non-judicial foreclosure provisions available to identified statutory beneficiaries is used. Unfortunately, a self-proclaimed beneficiary, claiming under an unrecorded document and having no apparent connection with the real property, has seemed to have a license to conduct a non-judicial trustee's sale without having fulfilled even the minimal requirement that ownership be acquired by giving value as established by *Blalak*. The "presumption", reaffirmed in *Kaufman*, that the public record shows actual ownership appears to be stripped of all meaning when a stranger to

the transaction can sell a home without any judicial repudiation of the presumption.

When one can violate A.R.S. § 33-404 and enforce an unrecorded beneficial interest in a deed of trust without commencing a judicial foreclosure to prove that the failure to record was justified by giving value, then the requirement of A.R.S. § 33-404(F) is meaningless. The requirement emphasized by both the majority and the well-reasoned dissent in *Blalak* (that value be given for ownership) need never be established. *Blalak*, 175 Ariz. at 542. Put simply, allowing non-judicial foreclosure of an unrecorded beneficial interest in a deed of trust allows anyone who fails to record in violation of A.R.S. § 33-404 to escape the consequences, even if no value were given. This would exacerbate the dangers raised in the *Blalak* dissent which thought that *Blalak* went too far in protecting secretive transactions prohibited by express statutory requirements. Allowing the banks and MERS to circumvent recording laws has nurtured a shadow market of real property transfers, leading to instability and chaos in our housing market as evidenced by the formal Findings of the Multi-Agency Task Force and the Congressional Oversight Panel. Federal Reserve System, Office of Comptroller of the Currency, Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (April 2011); Congressional Oversight Panel November Oversight Report, *Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* (November 16, 2010).

The harsh provisions of A.R.S. § 33-808 apparently create the "presumption" that a trustee's sale held by a stranger is a valid sale, even when conducted at the direction of a beneficiary not in the record title. Even greater rights are created in a *bona fide* purchaser at such a sale. As a pending Petition for Review before the Court of Appeals, US Bank v. Devan, No. 1 CA-CV 10-0434 reveals, a homeowner cannot now even successfully defend a forcible entry and detainer action in Arizona's Superior Court by raising A.R.S. § 33-404 deficiencies against a beneficiary who made a credit bid premised on its unrecorded and unproven interest underlying the non-judicial sale.

None of these results seem consistent with any of the authorities cited in this brief. How this came about is worth some examination.

In fairness to the comments made below about the decisions of the United States District Court of Arizona, most cases were either *pro se* or involved counsel raising lengthy, complicated, convoluted and distracting multi-count Complaints raising issues and assertions often not supported by the facts or law.

B. The United States District Courts Have Adopted A Precedent That Is Based On A Supposed Absence Of Arizona Legal Authority And Have Apparently Never Been Presented With The Authority Set Forth In This Brief.

At the present time, an action brought to challenge a non-judicial sale in Arizona is routinely met with a Notice of Removal to federal court that means, as a practical matter, that the supposed beneficiary need never prove that value was

given, even if first judicially challenged in Arizona courts. Challenging after a trustee's sale is then routinely dismissed under the harsh provisions of the Deed of Trust statutes creating finality for a sale, particularly A.R.S. § 33-808 and A.R.S. § 33-811(C).

What happens is that a state court suit seeking an injunction is routinely the subject of a Notice of Removal, alleging diversity jurisdiction between the out of state bank and the Arizona homeowner, enabling the federal court to exercise jurisdiction over the peculiarly local issue of whether a trustee's sale of real property is lawful.[5] Then, in the United States District Court for Arizona, any attempt to challenge the ownership of the Note is met with a routine Motion to Dismiss for Failure to State a Claim and an equally routine Order of Dismissal. An aberration to this practice is a decision dated December 3, 2010, by United States Magistrate Judge Mark E. Aspey in *Forde v. First Horizon Home Loan Corp*., 2010 WL 5758614 (D. Ariz. Dec. 6, 2010). This Order remands the case to the Superior Court on the well-reasoned conclusion that the issues are particularly local and should be resolved by Arizona courts. However, most cases are not handled in this way, but are routinely accepted and cursorily dismissed by the

[5] A trustee, even if an Arizona resident whose presence as a defendant would destroy federal diversity jurisdiction, cannot properly be named in an injunctive proceeding under A.R.S. § 33-807(E). As Stauffer Exhibit 10 shows, the banks aggressively allege fraudulent removal even when there is a legitimate Arizona defendant destroying diversity.

District Court. These federal court, trial level orders are also cited to Arizona Judges and Commissioners as some sort of "higher" legal authority on the issues of Arizona law on those cases that somehow avoid removal.

The first courts to address Arizona law on this issue seem to have been the federal courts within the District of Arizona, usually with *pro se* plaintiffs or counsel raising confusing and abstract issues of fraud, due process and violation federal statutes without any analysis of the documents or Arizona law. In the meantime, neither the Arizona Court of Appeals, nor the Arizona Supreme Court has had the opportunity to establish what Arizona law actually applies to these issues. In this context, when addressing foreclosure sales, courts within the District of Arizona "have routinely held that [a plaintiff's] 'show me the note' argument lacks merit." *Diessner v. Mortgage Elec. Registration Sys.*, 618 F.Supp.2d 1184, 1187-88 (D. Ariz. 2009) (quoting *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009)." *Blau v. America's Servicing Co.*, 2009 WL 3174823 at *6 (D. Ariz. 2009).

The *Blau* court concluded that: "Given the dearth of case law, the most prudent course of action is for this Court to follow the rulings of its sister courts within the District of Arizona and hold that production of the original Promissary [sic] Note is not required before commencing a foreclosure/trustee's sale." *Id.* at *6.

This decision was, however, based only on the absence of specific authority with no real participation of competent counsel. Tragically, it has been followed without further analysis as stated in the following recent quotation in *Mundinger v. Wells Fargo* Bank, 2011 WL 1559423 (D. Ariz. 2011) just a few months ago.

> We also reject plaintiffs' argument that because Deutsche Bank was not the holder of the promissory note at the time of the trustee's sale, it had no right to foreclose upon the property. **This argument and variations of it have been consistently rejected by courts in this District. Plaintiffs have failed to cite any Arizona authority that requires a showing that the beneficiary of a deed of trust is also the holder of the note.** (Emphasis added.)

See, e.g., Diessner v. MERS, 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009).

Interestingly, the District Court decisions rely solely upon the absence of authority requiring that someone must establish ownership of the Note that is to be repaid by the trustee's sale.[6] In itself, this seems a strange juxtaposition of the burden. A party acting non-judicially to take away ownership of an Arizonan's home should seemingly be obliged to demonstrate a *prima facie* right to take such a drastic non-judicial action. Nonetheless, the District Court decisions relying upon no actual Arizona state court authority have created a "precedent" where banks need only reference the "consistent rejection" by the Arizona District Court as authority.

[6] These cases have been dubbed "show me the note" cases, although there is no legal definition for this class of legal claims. The cases are more aptly called "show me your legal authority" or "show me how the presumption in *Kaufman* is rebutted" cases.

As noted earlier, the District Courts simply have not been presented with the authority cited in this brief, nor do they seem to take into account the Arizona adaptation of the UCC analyzed in the recently decided BAP decision in *In re Veal*, BAP AZ-10-1055, 2011 WL 2652328 at *13 (BAP 9th Cir. June 10, 2011).

Ownership of the Note carries with it the beneficial interest in the deed of trust being enforced at the trustee's sale, as the parties' briefs herein seem to agree. Put differently, the new owner of the Note becomes the new beneficiary of the deed of trust where MERS is the trustee for the beneficial owner of the lender's interest. Of course, actual assignments of the beneficial interest are not usually prepared at the time of the transfer, and as the Findings demonstrate, are often fraudulently reconstructed and back dated later. While apparently never raised in the United States District Court cases, A.R.S. § 33-404 and *Blalak* establish that an assignment of beneficial interest in a deed of trust following the MERS form must be recorded; and, if not recorded, the owner must show it gave value. *Blalak*, 175 Ariz. at 542.

Answering the Certified Questions without reference to the MERS form Deed of Trust will simply prevent the arguments never presented to the district Court from being raised successfully. Arizona residents will continue, routinely, to be removed to federal court as out of state banks and servicers foreclose non-judicially and use their non-resident status to create federal diversity jurisdiction

that supports removal to federal court, where Arizona law is now being incorrectly applied. Once there, these issues cannot be appealed to this Court for a determination of Arizona law, even though this Court's ruling on state property law is the definitive answer.[7]

The decisions of the United States District Court of Arizona uniformly rejecting the "show me the note" defense to foreclosure by an unnamed beneficiary under an unrecorded assignment do not reveal any awareness of the existence of A.R.S. § 33-404 requiring recordation each time that a Note is sold. This is true even where MERS obviously acts for the beneficial interest securing the Note. The decisions of the District Court rely only on a perceived lack of authority decided several years ago without any affirmative authority supporting the foreclosing bank's position and without proper legal briefing. This Court and the Certified Questions are the only expeditious way to right the current situation.

C. A.R.S. § 33-807.01 Confirms A Homeowner's Right To Know The Holder Of The Home Loan Obligation Which Is Consistent With The Statutory Framework Requiring Recordation of Transfers Of A Note Secured By A Deed Of Trust.

Two Nevada Supreme Court cases, and the analysis of substantially the

[7] As the district courts acknowledge (*albeit* in unpublished cases,) if a homeowner wants to argue that "these non-judicial proceedings are more appropriately governed by the UCC, that argument would be better suited for the Arizona Supreme Court, which is the body charged with interpreting the laws of the State of Arizona. Absent specific and compelling Arizona case law, this Court will not presume that the UCC has any applicability to foreclosure proceedings." *Blau* 2009 WL 3174823 at *6.

same UCC provisions adopted in Arizona in *In re Veal*, BAP AZ-10-1055, 2011 WL 2652328 at *13 (BAP 9th Cir. June 10, 2011), seem to establish that the obligor on a Note is entitled to know the identity of the new owner. This has been argued by Appellant and will not be re-argued. However, the two new Nevada cases decided after the Vasquez brief was filed are on point, even though dealing with a Nevada statute not present in Arizona in the same detailed form.

The Nevada Supreme Court remanded two foreclosure cases for sanctions against bank servicers because the servicers failed to bring a party with real authority to the mediation under Nevada's mediation statute. *Pasillas v. HSBC Bank USA, as Trustee for Luminent Mortgage Trust*, No. 56392, 127 Nev. 39 (July 7, 2011)(en banc)(advance opinion); *Levya v. National Default Servicing Corp*., No. 55216, 127 Nev. 40 (July 7, 2011)(advance opinion).

While Arizona has no such mandatory mediation statute, it does have a statute requiring a party with authority to conduct modification negotiations before becoming entitled to commence non-judicial foreclosure. A.R.S. § 33-807.01 states, "For a property with a first deed of trust recorded on or after January 1, 2003 through December 31, 2008, if the borrower occupies the property as the borrower's principal residence, before a trustee may give notice of a trustee's sale for the property pursuant to section 33-808, **the lender must attempt to contact the borrower to explore options to avoid foreclosure at least thirty days before**

the notice is recorded." The quoted language requires the "lender" (a term used in the MERS Deed of Trust), not the "loan servicer" (also a term used in the MERS Deed of Trust), to contact a homeowner prior to noticing a foreclosure sale.

Elsewhere, A.R.S. § 33-807.01 uses the term "servicer" so the use of "lender" is not accidental in terms of expressing an intention to require meaningful negotiation instead of a form letter from a loan servicer having no authority to negotiate "options to avoid foreclosure." This statute, passed in response to the foreclosure crisis, like the Nevada mediation statute, reveals legislative intent to facilitate settlement with a true stakeholder having ultimate authority regarding the promissory note. Indeed, in considering legislative action regarding non-judicial foreclosure, the Arizona Legislature issued the statement:

> The legislature declares that a serious public emergency exists with respect to real estate foreclosures in this state due to widespread and fundamentally unsound lending practices for mortgage loans, second mortgages and home equity loans. These lending practices have skewed the real estate and mortgage market in this state, have caused distress to consumers, neighborhoods and communities and have adversely affected the economic health of this state. The legislature declares that it is in the interests of this state that during this time of serious economic strain, homeowners should be permitted an opportunity to work with their lenders to reconfigure their obligations in a manner that preserves neighborhoods and protects both consumers and lenders.

A.R.S. § 33-807.01 provides clear authority establishing that a homeowner has every right under the Deed of Trust statutes to know his contractual counter-party on his promissory note and his deed of trust. The Vasquez Brief properly

argues that this is a contractual right, even under the MERS form document so will not be reargued here. Thus, by both a separate statute and by contract a homeowner's apparent rights to know his true lender under A.R.S. § 33-404 appear to be confirmed and reinforced.

Instead, in the midst of an unprecedented foreclosure crisis, an Arizona homeowner cannot determine the party with authority to negotiate. An Arizona homeowner is not being privy to many of the transfers of the promissory note to which the deed of trust is incidental. *In re Veal*, BAP AZ-10-1055, 2011 WL 2652328 at *13 (BAP 9th Cir. June 10, 2011). This is one reason why the recording statutes should be obeyed - to facilitate transparency in the transfer of interests in real property and to facilitate renegotiation in unprecedented statewide financial distress.

The following five elements are relevant to the privilege of using A.R.S. § 33-801, *et seq.*: (i) Arizona's Deed of Trust statutes permitting non-judicial foreclosure; (ii) Arizona's recording statutes cited by Appellant Vasquez; (iii) A.R.S. § 33-404 argued, *supra.*; (iv) A.R.S. § 33-807.01; and, (v) the language of the Deed of Trust, itself, as argued by Appellant Vasquez. All these things support this Court in reaffirming *Patton* and *Krohn v. Sweetheart Properties, Ltd.*, 203 Ariz. 205, 208, 52 P.3d 774, 777 (2002) by clarifying that the prerequisites for using the non-judicial foreclosure process are compliance with Arizona recording

laws.

D. Failure To Record Does Not Mean That The Deed Of Trust Is Invalid And Unenforceable.

The legal standard in Arizona to be used in interpreting the trustee sale provisions articulated in *Patton* and *Krohn* were persuasively noted in the Vasquez brief and will not be restated here. It should be noted, however, that these cases show that requiring judicial foreclosure will not somehow bring down the financial system just because a mortgage must be judicially foreclosed.

Moreover, the language used by this Court in those cases and quoted in the Vasquez brief seems to fit well with a carefully reasoned United States District Court decision interpreting Oregon law. *Hooker v. Northwest Trustee Services, Inc.*, No. 10-3111-PA, 2011 WL 2119103 (D. Ore. May 25, 2011) (slip opinion). Oregon law requires recordation of assignments of beneficial interests in a Deed of Trust. In *Hooker* the court granted a Declaratory Judgment holding that violation of the Oregon recording requirement by MERS and the beneficiary invalidated the right to foreclose non-judicially. *Id.*

MERS does not merely violate Arizona's recording statute like in *Hooker*, MERS actually violates more Arizona law than present Oregon. the MERS form Deed of Trust violates the Arizona non-judicial statutory scheme in at least three ways: (1) MERS claims to be a beneficiary, but does not fit the statutory definition

of "beneficiary" under .A.R.S § 33-801(1);[8] (2) MERS conceals the lender from the borrower and, therefore, there is no lender contact as prescribed by both A.R.S. § 33-807.01 and the contractual language of the Deed of Trust; and (3) MERS violates A.R.S. § 33-804(D) when MERS routinely executes and records substitutions of trustee without disclosure and without execution by all beneficiaries.

The Court in Hooker recognized that many borrowers now face the harsh prospect of losing a home outside the judicial system and that it is sound public policy to require a purported beneficiary who claims, without compliance with recording duties, to foreclose judicially instead of by non-judicial trustee's sale. Because "[t]he MERS system allows the lender to shirk its traditional due diligence responsibilities," and because "MERS makes it much more difficult to discover who 'owns' the loan," the court was concerned by the failure to record two of the assignments. *Hooker* at 14. Just like in Arizona, the Oregon court noted that the "MERS system" creates confusion as to who has the authority to do what with the trust deed and exacerbated the mistakes in the non-judicial process encouraged by the lack of recordation. "Considering that the non-judicial

[8] In *Hooker*, the court considered the identical Deed of Trust language and Oregon's similar definition of "beneficiary" and decided "Although the trust deed lists MERS as the nominal beneficiary 'solely as a nominee for lender . . .' the deed makes clear that MERS is not 'the person for whose benefit a trust deed is given.'" *Hooker*, 2011 WL 2119103.

foreclosure of one's home is a particularly harsh event, and given the numerous problems I see in nearly every non-judicial foreclosure case I preside over, a procedure relying on a bank or trustee to self-assess its own authority to foreclose is deeply troubling to me." *Id.* This wisdom rings just as true in Arizona.

Hooker found that violation of the Deed of Trust statutes in Oregon meant that the owner of the unrecorded beneficial interest could not avail itself of the non-judicial foreclosure process and had to foreclose like a mortgage. Under the reasoning of *Hooker,* as well as the authority of *Patton* and *Krohn,* requiring strict compliance with Arizona law to use the harsh non-judicial foreclosure procedure under A.R.S. § 33-801, *et seq.,* the beneficiary should be enjoined from foreclosing non-judicially in Arizona where the MERS registration system has been used to deny Arizona homeowners the "higher level of transactional awareness" that Judge Garbarino's dissent in *Blalak* said that they should have. It has done so by violating the very Deed of Trust statutes it seeks to use and its authority to conduct such non-judicial sales no longer exists. This Court should answer both Certified Questions so as to make the "enforcement issues" raised by the questions clear to the Bankruptcy Court that certified this issue and also for the Superior Court and United States District Court now handling hundreds of challenges to the tens of thousands of foreclosures in this state.

DATED this ____ day of July, 2011.

GORDON SILVER

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RONALD E. WARNICKE, ESQ.
Attorneys for *KARL and FABIANA STAUFFER*

JOHNSON, FINDSEN & KINNEY PLLC

_____

BETH K. FINDSEN ESQ.
Attorneys for *MARIUSZ and JULITA BUCHNA*